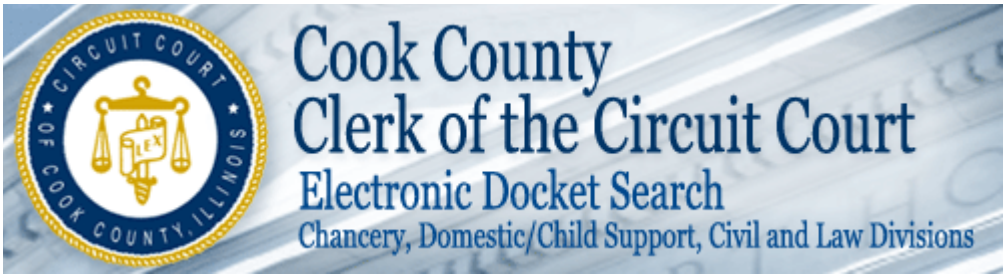

Case Information Summary for Case Number
2000-CH-13859

Filing Date: 09/22/2000
Division: Chancery Division
Ad Damnum: $0.00

Case Type: INJUNCTION
District: First Municipal
Calendar: 12

Party Information

Plaintiff(s)	**Attorney(s)**
BUNTROCK DEAN L	QUINLAN & CRISHAM 30 N LASALLE #2900 CHICAGO IL, 60602 (312) 263-0900
GIDWITZ RONALD	
PEOPLE STATE OF ILL	ATTORNEY GENERALS OFFICE 100 W RANDOLPH ST CHICAGO IL, 60601 (312) 814-3000
TERRA JAMES D	
RYAN JAMES	
BELLOWS BELLOWS	

Defendant(s)	**Defendant Date of Service**	**Attorney(s)**
TERRA JUDITH		SIDLEY & AUSTIN 1 FIRST NATIONAL PL CHICAGO IL, 60603 (312) 853-7000
TUCKER PAUL		
SIMPSON ALAN		
MICHAELI NAFTALI		PRO SE
TERRA FOUNDATION ARTS		

16di-000001

STEBBINS JR
THEODORE

Case Activity

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN L

INJUNCTION COMPLAINT FILED

Court Fee: 220.00 Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

MEMORANDUM OF LAW FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

PETITION FOR TEMPORARY PROTECTION ORDER

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

EMERGENCY NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/22/2000 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000591914

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 09/25/2000

Court Time: 0230

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000591914

Activity Date: 09/22/2000 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000591914

Activity Date: 09/22/2000 Participant: BUNTROCK DEAN L

CASE SET ON CASE MANAGEMENT CALL

Date: 05/01/2001

Court Time: 0915

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000591914

Activity Date: 09/25/2000 Participant: TERRA FOUNDATION ARTS

APPEARANCE FILED - FEE PAID -

Court Fee: 104.00

Attorney: SIDLEY & AUSTIN

Activity Date: 09/25/2000 Participant: PEOPLE

APPEARANCE FILED - NO FEE PAID -

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/25/2000 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: PEOPLE

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA JAMES

CERTIFICATE OF MAILING FILED

Attorney: MCBRIDE BAKER & COLES

Activity Date: 09/25/2000 Participant: PEOPLE

ADDITIONAL PARTY COMPLAINT (THIRD PARTY, ETC.) FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: PEOPLE

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA JAMES

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

AMENDED PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: PEOPLE

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: PEOPLE

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA JAMES

NOTICE OF FILING FILED

Attorney:

MCBRIDE BAKER & COLES

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/25/2000 Participant: PEOPLE

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/25/2000 Participant: PEOPLE

PETITION FOR T.R.O.

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: PEOPLE

EMERGENCY MOTION/PETITION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: TERRA JAMES

EMERGENCY MOTION/PETITION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/12/2000
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612501

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/12/2000
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612503

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612503

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

INTERVENE - PLAINTIFF - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612502

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

DISCOVERY - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612503

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000612503

Activity Date: 09/25/2000 Participant: BUNTROCK DEAN L

MOTION TO - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000612503

Activity Date: 09/26/2000 Participant: TERRA FOUNDATION ARTS

APPEARANCE FILED - NO FEE PAID -

Attorney: SIDLEY & AUSTIN

Activity Date: 09/26/2000 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/26/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/26/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 09/27/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/27/2000 Participant: BUNTROCK DEAN

MOTION TO APPOINT SPECIAL PROCESS SERVER

Attorney: QUINLAN & CRISHAM

Activity Date: 09/27/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/28/2000 Participant: BUNTROCK DEAN L

APPOINT SPECIAL DEPUTY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000610987

Activity Date: 09/28/2000 Participant: BUNTROCK DEAN L

APPOINT SPECIAL DEPUTY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000610988

Activity Date: 10/05/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/05/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/10/2000 Participant: PEOPLE STATE ILL

SUBPOENA - RETD P.S.

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/10/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/10/2000 Participant: PEOPLE STATE ILL

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/10/2000 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/10/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/10/2000 Participant: PEOPLE STATE ILL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/10/2000 Participant: BUNTROCK

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/11/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/11/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/11/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/11/2000 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

APPEARANCE FILED - FEE PAID -

Court Fee: 104.00

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: TUCKER PAUL

APPEARANCE FILED - FEE PAID -

Court Fee: 104.00 Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: SIMPSON ALAN

APPEARANCE FILED - FEE PAID -

Court Fee: 104.00 Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: SIMPSON ALAN

SUMMONS - RETD P.S.

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

SUMMONS - RETD P.S.

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TUCKER PAUL HAYES

SUMMONS - RETD P.S.

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: MICHAELI NAFTALI

SUMMONS - RETD P.S.

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: SIMPSON ALAN

AFFIDAVIT OF SERVICE OF SUMMONS OUTSIDE ILLINOIS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

AFFIDAVIT OF SERVICE OF SUMMONS OUTSIDE ILLINOIS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TUCKER PAUL HAYES

AFFIDAVIT OF SERVICE OF SUMMONS OUTSIDE ILLINOIS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: MICHAELI NAFTALI

AFFIDAVIT OF SERVICE OF SUMMONS OUTSIDE ILLINOIS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: SIMPSON ALAN

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR ARTS

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR ARTS

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: BUNTROCK AND GIDWITZ

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: BUNTROCK AND GIDWITZ

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: BUNTROCK AND GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/12/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR THE A

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR ARTS

MOTION TO DISMISS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA FOUNDATION FOR ARTS

MOTION TO DISMISS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/12/2000 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000641427

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/20/2000

Judge: KINNAIRD, DOROTHY KIRIE

Court Time: 0200

Court Room: 2302

Microfilm: CH000641425

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/20/2000
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641426

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/20/2000
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641427

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/20/2000
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641428

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 10/20/2000
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641429

Activity Date: 10/12/2000 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641427

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000641425

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000641426

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000641428

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000641429

Activity Date: 10/12/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000641427

Activity Date: 10/13/2000 Participant: BUNTROCK DEAN L

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/13/2000 Participant: BUNTROCK DEAN L

PROOF OF SERVICE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/16/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney:

TAFT STETTINIUS
HOLLISTER

Activity Date: 10/16/2000 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 10/16/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 10/16/2000 Participant: TERRA JUDITH

OBJECTIONS FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 10/17/2000 Participant: TERRA FOUNDATION FOR THE A

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/17/2000 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 10/17/2000 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/17/2000 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 10/17/2000 Participant: TERRA FOUNDATION FOR THE A

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/17/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/17/2000 Participant: BUNTROCK DEAN

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/17/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/17/2000 Participant: TERRA FOUNDATION FOR THE A

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/17/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/17/2000 Participant: TERRA JUDITH

OBJECTIONS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/17/2000 Participant: TERRA FOUNDATION FOR THE A

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: PEOPLE OF THE STATE OF IL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: PEOPLE OF THE STATE OF IL

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: PEOPLE OF THE STATE OF IL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/19/2000 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/20/2000 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/20/2000 Participant: TUCKER PAUL HAYES

ANSWER FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/20/2000 Participant: TUCKER PAUL HAYES

AFFIRMATIVE DEFENSE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/20/2000 Participant: TUCKER PAUL

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 10/20/2000 Participant: BUNTROCK DEAN L

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000661951

Activity Date: 10/20/2000 Participant: BUNTROCK DEAN L

MOTION TO - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000661951

Activity Date: 10/20/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000661951

Activity Date: 10/20/2000 Participant: TERRA JAMES

ORDER PLAINTIFF LEAVE TO FILE PETITION

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000661950

Activity Date: 10/20/2000 Participant: TERRA JAMES

MOTION TO - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000661951

Activity Date: 10/20/2000 Participant: BUNTROCK DEAN L

MOTION TO - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000661950

Activity Date: 10/30/2000 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/30/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/30/2000 Participant: TERRA FOUNDATION

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 10/31/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/31/2000 Participant: PEOPLE OF THE STATE OF ILL

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/31/2000 Participant: PEOPLE OF THE STATE OF ILL

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/31/2000 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 10/31/2000 Participant: TERRA FOUNDATION

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/31/2000 Participant: PEOPLE OF THE STATE OF ILL

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 10/31/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/01/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/01/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/01/2000 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/01/2000 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/01/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/01/2000 Participant: TERRA JUDITH

ANSWER TO MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/01/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/01/2000 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/01/2000 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000682128

Activity Date: 11/01/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 11/20/2000

Court Time: 0500

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000682128

Activity Date: 11/01/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 11/02/2000

Court Time: 0330

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Activity Date: 11/02/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/02/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 11/02/2000 Participant: PEOPLE OF THE STATE OF ILL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/02/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 11/02/2000 Participant: BUNTROCK DEAN

ANSWER TO MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/02/2000 Participant: PEOPLE OF THE STATE OF ILL

ANSWER TO MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/02/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/02/2000 Participant: TERRA FOUNDATION

EMERGENCY NOTICE FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 11/02/2000 Participant: TERRA FOUNDATION

EMERGENCY MOTION/PETITION FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 11/03/2000 Participant: MICHAELI NAFTALI

AFFIDAVIT FILED

Attorney: PRO SE

Activity Date: 11/03/2000 Participant: MICHAELI NAFTALI

CERTIFICATE OF MAILING FILED

Attorney: PRO SE

Activity Date: 11/03/2000 Participant: MICHAELI NAFTALI

NOTICE OF MOTION FILED

Attorney: PRO SE

Activity Date: 11/03/2000 Participant: MICHAELI NAFTALI

MOTION FILED

Attorney: PRO SE

Activity Date: 11/03/2000 Participant: MICHAELI NAFTALI

INCOMING CORRESPONDENCE FILED

Attorney: PRO SE

Activity Date: 11/06/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/06/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/06/2000 Participant: BUNTROCK DEAN

EMERGENCY NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/06/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/08/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/08/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/08/2000 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN

ANSWER TO AFFIRMATIVE DEFENSE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN L

AMEND ORDER OR DECREE - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000710377

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 12/06/2000

Court Time: 0300

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000710377

Activity Date: 11/13/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge:

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000710377

Activity Date: 11/14/2000 Participant: MICHAELI N

APPEARANCE FILED - FEE PAID -

Court Fee: 104.00 Attorney: PRO SE

Activity Date: 11/14/2000 Participant: MICHAELI NAFTALI

AFFIDAVIT FILED

Attorney: PRO SE

Activity Date: 11/14/2000 Participant: MICHAELI NAFTALI

CERTIFICATE FILED

Attorney: PRO SE

Activity Date: 11/14/2000 Participant: MICHAELI N

CERTIFICATE FILED

Attorney: PRO SE

Activity Date: 11/14/2000 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 11/14/2000 Participant: MICHAELI NAFTALI

NOTICE OF MOTION FILED

Attorney: PRO SE

Activity Date: 11/27/2000 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000732273

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: TERRA FOUNDATION FOR THE

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/06/2000 Participant: TERRA FOUNDATION FOR THE

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: TERRA FOUNDATION FOR THE

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

ANSWER TO MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: TERRA FOUNDATION FOR THE

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: TERRA FOUNDATION FOR THE

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 12/14/2000
Court Time: 1230
Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000761352

Activity Date: 12/06/2000 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000761352

Activity Date: 12/06/2000 Participant: TERRA JUDITH

PRODUCE EXHIBITS OR OTHER RECORDS OR DOCUMENTS OR PERSON - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000761352

Activity Date: 12/06/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000761352

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

AFFIDAVIT FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/11/2000 Participant: TERRA FOUNDATION

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/12/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/12/2000 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/12/2000 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/12/2000 Participant: TERRA JUDITH

ANSWER TO MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/12/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/13/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/13/2000 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/13/2000 Participant: BUNTROCK DEAN

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/13/2000 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/13/2000 Participant: BUNTROCK DEAN

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/14/2000 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000771478

Activity Date: 12/14/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 12/27/2000

Court Time: 1100

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000771478

Activity Date: 12/14/2000 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000771478

Activity Date: 12/14/2000 Participant: TERRA JUDITH

MOTION TO - DENIED -

Court Room: 2302 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000771478

Activity Date: 12/20/2000 Participant: BUNTROCK DEAN L

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/20/2000 Participant: BUNTROCK DEAN L

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/20/2000 Participant: BUNTROCK DEAN L

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/21/2000 Participant: TERRA FOUNDATION

CERTIFICATE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/21/2000 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/21/2000 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/21/2000 Participant: TERRA FOUNDATION

ANSWER TO MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 12/22/2000 Participant: PEOPLE OF THE STATE OF ILL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 12/22/2000 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 12/22/2000 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 12/22/2000 Participant: PEOPLE OF THE STATE OF ILL

PROOF OF SERVICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 12/22/2000 Participant: PEOPLE OF THE STATE OF ILL

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 12/26/2000 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/26/2000 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/26/2000 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/26/2000 Participant: TERRA JUDITH

ANSWER FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/26/2000 Participant: BUNTROCK

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/26/2000 Participant: BUNTROCK

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/26/2000 Participant: TERRA JUDITH

EMERGENCY NOTICE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/26/2000 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/27/2000 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/27/2000 Participant: TERRA JUDITH

ANSWER TO MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/27/2000 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN

EMERGENCY NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 12/29/2000
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000791122

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN L

EXTEND TIME - ALLOWED -

Date: 12/29/2000
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000791122

Activity Date: 12/27/2000 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000791122

Activity Date: 12/27/2000 Participant: BUNTROCK DEAN L

EXCLUDE EVIDENCE, TESTIMONY OR A WITNESS - DENIED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000791122

Activity Date: 12/28/2000 Participant: BUNTROCK DEAN L

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/28/2000 Participant: BUNTROCK DEAN L

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/28/2000 Participant: BUNTROCK DEAN L

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 12/29/2000 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 01/02/2001

Court Time: 1100

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000792592

Activity Date: 12/29/2000 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000792592

Activity Date: 12/29/2000 Participant: BUNTROCK DEAN L

ORDER PLAINTIFF LEAVE TO FILE PETITION

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000792592

Activity Date: 12/29/2000 Participant: TERRA JUDITH

ORDER DEFENDANT LEAVE TO FILE PETITION

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000792592

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: PEOPLE OF THE STATE

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: PEOPLE OF THE STATE

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: PEOPLE

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE OF APPEAL FILED

Attorney: WILSON PETER K JR

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE OF APPEAL FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: PEOPLE OF THE STATE

PETITION TO COMPEL APPEARANCE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: PEOPLE OF THE STATE

PROOF OF SERVICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: PEOPLE

PROOF OF SERVICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: BUNTROCK

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/02/2001 Participant: PEOPLE OF THE STATE

EMERGENCY MOTION/PETITION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: PEOPLE

EMERGENCY MOTION/PETITION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 01/30/2001
Court Time: 1030
Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010010930

Activity Date: 01/02/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010010930

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 01/09/2001
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010010930

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010010930

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN L

MOTION TO - DENIED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010010930

Activity Date: 01/02/2001 Participant: BUNTROCK DEAN L

MOTION TO - DENIED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010010930

Activity Date: 01/03/2001 Participant: PEOPLE STATE

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/03/2001 Participant: BUNTROCK DEAN L

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/03/2001 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: BUNTROCK DEAN L

INTERROGATORIES FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: PEOPLE STATE

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/03/2001 Participant: PEOPLE STATE

NOTICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/03/2001 Participant: TERRA JUDITH

NOTICE OF APPEAL FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/03/2001 Participant: BUNTROCK DEAN L

NOTICE OF DEPOSITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: BUNTROCK DEAN L

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/03/2001 Participant: BUNTROCK

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/03/2001 Participant: BUNTROCK DEAN L

REQUEST FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/08/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/08/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/08/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/08/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/08/2001 Participant: TERRA JUDITH

REQUEST FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/08/2001 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/09/2001 Participant: MICHAELI NAFTALI

CERTIFICATE FILED

Attorney: PRO SE

Activity Date: 01/09/2001 Participant: MICHAELI NAFTALI

CERTIFICATE FILED

Attorney: PRO SE

Activity Date: 01/09/2001 Participant: MICHAELI NAFTALI

ANSWER FILED

Attorney: PRO SE

Activity Date: 01/09/2001 Participant: MICHAELI NAFTALI

AFFIRMATIVE DEFENSE FILED

Attorney: PRO SE

Activity Date: 01/09/2001 Participant: MICHAELI NAFTALI

NOTICE OF FILING FILED

Attorney: PRO SE

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 02/20/2001
Court Time: 0130
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 02/21/2001
Court Time: 0130
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 02/22/2001
Court Time: 0130
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: PEOPLE

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/09/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 01/22/2001
Judge:

Court Time: 1100
Court Room: 2302

KINNAIRD, DOROTHY KIRIE
Microfilm: CH010030005

Activity Date: 01/10/2001 Participant: TERRA JUDITH
CERTIFICATE FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA JUDITH
CERTIFICATE FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: PEOPLE OF THE STATE OF ILL
CERTIFICATE FILED
Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/10/2001 Participant: TERRA JUDITH
CERTIFICATE OF MAILING FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA JUDITH
CERTIFICATE OF MAILING FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA FOUNDATION FOR ARTS
CERTIFICATE OF MAILING FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA
CERTIFICATE OF MAILING FILED
Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA JUDITH
EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA FOUNDATION FOR ARTS

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA JUDITH

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/10/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: TERRA

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/10/2001 Participant: PEOPLE OF THE STATE OF ILL

SUPPLEMENTAL REQUESTS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/11/2001 Participant: BUNTROCK AND GIDWITZ

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: BUNTROCK AND GIDWITZ

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/11/2001 Participant: BUNTROCK AND GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: TERRA FOUNDATION

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/11/2001 Participant: BUNTROCK AND GIDWITZ

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/12/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: SIMPSON ALAN

MEMORANDUM OF LAW FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: SIMPSON ALAN

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

NOTICE FILED

Attorney:

TAFT STETTINIUS
HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 01/12/2001 Participant: TUCKER PAUL

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 01/12/2001 Participant: SIMPSON ALAN

MOTION TO DISMISS FILED

Attorney: TAFT STETTINIUS
HOLLISTER

Activity Date: 01/12/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 03/08/2001
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010040785

Activity Date: 01/12/2001 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010040785

Activity Date: 01/12/2001 Participant: TERRA JUDITH

ORDER DEFENDANT LEAVE TO FILE PETITION

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010040786

Activity Date: 01/12/2001 Participant: TERRA JUDITH

MOTION TO - DENIED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010040786

Activity Date: 01/16/2001 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/16/2001 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/16/2001 Participant: PEOPLE OF THE STATE OF ILL

PROOF OF SERVICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/16/2001 Participant: PEOPLE OF THE STATE OF ILL

PROOF OF SERVICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/16/2001 Participant: PEOPLE OF THE STATE OF ILL

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/17/2001 Participant: BUNTROCK AND GIDWITZ

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/17/2001 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/17/2001 Participant: BUNTROCK AND GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/17/2001 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/19/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/19/2001 Participant: BUNTROCK GIDWITZ

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/19/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/19/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/19/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/19/2001 Participant: BUNTROCK

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/19/2001 Participant: TERRA JUDITH

MEMORANDUM FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/19/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/19/2001 Participant: BUNTROCK GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/19/2001 Participant: TERRA FOUNDATION

OBJECTIONS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/22/2001 Participant: PEOPLE OF THE STATE OF ILL

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/22/2001 Participant: PEOPLE OF THE STATE OF ILL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/22/2001 Participant: PEOPLE OF THE STATE OF ILL

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/22/2001 Participant: PEOPLE OF THE STATE OF ILL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/22/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 01/30/2001
Court Time: 1030
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010060127

Activity Date: 01/22/2001 Participant: BUNTROCK DEAN L

MOTION TO - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010060126

Activity Date: 01/22/2001 Participant: BUNTROCK DEAN L

MOTION TO - DENIED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010060126

Activity Date: 01/26/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

NOTICE OF MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/26/2001 Participant: TERRA JUDITH

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

PETITION TO COMPEL APPEARANCE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 01/26/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 01/26/2001 Participant: TERRA FOUNDATION

MOTION TO VACATE ORDER

Attorney: SIDLEY & AUSTIN

Activity Date: 01/30/2001 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: R F WITTMEYER LTD

Activity Date: 01/30/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK

NOTICE OF DEPOSITION FILED

Attorney: R F WITTMEYER LTD

Activity Date: 01/30/2001 Participant: BUNTROCK

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK

EMERGENCY NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 01/30/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 02/05/2001
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010081665

Activity Date: 01/30/2001 Participant: BUNTROCK DEAN L

EXCHANGE INFORMATION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010081665

Activity Date: 01/30/2001 Participant: TERRA JUDITH

EXCHANGE INFORMATION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010081665

Activity Date: 01/30/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010081665

Activity Date: 01/31/2001 Participant: RYAN JAMES

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/31/2001 Participant: PEOPLE OF THE STATE

ANSWER TO MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 01/31/2001 Participant: RYAN JAMES

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/05/2001 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090976

Activity Date: 02/05/2001 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090976

Activity Date: 02/05/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 03/08/2001

Court Time: 0200

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090978

Activity Date: 02/05/2001 Participant: BUNTROCK DEAN L

MOTION TO - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090976

Activity Date: 02/05/2001 Participant: BUNTROCK DEAN L

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090978

Activity Date: 02/05/2001 Participant: BUNTROCK DEAN L

STAY OF EXECUTION

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010090976

Activity Date: 02/06/2001 Participant: TERRA JAMES

CERTIFICATE OF MAILING FILED

Attorney: MCBRIDE BAKER & COLES

Activity Date: 02/06/2001 Participant: TERRA JAMES

EXHIBITS FILED

Attorney: MCBRIDE BAKER & COLES

Activity Date: 02/06/2001 Participant: TERRA JAMES

NOTICE OF MOTION FILED

Attorney: MCBRIDE BAKER & COLES

Activity Date: 02/06/2001 Participant: TERRA JAMES

PETITION FILED

Attorney: MCBRIDE BAKER & COLES

Activity Date: 02/06/2001 Participant: BUNTROCK DEAN L

ORDER PLAINTIFF LEAVE TO FILE PETITION

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010091419

Activity Date: 02/06/2001 Participant: TERRA JUDITH

ORDER DEFENDANT LEAVE TO FILE PETITION

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010091419

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

CERTIFICATE FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

CERTIFICATE OF MAILING FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

ANSWER FILED

Attorney: PRO SE

Activity Date: 02/07/2001 Participant: MICHAELI NAFTALI

NOTICE OF FILING FILED

Attorney: PRO SE

Activity Date: 02/21/2001 Participant: BUNTROCK GIDWITZ

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/21/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/21/2001 Participant: BUNTROCK

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/21/2001 Participant: BUNTROCK GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/26/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/26/2001 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/26/2001 Participant: BUNTROCK DEAN

EMERGENCY NOTICE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/26/2001 Participant: BUNTROCK DEAN

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 02/27/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010133433

Activity Date: 03/01/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 03/01/2001 Participant: TERRA JUDITH

ANSWER FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 03/01/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 03/08/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 03/21/2001

Court Time: 0230

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010611790

Activity Date: 03/08/2001 Participant: BUNTROCK DEAN L

PROTECTIVE ORDER - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010161180

Activity Date: 03/08/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010161179

Activity Date: 03/08/2001 Participant: BUNTROCK DEAN L

APPELLATE COURT MANDATE - REVERSED AND REMANDED WITH DIRECTIONS

Court Room: 2403

Judge: GREIMAN, ALAN J

Microfilm: CH010030239

Activity Date: 03/21/2001 Participant: BUNTROCK DEAN

CASE MGMT CALL NOTICE MAILED

Date: 05/01/2001

Court Time: 0915

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Activity Date: 03/21/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 04/13/2001

Court Time: 1015

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010200600

Activity Date: 03/21/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010200601

Activity Date: 04/03/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 05/16/2001

Court Time: 0200

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010231316

Court Room: 2302

Activity Date: 04/03/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 05/02/2001
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010231316

Activity Date: 04/03/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010231315

Activity Date: 05/02/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 05/16/2001
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010302219

Activity Date: 05/02/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010302219

Activity Date: 05/16/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 05/21/2001
Court Time: 0115
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010332941

Activity Date: 05/16/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010332941

Activity Date: 05/21/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 06/18/2001
Court Time: 0230
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010342243

Activity Date: 05/21/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010342243

Activity Date: 06/07/2001 Participant: BUNTROCK

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: BUNTROCK

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: BUNTROCK

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: BUNTROCK

EMERGENCY MOTION/PETITION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 06/07/2001 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380392

Activity Date: 06/07/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 06/08/2001

Court Time: 1130

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380392

Activity Date: 06/07/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380392

Activity Date: 06/07/2001 Participant: BUNTROCK DEAN L

IMPOUND EXHIBITS OR DOCUMENTS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380392

Activity Date: 06/08/2001 Participant: TERRA

OBJECTIONS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/08/2001 Participant: TERRA

FILED UNDER SEAL

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/08/2001 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380906

Activity Date: 06/08/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380904

Activity Date: 06/08/2001 Participant: TERRA JUDITH

IMPOUND EXHIBITS OR DOCUMENTS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380904

Activity Date: 06/08/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 07/02/2001

Court Time: 0200

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380904

Activity Date: 06/08/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380904

Activity Date: 06/08/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010380904

Activity Date: 06/15/2001 Participant: TERRA FOUNDATION

AMENDED NOTICE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/15/2001 Participant: TERRA FOUNDATION

PROOF OF SERVICE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/15/2001 Participant: TERRA FOUNDATION

PROOF OF SERVICE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/15/2001 Participant: TERRA FOUNDATION

EMERGENCY MOTION/PETITION FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 06/15/2001 Participant: BUNTROCK DEAN L

MISCELLANEOUS MOTION - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH000393287

Activity Date: 06/18/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/18/2001 Participant: TUCKER PAUL

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/18/2001 Participant: TUCKER PAUL

EMERGENCY NOTICE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/18/2001 Participant: TUCKER PAUL

EMERGENCY MOTION/PETITION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/18/2001 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000393580

Activity Date: 06/18/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 07/02/2001

Court Time: 0200

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000393579

Activity Date: 06/18/2001 Participant: TERRA JUDITH

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000393580

Activity Date: 06/18/2001 Participant: TERRA JUDITH

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000393578

Activity Date: 06/18/2001 Participant: TERRA JUDITH

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000393578

Activity Date: 06/19/2001 Participant: PEOPLE OF THE STATE OF ILL

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/19/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/19/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/19/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/19/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/19/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/19/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 06/19/2001 Participant: PEOPLE OF THE STATE OF ILL

EMERGENCY MOTION/PETITION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/29/2001 Participant: TERRA JUDITH

APPEARANCE FILED - NO FEE PAID -

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: TUCKER PAUL H

APPEARANCE FILED - NO FEE PAID -

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: SIMPSON ALAN K

APPEARANCE FILED - NO FEE PAID -

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: BELLOWS & BELLOWS

Activity Date: 06/29/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 07/02/2001
Court Time: 0200
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010420657

Activity Date: 06/29/2001 Participant: TERRA JUDITH

ORDER T.R.O. - DENIED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010420657

Activity Date: 07/02/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 07/02/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 07/02/2001 Participant: TERRA JUDITH

EMERGENCY NOTICE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 07/02/2001 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN

INCOMING CORRESPONDENCE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 07/24/2001

Court Time: 0200

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN L

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN L

IMPOUND EXHIBITS OR DOCUMENTS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010422345

Activity Date: 07/02/2001 Participant: TERRA JUDITH

SUBSTITUTE OR ADD ATTORNEY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Attorney: BELLOWS & BELLOWS
Microfilm: CH010422343

Activity Date: 07/02/2001 Participant: TERRA JUDITH

WITHDRAWAL OF ATTORNEY FROM CASE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Attorney: TAFT STETTINIUS HOLLISTER
Microfilm: CH010422344

Activity Date: 07/02/2001 Participant: BUNTROCK DEAN L

ORDER T.R.O. EXTENSION - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: TERRA JUDITH

ORDER DEFENDANT LEAVE TO FILE PETITION

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Microfilm: CH010422346

Activity Date: 07/02/2001 Participant: TERRA JUDITH

ORDER LEAVE TO FILE PETITION FOR ATTORNEY FEES

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Microfilm: CH010422344

Activity Date: 07/02/2001 Participant: TERRA JUDITH

MOTION TO - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Microfilm: CH010422346

Activity Date: 07/06/2001 Participant: TERRA FOUNDATION

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/06/2001 Participant: TERRA FOUNDATION

MOTION FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/13/2001 Participant: BUNTROCK DEAN L

APPELLATE COURT MANDATE - REVERSED AND REMANDED WITH DIRECTIONS

Judge: THEIS, MARY JANE WENDT

Court Room: 2403

Microfilm: CH010070250

Activity Date: 07/19/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/19/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

COUNTER CLAIM FILED - FEE PAID -

Court Fee: 116.00

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

COUNTER CLAIM FILED - FEE PAID -

Court Fee: 116.00

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

ANSWER TO COMPLAINT FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

ANSWER TO COMPLAINT FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

AFFIRMATIVE DEFENSE FILED

Attorney:

CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TUCKER PAUL

AFFIRMATIVE DEFENSE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/20/2001 Participant: TERRA JUDITH

SUBSTITUTE OR ADD ATTORNEY - ALLOWED -

Court Room: 2302 Judge: KINNAIRD, DOROTHY KIRIE

Attorney: CUMMINS & CRONIN LLC

Microfilm: CH000451249

Activity Date: 07/20/2001 Participant: TERRA JUDITH

WITHDRAWAL OF ATTORNEY FROM CASE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Attorney: BELLOWS & BELLOWS

Microfilm: CH000451249

Activity Date: 07/23/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/23/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/23/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/23/2001 Participant: BUNTROCK DEAN

ANSWER FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: TERRA FOUNDATION ARTS

ANSWER FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/23/2001 Participant: PEOPLE STATE IL

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/23/2001 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: BUNTROCK

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/23/2001 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/23/2001 Participant: PEOPLE STATE IL

FILED UNDER SEAL

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/23/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 07/24/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 07/24/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/24/2001 Participant: BUNTROCK

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 07/24/2001 Participant: TERRA JUDITH

ANSWER FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 07/24/2001 Participant: TERRA JUDITH

BRIEF FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 07/24/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010461203

Activity Date: 07/24/2001 Participant: BUNTROCK DEAN L

MOTION TO - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010461205

Activity Date: 07/24/2001

Participant: TERRA JUDITH

MOTION TO - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010461205

Activity Date: 07/24/2001

Participant: BUNTROCK DEAN L

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010461203

Activity Date: 07/24/2001

Participant: TERRA JUDITH

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010461203

Activity Date: 07/25/2001

Participant: PEOPLE

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/25/2001

Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/25/2001

Participant: PEOPLE

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/25/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/25/2001 Participant: PEOPLE

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/25/2001 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 07/26/2001 Participant: PEOPLE STATE ILLINOIS

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/26/2001 Participant: TERRA

EXHIBITS FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 07/26/2001 Participant: PEOPLE STATE ILLINOIS

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/26/2001 Participant: PEOPLE STATE ILLINOIS

ANSWER TO MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/26/2001 Participant: PEOPLE STATE ILLINOIS

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 07/26/2001 Participant: BUNTROCK DEAN

INCOMING CORRESPONDENCE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 07/26/2001 Participant: TERRA

INCOMING CORRESPONDENCE FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 07/26/2001 Participant: BUNTROCK DEAN L

MOTION TO - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010462090

Activity Date: 07/26/2001 Participant: TERRA JUDITH

FILE COUNTER-CLAIM OR CROSS COMPLAINT - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010462090

Activity Date: 07/26/2001 Participant: TERRA JUDITH

MOTION TO - DENIED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010462090

Activity Date: 07/26/2001 Participant: BUNTROCK DEAN L

INJUNCTION - VOLUNTARY DISMISSAL, NON-SUIT OR DISMISSED BY AGREEMENT

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010462082

Activity Date: 08/06/2001 Participant: TUCKER PAUL

AFFIDAVIT IN SUPPORT OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 08/06/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 08/06/2001 Participant: TUCKER PAUL

EXHIBITS FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 08/06/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 08/06/2001 Participant: TERRA JUDITH

PETITION FOR ATTORNEYS FEES

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 08/22/2001 Participant: TUCKER

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 08/22/2001 Participant: TUCKER

NOTICE OF APPEAL FILED

Attorney: PRO SE

Activity Date: 08/29/2001 Participant: BUNTROCK DEAN L

COMPLY - ALLOWED -

Court Room: 2302 Judge: KINNAIRD, DOROTHY KIRIE

16di-000086

Microfilm: CH010520269

Activity Date: 08/29/2001 Participant: TERRA JUDITH

COMPLY - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010520269

Activity Date: 08/29/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 09/14/2001

Court Time: 0100

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010520269

Activity Date: 09/06/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/06/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: PATZIK FRANK SAMOTNY LT

Activity Date: 09/06/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: PATZIK FRANK SAMOTNY LT

Activity Date: 09/06/2001 Participant: TERRA JUDITH

PETITION FILED

Attorney: PATZIK FRANK SAMOTNY LT

Activity Date: 09/06/2001 Participant: TERRA JUDITH

EMERGENCY NOTICE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/06/2001 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/07/2001 Participant: TERRA JUDITH

EXTEND TIME - ALLOWED -

Date: 09/17/2001
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010532286

Activity Date: 09/07/2001 Participant: BUNTROCK DEAN L

STRIKE FROM THE CALL - ALLOWED -

Date: 09/14/2001
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010532287

Activity Date: 09/07/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 09/20/2001
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010532287

Activity Date: 09/07/2001 Participant: BUNTROCK DEAN L

ORDER PLAINTIFF LEAVE TO FILE PETITION

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010532287

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: BUNTROCK GIDWITZ

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/14/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: BELLOWS & BELLOWS

Activity Date: 09/14/2001 Participant: BUNTROCK GIDWITZ

PETITION FOR ATTORNEYS FEES

Attorney: QUINLAN & CRISHAM

Activity Date: 09/20/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 09/20/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 09/20/2001 Participant: TERRA JUDITH

OBJECTIONS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 09/20/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 09/28/2001 Judge:

Court Time: 1100
Court Room: 2302

KINNAIRD, DOROTHY KIRIE
Microfilm: CH010561774

Activity Date: 09/24/2001 Participant: TERRA

REQUEST FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 09/25/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/25/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/25/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/28/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 09/28/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/28/2001 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney:

QUINLAN & CARROLL LTD

Activity Date: 09/28/2001 Participant: BUNTROCK DEAN

SUPPLEMENTAL PETITION FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 09/28/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/28/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 09/28/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/28/2001 Participant: TERRA JUDITH

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010580433

Activity Date: 09/28/2001 Participant: BUNTROCK DEAN L

IMPOUND EXHIBITS OR DOCUMENTS - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2302

Microfilm: CH010580434

Activity Date: 10/01/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 12/19/2001
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010581590

Activity Date: 10/01/2001 Participant: BUNTROCK DEAN L

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010581590

Activity Date: 10/01/2001 Participant: BUNTROCK DEAN L

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010581590

Activity Date: 10/01/2001 Participant: BUNTROCK DEAN L

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010581590

Activity Date: 10/01/2001 Participant: BUNTROCK DEAN L

PROTECTIVE ORDER - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010581588

Activity Date: 10/31/2001 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/31/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/31/2001 Participant: TERRA JUDITH

EMERGENCY NOTICE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/31/2001 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 11/02/2001 Participant: PEOPLE STATE ILLINOIS

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/02/2001 Participant: PEOPLE STATE ILLINOIS

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/02/2001 Participant: PEOPLE STATE ILLINOIS

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/05/2001 Participant: BUNTROCK DEAN L

EXTEND TIME - ALLOWED -

Date: 11/19/2001

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010650467

Activity Date: 11/05/2001 Participant: TERRA JUDITH

MOTION TO - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010650467

Activity Date: 11/05/2001 Participant: BUNTROCK DEAN L

CASE SET ON PROGRESS CALL

Date: 12/07/2001

Court Time: 1030

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH010650467

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

NOTICE OF MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

NOTICE OF MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/16/2001 Participant: TERRA FOUNDATION ARTS

MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOIS

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE OFIL

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOI

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOIS

ANSWER FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOIS

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOIS

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE OFIL

FILED UNDER SEAL

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOI

FILED UNDER SEAL

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/20/2001 Participant: PEOPLE STATE ILLINOIS

FILED UNDER SEAL

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 11/21/2001 Participant: TERRA JUDITH

CONTINUANCE - ALLOWED -

Date: 01/15/2002
Court Time: 0200
Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: PEOPLE STATE I LLINOIS

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: TERRA JUDITH

STRIKE FROM THE CALL - ALLOWED -

Date: 12/07/2001
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: TERRA JUDITH

STRIKE FROM THE CALL - ALLOWED -

Date: 12/19/2001
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: TERRA JUDITH

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/21/2001 Participant: TERRA JUDITH

SET BRIEFING SCHEDULE - ALLOWED -

Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010682257

Activity Date: 11/27/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/27/2001 Participant: TERRA JUDITH

EMERGENCY NOTICE FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 11/27/2001 Participant: TERRA JUDITH

EMERGENCY MOTION/PETITION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 12/04/2001 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 12/14/2001
Court Time: 1100
Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH010710049

Activity Date: 12/10/2001 Participant: BUNTROCK GIDWITZ

CERTIFICATE FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/10/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 12/10/2001 Participant: BUNTROCK DEAN

ANSWER FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 12/10/2001 Participant: TERRA JUDITH

ANSWER FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 12/10/2001 Participant: BUNTROCK GIDWITZ

ANSWER FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/10/2001 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 12/10/2001 Participant: BUNTROCK GIDWITZ

NOTICE OF FILING FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/10/2001 Participant: BUNTROCK DEAN

FILED UNDER SEAL

Attorney: CUMMINS & CRONIN LLC

Activity Date: 12/11/2001 Participant: TERRA JUDITH

AFFIDAVIT FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 12/11/2001 Participant: BUNTROCK DEAN L

CERTIFICATE FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/11/2001 Participant: BUNTROCK DEAN L

ANSWER FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/11/2001 Participant: BUNTROCK DEAN L

AMENDED NOTICE FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/11/2001 Participant: TERRA JUDITH

FILED UNDER SEAL

Attorney: CUMMINS & CRONIN LLC

Activity Date: 12/14/2001 Participant: BUNTROCK DEAN L

ORDER FOR ATTORNEYS FEES

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2302
Microfilm: CH010732584

Activity Date: 01/11/2002 Participant: TERRA FOUNDATION ARTS

CERTIFICATE OF MAILING FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 01/11/2002 Participant: TERRA FOUNDATION ARTS

NOTICE OF MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 01/11/2002 Participant: TERRA FOUNDATION ARTS

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 01/11/2002 Participant: TERRA FOUNDATION ARTS

MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 01/15/2002 Participant: TERRA JUDITH

CONTINUANCE - ALLOWED -

Date: 02/13/2002
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH000000000

Activity Date: 01/15/2002 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 02/12/2002
Court Time: 1100
Court Room: 2302
Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH020031747

Activity Date: 01/15/2002 Participant: TERRA JUDITH

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH000000000

Activity Date: 01/15/2002 Participant: BUNTROCK DEAN L

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2302

Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH020031747

Activity Date: 01/30/2002 Participant: BUNTROCK DEAN

RECEIPT FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 02/04/2002 Participant: PEOPLE STATE ILLINOIS

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/04/2002 Participant: PEOPLE STATE ILLINOIS

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/04/2002 Participant: PEOPLE STATE IL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/04/2002 Participant: PEOPLE STATE ILLINOIS

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/04/2002 Participant: PEOPLE STATE IL

EMERGENCY NOTICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/04/2002 Participant: PEOPLE STATE ILLINOIS

EMERGENCY NOTICE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/05/2002 Participant: PEOPLE

ADVANCE OR RESET ON CALL

Date: 02/20/2002
Court Time: 0200
Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH002080008

Activity Date: 02/05/2002 Participant: BUNTROCK DEAN L

TRANSFERRED TO PRESIDING JUDGE

Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH002080007

Activity Date: 02/05/2002 Participant: PEOPLE

STRIKE FROM THE CALL - ALLOWED -

Date: 02/13/2002
Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH002080008

Activity Date: 02/05/2002 Participant: PEOPLE

MISCELLANEOUS MOTION - DENIED -

Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH002080008

Activity Date: 02/05/2002 Participant: BUNTROCK DEAN L

ASSIGN TO JUDGE WITHIN DIVISION

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH002080007

Activity Date: 02/09/2002 Participant: BUNTROCK DEAN L

RETURN FOR RANDOM ASSIGNMENT

Judge: GREEN, ALBERT

Activity Date: 03/11/2002 Participant: TERRA

INCOMING CORRESPONDENCE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 03/13/2002 Participant: TERRA JUDITH

FILE AFFIDAVITS - ALLOWED -

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH020152523

Activity Date: 03/13/2002 Participant: TERRA JUDITH

ORDER LEAVE TO FILE PETITION FOR ATTORNEY FEES

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH020152523

Activity Date: 03/13/2002 Participant: BUNTROCK DEAN L

ORDER FOR ATTORNEYS FEES

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH020152523

Activity Date: 04/05/2002 Participant: TERRA JUDITH

EXTEND TIME - ALLOWED -

Date: 04/24/2002 Judge: SCHILLER, STEPHEN A.

Court Room: 2403 Microfilm: CH020210930

Activity Date: 04/05/2002 Participant: TERRA JUDITH

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Court Room: 2403

Judge: SCHILLER, STEPHEN A.

Microfilm: CH020210930

Activity Date: 04/12/2002 Participant: BUNTROCK DEAN

NOTICE OF APPEAL FILED

Attorney: PRO SE

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

AFFIDAVIT FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

AMENDED PETITION FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

MOTION FILED

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

FILED UNDER SEAL

Attorney: QUINLAN & CRISHAM

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

FILED UNDER SEAL

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 04/24/2002 Participant: SIMPSON ALAN

FILED UNDER SEAL

Attorney: TAFT STETTINIUS HOLLISTER

Activity Date: 04/24/2002 Participant: BUNTROCK DEAN

PETITION FOR ATTORNEYS FEES

Attorney: QUINLAN & CRISHAM

Activity Date: 04/29/2002 Participant: BUNTROCK

REQUEST FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 05/02/2002 Participant: STEBBINS JR THEODORE

CERTIFICATE OF MAILING FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 05/02/2002 Participant: STEBBINS JR THEODORE

EXHIBITS FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 05/02/2002 Participant: STEBBINS JR THEODORE

NOTICE OF MOTION FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 05/02/2002 Participant: STEBBINS JR THEODORE

MOTION FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 05/08/2002 Participant: BUNTROCK DEAN L

AMEND ORDER OR DECREE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Microfilm: CH020292306

Activity Date: 05/09/2002 Participant: TERRA JUDITH

CERTIFICATE FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/09/2002 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/09/2002 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/09/2002 Participant: TERRA JUDITH

OBJECTIONS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/09/2002 Participant: TERRA JUDITH

MOTION FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/15/2002 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/15/2002 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/15/2002 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/15/2002 Participant: TERRA JUDITH

OBJECTIONS FILED

Attorney: MULROY,SCANDAGLIA

Activity Date: 05/15/2002 Participant: TERRA JUDITH

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Microfilm: CH020310656

Activity Date: 05/21/2002 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 05/21/2002 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 05/21/2002 Participant: TERRA JUDITH

MOTION FILED

Attorney: SIDLEY & AUSTIN

Activity Date: 06/14/2002 Participant: RYAN JAMES

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/14/2002 Participant: RYAN JAMES

NOTICE OF MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/14/2002 Participant: RYAN JAMES

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 06/14/2002 Participant: RYAN JAMES

OBJECTIONS FILED

Attorney:

ATTORNEY GENERALS OFFICE

Activity Date: 06/21/2002 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 06/21/2002 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 06/21/2002 Participant: BUNTROCK DEAN

OBJECTIONS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 06/21/2002 Participant: BUNTROCK DEAN L

MISCELLANEOUS MOTION - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Microfilm: CH020400750

Activity Date: 07/23/2002 Participant: TERRA

CERTIFICATE OF MAILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 07/23/2002 Participant: TERRA

NOTICE OF FILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 07/23/2002 Participant: TERRA

MOTION FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: BUNTROCK DEAN

NOTICE OF MOTION FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/09/2002 Participant: TERRA JUDITH

WITHDRAWAL OF ATTORNEY FROM CASE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Attorney: CUMMINS & CRONIN LLC

Microfilm: CH020521606

Activity Date: 08/09/2002 Participant: TERRA JUDITH

WITHDRAWAL OF ATTORNEY FROM CASE - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Attorney: NOVOSELSKY DAVID A

Microfilm: CH020521606

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney:

QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 08/13/2002 Participant: BUNTROCK

REPORT OR RECORD OF PROCEEDINGS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 10/11/2002 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/11/2002 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/11/2002 Participant: TERRA JUDITH

NOTICE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/11/2002 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 10/15/2002 Participant: TERRA JUDITH

APPEARANCE FILED - NO FEE PAID -

Attorney: MORRIS RATHNAU & DELAROSA

Activity Date: 10/15/2002 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: MORRIS RATHNAU & DELAROSA

Activity Date: 10/15/2002 Participant: TERRA JUDITH

PROOF OF SERVICE FILED

Attorney: MORRIS RATHNAU & DELAROSA

Activity Date: 10/16/2002 Participant: TERRA JUDITH

CONTINUANCE - ALLOWED -

Date: 11/13/2002
Court Time: 0200
Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH020672001

Activity Date: 12/19/2002 Participant: BUNTROCK

CERTIFICATE FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/19/2002 Participant: BUNTROCK

EXHIBITS FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/19/2002 Participant: BUNTROCK

NOTICE OF MOTION FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 12/19/2002 Participant: BUNTROCK

MOTION FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 01/06/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 01/06/2003 Participant: TERRA JUDITH

ANSWER TO MOTION FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 01/06/2003 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 01/06/2003 Participant: TERRA JUDITH

PROOF OF SERVICE FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 01/10/2003 Participant: BUNTROCK DEAN L

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH030031033

Activity Date: 01/10/2003 Participant: BUNTROCK DEAN L

WITHDRAW OR RELEASE DEPOSITS, EXHIBITS OR DOCUMENTS - ALLOWED -

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH030031033

Activity Date: 01/10/2003 Participant: BUNTROCK DEAN L

MISCELLANEOUS MOTION - ALLOWED -

Court Room: 2403 Judge: KINNAIRD, DOROTHY KIRIE

Microfilm: CH030031033

Activity Date: 02/18/2003 Participant: TERRA JUDITH

NOTICE OF FILING FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/18/2003 Participant: TERRA JUDITH

PROOF OF SERVICE FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/18/2003 Participant: TERRA JUDITH

MOTION FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/18/2003 Participant: TERRA JUDITH

MOTION FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: PEOPLE STATE IL

CERTIFICATE OF MAILING FILED

Attorney:

ATTORNEY GENERALS OFFICE

Activity Date: 02/25/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: MORRIS & DE LA ROSA

Activity Date: 02/25/2003 Participant: PEOPLE STATE IL

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/25/2003 Participant: PEOPLE STATE IL

ANSWER TO MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/25/2003 Participant: PEOPLE STATE IL

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/25/2003 Participant: PEOPLE STATE IL

OBJECTIONS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/25/2003 Participant: TERRA JUDITH

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE

Court Room: 2403

Microfilm: CH030123798

Activity Date: 04/15/2003 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 04/15/2003 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 04/17/2003 Participant: BELLOWS BELLOWS

CERTIFICATE OF MAILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/17/2003 Participant: BELLOWS BELLOWS

NOTICE OF FILING FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 04/17/2003 Participant: BELLOWS BELLOWS

MOTION FILED

Attorney: BELLOWS & BELLOWS

Activity Date: 05/01/2003 Participant: TERRA

NOTICE OF FILING FILED

Attorney: MCGUIRE WOODS
BATTLE BTH

Activity Date: 05/01/2003 Participant: TERRA

PROOF OF SERVICE FILED

Attorney: MCGUIRE WOODS
BATTLE BTH

Activity Date: 05/01/2003 Participant: TERRA

SUBSTITUTION OF ATTORNEY FILED

Attorney: MCGUIRE WOODS
BATTLE BTH

Activity Date: 05/01/2003 Participant: BUNTROCK DEAN L

CONTINUANCE - ALLOWED -

Date: 05/15/2003
Court Time: 1100
Court Room: 2403

Judge: KINNAIRD, DOROTHY KIRIE
Microfilm: CH030271541

Activity Date: 05/01/2003 Participant: TERRA FOUNDATI ON

SUBSTITUTE OR ADD ATTORNEY - ALLOWED -

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2403
Attorney: MCGUIRE WOODS
BATTLE BTH
Microfilm: CH030271541

Activity Date: 05/15/2003 Participant: TERRA JUDITH

ORDER FOR ATTORNEYS FEES

Judge: KINNAIRD, DOROTHY KIRIE
Court Room: 2403
Microfilm: CH030300141

Activity Date: 06/26/2003 Participant: BUNTROCK DEAN

NOTICE OF APPEAL FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 06/30/2003 Participant: BUNTROCK DEAN

REQUEST FILED

Attorney: QUINLAN & CARROLL LTD

Activity Date: 10/23/2003 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: PRO SE

Activity Date: 10/23/2003 Participant: BUNTROCK DEAN

MOTION FILED

Attorney: PRO SE

Activity Date: 12/03/2003 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: SCOFIELD CHARLES J JR MAI

Activity Date: 04/20/2004 Participant: BUNTROCK DEAN L

STRIKE OR WITHDRAW COMPLAINT, AMENDED COMPLAINT OR PORTION THEREOF - ALW -

Court Room: 2403

Judge: CAMPBELL, CALVIN C.

Microfilm: CH040040037

Activity Date: 04/20/2004 Participant: BUNTROCK DEAN L

STRIKE OR WITHDRAW COMPLAINT, AMENDED COMPLAINT OR PORTION THEREOF - ALW -

Court Room: 2403

Judge: CAMPBELL, CALVIN C.

Microfilm: CH040040010

Activity Date: 11/04/2004 Participant: BUNTROCK DEAN L

APPELLATE COURT MANDATE - AFFIRMED

Court Room: 2403

Judge: CAMPBELL, CALVIN C.

Microfilm: CH040110289

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a director of the Terra Foundation for the Arts,

Plaintiffs,

-vs-

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

No. 00 CH 13859

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DOROTHY KIRIE KINNAIRD, Judge of said court, on the 22nd day of September, 2000.

PRESENT:

MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL,
MR. MICHAEL J. ROTHSTEIN,
Appeared on behalf of the Plaintiffs;

MR. TERRY GRIMM,
Appeared on behalf of the Terra Foundation for the Arts;

MR. FLOYD PERKINS,
MR. TERRY GOLDBERG,
Appeared on behalf of the People of the State of Illinois.

ANGELA PETRUZZI, CSR
Official Court Reporter
Chancery Division
Circuit Court of Cook County

THE CLERK: Buntrock versus Terra. 00 CH 1359.

THE COURT: Good afternoon.

MR. QUINLAN: Good afternoon, Your Honor. William R. Quinlan with Michael Rothstein and James Carroll on behalf of the plaintiffs.

MR. GRIMM: My name is Terry Grimm, G-r-i-m-m. And we have now seen what a bad idea casual Friday is, Your Honor, because I'm the only person over there with a suit and tie on this afternoon and about half an hour ago, I got this document.

THE COURT: Who are you here behalf of?

MR. GRIMM: Our firm represents the Terra Foundation for the Arts.

THE COURT: Just the Terra Foundation?

MR. GRIMM: We have no authority to appear for anyone else, Your Honor, and before I get too deep in it, one of the plaintiffs, in this case Mr. Gidwitz, is a good client of Winston & Strawn. So unless Judge Quinlan has a waiver for me, there is a real question now how Winston & Strawn would be able to stay in this case.

MR. PERKINS: Judge, Floyd Perkins and Terry

Goldberg, for the People of the State of Illinois.

We are not named in the caption but we intend to intervene.

THE COURT: You have received a notice of motion for today for this afternoon?

MR. PERKINS: Yes.

THE COURT: And what do you intend to intervene as a party defendant with a position or a bystander or what are the attorney general be doing here?

MR. PERKINS: Judge, we would likely be intervening as a party plaintiff although we will have to look at our own allegations. In that regard, it is a situation where we are looking at the first instance.

So in that regard, we want to be cautious in what we plead, but we will be intervening in the sense that we see this as a serious matter. That involves substantial charitable organization here in Illinois. Last report we had was $400 million.

THE COURT: 450 I think.

MR. PERKINS: $450 million. Some of the allegations cause us concern and we need to look into those matters so we would like to do so.

vote from taking place because as we alleged all the way through here this has been part of the plan and scheme all along is to push this through in a setting where they feel they have the votes and have manipulated the votes in such away that they will get this passed at that time. We don't think that's proper.

We agree with Your Honor there has been no real discussion of this anywhere. And that is the very concern that we have and the propriety of this action taking that action would be ultra virus and that is what we are alleging.

And the Attorney General himself is here to say he is concerned about the taking of any ultra virus steps which would be removing the assets from the City of Chicago.

THE COURT: I don't mean to interrupt you, sir, but there's 11 people at most. What I'm hearing in the pleadings that you've got is that some of them you think are really bad and they're going to do something horrible maybe on Tuesday. What about all the rest of them?

I would think that there is going to be a discussion. I would think if there is any kind of

evidence again today that this is exactly what the intent is to do is to push this through at that board meeting.

And that is why we ask both to stop the meeting and then to prevent any action on taking removal of any directors at the second meeting if that were to go forward and to prevent them from voting on an ultra virus act that they cannot do.

It does not disrupt them from conducting any other business, doing a lot of things that would be generally beneficial, but not from taking any improper or inappropriate actions.

THE COURT: Is there a history in the case law of not -- maybe Mr. Perkins can help me out on this one. If a not for profit organizations charitable organizations in Illinois wishing to move outside the state and being stopped by force from doing so?

MR. PERKINS: Judge, I think it is a matter -- I have looked for cases myself on that particular area, and I think you have to look at -- I think it really comes down to who gave the money to the charity and for what purposes and the restrictions are that very trust instrument itself.

In this particular case our quick look at this we are pretty familiar with this foundation, because we were involved in the Dan Terra estate.

Most of the money -- almost all the money as far as I can see came from Dan Terra. This foundation started with I think with three directors, Dan Terra, his son Jim Terra, and a third person I can't remember who that was.

I understand from Jim Terra that he believes that the foundation is to stay in Illinois. We see everything that we have ever seen with regard to this.

This was left for the benefit of the People of the State of Illinois. The People of the State of Illinois is the ultimate beneficiary of every charitable trust by the common law that's the way the common law reads.

Unfortunately, it may be a question in some people's mind, but common law says the people are the one who are the ultimate beneficiary and they certainly have no interest in having a charitable trust that's in the state leave the state.

The public here has a right to enjoin the

benefits of its charitable trust. The founders here put the money in established this foundation here in this city, in this state and we believe that there are enough indicia of facts that would lead one to believe that the intent of the trust was that it remain in Illinois and that would be what we would try to put together.

I can't say to you, judge, this is the case of Smith and something else that would be definitive on that, but we will be looking to give you what we can in that regard as well.

We believe that under these circumstances, that this board shouldn't be considering this issue.

THE COURT: Well, then maybe they should consider whatever they want to consider, but are you saying they should be allowed to take a definitive vote?

MR. PERKINS: Take a definitive vote? Judge, the interesting thing about this is the history of the board itself. This is a fairly new board of people. This is not a long running list of these people having run and stayed with this museum for many, many years.

Dan Terra died I believe in 1996. And at that time, he was probably the person who steered the ship all the time and at that time, there were -- the board was I believe only five or six people.

Jim Terra was on the board at the time. I'm not sure if Judith Terra was on the board while Dan was alive. I believe in fact she was not. There was some agreement that she wouldn't be on the board.

So we have since 1996 a big change in who's running this organization. And quite frankly, the direction that the founder and the people would -- the settlers so to spoke of this charitable trust I think we need to step back and visit what was the intent and really where this foundation should remain.

THE COURT: Mr. Grimm, you have been very patient. Thank you. Tell me about -- do you all want to work all weekend putting together a response for a motion to be heard on Monday?

MR. GRIMM: The direct question is do I? No, but will somebody will it be ready, yes.

THE COURT: So you want to be able to

Simpson can possibly participate by phone any way. I mean I don't know the circumstances. It was moved as a convenience to him, this information that we received.

Now, that does not necessarily mean that he may not be able to do it by phone, but it was his preference not to do it on Tuesday.

THE COURT: Is anybody from the plaintiffs' side planning to bring anyone else to this meeting like counsel or anyone? Are you going to have anybody there on Tuesday?

MR. CARROLL: I volunteer, Your Honor.

MR. QUINLAN: I don't think we have any standing, but we would like to mention one thing.

MR. GRIMM: That happens all the time.

MR. QUINLAN: Mr. Mulac is here who represents Mr. Jim Terra who is here to support our position and to indicate in fact as the Attorney General has stated that he could and would be able to endorse and testify to his father's position that this was to be logically within Chicago, within Illinois and that was part of his vision.

Also, Your Honor asked about a particular case. I'd like to invite Your Honor to take a look

foundation purposes. That this clearly is a public Illinois trust.

THE COURT: I'm just wondering whether there is going to be someone here, there all of those other boards members, that you have suggested that might be easily influenced?

MR. QUINLAN: Could be.

THE COURT: Are they going to have the benefit of knowing what this case is about or what the issues that are raised here and that the Attorney General is here and that they are indicating they are seeking to intervene as a party plaintiff to stop the very things that they are going to be talking about? Does everybody who is supposed to vote know the seriousness at this time?

MR. QUINLAN: I have no idea. Surely there will be discussions. We do not control the process. That is controled by the people whom are here suing who are in positions to control this and to control the information that is transmitted on behalf of the group.

Again I merely go back to the statement again if in fact as we have alleged and this is a summary proceeding of course as Your Honor knows and

there really is no difference whether there is an answer or not because it is --

THE COURT: All right.

MR. QUINLAN: My whole point is whether or not we have established a fair question although I would be very interested in what Mr. Grimm can ascertain in the interim and what the position is.

And I'm more than happy to act in any reasonable way to work something out. The same time as we have to establish and we need to establish to have a right to prevent them taking actions that are arising and a fair question of the impropriety of what is being done and the basis upon which they have been acting.

And as the Attorney General said we have raised some very serious questions regarding the propriety of their management and use of fiduciary duties and responsibilities to the museum itself and to their operation of the board in manner in which it has been operating that if and of itself is grounds for removal of trustees and director under the state law by the Attorney General.

And it is the same thing that happened in the Hardy Museum case. All I'm saying this is a

So we are in a situation here where we are trying to do is just let this stand still long so Your Honor can take care of it, look at these -- these are serious allegations. Whether they go ahead with the meeting or they don't and there are serious allegations talking about the continued viability of certain people, service upon their board, and I think the Attorney General's presence here surely indicates the concern of the State of Illinois about the very thing that we are alleging.

So in terms of taking a small action here to insure that the status quo is maintained for Your Honor to consider this case, I'm not so sure it is that kind of a reach or is that kind of inconvenience. The inconvenience to the people in France here.

Your Honor herself has indicated this is something ought well be discussed and we encourage that. That's fine. But it does not need to have a vote taken and that of course is exactly what the documents that we receive clearly indicates is their intent.

THE COURT: Are what you suggesting you don't come back Monday? We will recess now and

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

VERIFIED COMPLAINT
FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of Terra Foundation for the Arts, an Illinois not-for-profit corporation, for their Complaint against the Defendants, state as follows:

Nature of this Action

1 This is an action for declaratory, injunctive and other relief seeking to enjoin defendants' illegal and wasteful conduct in connection with the management and operations of Terra Foundation for the Arts, an Illinois not-for-profit corporation ("Terra Foundation").

2 In this action Plaintiffs seek to enjoin defendants from (1) holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws; (2) taking any action

to elect or remove any member of the Board of Directors or changing any committee assignment; (3) taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and (4) taking any other action contrary to the by-laws of the Terra Foundation or defendants' fiduciary duties as directors of an Illinois Not For Profit Corporation.

The Parties

3 Plaintiff Buntrock is a resident of DuPage County, Illinois, a prominent businessperson, and a benefactor of the arts. Since 1998, Buntrock has served as a director and officer of Terra Foundation. He presently serves as Terra Foundation's treasurer, is chairman of its finance and investment committee, and is a member of its Executive Committee.

4 Plaintiff Gidwitz is a resident of Chicago, Cook County, Illinois, a former CEO of Helene Curtis Corporation, and a benefactor of the arts. Since 1982, Gidwitz has served as a director and officer of Terra Foundation. He presently serves as chairman of Terra Foundation's strategic planning committee and is a member of its Executive Committee.

5 Defendant Paul Hayes Tucker ("Mr. Tucker") is a resident of Massachusetts. Mr. Tucker is a director, chairman and president of Terra Foundation and is a member of its Executive Committee.

6 Defendant Judith Terra is a resident of Washington, D.C. Judith Terra is a director and vice chairman of Terra Foundation, and is a member of its Executive Committee.

7 Defendant Senator Alan K. Simpson is a resident of Wyoming and a former United States senator from that state. Sen. Simpson is a director of Terra Foundation and a member of its finance and investment committee.

8 Defendant Naftali Michaeli ("Mr. Michaeli") is an Israeli citizen and a resident of Washington, D.C. Mr. Michaeli is a close personal friend of Judith Terra, and has no official position with Terra Foundation.

9 Defendant Terra Foundation is an Illinois not-for-profit charitable corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit collections of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate museums in Chicago and France.

10 Because of Dan Terra's extraordinarily generous gifts to Terra Foundation in his lifetime, and his bequest to Terra Foundation of most of his estate, Terra Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art.

11 Terra Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Ave., Chicago, Illinois.

12 Terra Foundation currently has eleven directors, the maximum number allowed under the by-laws of Terra Foundation. The Board includes Margaret Daley, a well-known benefactor of education and the arts and the wife of Mayor Richard M. Daley, and Arthur A. Hartman, the former United States Ambassador to France. The Board also includes Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Catherine A. Stevens, the wife of United States Senator Ted Stevens, was the Executive Director of Terra Foundation from August of 1996 through April, 2000 until terminated by Tucker.

Creation of Terra Foundation

13 Dan Terra established Terra Foundation in December 1978 under the Illinois General Not For Profit Corporation Act. It was Dan Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art. As set forth in the original Articles of Incorporation, the purpose of Terra Foundation was:

> to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions.

(See Articles of Incorporation, attached hereto as Exhibit 1).

14 To ensure that the primary mission and purpose of Terra Foundation was carried out, the Terra Museum was opened in 1982 in Evanston, Illinois. In 1987, the Museum relocated to 664 N. Michigan Avenue, Chicago, Illinois, and remains at that location until today.

15 Throughout the 1980s and early to mid-1990s, Dan Terra contributed cash, stock and art for the continued growth and viability of the Terra Foundation and the Terra Museum in Chicago. To ensure that his contributions would further the goals and mission of Terra Foundation for the benefit of the public, Dan Terra created two restricted endowments, the "B2 Endowment," restricted to the acquisition of art for Terra Foundation, and the D4 Endowment restricted to education endeavors relating to American art.

16 In the early 1990s, Terra Foundation constructed and developed the Musee d'Art Americain Giverny ("Giverny Museum"), an art museum in Giverny, France dedicated to the exhibition of American art and American art education.

17 Primarily because of Dan Terra's gifts and bequests, the value of Terra Foundation has grown substantially since its creation. Currently, Terra Foundation holds net assets worth approximately $450 million. The value of the art alone located at the Terra Museum in Chicago exceeds $100 million, with the overall value of Terra's Foundation's art collection exceeding $173 million.

18 Pursuant to its by-laws, the Board of Directors of Terra Foundation is required to hold an annual meeting during the month of September of each year for the purpose of electing directors and officers and for the transacting of other business. If the election of the directors and officers is not held at such meeting, the Board of Directors may cause the election to be held at a meeting of the Board of Directors as soon thereafter as may be convenient. The Board of Directors may only elect officers and directors by a majority vote.

19 In periods of time between the quarterly Board of Director Meetings, the by-laws provide that as Terra Foundation's Executive Committee has the authority to take action on behalf of Terra Foundation, except on specific issues delegated to the Board of Directors pursuant to the Illinois General Not For Profit Corporation Act. Since October, 1999, Terra Foundation's Executive Committee has consisted of plaintiffs Buntrock and Gidwitz, defendants Edith Terra and Mr. Tucker, and director Stephanie Marshall.

Dan Terra's Dedication To Chicago

20 Dan Terra was a successful entrepreneur and businessman who resided predominately in the Chicago area. A large portion of his wealth enured through investments in companies located in and around Chicago. As result, Dan Terra made the decision to start the Terra Foundation with the intent to benefit of the citizens of Illinois and the Chicago area. Terra Foundation became Terra's principal charitable endeavor.

21 Dan Terra described his decision to establish Terra Foundation in Illinois and to open Terra Museum in the Chicago area for the people of Illinois as follows:

> [W]hat's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do.

(See Grace Glueck, *American-Art Museum Opening in Chicago*, N.Y. Times, April 19, 1987 at B14, attached hereto as Exhibit 2). On many occasions, Dan Terra articulated his intent to benefit the people of Illinois through the creation of Terra Foundation in Illinois and the opening of Terra Museum as " major institution in Chicago." (See, e.g., Dodie Kazanjian, *Daniel J. Terra, America's First Ambassador-at-large for Cultural Affairs Pursues the Best in American Painting for His New Museum in Chicago*, House & Garden, May 1987, at 52, attached hereto as Exhibit 3).

22 Shortly after the creation of Terra Foundation, Dan Terra's first wife, Adeline died. In 1986, Dan Terra married Judith Terra. Judith Terra acknowledged in a prenuptial agreement that she fully understood that the bulk of Dan Terra's estate would go to the Terra Foundation, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the prenuptial agreement. Under the prenuptial agreement, Judith Terra agreed she would receive only a fixed amount of money and assets upon Dan Terra's death. Judith Terra became a member of the Board of Directors of Terra Foundation.

23 On information and belief, after Judith Terra became a member of the Board of Directors of Terra Foundation, she suggested to Dan Terra that the Terra Museum be closed and Terra Foundation be moved out of Chicago. This was never done during Dan Terra's lifetime.

Terra's Death And The Will Contest

24 On June 28, 1996, Dan Terra died after suffering a stroke. As the sole residuary beneficiary under his will, Terra Foundation was to receive $125 million.

25 As the first step in a plan to seize control of Terra Foundation, Judith Terra immediately attempted to transfer Dan Terra's probate proceedings from the Circuit Court of Cook County to Washington, D.C. After a five-day trial, the Chief Judge of the Probate Division denied the motion to transfer, finding that the motion was without merit in law or fact.

26 Judith Terra next embarked on a scheme to seize tens of millions of dollars that Dan Terra intended for Terra Foundation.

27 Under the prenuptial agreement between Dan Terra and Judith Terra, Judith Terra was to receive $4.5 million in cash plus approximately $2.6 million in other assets, for a total of $7.1 million.

28 Contrary to her promise in the prenuptial agreement, after Dan's death, Judith Terra immediately filed an action challenging the prenuptial agreement and contesting Dan Terra's will. Judith Terra sought for herself $43 million of the $125 million bequest to Terra Foundation.

29 Judith Terra's attempt to seize $43 million of Dan Terra's bequest to Terra Foundation put her in irreconcilable conflict with the interests of Terra Foundation and, therefore, with the people of the State of Illinois as the beneficiaries of the charitable trust created by Dan

Terra. As a result, Judith Terra was forced to take a leave of absence as a director of Terra Foundation.

30 The Terra Foundation hired Tyrone Fahner, former Attorney General of Illinois, and Howard McCue III of Mayer, Brown & Platt as special counsel with respect to Judith Terra's attempt to seize the $43 million bequest. Both Terra Foundation's special counsel and the counsel for Dan Terra's estate found that Judith Terra's claims lacked substantial merit. However, to avoid protracted litigation, the estate and Terra Foundation entered into a settlement with Judith Terra whereby she received approximately $1 million more than she was entitled to under the prenuptial agreement. This allowed Terra Foundation to receive virtually all of Dan Terra's $125 million bequest as intended under Dan Terra's will.

Mismanagement of Terra Museum After Dan Terra's Death

31 Following the settlement of her claims against the Dan Terra's Estate, Judith Terra sought reinstatement to her position as director of Terra Foundation. Thereafter, changes were made within Terra Foundation and the Museum that were contrary to the best interests of Terra Foundation and therefore contrary to the public interest that was intended to benefit from Terra Foundation.

32 Beginning in mid-1998, Judith Terra launched a scheme to gain control of Terra Foundation to carry out her own agenda of closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C. Judith Terra owns a home in Washington, D.C. and desires to move the Foundation there to obtain a prominent place in the social circles of Washington, D.C. Judith Terra believes that if she is able to move a foundation as large as Terra Foundation to

Washington, D.C., she would be able to establish herself in Washington, D.C. as a large benefactor of the arts, thereby placing herself in the elite social circles of Washington, D.C.

33 To accomplish her scheme of seizing control of Terra Foundation, Judith Terra began stacking Terra Foundation's Board with persons loyal to her alone. For example, Judith Terra recommended and sought the election of her friend Sen. Simpson to the Board. Sen. Simpson became a director in mid-1999. At his first Board of Directors meeting in October 1999, Sen. Simpson announced to the Board that his purpose for being on Terra Foundation's Board of Directors was "to protect Mrs. Terra's interests."

34 Prior to October 1999, Judith Terra orchestrated a plan to replace Arthur Hartman as Terra Foundation's president and chairman with her loyalist, Mr. Tucker. Although Terra Foundation had been searching for a new president for more than two years from outside the Board of Directors, Judith Terra and her new allies on the Board replaced Arthur Hartman as president and chairman with Mr. Tucker. As was later discovered, the decision to place Mr. Tucker in the position of president and chairman was made to further Judith Terra's attempt to gain control of Terra Foundation and to further her own agenda contrary to the mission and intent of Dan Terra in creating Terra Foundation.

35 Mr. Tucker and Judith Terra further entrenched their power through the hiring of Donald Ratner and the unauthorized expansion of his authority within Terra Foundation. Mr. Ratner was originally retained as a consultant to the Foundation on an interim basis. During the January 25, 2000 meeting of the Board of Directors a motion was made to give Mr. Ratner the title of vice president of finance and administration. The Board members present at the meeting voted in favor of the motion. However, because not all Board Members were present, the motion was made subject

to the ratification by each of the absent Board members. In a subsequent poll of Board members, the motion failed to receive unanimous approval as required by the vote at the January 25, 2000 meeting. Nonetheless, pursuant to Mr. Tucker's dictate, Mr. Ratner has continued to serve as a purported officer of Terra Foundation, and has taken direction from Board members loyal to Judith Terra.

36 Judith Terra also furthered her scheme to gain control of Terra Foundation by causing the removal of the attorneys that had counseled and represented Terra Foundation since its inception. In 1982, Dan Terra asked James Collins, an attorney at the law firm of Bell, Boyd & Lloyd, to act as both general counsel and an officer of Terra Foundation. Collins served in the capacity of general counsel and secretary of Terra Foundation from 1978 until his removal in October 1999. He also served as treasurer from August 1996 through October 1999. During this time, Collins had represented the interests of Terra Foundation through many difficult issues, including Judith Terra's attempt to confiscate $43 million of Dan Terra's bequest to Terra Foundation.

37 Defendants next forced the resignation of Terra Foundation's special counsel, Ty Fahner and Howard McCue III of Mayer, Brown & Platt. Terra Foundation hired Mayer, Brown & Platt as special counsel when Judith Terra sued Dan Terra's estate for the $43 million residual bequest to Terra Foundation. Mayer, Brown & Platt also represented Terra Foundation in connection with its interests in the now defunct Mercury Finance Company.

38 Specifically, on or about August 11, 2000, Mr. Ratner, acting in his *ultra vires* capacity at the direction of defendants, told Mayer, Brown & Platt that Terra Foundation would not pay its fees for any time incurred in dealing with or responding to any issues not specifically requested by either Mr. Tucker or Mr. Ratner. Mayer, Brown & Platt rejected this arrangement

recognizing that it would be contrary to its duties and obligations as special counsel to Terra Foundation and its directors. In resigning its position as special counsel to Terra Foundation, Mayer, Brown & Platt stated in a letter to Mr. Tucker:

> In our original engagement letter of December 11, 1996, sent by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all of its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

(Emphasis added) (See August 18, 2000 Letter, attached hereto as Exhibit 4).

39 In furtherance of her plan to seize control of Terra Foundation, Judith Terra, Mr. Tucker and Sen. Simpson have ignored the requirements of Terra Foundation's by-laws regarding management of Terra Foundation. Article III, Section 11 of the by-laws provides that the executive committee is to operate Terra Foundation between the quarterly Board of Director meetings. (See By-laws of Terra Foundation, attached hereto as Exhibit 5, at Article IV, Section 9). With few exceptions relating to bringing in new counsel for Terra Foundation, issues were not brought before the executive committee. By not having meetings of the executive committee, Judith Terra, Mr. Tucker, Sen. Simpson were able to control the operations of Terra Foundation for their own benefit, contrary to the provisions of the by-laws.

40 Judith Terra, Mr. Tucker, Sen. Simpson have also consulted with and taken advice from Mr. Michaeli. Mr. Michaeli has been making decisions for Terra Foundation even though he is not an officer or director of Terra Foundation, or even an employee. Mr. Michaeli's only connection to Terra Museum is his relationship with Judith Terra.

41 Judith Terra also began treating the art collection of Terra Foundation as if it were her own personal property. Judith Terra ordered that art from the collection held by Terra Foundation be transported from the Giverny Museum to her personal residence. The curator of the Giverny Museum objected to any piece of the collection leaving the Giverny Museum. However, at Judith Terra's direction, Mr. Tucker ordered the curator of the Giverny Museum to transport the art to Judith Terra's residence for her personal use.

42 Under the control of Judith Terra, Mr. Tucker, Sen. Simpson and Mr. Michaeli, substantial waste and mismanagement has occurred which jeopardizes the continued viability of Terra Museum. This waste and mismanagement includes, but is not limited to, the following:

a. Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

b. Causing the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, and jeopardizing the security of the $100 million of art displayed and collected at Terra Museum;

c. Permitting a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

d. Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

e. Attempting to invade the D4 Endowment restricted to educational purposes for the unauthorized purpose of acquiring art;

f. Bypassing the lawfully elected Executive Committee operating Terra Foundation and Terra Museum;

g. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel;

h. Misusing the art collection of Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

i. Allowing Mr. Michaeli to participate the management, control and operation of Terra Foundation and Terra Museum.

43 Members of the Board of Directors have repeatedly questioned the manner in which Mr. Tucker, Judith Terra and Sen. Simpson have been operating Terra Foundation in the past year. For example, on March 2, 2000, Margaret Daley wrote to John Neff, Director of Terra Museum, regarding the significant problem occurring at Terra Museum as a result of the high turnover of key employees. Specifically, Mrs. Daley stated:

> Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler. John, Ginny worked tirelessly on the School Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their herculean efforts, it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation. Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner. In my working with her on education issues, I believe she has always gone "above and beyond" her duties .... I couldn't leave without letting you and the Board know my feelings and deep concerns.

(See March 2, 2000 Letter, attached hereto as Exhibit 6).

44 Other members of the Board of Directors, including Buntrock, as well employees of both Terra Foundation and Terra Museum have repeatedly and vigorously challenged the manner and lack of direction in which Terra Foundation has been operated and managed under the direction of Mr. Tucker. (See Arthur A. Hartman letter dated November 7, 1999, attached hereto as Exhibit 7).

45 On information and belief, the pattern of mismanagement and waste occurring at Terra Museum is a conscious effort on the part of Judith Terra, Mr. Tucker and Sen. Simpson to cause the failure of Terra Museum in Chicago to justify closing Terra Museum in Chicago and

moving Terra Foundation from Chicago to Washington, D.C. for their own purposes and in utter disregard for the people of Illinois intended to benefit from Dan Terra's museum and foundation.

Judith Terra's Plan To Move Terra Museum From Chicago To Washington

46 Despite the fact that Terra during his life had rejected any suggestion of moving Terra Museum from Chicago and therefore depriving the people of the State of Illinois of the charitable trust that he had created, Judith Terra has never abandoned her personal scheme to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. In the last year, after Mr. Tucker obtained the position of president and chairman, Judith Terra, Mr. Tucker and Mr. Michaeli have been actively seeking to close Terra Museum in Chicago.

47 To this end, and in breach of their fiduciary duties to Terra Foundation and the people of Illinois, Judith Terra and Mr. Tucker have engaged in negotiations relating to a merger or affiliation between Terra Foundation and The Corcoran Gallery of Art in Washington, D.C. ("the Corcoran"). As part of the proposed merger of affiliation, certain positions on the Board of The Corcoran would be filled by individuals on the Board of Directors of Terra Foundation. Also, the proposal provides that the president and chairman of Terra Foundation, Mr. Tucker, would assume the position of vice-chairman of The Corcoran.

48 The overall plan and method whereby Judith Terra and Mr. Tucker would secure their mission of obtaining prominent positions in Washington, D.C., in breach of their fiduciary duties to the people of Illinois, was clearly evidenced at the recent Board of Directors meeting held on August 24, 2000. There, Mr. Tucker made clear that it was his intention to close Terra Museum in Chicago. Mr. Tucker stated that under his thinking, there were potential problems with the

continued operation of the museum in Chicago. Mr. Tucker went to state clearly and unambiguously,

> the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

(Emphasis added) (See Minutes of August 24, 2000 Board of Directors Meeting, attached hereto as Exhibit 8, p. 2). In fact, many of the "problems" with the Chicago museum were of the defendants' own making.

49 Buntrock objected to Mr. Tucker's improper interpretation of the mission of Terra Foundation and stated that the closing of Terra Museum in Chicago had never been discussed or considered by the full Board of Directors. Mr. Tucker agreed that this critical issue had never been discussed by the full Board of Directors, but stated that a decision had already been reached to close Terra Museum in Chicago. According to Mr. Tucker, the Strategic Planning Committee was prepared to make a recommendation on this issue to the Board of Directors. Mr. Tucker stated that the Board of directors "definitely" must make a decision on the closing of the Chicago museum during the annual Board of Directors meeting in September 2000.

50 In conjunction with their overall plan, Judith Terra and Mr. Tucker have attempted to create the impression that Terra Museum in Chicago needs to be abandoned as a mission of Terra Foundation.

Defendants' Plan To Remove Buntrock
From Board Of Directors To Further Their Goals

51 Notice was mailed to the directors informing them that the annual Board of Directors meeting of Terra Foundation was scheduled for Tuesday, September 26, 2000 in France. Although various events and committee meetings were scheduled to occur between September 23, 2000 and

September 26, 2000, the annual meeting of the Board of Directors was scheduled for September 26, 2000.

52 As set forth in the agenda for the annual Board meeting that was distributed to each Board member, the election of officers and directors for the upcoming year was to be held during the September 26, 2000 meeting. (See Agenda for September 26, 2000 Board of Directors Meeting, attached hereto as Exhibit 9). As set forth in the agenda, the elections were to occur and then the chairman of each committee would make a presentation to the Board. (Id.) As indicated in the agenda, Mr. Buntrock was scheduled to give a presentation to the Board as the chairman of the finance and investment committee immediately subsequent to the election of the directors and officers.

53 The defendants have now contrived a plan to ensure that the directors are elected with the exception of Buntrock. Defendants intend to see that Buntrock is not retained as a director in order to allow them to more easily accomplish their unlawful personal objective of closing the museum in Chicago and moving Terra Foundation to Washington, D.C. Buntrock has recognized defendants' efforts and has continued to question the Board's authority to move the charitable assets of the people of the State of Illinois to Washington, D.C. in contravention of the Board's fiduciary duties to the people of Illinois.

54 Plaintiffs have just recently learned of the defendants' improper plan to remove Mr. Buntrock from the Board of Directors. Subsequent to the dissemination of the agenda for the September 26, 2000 meeting of the Board of Directors, and only days prior to the directors leaving for France, Mr. Ratner was directed to send a letter to all directors, without any consultation, informing them that a 30-minute Board of Directors meeting was scheduled for September 24, 2000,

two days prior to the properly noticed and scheduled meeting of the Board of Directors. (*See* September 15, 2000 Letter, attached hereto as Exhibit 10). This improperly noticed meeting has been scheduled because defendants will not have a sufficient number of directors available on September 26, 2000 to remove Mr. Buntrock from the Board of Terra Foundation.

55 Defendants' attempt to hold the elections for directors and/or officers at a Special Meeting of the Board of Directors on September 24, 2000, is violative of the by-laws of Terra Foundation for at least two reasons. First, Ratner does not have the authority to provide notice of a meeting of the Board of Directors as he is not the secretary of Terra Foundation, nor is he even a duly elected officer or director. Pursuant to the by-laws of Terra Foundation, only the secretary of Terra Foundation is empowered to provide notices required under the by-laws. (Exhibit 5, Article IV, Section 9). Any attempt by Ratner to send notice of a meeting of the Board of Directors constitutes an *ultra vires* act.

56 Second, under the by-laws an election of the officers and directors may occur only at one of two occasions. First, the election may take place at the annual meeting of the Board of Directors. Second, if the election is not held at the scheduled annual meeting, a special meeting may be held subsequent to the annual meeting. (Id. at Article III, Section 3). The by-laws provide no authority for the holding of elections of officers or directors prior to the scheduled annual meeting. For this additional reason, defendants' attempt to hold the elections of directors and officers at the improperly noticed meeting on September 24, 2000 constitutes and *ultra vires* act, as well as a clear breach of their fiduciary duty to Terra Foundation and the people of Illinois.

57 Without relief from this Court, defendants will carry out their improper plan to ensure that Buntrock does not remain as a director and officer, to close the Terra Museum in Chicago and

to undermine the effort of the other directors to ensure that fiduciary duties to the Terra Foundation, and its beneficiaries -- the people of the State of Illinois -- are followed. The Defendants' plan is motivated by their own self-interests and desires, and inconsistent with their fiduciary obligations as directors of a charitable trust intended to benefit the people of Illinois.

58 Moreover, if defendants are permitted to carry out their plan to remove Buntrock there is a real and serious danger that other members of the Board of Directors will resign their positions thereby leaving the Terra Foundation in great jeopardy, and leaving the people of Illinois without protection on the Board. Once Buntrock and other similar "obstructionist" directors are removed or resign, defendants will have no opposition to carrying out their plan of depriving the people of Illinois of the public trust created over twenty years ago by Dan Terra for their benefit.

COUNT I
(Declaratory Relief)

59 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 58 of this Complaint as though fully set forth in this Paragraph 59.

60 By and through the creation Terra Foundation as a not-for-profit Illinois corporation, Dan Terra intended that a museum of American art be operated in the Chicago area to be held in trust for the benefit of the people of the State of Illinois.

61 At various times after the creation of Terra Foundation, Terra reaffirmed his mission of operating a museum in the Chicago area for the benefit of the people of Illinois through the collection of American art and the education generally of the public on the issue of American art.

62 The Board of Directors of Terra Foundation are the trustees of the charitable trust created by Dan Terra responsible to the people of Illinois as the beneficiaries of the public trust.

63 As directors of Terra Foundation, plaintiffs Buntrock and Gidwitz, as well as many others, have donated their time, efforts and resources to accomplish the goals and mission started over twenty years ago by Terra.

64 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to protect Terra Foundation from waste and mismanagement caused by defendants.

65 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to see that Terra Foundation continues to carry out the mission for which it was started for the benefit of the people of Illinois.

66 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the Terra Foundation and the people of Illinois to protect the charitable assets of Terra Foundation and to act in their interests by furthering the charitable purpose and mission started by Terra more than twenty years ago.

67 Notwithstanding their fiduciary duties to the people of Illinois to further the charitable purpose and mission started by Dan Terra more than twenty years ago, Judith Terra, Sen. Simpson and Mr. Tucker used their positions as directors and/or officers of Terra Foundation to intentionally mismanage Terra Museum in Chicago to further their own self interests in closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C.

68 The foregoing improper conduct of Judith Terra, Sen. Simpson and Mr. Tucker has caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois as the beneficiaries of the public trust established for Terra Museum in Chicago as a unique center for American art.

69 Plaintiffs have no adequate remedy at law.

70 An actual controversy exists between the parties hereto concerning Terra Foundation's obligation and purpose to maintain a museum in the Chicago area for the benefit of the people of Illinois as originally intended by Dan Terra at the time of the creation of Terra Foundation.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation as a public trust for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Dan Terra in creating Terra Foundation was to operate the museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants are precluded from closing Terra Museum in Chicago and moving the Foundation to a location outside of the Chicago area;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of the Chicago area would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

B. A temporary, preliminary and permanent injunction enjoining defendants from closing Terra Museum in Chicago or transferring the museum or its art to Washington, D.C. or any other location outside of Illinois.

C. For such additional relief as the Court deems fair and just.

COUNT II
(Statutory *Ultra Vires Acts*)

71 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 70 of this Complaint as though fully set forth in this Paragraph 71.

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72 The above acts and conduct of defendants have been taken without lawful authority, capacity, or power and will continue unless enjoined.

73 Section 103.15 of the General Not for Profit Corporation Act of 1986 allows this Court to enjoin defendants' unlawful acts.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

B. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

C. An accounting of all assets of the Terra Museum and Terra Foundation.

D. For such additional relief as the Court deems fair and just.

COUNT III
(Breach of Fiduciary Duty)

74 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 73 of this Complaint as though fully set forth in this Paragraph 74.

75 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the people of Illinois to act in their interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago.

76 Defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust. Defendants improper conduct included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law;

d. Contrary to the by-laws of Terra Foundation, attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation.

77 The foregoing breaches of fiduciary duty of Judith Terra, Sen. Simpson and Mr. Tucker have caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois, as the beneficiaries of the public trust by endangering the

future of Terra Foundation and the continued viability of Terra Museum in Chicago as a unique center for American art.

78 Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Terra in creating Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art to Washington, D.C. or any other location outside of Illinois;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of Illinois would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Sen. Simpson and Mr. Tucker have breached their fiduciary duty to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties;

(7) Defendants have acted improperly and breached their fiduciary duties by seeking to defeat Mr. Buntrock's re-election as director in order to further their own agenda;

(8) The letter sent by Ratner to the members of the Board of Directors dated September 15, 2000 is a nullity and does not comply with the by-laws of Terra Foundation for scheduling a meeting of the Board of Directors for the election of directors and/or officers.

B. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

C. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

D. An accounting of all assets of the Terra Museum and Terra Foundation.

E. For such additional relief as the Court deems fair and just.

COUNT IV
(Inducing A Breach of Fiduciary Duty)

79 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 78 of this Complaint as though fully set forth in this Paragraph 79.

80 As set forth more fully above, defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust established by Dan Terra. Defendants improper conduct included, but is not limited to, the following acts:

a. Intentionally mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer or re-establish the museum to Washington, D.C. or some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois;

d. Attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation

81 Defendant Mr. Michaeli colluded with Judith Terra, Sen. Simpson and Mr. Tucker in committing breaches of fiduciary duty, or otherwise induced or participated in their breaches of duty to Terra Foundation and the people of Illinois as the various ways, including, but not limited to the following:

a. Knowingly providing advice to Judith Terra, Mr. Tucker and Sen. Simpson that was contrary to the fiduciary duties owed by them as directors of Terra Foundation;

b. Acting with Judith Terra, Mr. Tucker and Sen. Simpson to make decisions for Terra Foundation in contravention of the by-laws of Terra Foundation;

c. Advising Judith Terra, Mr. Tucker and Sen. Simpson to take action relating to Terra Foundation that constituted waste and mismanagement in an attempt to justify the closure of Terra Museum in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

d. Colluding with or advising Judith Terra, Mr. Tucker and Sen. Simpson in the decision to replace Jim Collins and the law firm of Bell, Boyd & Lloyd in order to gain control over the operations of Terra Foundation for their own improper purpose in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

e. Colluding with, advising or participating in the plan to remove Mr. Buntrock from the Board of Directors in order to remove opposition to their plan to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

82 The conduct of Mr. Michaeli has caused, and will continue to cause, damage to Terra Foundation and the people of Illinois. If the conduct of Mr. Michaeli is not stopped, the public trust created by Dan Terra may be destroyed to the detriment of the people of Illinois.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining Mr. Michaeli, his agents or assigns from colluding with, inducing or participating in any further breaches of fiduciary duty with Judith Terra, Sen. Simpson and Mr. Tucker.

B. An award of exemplary damages for Mr. Michaeli's intentional, deliberate, and ongoing inducement of Judith Terra's, Sen. Simpson's and Mr. Tucker's breaches of its fiduciary duties to Terra Foundation.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ, Directors of Terra Foundation of the Arts

By: _____
One of Their Attorneys

Dated: September 22, 2000

William R. Quinlan
James R. Carroll
Michael I Rothstein
Martin J. O'Hara
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm ID No. 33745

VERIFICATION

DEAN L. BUNTROCK, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

BY: Dean L Buntrock
DEAN L. BUNTROCK

VERIFICATION

RONALD GIDWITZ, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

By: _____
RONALD GIDWITZ

Certificate 38135

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, Articles of Incorporation, duly signed and verified of

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 13th day of December A. D. 1978, as provided by the "GENERAL NOT FOR PROFIT CORPORATION ACT" of Illinois, approved July 17, 1943, in force January 1, A. D. 1944:

Now Therefore, I, ALAN J. DIXON, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this Certificate of Incorporation, and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand, and cause to be affixed the Great Seal of the State of Illinois.

Done at the City of Springfield, this 13th day of December AD 19 78, and of the Independence of the United States the two hundred and 3rd

(SEAL)

Alan J. Dixon

$25.00

FORM NP-29

ARTICLES OF INCORPORATION
UNDER THE
GENERAL NOT FOR PROFIT CORPORATION ACT

(These Articles Must Be Filed in Duplicate)

(Do Not Write in This Space)
Date Paid 12/12/78
Filing Fee $ 25.00
Clerk

Secretary of State, Springfield, Illinois.

We, the undersigned, (Not less than three)

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

being natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of forming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

1. The name of the corporation is: FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

2. The period of duration of the corporation is: perpetual
(Please state "perpetual" or a definite number of years)

3. The address of its initial **Registered Office** in the State of Illinois is: 2600 Central Park
Street in the City of Evanston (60201) (Zip Code) County of Cook and
the name of its initial **Registered Agent** *at said Address* is: Daniel J. Terra

4. The first Board of Directors shall be three (Not less than three) in number, their names and addresses being as follows:

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

(47)

5. The purpose or purposes for which the corporation is organized are: This corporation is organized exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, or the corresponding provisions of any subsequent Federal tax laws ("Code"). Within the foregoing, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions engage in any and all oter activities and exhibitions; engage in any and ll other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributable to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 5 hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributions of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

7. Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

NOTE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)

Daniel J. Terra
James D. Terra
Robert J. Sugrue

Incorporators

ACKNOWLEDGMENT

STATE OF ILLINOIS,
County of Cook } ss.

I, Margaret Solyomi, a Notary Public do hereby certify that on the 11th day of December, 19 78 Daniel J. Terra, James D. Terra, and Robert J. Sugrue (Names of Incorporators)

personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE (NOTARIAL SEAL) HERE

Margaret Solyomi
Notary Public

PAID
DEC 13 1978
ALAN J. DIXON
Secretary of State

FILED
DEC 13 [illegible]
Secretary of State

FO F-29

ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT CORPORATION ACT
of

SECRETARY OF STATE
CORPORATION DEPARTMENT
TELEPHONE: (217) 782-7880

(These Articles Must Be Executed and Filed In Duplicate)

Filing Fee $25.00

American-Art Museum Opening in Chicago

By GRACE GLUECK
Special to The New York Times

CHICAGO, April 19 — For a cultural institution, the Terra Museum of American Art has had a meteoric career. The latest entry in what seems to be an increasing trend toward private museums, it started out seven years ago with a highly personal selection of paintings — dating mainly from 1850 to 1900 — installed in a former florist's shop in nearby Evanston. Tuesday, at four times its original size and with holdings more oriented to the needs of a public institution, it opens in a pair of elegantly refurbished buildings on North Michigan Avenue, part of a $25 million real-estate package in the heart of Chicago's "Magnificent Mile."

"Someone said that Dan Terra has made up his mind he'll be a force in American art, and I don't deny it," Mr. Terra said. The museum's ebullient founder is a 75-year-old industrialist who since 1981 has been a cultural ambassador-at-large for President Reagan.

"Sure, I suppose you could characterize the museum as a personal monument," he said. "But what's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do."

Although Mr. Terra and his wife, Adeline, who died in 1982, had been acquiring 18th- and 19th-century American paintings for many years, he came to national attention as a collector in 1982 by paying $3.25 million for Samuel F. B. Morse's 1832 canvas "The Gallery of the Louvre." It was then the highest auction price ever paid for an American work of art. The painting stars in the museum's opening show, which combines works from the Terra collection with a distinguished group borrowed from the Pennsylvania Academy of the Fine Arts. "God knows what we'd pay for the Morse today," said Mr. Terra, whose holdings of some 800 works are valued, for insurance purposes, at more than $100 million. "It's not at all unusual to spend $2.5 to $3 million for top American paintings now."

Stores Help Pay Expenses

The new museum at present occupies two of the four buildings on North Michigan Avenue owned by Mr. Terra. The elegant five-story entrance building at No. 664, a former Helena Rubinstein salon of rather shallow interior space, was gutted and handsomely redone by the architect Larry Booth. Entrance is through a ground-floor museum bookshop, and a ramp-and-stair system with a dramatic arrangement of railings guides the viewer up the four gallery levels. A four-story glass window on the facade gives a full view of the bustling street and the Saks Fifth Avenue store across from the museum.

The entrance building is connected to an older, 11-story structure next door, which also houses four floors of galleries, along with museum offices and education, library and workshop facilities. A shoe store that occupies the ground floor will remain for the present, since its lease helps pay for the museum's operation.

"I got the idea from Paul Mellon's Yale Center for British Art in New Haven, which has retail stores on its ground level," Mr. Terra said.

The two other Terra-owned buildings, one across the street to the south, the other immediately north of the two now used for the museum, will figure in later plans. At present, they are leased to retail tenants who sell shoes, haberdashery, popcorn and books and produce a substantial income for the new museum. So far, real estate and renovation expenses have cost Mr. Terra and his son, James, an electronics entrepreneur, more than $30 million, with an additional $3 million contributed by individuals and corporations.

Before making firm plans for the new facility, Mr. Terra — the founder, president and chief executive officer of Lawter Chemicals Inc. — had thought of merging his collection with the Art Institute of Chicago, which has impressive holdings in American art and is building a new wing to house them. But after some months of negotiations, discussions broke off.

"The hang-up was that I insisted that we have our own board, raise our own money and make our own decisions," Mr. Terra said, then laughed. "Many times since, I've wondered if I didn't make a mistake."

The director of the Art Institute, James Wood, said: "He really wanted to have his own identity. After all, there's only so much you can do in an existing institution. But as a separate museum, there's a wonderful role he can play. In Chicago, we don't have many of the smaller, more specially focused institutions that are a vital part of urban culture."

'Flabbergasted by the Interest'

It was the success of the small museum in low-profile Evanston that brought about the move to Chicago, Mr. Terra said. "After we started the Evanston museum, I was flabbergasted by the interest it excited and the number of people who showed up for symposia we held. We said to ourselves, if this excitement exists, now would be the time to open a museum with the highest visibility and accessibility, in Chicago. So we began to broaden the collection from a public viewpoint, and we bought the first property on Michigan Avenue in 1981."

He rejected the idea of seeking city-owned park land for the museum because — partly inspired by the Whitney Museum branches in New York — he wanted it in a "high density" area, Mr. Terra said. "I hope it draws lots of people who have never seen a museum or looked at American art before," he said. "But we're going to have to prove that locating a museum of this character on a very valuable commercial piece of land is viable. If we do it well, the public will support it."

If the present facilities meet Mr. Terra's hopes in terms of such support, there will be a Phase 2 and then a Phase 3 to the project.

Actually, Phase 2 is already in the planning stage. It would involve razing the low structure immediately to the north of the entrance building, and putting up a nine-story one instead. Cantilevering over the top of the entrance building, it would not only add to the present exhibition space, but would provide room for a 900-seat concert hall, which Mr. Terra said was sorely needed in Chicago. Altogether the museum's space would be increased to around 100,000 square feet from its present 60,000. To carry out these plans, some $25 million will be sought from individuals, corporations and foundations.

Phase 3: Unification

Phase 3, perhaps to be the subject of an architectural competition, would presumably involve unification of the various buildings into a large museum complex. "When all the elements are in place, we project an income of $3 million a year from retail tenants," the museum's director, Michael H. Sanden, said. "It will help considerably toward operational expenses."

So far Mr. Terra, whose collection will not actually be given to the museum until after his death, has borne the brunt of those expenses. The Evanston museum, which will be retained as a branch, costs $900,000 a year, and it is hoped that corporate sponsorship can be found for it. Estimated costs for both Evanston and Chicago are between $3 million and $4 million a year. "I sell properties and securities and I borrow," Mr. Terra said. "I don't beg, I don't steal, but I do everything else."

The museum's staff now comprises some 30 professionals, headed by Mr. Sanden and including three curators and a director of education. "We need to build strong education and exhibition programs so that people don't think of the Terra as just one man's collection," Mr. Sanden said.

There is general agreement, too, that the six-member board, closely associated with Mr. Terra, needs broadening. Already, on the educational side, the museum runs symposiums for the general public as well as programs for schoolteachers and children. On the exhibition side, apart from the collection itself, several shows are being organized, among them one on the Ashcan school and another on the work of William Merritt Chase. In December, a show of art by three generations of the Wyeth family, now in the Soviet Union, is to open at the Terra.

The New York Times/Mark Peterson

Dan Terra at the new Terra Museum of American Art in Chicago.

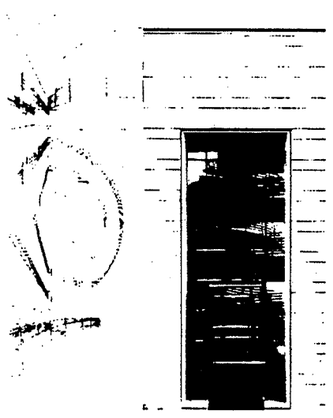
16di-000172

DANIEL J. TERRA

America's first ambassador-at-large for cultural affairs pursues the best in American painting for his new museum in Chicago

By Dodie Kazanjian

Ambassador Terra, *above*, on the dramatic central staircase of his Chicago museum. *Below:* Details of interior ramp and elevation by architect Laurence Booth.



We have more frontage on North Michigan Avenue than Neiman-Marcus, Saks Fifth Avenue, Marshall Field's, Lord & Taylor, or—what's the name of that other one?—Bloomingdale's," says Daniel J. Terra looking down from the rooftop of his new Terra Museum of American Art. Even the wind that Chicago is famous for and subzero winter weather can't stifle his enthusiasm. "We have more frontage than the Whitney. Yes, we do. But we don't have as much frontage as the Metropolitan . . . yet," he laughs uproariously. His explosive laugh has an infectious quality that makes any listener want to join in.

For more than three years Ambassador Terra and I have been talking about the opening of his North Michigan Avenue museum. Beneath us on this cold January day, the museum that bears his name is far from finished. The skeleton of a ramp system is in place, but welding, hammering, plastering, and painting continue at an accelerated pace so that the museum can be ready for its scheduled opening on April 21. (See the opening feature of this issue for a selection of American Impressionist paintings from the museum.) We, along with his wife, Judith, are on top of the tallest of four buildings (eleven stories) that will make up the Terra Museum. These buildings take up 245 feet along Chicago's Magnificent Mile where Terra plans to attract as many as he can of the estimated 14.5 million pedestrians who pass by here every year. He says the museum "will ultimately be the tallest known art museum. This land is so valuable, we had to go vertical." His idea is to bring American art to the people. That's why he picked a site on the avenue that has one of the highest pedestrian traffic counts in the nation, second only to Fifth Avenue between 48th and 57th streets.

Don't be fooled by Dan Terra's age, 75, or his full white head of hair or his diminutive stature. He has more energy than a Fourth of July firecracker. He is, first of all, chairman of his own company, Lawter International, the printing-ink manufacturing company in Northbrook, Illinois, which he started in the 1930s. The son of an immigrant Italian lithographer, Terra at age 25 pioneered a printing process with fast-drying ink that "revolutionized magazine printing" and made it possible to substantially shorten deadlines "so that news items in national magazines wouldn't be stale by the time the magazines came out." In 1936, using his new process, *Life* magazine began publication. "I had a cot for a six-week period in the plant where it was being printed so I could be there all night if they had problems."

In 1981, President Reagan appointed him America's first ambassador-at-large for cultural affairs. His office is at the State Department, and last year he gave 109 speeches around the world promoting the importance of America's cultural achievements and urging private-sector support for the arts in

LIZZIE HIMMEL

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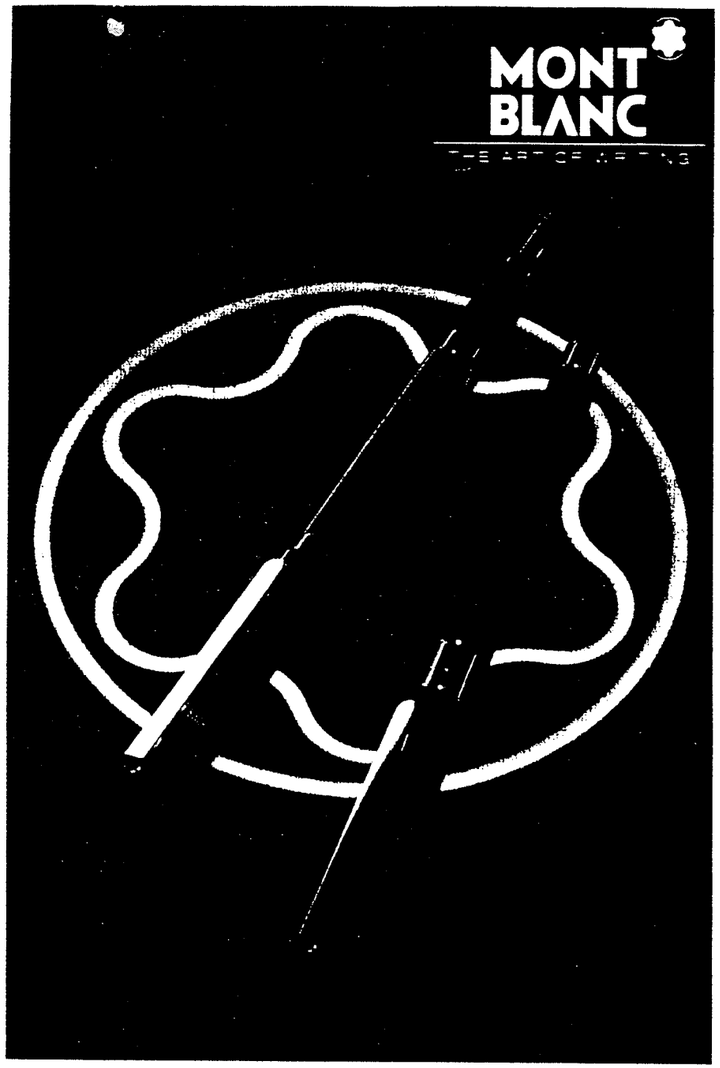

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this country. And to make sure his museum opens on time, he's been commuting for the past year at least twice a week between his two homes in Washington and Kenilworth, near Chicago.

A longtime collector of American paintings, Terra has had a museum in Evanston, Illinois, since 1980 (it will remain open as a branch of the new one on North Michigan Avenue). His first wife, the late Adeline Evans Richards, was an art historian and inspired Terra to begin collecting more than fifty years ago. But it wasn't until a New York dealer mentioned to him that there wasn't a museum of American art within 400 miles of Chicago that he got the idea to open his own museum. "One of the problems with the little museum in Evanston is its location," he says. "We don't even have bus service there on Sundays, and weekends are the biggest part of museum attendance. We were in a quiet hard-to-find spot, and we were getting excellent crowds. So we decided that we had to go to the other extreme. Imagine what American art would draw if you had the best location. And when you start thinking in terms of Chicago, the best location has to be North Michigan Avenue."

Many of Dan Terra's paintings—his collection now numbers more than eight hundred important American works—are on loan elsewhere and are being reassembled for the museum opening. The most famous, *The Gallery of the Louvre* by Samuel F. B. Morse ("It's the icon of America," he says), which he purchased in 1982 for $3.25 million—a then-record price for an American painting—is returning from Cincinnati. *Brace's Rock, Brace's Cove* by Fitz Hugh Lane, which National Gallery Deputy Director John Wilmerding says is one of the finest examples of Luminism, and *The Jolly Flatboatmen* by George Caleb Bingham are being hand-carried from Sweden. And *Lilies* by Frederick Carl Frieseke, Terra's most recent acquisition, is being framed at the Berry Hill Gallery in New York, but will be ready on time. The opening exhibition, "A Proud Heritage: Two Centuries of American Art," will feature about a hundred paintings from the Terra collection along with more than sixty major paintings from the Pennsylvania Academy of the Fine Arts in Philadel-

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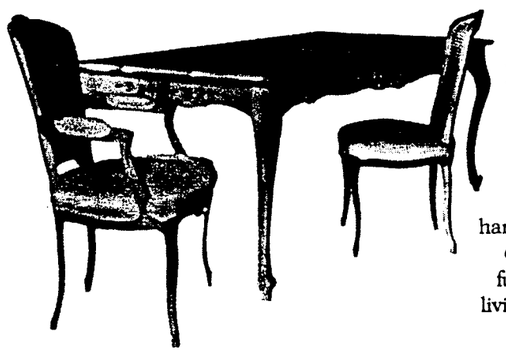
THE DEVON SHOP



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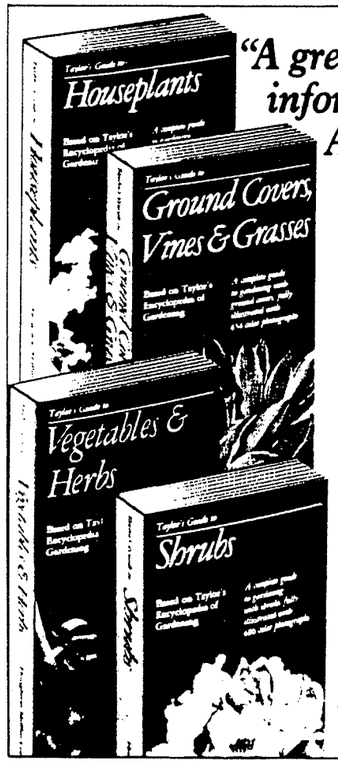

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phia. ("It's the longest-standing museum of American art in the country, and we're the newest," explains Terra.) "It's very unusual for the Pennsylvania Academy to lend a substantial group of paintings like this," says Michael Sandin, director of the Terra Museum and former director of the Oklahoma Art Center.

The museum opening in April is the first phase of a three-phase plan and will involve two of the existing four buildings—a 1927 limestone building by architect Philip B. Maher and the five-story building that Helena Rubenstein built in 1957. The third building sits next to the Helena Rubenstein building to the north, and the fourth is across Erie Street to the south. Architect Laurence Booth of the noted Chicago firm Booth/Hansen & Associates has gutted the interior of the eleven-story corner building and connected it with a new five-story building constructed on the foundations of the Helena Rubenstein building. "We wanted something that would catch people's attention," says Booth, "so we chose white Vermont marble to brighten that stuffy part of the avenue. We wanted it to be appropriately visible, exciting and intriguing, and at the same time not jarring and aggressive—creating the appropriate presence that establishes the Terra as a major institution in Chicago."

Booth's white marble building houses the main entrance and a winding ramp that runs from top to bottom. Descending through the interior, the ramp—unlike the Guggenheim's spiral, it's more like a sculpture combining stairs and ramps—makes a dramatic statement. "Larry Booth deserves the credit for coming up with the ramp system," says Dan Terra. "It is really quite brilliant because it allows plenty of wall space for large paintings and for receptions, too."

The museum's second phase is expected to begin in 1988. This will involve tearing down the third building to the north and replacing it with a new structure that will connect with and add four stories to the white marble center building. "The second phase has to unify the three buildings," says Ambassador Terra. The third and final phase will involve the fourth building across Erie Street and will not begin until the second phase is finished.

16di-000177

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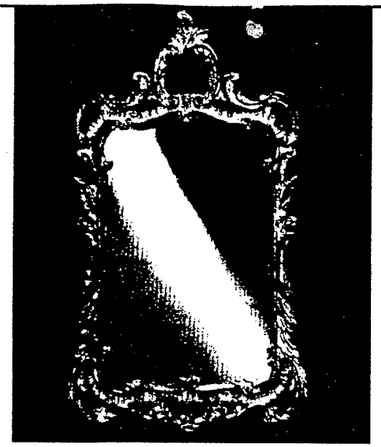

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Dan Terra's passion for *Lilies* is apparent. "This is a drop-dead picture. It really is. Frieseke didn't always make it but this time he was absolutely superb. And there isn't anybody in American art who I think paints these magnificent flowers like Frieseke did. And beautiful, beautiful female figures."

Later during lunch Terra says, "I know the story behind all the paintings before I buy them," he says. For instance, if there is a house in the painting, the ambassador often visits the site before buying the painting.

"That's part of learning what these artists were all about because of all the information you can get out of these visits. We went to Shinnecock Hall [the Long Island home of William Merritt Chase] and spent two days at that house just exploring it before we bought that great Chase pastel. It's so fabulous." He lowers his voice to a near whisper and says, "Let me tell you, as great he was, Degas never did any better."

You can't talk about the Terra collection without mentioning Maurice Prendergast. "The last non-American paintings we collected were the French Impressionists, and there was something about Prendergast that resembled the Impressionists and Post-Impressionists," says Terra. He has acquired about eighty works (considered to be the most comprehensive collection) by Prendergast, 58 of which are monotypes. These are now traveling in a show that first opened at the National Gallery of Art in Washington in January 1985.

In the past year Daniel Terra has bought more than twenty important works to fill gaps in his collection. Through one collector in Zürich he found several paintings by early modern artists Marsden Hartley, Joseph Stella, Stuart Davis, and Patrick Henry Bruce. "I don't think it's compulsive buying," he says. "I think it's very careful, deliberately planned buying to fill out the collection. There are always gaps in all of these periods, and that acquisition was a fine step forward in the early modern collection.

"I'm aware of where probably ninety percent of the last remaining American historical works, perhaps a hundred, are in private hands. I never stop trying to negotiate a purchase." Right now he's trying to obtain several

16di-000178

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August 18, 2000

Dr. Paul Tucker
Chairman and President
Terra Foundation for the Arts
664 N. Michigan Avenue
Chicago, IL 60611

Dear Dr. Tucker:

We are in receipt of Donald H. Ratner's letter of August 11, 2000. In that letter, Mr. Ratner, purporting to speak for you, has indicated that the Foundation will not pay Mayer, Brown & Platt "for any time incurred in dealing with or responding to any issues not specifically requested by either Paul Tucker or Donald Ratner as his agent." We have spoken to Mr. Ratner about this letter. He has indicated to us that the Foundation wishes to reduce the substantial level of its professional fees; he has suggested that you intend to make our task easier and less time consuming by encouraging us to decline to communicate with other officers and directors.

With all due respect to you and Mr. Ratner, we conclude that we cannot continue to act as special counsel to the Foundation under these circumstances and therefore withdraw from our representation. In our original engagement letter of December 11, 1996, sent to us by Catherine A. Stevens on behalf of Helene Ahrweiler, Chairman of the Board, and signed by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the Foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

Most recently, we have been engaged in three tasks. We have been providing information to your new general counsel at Winston & Strawn. We have represented the Foundation in connection with the administration of the Estate of Ambassador Terra (which is ready to close, awaiting only final action by the Foundation). We have given advice to the

Foundation with regard to its claim as a member of the "holder class" in the Mercury Finance bankruptcy matter.

As to the transition to new general counsel, we have made all of our files available to your new counsel. They and Mr. Ratner have examined them extensively and requested voluminous copies. We have complied with all of their requests, and they have acknowledged our complete cooperation. These files remain available to you and your counsel.

As to the Estate of Daniel Terra, you have asked your new general counsel to review the matters as to which we were previously asked to give counsel. We should arrange for a prompt substitution of counsel in the Estate so that the Foundation can be represented by Winston & Strawn in these matters. You do not require both firms.

We understand that Winston & Strawn has a potential conflict of interest in the Mercury bankruptcy. Note, however, that we have never filed an appearance in any of these matters, but have gathered information from Bell, Boyd & Lloyd and other sources. Under these circumstances, we recommend that you retain another firm to act as special counsel to advise you with respect to these matters.

We have enjoyed the opportunity to work with the Terra Foundation for the Arts.

Very truly yours,

Tyrone C. Fahner

Howard M. McCue III

mgp

cc: Board of Directors
Mr. Mark Heatwole

RESTATED BYLAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these bylaws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess business holdings, as defined in Section 4943(c), from making any investments in such manner as to

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The bylaws of the corporation were restated on July 18, 1994, amended on August 17, 1996 and amended on January 27, 1998.

subject the foundation to tax under Section 4944, and from making any taxable expenditures, as defined in Section 4945(d), all Sections being of the Code.

Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

The corporation shall have such powers as are authorized by law and in general, subject to such limitations and conditions as are or may be prescribed by law, to exercise such other powers which now are or hereafter may be conferred by law upon a corporation organized for the purposes hereinabove set forth, or necessary or incidental to the powers so conferred, or conducive to the attainment of the purposes of the corporation, subject to the further limitation and condition that only such powers shall be exercised as are in furtherance of the exempt purposes of the organization set forth in Section 501(c)(3) of the Code and its Regulations as they now exist or as they may hereafter be amended.

The corporation also has such powers as are now or may hereafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

ARTICLE II

Offices

The corporation shall have and continuously maintain in this state a registered office and a registered agent whose office is identical with such registered office, and may have such other offices within or without the State of Illinois as the Board of Directors may from time to time determine.

ARTICLE III

Board of Directors

Section 1. General Powers. The affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications.

(a) The number of directors elected by the Board of Directors shall be no less than seven and no more than eleven. The number of directors may be fixed or changed from time to time, within this minimum and maximum, without further amendment to these bylaws. Each elected director shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been elected and qualified.

(b) Directors need not be residents of Illinois.

Section 3. Regular Meetings. A regular annual meeting shall be held during the month of September of each year, for the purposes of electing directors and officers and for the transaction of such other business as may properly come before the meeting. If the election of directors and officers shall not be held at such meeting, the board of directors shall cause the election to be held at a meeting of the board of directors as soon thereafter as conveniently may be. The Board of Directors shall provide by resolution the time and place, either within or without the State of Illinois, for the holding of the regular annual meeting and additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two directors. The person or persons authorized to call special meetings of the board may fix any reasonable place, either within or without the State of Illinois, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any meeting of the Board of Directors shall be given at least five days previously thereto by written notice delivered personally or sent by mail or telegram to each director at his address as shown by the records of the corporation. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail in a sealed envelope so addressed, with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of waiver of notice of such meeting, unless specifically required by law or by these Bylaws.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the board, except that if less than a majority of the directors are present at such meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these Bylaws.

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors.

Section 9. Informal Action by Directors. Unless specifically prohibited by the articles of incorporation or bylaws, any action required to be taken at a meeting of the board of directors, or any other action which may be taken at a meeting of the board of directors or any committee thereof, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the directors entitled to vote with respect to the subject matter thereof, or by all the members of such committee, as the case may be. Any such consent signed by all the directors or all the members of the committee shall have the same effect as a unanimous vote, and may be stated as such in any document filed with the Secretary of State.

Section 10. Participation by Telecommunications Equipment. Directors or nondirector committee members may participate in and act at any meeting of the board or committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can communicate with each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

Section 11. Executive Committee. The board of directors may, by resolution passed by a majority of the whole board, designate an executive committee consisting of two or more of the directors of the corporation. The executive committee shall have and may exercise all the authority of the board of directors in the management of the corporation between meetings of the board of directors, provided the committee shall not have the authority of the board of directors in reference to (a) amending the articles of incorporation, (b) adopting a plan of merger or adopting a plan of consolidation with another corporation or corporations, (c) authorizing the sale, lease, exchange or mortgage of all or substantially all of the property and assets of the corporation, (d) authorizing the voluntary dissolution of the corporation or revoking proceedings therefor, (e) adopting a plan for the distribution of the assets of the corporation, (f) amending, altering or repealing the bylaws of the corporation, (g) electing, appointing or removing any director or officer of the corporation or any member of the executive committee or (h) amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by the executive committee. The executive committee shall keep minutes of each of its meetings and report the same at the next meeting of the board of directors.

Section 12. Other Committees. The board of directors may from time to time establish other committees and specify the scope of their authority.

Section 13. Compensation. Directors as such shall not receive any stated salaries for their services, but by resolution of the Board of Directors, a fixed sum may, and expenses of attendance, if any, shall be allowed for attendance at each regular or special meeting of the Board or committee thereof; except that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

ARTICLE IV

Officers

Section 1. Officers. The officers of the corporation shall be a chairman, one or more vice chairmen, a president, one or more vice presidents, a secretary and a treasurer. The Board of Directors may appoint such other officers, including one or more assistant secretaries and one or more assistant treasurers as it shall deem desirable, such appointed officers to have the authority to perform the duties prescribed from time to time by the Board of Directors. Any two or more offices may be held by the same person, except the offices of president and secretary.

Section 2. Election and Term of Office. The officers of the corporation shall be elected by the Board of Directors at its regular annual meeting. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be.

Vacancies may be filled and new offices created and filled at any meeting of the Board of Directors. Each elected officer shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been duly elected and shall have qualified. Election or appointment of an officer or agent shall not of itself create contract rights.

Section 3. Removal. Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed.

Section 4. Chairman. The chairman shall be the chief executive officer of the corporation and shall in general supervise and control all of the affairs of the corporation. He shall preside at all meetings of the Board of Directors. He shall have the power to execute all documents that the board of directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the board of directors or by these bylaws to some other officer or agent of the corporation, or shall be required by law to be otherwise signed or executed, and in general shall perform all duties incident to the office of chairman and such other duties as the board of directors may from time to time prescribe.

Section 5. Vice Chairman. In the absence of the chairman or in the event of his inability or refusal to act, the vice chairman, or in the event there is more than one in the order designated by the Board of Directors (or if none, in the order of election), shall perform the duties of the chairman and when so acting shall have all the powers of the chairman. These duties shall not include the duty to preside at meetings of the Board of Directors in the event of the absence, inability or refusal to act of the chairman, which is expressly granted to the president. Each vice chairman shall perform such other duties as from time to time may be assigned to him by the chairman or the Board of Directors.

Section 6. President. The president shall be the principal operating officer of the corporation and shall in general supervise and control all the day-to-day business and affairs of the corporation. In the absence of the chairman or in the event of his inability or refusal to

preside at any meeting of the Board of Directors, the president shall preside at such meeting or meetings of the Board of Directors. He may sign, with the secretary or any other proper officer of the corporation authorized by the Board of Directors, any deed, mortgages, bonds, contracts, or other instruments which the Board of Directors have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these Bylaws or by statute to some other officer or agent of the corporation; and in general shall perform all duties incident to the office of president and such other duties as may be prescribed by the Board of Directors from time to time.

Section 7. Vice Presidents. In the absence of the president or in the event of the inability or refusal to act of the president, the vice presidents in the order designated by the Board of Directors (or if none, in the order of election) shall perform the duties of the president, and when so acting shall have all the powers of the president. Each vice president shall perform such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 8. Treasurer. If required by the Board of Directors, the treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety or sureties as the Board of Directors shall determine. He shall have charge and custody of and be responsible for all funds and securities of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of the corporation and in such banks, trust companies or other depositories as shall be selected in accordance with the provisions of ARTICLE V of these Bylaws; and in general perform all the duties incident to the office of treasurer and such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 9. Secretary. The secretary shall keep minutes of the meetings of the Board of Directors in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law; be custodian of the corporate records and of the seal of the corporation and see that the seal of the corporation is affixed to all documents, the execution of which on behalf of the corporation under its seal is duly authorized in accordance with the provisions of these Bylaws; and in general perform all duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 10. Assistant Treasurers and Assistant Secretaries. If required by the Board of Directors, the assistant treasurers shall give bonds for the faithful discharge of their duties in such sums and with such sureties as the Board of Directors shall determine. The assistant treasurers and assistant secretaries, in general, shall perform such duties as shall be assigned to them by the treasurer or the secretary, as the case may be, or by the president or the Board of Directors.

ARTICLE V

Contracts, Checks, Deposits and Funds

Section 1. Contracts. The Board of Directors may authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these Bylaws, to

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enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors. In the absence of such determination by the Board of Directors, such instruments shall be signed by any two elected officers of the corporation.

Section 3. Deposits. All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select.

Section 4. Gifts. The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the corporation.

Section 5. Loans. No loan of money shall be contracted on behalf of the corporation and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. Such authority may be general or confined to specific instances.

ARTICLE VI

Books and Records

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board of Directors and its committees.

ARTICLE VII

Fiscal Year

The fiscal year of the corporation shall begin on July 1 of each year and end on June 30 of the succeeding year.

ARTICLE VIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the form of a circle and shall have inscribed thereon the name of the corporation and the words "Corporate Seal, Illinois".

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ARTICLE IX

Waiver of Notice

Whenever any notice whatever is required to be given under the provisions of the General Not For Profit Corporation Act of Illinois or under the provisions of the Articles of Incorporation or the Bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE X

Indemnification

(a) The corporation shall indemnify any and all of its directors or officers or the directors or members of the boards or committees of the constituent museums or schools of the corporation or any person who may have served at its request or by its election as a director or officer of another corporation (an "indemnified person") against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties, or a party, by reason of being or having been an indemnified person except in relation to matters as to which any such indemnified person shall be adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicted on the existence of such liability.

(b) Except as provided in paragraph (a) above, the termination of any litigation by judgment, settlement, conviction or upon a plea of *nolo contendre*, or its equivalent, shall not create a presumption that the person seeking indemnification did not meet the applicable indemnification standard as set forth in paragraph (a) above.

(c) Advances may be made by the corporation against costs, expenses and fees arising out of, or in connection with, such litigation at the discretion of, and upon such terms (but always subject to the final determination of a person's right to indemnification) as may be determined by the Board of Directors.

(d) The right of indemnification provided hereunder shall not be deemed exclusive of any other right to which any person may be entitled, or of any other indemnification which may lawfully be granted to any person in addition to the indemnification provided hereunder. Indemnification provided hereunder shall, in the case of the death of the person entitled to indemnification, inure to the benefit of his heirs, executors or other lawful representative.

(e) The corporation may purchase and maintain insurance on behalf of any and all of its indemnified persons against any liability, incurred by them by reason of being or having been an indemnified person, whether or not the corporation would have the power to indemnify them against such liability or settlement under the provisions of this ARTICLE X.

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to Bylaws

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a majority of the directors then in office and present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new Bylaws at such meeting.

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Margaret Corbett Daley

2 March 2000

Dear John

Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler.

John, Ginny worked tirelessly on the Sibal Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their tireless efforts it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation.

Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner.

In my dealings with her on education issues, I believe she has always gone "above and beyond" her duties.

I am leaving today for my Aunt's funeral in Pittsburgh.

But I couldn't leave without letting you and the Board know my feelings and deep concerns.

Maggie

CC: Foundation Board

ARTHUR A. HARTMAN
2738 MCKINLEY STREET, NW
WASHINGTON, D.C. 20015
(202) 362-6660 FAX & VOICE

November 7, 1999 CONFIDENTIAL

MEMORANDUM to the Board of the Terra Foundation

On my return from Moscow, I find the concerns that I expressed to all of you both prior to our meeting and at the meeting itself have now come true. We are once again embarked on an argument that is seriously dividing the Board and keeping us from carrying on the fulfillment of our mandate. This is due in my opinion to the hasty action of transferring authorities without each of the members taking the time to get properly briefed on the functions and the activities of the previous Board leadership. I am not counting in this the charges made by Alan Simpson, which I can only describe as off the wall. Thus, after what I had seen as progress at our recent retreat, we are now engaged in a review of past history and not focused on the search for a President. So be it.

I would like to state for the record that I agree with the description of events and actions in Jim Collins' memorandum. I have always said to you that, despite my occasional differences with Jim, this Foundation owes him a debt of gratitude for the effective and scrupulously honest way that he has brought our finances together. If anything, his memo understates the efficient and creative effort that he and his colleagues made to assure that the intentions of Dan Terra (as he directly related it to me) to leave the bulk of his estate to this Foundation, was carried out. Lest we forget, that was and is the duty of all those on this Board. (Here I must say that I found Alan's statements totally out of line and contrary to the law under which this Foundation is chartered in the State of Illinois.) Some of our new members might not have been present when we briefed the Board (and sought appropriate approval) on the various stages of the settlement of the estate and the sale of assets. The reason for the participation of special counsel—Scott McCue and Ty Fahner—a former Attorney General of Illinois—was to assure ourselves that our duties were being properly carried out. Since Dan had put me on the Lawter Board, I was particularly concerned that there might even be the appearance of a conflict of interest with my position as President/Chairman of the Foundation. On the advice of special counsel, I was always careful to tell my colleagues what actions were proper for me to take and those on which I had to recuse myself. Jim did the same. But we were both able to work with the Lawter Board to get them first to buy back the estate shares and then, finally, to help in the mutually advantageous sale of Lawter itself to Eastman

Chemical. Jim's efforts in all these endeavors, to say nothing of his handling of Dan's outstanding bank loans, saved this Foundation millions of dollars in assets which might have been lost or reduced in value. These efforts were at all times in the interest of this Foundation. And I reject any notion that his efforts on our behalf met anything other than the highest ethical standards.

Several of you have commented on the question of continuity. As I informed you, I was in the process of attempting to effect a seamless transition on the financial side by hiring A.T. Kearney to search for a Vice President for Finance and Administration in order to provide the necessary continuity in the functions that Jim had performed. I did this with complete accord of the Finance Committee even though we all recognized that such a hire should logically follow that of the President. The intention was to assure that our Finance Committee and Chairman would have the most competent professional advice at all times. This was naturally to be followed by the election of a Board member as Treasurer. I hope this process will continue but I fear our current controversy may make that search more difficult. In any case, it is urgent to build into the Foundation staff an ability to backstop our Finance Committee and to look after our resources properly.

With respect to the Secretary, Stephanie should obviously have access to all records. This too was in process as I read Dean's memo after his conversations with a senior partner in Bell/Boyd. Incidentally, these records are not only at Bell/Boyd, as Cathy could have told anyone willing to be briefed. They are also indexed and in the possession of the Foundation. On the subject of counsel, I should point out that Jim Collins was not our sole resource at Bell/Boyd. Rick Sevcik has been of invaluable assistance to us on matters as varied as getting employment manuals and human relations policies in place in the Chicago Museum to settling employment issues in France and the U.S. Others in the firm have helped us with many problems that have arisen because the Foundation and its properties were not in the best shape from a documentary and regulatory point of view when Dan died. He had many great qualities but as with other founders he was more focused on long-term objectives and was very impatient with what he considered bureaucratic detail. We can thank Jim and his staff for getting much of this straightened out, with help from Cathy. On personnel issues, several of these are still outstanding and require continuity of treatment.

As you all know, I spent a great amount of time over the last six months, particularly on the problems of Chicago. It is essential that these matters be dealt with and followed through along the lines that on behalf of the Foundation I have set out contractually with John Neff. We should not let our current discussions deflect us from the progress that has been made. I clearly have much less concern about MAAG than I do about Chicago which is not well led. Again, someone must pick up with Cathy to prevent this situation from
deteriorating.

You may ask if I have any positive suggestions. My feeling at this point is that the Chairman/President should call another Board meeting prior to January 18th to review our proposed candidates for President, the status of the search for a Vice President for Finance and Administration and thrash out the other matters before us. This would get us back to the point I thought we had reached at the end of our retreat.

Arthur Hartman AH

cc: Catherine Stevens
Tyrone Fahner
Howard McCue
James Collins

Terra Foundation
Board Meeting
Minutes
August 24, 2000

In attendance by Conference Call:

Dr. Paul Tucker, Chair
Hon. Jacques Andreani
Mr. Dean Buntrock
Mrs. Margaret Daley
Senator Alan Simpson
Dr. Theodore Stebbins, Jr.
Dr. Stephanie Pace Marshall
Mrs. Judith Terra

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner

Staff:

Mr. Donald Ratner

By Invitation:

Dr. Derrick Cartwright
Dr. John Hallmark Neff

The meeting was called to order at 1:08 PM. Dr. Tucker indicated that the purpose was to review the four proposals and detailed data we had received from our four potential partners allow us to be better prepared for the September meeting. The minutes from the August 7, 2000 Strategic Plan meeting were reviewed and unanimously approved by the Strategic Planning Committee.

There were significant discussions around whether Giverny was "central" to the focus of the Foundation's mission. A decision was made to examine this question at the Board meeting in September.

Dr. Stebbins suggested that we had already decided on the central importance of Giverny.

Dr. Tucker reviewed the background that resulted in the decision of making Giverny central. Mr. Buntrock indicated that he saw that there is a difference between the importance of Giverny and making it central. Dr. Marshall discussed alternatives at this point:

1. Agree that there are unresolved issues and put them aside and then look at the proposals in front of us; or
2. Focus on the issues and then refer them back to a small group to make a presentation at the next meeting and end the call now.

Dr. Marshall agreed that we had not discussed the centrality of Giverny as a Board but had discussed it in Strategic Plan Committee meetings and that Committee has come to the conclusion of Giverny as being central.

Dr. Marshall also suggested we ask Helene to write "her perception of Dan's vision of Giverny". In other words, what is the purpose of Giverny?

Dr. Cartwright indicated that he has Helene's paper and will send it out as soon as Helene reviews it.

The Board asked Dr. Cartwright to write his view of Giverny's future relating to education.

Mrs. Daly said that she did not recall that we had discussed "abandoning" Chicago.

Dr. Tucker indicated that the thinking had gone along these lines:

- The Chicago facility needs a great deal of money to be brought up to par with other museums;
- There are problems with the Chicago museum's configuration;
- We have a problem attracting attendance in Chicago;
- There is considerable cost involved in supporting the Chicago museum;
- The collection is not adequate to be split between two institutions;
- Therefore, the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

Mr. Buntrock said that we had never discussed this at the Board level.

Dr. Tucker agreed but noted that it was a conclusion of the Strategic Planning Committee and that they were going to make a recommendation to the Board.

Dr. Marshall said that we could make a decision on this call if we so chose. She further indicated that we should make sure that there are two issues on the agenda at the September meeting:

- Giverny as being central;
- Closing Chicago

Dr. Tucker suggested that we definitely make a decision in September.

Dr. Marshall suggested we change the order of the agenda to go through Ralph's contract. Mr. Andreani indicated that two of the proposals need more detail. Mr. Lerner then discussed the strategic alliance contract. One premise of his draft was that there would be no museum in the U.S. and that would relieve us of the administrative burden of running that museum. He also indicated that the education portion had not yet been sufficiently developed. And the final premise was that we would ultimately turn the works of art over to the new/aligned institution.

3. Get more information on the existing educational programs of the four institutions.

4. Reduce the four institutions to two or three and then focus on those and discuss.

In September we will need:

1. White papers on education from any Board member who would like to prepare one.

2. Educational information.

The meeting was adjourned at 4:00 PM.

Respectively submitted,

_____

Donald H. Ratner

TERRA FOUNDATION for the ARTS

BOARD MEETING AGENDA

September 26, 2000
9:30 AM – 4:00 PM
Giverny

			TAB
I.	Report of Chairman	Paul Tucker	
II.	Review and Approval/Acceptance of Minutes	Paul Tucker	1

- Board Meeting – October 22, 1999
- Strategic Planning – March 13, 2000
- Strategic Planning – April 5, 2000
- Strategic Planning – May 10, 2000
- Finance – May 16, 2000
- Executive – June 7, 2000
- Board – June 19, 2000
- Collections – June 19, 2000
- Executive – June 19, 2000
- Finance – June 19, 2000
- Board – June 20, 2000
- Finance – August 8, 2000
- Board – August 24, 2000
- Collections – August 24, 2000

III.	Election of Directors/Officers	Paul Tucker	
IV.	Committee Reports		2
	• Finance	Dean Buntrock	
	• Education	Margaret Daley	
	• Strategic Planning	Ron Gidwitz	
	• Collections	Ted Stebbins	
V.	Review of Estate	Mark Heatwole	
VI.	Directors' Reports	John Neff Derrick Cartwright	3
VII.	Report of VP Finance & Administration	Donald Ratner	4

VIII. Setting Meeting Dates — Paul Tucker

IX. Executive Session

X. Other Business

TERRA FOUNDATION FOR THE ARTS

Donald H. Ratner
VP Finance and Administration
Terra Foundation for the Arts
664 N. Michigan
Chicago, IL 60611

Phone 312-654-2265
Fax 312-664-2052
E-mail ratner@terramuseum.org

Memo

To: Board of Directors

From: Donald H. Ratner
VP Finance and Administration

Date: 09/15/00

Re: Giverny Meeting Arrangements

There have been a couple of questions regarding the arrangements for the meeting in Giverny on September 23 –26. I wanted to get out a preliminary memo to give you the current status. There have been a few changes from the information sent you previously.

Any changes to the following information will be sent out with the Board Books which are scheduled to be Federal Expressed to you next Monday. Also, detail information for breakfast and lunch locations, as well as information on daily transportation to and from the hotel and information for spouses will be included in a packet of information for you when you arrive.

Lastly, I am sending our detail accommodation information seperately.

The current schedule is as follows:

Friday, September 22	On your own
Saturday, September 23	Educational Session – 9:30 AM-5.00 PM - Perry House. Dinner at Marguerite de Bourgogne 7:30 PM – Pickup at Hotel at 7:00 PM
Sunday, September 24	Strategic Planning Session – 9:30 AM – 4.00 PM - Perry House. BOARD MEETING – 4:00 PM – 4:30 PM – Perry House

	Cocktails and Dinner at Ambassador Andreani's. Pickup at Hotel at 6:00 PM
Monday, September 25	Finance Committee 9:00 AM Perry House Education Committee 12:00 PM Bertin House Collections Committee 3:00 PM Perry House Dinner at Judith's 7:30 PM Pickup at Hotel 7:15 PM
Tuesday, September 26	Board Meeting 9:00 AM – 4:30 PM - Perry House Taxis to Paris have been arranged for those returning to Paris

Please let me know if you need transportation from the airport or to the airport by filling out the attached form and faxing back to me by Monday, September 18, 2000.

Please let me know if you have any questions.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of the Terra Foundation for the Arts ("Terra Foundation" or "Foundation"), by their attorneys, Quinlan & Crisham, Ltd., respectfully move this Court for the entry of a temporary restraining order to maintain the *status quo* until this Court can rule on the merits of plaintiffs' claims. Specifically, plaintiffs seek an order restraining defendants from: (1) holding an illegal meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000; (2) taking any action at the annual Board of Directors meeting scheduled for Tuesday, September 26, 2000, to elect or remove any member of the Board of Directors and taking action to change any committee assignment; (3) closing

the Terra Museum in Chicago; (4) transferring any assets or artwork of the Terra Museum or Terra Foundation outside of the State of Illinois; and (5) taking any other action contrary to the by-laws of the Terra Foundation, all until further order of Court. In support of this motion, plaintiffs submit their Verified Complaint and the exhibits attached thereto, and their memorandum of law in support of this motion, and further state as follows:

1. By this action, Buntrock and Gidwitz seek to enjoin defendants' continuing improper and wasteful conduct in connection with the management and operation of the Terra Foundation, an Illinois not-for-profit corporation dedicated to preserving and exhibiting American art, and to promoting the appreciation and awareness of American art in Illinois and, specifically, the Chicago area. Buntrock and Gidwitz are both directors of the Foundation committed to furthering these specific intended goals of the Foundation as recognized in its original articles of incorporation.

2. Contrary to the intended purpose of the Foundation, defendants have taken various actions in furtherance of a plan to gain control of the Foundation and use its assets to carry out their own personal agenda. In culmination of this improper and illegal plan, defendants have, in violation of the Foundation's by-laws, scheduled a Board of Directors' meeting for this Sunday, September 24, 2000 in France.

3. On information and belief, defendants plan to use the September 24, 2000 meeting to remove Buntrock from the Board of Directors because of his persistent criticism of defendants' mismanagement and waste of assets of the Foundation and their improper efforts to close the Chicago museum and, on information and belief, defendants intend to use the September 26 meeting to vote to close the Foundation's Chicago Museum and move the Foundation and its assets to Washington, D.C.

16di-000211

4. As set forth below and in the accompanying memorandum of law, Buntrock and Gidwitz meet all the requisite elements for the issuance of temporary injunctive relief under Illinois law. The issuance of a temporary restraining order is appropriate where the facts demonstrate a "fair question" that: (1) the party seeking relief has a protected right; (2) the party will suffer irreparable injury if injunctive relief is not granted; (3) the party has an inadequate remedy at law; and (4) there is a likelihood that the party seeking injunctive relief will succeed on the merits. *Tierney v. Village of Schaumburg*, 182 Ill. App. 3d 1055, 538 N.E.2d 904, 907 (1st Dist. 1989). Moreover, a temporary restraining order is properly issued where it is necessary to maintain the status quo. *People's Gas, Light & Coke v. City of Chicago*, 117 Ill. App. 3d 353, 355, 453 N.E.2d 740, 741 (1st Dist. 1983). Here, each of the above factors is met.

5. As directors of the Terra Foundation, Buntrock and Gidwitz possess a protectible right in that they are expressly authorized that by Section 103.15 of the Not for Profit Corporation Act, 805 ILCS 105/103.15 to "enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation."

6. Plaintiffs will also suffer irreparable injury with no adequate remedy at law if temporary injunctive relief is not granted in this case. Under Illinois law, "an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated or when damages cannot be measured by any pecuniary standard." *Falcon Ltd. v. Corr's Nat'l Beverages, Inc.*, 165 Ill. App. 3d 815, 820, 520 N.E.2d 831, 835 (1st Dist. 1987); *A.W. Chesterton Co., Inc. v. Chesterton*, 128 F.3d 1, 8-9 (5th Cir. 1997); *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124, 556 N.E.2d 1265 (2d Dist. 1990) (finding that showing irreparable harm "is the most common method of proving an inadequate remedy at law . . ."). Without this Court's intervention, defendants will be free to close

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the Terra Museum in Chicago, thereby violating the purpose of the Foundation and depriving the people of Illinois of the intended benefits of the museum. An improper closing of the museum will also result in a loss of jobs, as well as loss in goodwill of benefactors and patrons. Moreover, directors Buntrock and Gidwitz will be unable to fulfill their fiduciary duties to prevent the mismanagement of the Foundation by defendants without injunctive relief from this Court.

7. Buntrock and Gidwitz also have a strong likelihood of success on the merits of their underlying claims against defendants. Notably, plaintiffs are not required at this juncture to "make out a case that would entitle them to relief on the merits." *Mister v. A.R.K. Partnership*, 197 Ill. App. 3d 105, 553 N.E.2d 1152, 1155 (2d Dist. 1990). Rather, they need only raise a "fair question" about the existence of their rights and the need for this Court to preserve the *status quo*. *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 523, 532 N.E.2d 464, 467 (1st Dist. 1988) (holding that a plaintiff only need show a "fair question"). As detailed in the accompanying memorandum of law, Buntrock and Gidwitz raise more than a fair question as to the following claims:

- That the purported meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000 is unlawful and violative of the by-laws of the Foundation because (1) notice of the meeting was not provided in the form and manner required by the by-laws; (2) notice was not provided by the Secretary of the Foundation as required by the by-laws; and (3) the meeting's sole purpose is to conduct elections for directors of the Foundation *prior to* the scheduled annual meeting, in violation of the by-laws.

- That the Terra Foundation for the Arts is a charitable corporation established under the laws of the State of Illinois for the benefit of its citizens, and that under Illinois law, the defendants cannot take any action contrary to the Foundation's charitable purpose.

- That the members of the Foundation's board of directors owe a fiduciary duty to the corporation and its benefactors to preserve the corporate assets for use in the stated charitable purpose of the corporation, and that defendants' mismanagement of the Foundation and their efforts to deprive the people of

16di-000213

Chicago and the State of Illinois of the Terra Museum are contrary to the purpose for which the Foundation was formed, and violate the fiduciary duties of defendants.

- That defendants' efforts to close the Terra Museum in Chicago and transfer its assets out of state, as well as the exclusion of Buntrock from the Board of Directors to facilitate this closure and transfer of assets, are *ultra vires* acts of the corporation and are therefore void.

8. Finally, the balance of harm in this case clearly weighs in favor of plaintiffs and supports the issuance of temporary injunctive relief. Defendants will suffer no harm if a temporary restraining order is entered to preserve the status quo in this case. On the other hand, plaintiffs and the public at large will suffer greatly if this Court does not maintain the status quo. As discussed more fully in plaintiffs' memorandum of law, if plaintiffs are allowed to carry their improper plans to fruition, the charitable purpose of the Foundation will be frustrated, jobs will be lost, and the people of the State of Illinois, as well as the benefactors of the Foundation, will lose a unique center for American Art if the Terra Museum in Chicago is closed.

WHEREFORE, plaintiffs Dean Buntrock and Ronald Gidwitz respectfully request that this Court enter an order temporarily restraining and enjoining the Terra Foundation and all officers, directors and employees of the Terra Foundation, including, but not limited to Judith Terra, Paul Hayes Tucker, and Allan K. Simpson, as well as third parties with knowledge of this order, including Neftali Michaeli, from: (1) holding an illegal meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000; (2) taking any action at the annual Board of Directors meeting scheduled for Tuesday, September 26, 2000, to elect or remove any member of the Board of Directors and taking action to change any committee assignment; (3) closing the Terra Museum in Chicago; (4) transferring any assets or artwork of the Terra Museum or Terra Foundation

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outside of the State of Illinois; and (5) taking any other action contrary to the by-laws of the Terra Foundation, until further order of Court, as well as for any other relief this Court deems fair and just.

Dated: September 22, 2000

Respectfully submitted,

DEAN BUNTROCK and RONALD GIDWITZ,
Directors of the Terra Foundation for the Arts

By: _____
One of Their Attorneys

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James R. Carroll
Michael I Rothstein
James A. Niewiara
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Terra switch gives edge to Chicago

Board now backs plan to keep art, close museum

Museum move: Paul Hayes Tucker, chairman of the Terra board of directors, wants to consider new locations both here and elsewhere. Photo: John R. Boehm

June 25, 2001
By Brian McCormick

A director of the Terra Foundation for the Arts is switching sides in the long-running dispute over the foundation's future, tilting the balance of power to a board faction determined to keep its collection of American art in Illinois.

The flip by Stephanie Pace Marshall, who is president of the Illinois Mathematics and Science Academy in Aurora, appears to ensure that a majority of the board will vote Friday for a mediated settlement requiring the foundation and its artworks to stay here for at least 50 years.

The settlement also calls on the Terra board to close its North Michigan Avenue museum and seek a home for the collection in another local art museum — most likely the Art Institute of Chicago.

Ms. Marshall didn't return phone calls, but sources say she endorsed the settlement in a mediation session last week, after previously siding with a board group that was exploring potential new sites for the museum in other

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cities. That group includes Judith Terra of Washington D.C., widow of museum founder Daniel Terra, who funneled some of his chemical-company fortune into a 900-piece collection of paintings and sculptures by American artists.

Conflict broke out last summer when a group of directors led by Dean **BUNTROCK** and Ronald Gidwitz accused Ms. Terra and other board members of plotting to spirit the museum out of town. The dispute landed in court when the two business heavyweights filed suit seeking control of the foundation.

Until now, the dissident group was one vote short of a majority on the 11-member board. Ms. Marshall's shift gives that faction the votes to push through a settlement plan opposed by Ms. Terra, board Chairman Paul Hayes Tucker and three other board members — setting up the endgame in a feud that clearly has engendered ill will on both sides.

"This is the most stupid, bizarre, asinine, puerile thing I've been in in 70 years of life," says former U.S. Sen. Alan Simpson, R-Wyo., a member of Ms. Terra's board group, which has steadfastly denied having ruled out keeping the museum in Chicago.

'On the side of the angels'

If the settlement is approved as expected at a board meeting scheduled for Friday morning, it will go to Cook County Circuit Judge Dorothy Kirie Kinnaird for approval next Monday. Her imprimatur would appear to leave Ms. Terra's group little recourse beyond appealing the decision.

The settlement requires all 11 Terra board members to step down next year. The board would be expanded to 16 members, at least eight of whom would have to be Illinois residents approved by the Illinois attorney general's office. Attorney General Jim Ryan entered the case last fall on behalf of the plaintiffs, arguing that, as the overseer of charitable activity in the state, his office had a stake in the proceedings.

Citing a February order by Judge Kinnaird barring parties involved in the mediation from talking to the press — and a motion filed last week by Ms. Terra's group seeking an investigation into previous leaks — board members say they are leery of discussing the case.

While Ms. Marshall's motives aren't clear, sources say she has come under pressure from

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FTD
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Motorola
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Quadrix
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Sears
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Tellabs
Terra Museum
UAL
University of Chicago
Warner Candy
Wrigley Field
YMCA

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local civic and business leaders who don't want to lose the Terra collection. While not commenting on her specifically, Mr. Tucker acknowledges that the battle has been a bruising one.

"This has been a very pressurized situation," he says, "with a lot at stake, including the opportunity to remain as a stand-alone facility and the possible distribution of some significant assets."

But Mr. Gidwitz, former CEO of Helene Curtis Industries Inc., insists that no undue pressure was brought to bear on any board members.

"We have not strong-armed anyone," he says. "We are on the side of the angels; those who have joined us have seen the light and come to God."

Forcing the $450-million foundation and museum to stay in Illinois and requiring an alliance that would close the poorly attended North Michigan Avenue facility would limit the foundation's leverage in negotiating with potential partners, Mr. Tucker says. While the foundation was exploring options with the Art Institute before the lawsuit, it was also talking with museums in Boston and Washington.

"If our opportunities (to remain a stand-alone museum or merge with out-of-state partners) are limited, that would constitute an abrogation of our responsibility as a board that borders on illegal," says Mr. Tucker.

Broader ramifications

Sources say the foundation discussed two scenarios with the Art Institute before talks broke off last fall. Both provided for a Terra wing at the South Michigan Avenue museum, and one also included a $60-million payment to the Art Institute by the Terra Foundation.

The Art Institute declined to comment beyond a statement that "we have no awareness of any settlement of this lawsuit."

Meanwhile, the involvement of the attorney general in the case is causing concern among those who fear that blocking an Illinois-chartered trust from leaving the state will encourage charities to form trusts elsewhere.

"Even if a charitable organization begins in Illinois, there is no legal requirement that it always be based here unless that condition is written into the bylaws," says Janice Rodgers, a partner in the Chicago office of law firm Quarles & Brady.

16di-000218

But Floyd Perkins, chief of the attorney general's charitable trust bureau, points out that state law makes the people of Illinois the beneficiaries of charitable trusts set up here.

"As their lawyers," he says, "we have a hard time letting people take those trusts away."

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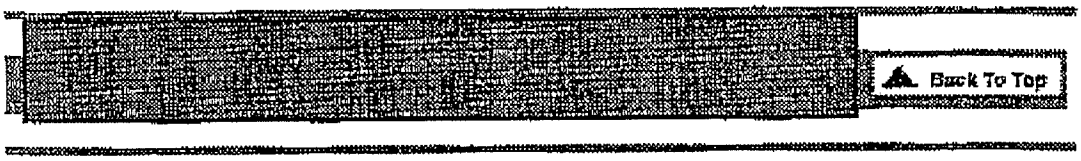

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Terra would not have been so firma had it added this trustee

Chicago Observer

June 25, 2001
By Steven R. Strahler

Aiming to add more local trustees to the board of the Terra Foundation for the Arts in hopes of preserving the Chicago home of the Terra Museum of American Art (see story, this issue), trustee Dean L. **BUNTROCK** suggested someone he knew well, according to insiders: Robert Allgyer.

Mr. Allgyer had headed the Arthur Andersen LLP audit team at Waste Management Inc., where Mr. **BUNTROCK** was once chairman and CEO. But last week, it became apparent that the 56-year-old Mr. Allgyer would not have been a good choice, at least from a public-image perspective.

He was among current and former Andersen partners who settled a Securities and Exchange Commission complaint alleging accounting practices that improperly inflated earnings of the garbage hauler. Otherwise, Mr. Allgyer might have found the time to serve: He's now retired from Andersen.

Moreover, as part of the settlement, under which defendants paid more than $7 million in fines but did not admit or deny the charges, Mr. Allgyer agreed not to audit a public company for five years. He did not return a phone call to his home. Mr. **BUNTROCK** also did not respond.

Not too old, however, to move up to a new challenge

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TERRA FOUNDATION FOR THE ARTS

Donald H. Ratner
Vice President Finance & Administration
Assistant Secretary
Terra Foundation for the Arts
664 N. Michigan Avenue
Chicago, IL 60611

Phone 312-654-2265
Fax 312-664-4749
E-mail ratner@terramuseum.org

Fax

To: Mr. Larry Levinson
From: Donald H. Ratner
Fax: 202-371-6279
Pages: 5
Phone:
Date: 06/25/01
Re: Attached

June 5, 2001

Mr. David C. Hilliard
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson
311 South Wacker Drive, Suite 5000
Chicago, Illinois 60606

Dear Mr. Hilliard:

I also object to the meeting you have called for 2:00PM Tuesday, June 5, 2001 for the purpose of discussing nominations of "new Directors" for the Board.

We have not agreed to any settlement of this litigation. Therefore, I believe that it is completely inappropriate to implement one possible component of an overall package that has not been agreed to by the Board of Directors.

I join with my fellow Board members in requesting you and directing our colleague, Theodore E. Stebbins, Jr., of the "nominating committee" to abandon this meeting and try once more to find a solution which respects the independence, integrity and identity of Dan Terra's legacy.

Sincerely,

Stephanie Pace Marshall/kc

Stephanie Pace Marshall

June 4, 2001

Mr. David C. Hilliard
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson
Suite 5000, 311 South Wacker Drive
Chicago, Illinois 60606

Dear Mr. Hilliard:

We, the undersigned, a majority of the Board of the Terra Foundation for American Art, object most strenuously to the meeting you have called for 2 p.m., Tuesday, June 5, for the purpose of discussing nominations of "new Directors" for the Board. We have never agreed to this.

The nomination / election process to which you refer in your letter of June 1, 2001 is but one of many parts of a settlement agreement you proposed which has yet to be, in our opinion, appropriately committed to paper, let alone accepted by a Board majority. We have serious questions about the procedure by which this mediation is and has been operating, about substantive issues, and about the relative importance you have assigned the various parties to this matter. Clearly, the meeting you call is ad hoc, unauthorized, possibly illegal and unquestionably deleterious to our efforts to avoid a trial by finding common ground.

By this letter we request you and direct our colleague, Theodore E. Stebbins, Jr., the other non-plaintiff member of the "nominating committee" to abandon this meeting and try once more to find a solution which respects the independence, integrity and identity of Dan Terra's legacy.

Sincerely yours,

Paul Hayes Tucker Hon. Jacques Andréani Hélène Arwheiler

Stephanie Pace Marshall Judith Terra Hon. Alan Simpson

Cc: Theodore E. Stebbins, Jr.
The Honorable Dorothy Kirie Kinnaird

TOTAL PAGE(S) 01

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Stephanie Pace Marshall Judith Terra Hon. Alan Simpson

Cc: Theodore E. Stebbins, Jr.
The Honorable Dorothy Kirie Kinnaird

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Sincerely yours,

Paul Hayes Tucker

Hon. Jacques Andréani

Hélène Arwhelier

Stephanie Pace Marshall

Judith Terra

Hon. Alan Simpson

alan K. Simpson/J.T.

Cc: Theodore E. Stebbins, Jr.
The Honorable Dorothy Kirie Kinnaird

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED

SEP 25 2000

AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intevenor

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

PLAINTIFF'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COMES the Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES

16di-000228

E. RYAN, Attorney General of Illinois, and in support of his Emergency Motion For Temporary Restraining Order and Preliminary Injunction, and states as follows:

INTRODUCTION

Plaintiff is requesting that this Honorable Court enter an order imposing a Temporary Restraining Order and Preliminary Injunction on Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, and the TERRA FOUNDATION FOR THE ARTS (hereinafter "FOUNDATION"), in conjunction with its Complaint, which Plaintiff has filed in this case pursuant to the Charitable Trust Act (760 ILCS 55/1 et seq. (1997)) (hereinafter "the Trust Act") and his common law duty to safeguard charitable assets. Plaintiff is seeking to prevent Defendants from (a) mismanaging the Terra Museum in Chicago to create the impression that the museum needs to be closed; (b) seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals; (c) attempting to remove employees and directors of the Museum that opposed the self interested acts aforesaid and to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law; and (d) endangering the assets of the Terra Foundation, as well as to prevent Defendants from engaging in ongoing violations of the Trust Act which Plaintiff has set out in his Complaint.

Plaintiff is seeking injunctive relief to prevent Defendants from holding any further meetings of the Foundation's Board of Directors, until a new board is constituted ; taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments; taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and taking any other action contrary to the by-laws of the Terra Foundation.

16di-000229

ARGUMENT

A Temporary Restraining Order is appropriate in this case in order to protect charitable assets held by the FOUNDATION and to prevent Defendants from engaging in any further breach of their fiduciary duties and misuse or waste of charitable funds. Such injunctive relief is necessary to preserve the status quo pending a hearing on the case to prevent Defendants from effectively divesting the PEOPLE OF THE STATE OF ILLINOIS of their charitable interests in the FOUNDATION, and closing the FOUNDATION's Illinois facilities and moving the FOUNDATION to Washington D.C. in violation of the Trust's Purpose. Plaintiff is seeking this injunctive relief pursuant to his statutory and common law powers and duty to protect and safeguard charitable assets and to ensure that monies designated for charitable purposes are devoted to their proper use. Such relief is proper under traditional common-law standards of equity and also because such relief is expressly authorized by a statute under which Plaintiff is suing.

I. A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED TO PROTECT THE RIGHTS OF THE PEOPLE IN CHARITABLE ASSETS AND TO PREVENT IRREPARABLE HARM AND LOSS OR MISUSE OF CHARITABLE FUNDS.

A Temporary Restraining Order is an emergency remedy issued upon a summary showing of the necessity of the order to prevent immediate and irreparable harm. (Stanton v. City of Chicago, 177 Ill. App. 3d 524 (1st Dist. 1988).) A temporary restraining order requires only a summary showing by a plaintiff that the order is necessary to prevent immediate and irreparable harm and that there is no adequate remedy at law. (Id.) It is well established that a party seeking a Temporary Restraining Order is not required to make out a case which would entitle him to relief on the merits, but needs only to show that he raises a "fair question" regarding the existence of his right and that the court should preserve the status quo until the case can be decided on the merits to prevent

16di-000230

immediate and irreparable harm. (Buzz Barton & Associates, Inc. v. Giannone, 108 Ill. 2d 373 (1985.); Stanton v. City of Chicago, 177 Ill. App. 3d at 524.) A motion for Temporary Restraining Order is properly granted on the uncontroverted facts of a complaint. (Id.)

In the present action, Plaintiff has filed a complaint alleging significant wrongdoing by Defendants regarding the misuse of charitable assets. To satisfy the requirements of a Temporary Restraining Order as requested in Plaintiff's Motion, all Plaintiff would need to show at common law is (1) that there is a "fair question" regarding the existence of the PEOPLE OF ILLINOIS' right or interest in the charitable assets at issue here, (2) that the Court should preserve the status quo to prevent immediate and irreparable harm, and (3) that there is no adequate remedy at law. (Stanton v. City of Chicago, 177 Ill. App. 3d at 524.)

A. The PEOPLE OF ILLINOIS Have A Clear And Ascertainable Right To The Charitable Assets In Question And Therefore Raise A Fair Question Regarding The Plaintiff's Right Or Interest In the Terra Foundation.

At common law, the PEOPLE OF ILLINOIS are the ultimate beneficiaries of charitable trusts and charitable assets held in Illinois. (In re Estate of Laas, 171 Ill. App.3d 916, 920-921 (1st Dist. 1988).) In this connection, it is well established that the Attorney General's authority under the Charitable Trust Act to protect a public charity to prevent or correct abuses cannot be denied. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d 269, 276 (1st Dist. 1984).) The Attorney General is the sole officer authorized to represent the People of this State in any litigation in which the PEOPLE OF ILLINOIS are the real party in interest pursuant to article V, section 15 of the Illinois Constitution (In re Estate of Stern, 240 Ill. App. 3d 834, 836 (1st Dist.1992); People v. National Anti-Drug Coalition, 124, Ill. App. 3d 269, 275 (1st Dist. 1984)), and it has been judicially recognized that the Attorney General is the proper representative of the PEOPLE OF ILLINOIS in all actions concerning the enforcement or administration of a charitable trust. (In re Estate of Laas,

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171 Ill. App. 3d 916, 920 (1st Dist. 1988); People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) Since, at common law, the PEOPLE OF ILLINOIS are the ultimate beneficiary of charitable assets and property held for charitable purposes, the Attorney General of Illinois has standing to enforce charitable trusts and to see that charitable funds are applied to their intended charitable uses. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.)

In the present action, the PEOPLE's Complaint has alleged specific facts showing that Defendants have engaged in multiple acts in breach of their fiduciary duties to the FOUNDATION, and a need to safeguard such charity. Taking such allegations as true, as they must be in the absence of an answer to the Complaint, Plaintiff has clearly satisfied the requirement of showing the existence of a "fair question" regarding the existence of Attorney General's right or interest in charitable assets wrongfully taken.

B. The PEOPLE Will Suffer Immediate and Irreparable Harm If The Status Quo Is Not Preserved.

As already stated, Plaintiff's Complaint alleges that Defendants have mismanaged the Terra Museum in Chicago to create the impression that the museum needs to be closed; have sought to close the Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals; have attempted to remove employees and directors of the Museum that opposed the self interested acts aforesaid and to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law; and have endangered the assets of the Terra Foundation. The injury that would be perpetrated on the FOUNDATION and its beneficiaries the PEOPLE OF THE STATE OF ILLINOIS would be to irreparably deprive them of the benefit of the art collection held at the Terra Museum in Chicago. In effect, without the imposition of a Temporary Restraining Order, the

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PEOPLE OF THE STATE OF ILLINOIS will suffer a loss of at least $450 million in charitable assets, and based on the allegations of past wrongdoing, will be prevented from truly discovering the extent to which charity has been harmed. Only the imposition of a Temporary Restraining Order pending the holding of a hearing or further action by the Court will enable the PEOPLE to safeguard the charity which Defendants have wronged.

C. **There Is No Adequate Remedy At Law.**

Plaintiff's Complaint alleges that extensive harm to the public at large has occurred, the full extent to which is unknown at the present time. The Complaint shows that while Defendants have engaged in multiple acts of wrongdoing against the charitable trust, Plaintiff does not know the full extent of the wrong committed by Defendants and therefore needs an accounting at equity as part of the relief sought. Furthermore, immediate and irreparable injury will occur in the absence of a Temporary Restraining Order. Plaintiff has alleged that the FOUNDATION, and the Defendant directors are at risk of escaping out of an Illinois jurisdiction. If injunctive relief is not granted to prevent Defendants from divesting the PEOPLE OF ILLINOIS of its charitable interest, Defendants may succeed avoiding a need to fully account and the PEOPLE will never know the full extent to which they have been wronged and may be permanently precluded from recovering their assets. The public has already suffered injury in that Defendants have breached their fiduciary duties to the FOUNDATION. If equitable relief is not granted immediately, then charity will likely suffer further in that funds devoted for public benefit purposes will never reach their intended charitable destination. Because the full extent of Plaintiff's injury is as yet unknown and because the risk of irreparable injury to Plaintiff is so great, there is no adequate remedy at law that will cure the harm caused to the PEOPLE OF ILLINOIS. Only the imposition of a Temporary Restraining Order will enable the PEOPLE to safeguard its charitable interest.

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II. THE COURT SHOULD ALSO GRANT A PRELIMINARY INJUNCTION BECAUSE PLAINTIFF ATTORNEY GENERAL IS SEEKING INJUNCTIVE RELIEF AUTHORIZED BY A STATUTE.

In addition to a temporary restraining order entered based on common-law equitable grounds as aforesaid, a temporary restraining order and preliminary injunction should also be entered because Plaintiff is seeking injunctive relief pursuant to specific statutory authority.

Traditionally, the equitable remedy of preliminary injunction is granted where plaintiff shows: (1) he has a right which needs protection; (2) he will suffer irreparable harm without the protection; (3) he has no adequate remedy at law; and (4) he is likely to succeed on the merits. ((People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d 575, 580 (2nd Dist. 1985); People *ex rel.* Edgar v. Miller, 110 Ill. App. 3d 264, 269 (4th Dist.1982).) However, because Plaintiff is a public official or body seeking injunctive relief pursuant to a statute, the requirements of the statute authorizing the injunctive relief control rather than the traditional equitable factors enumerated above. (People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d at 580; People *ex rel.* Edgar v. Miller, 110 Ill. App. 3d at 269; People *ex rel.* Carpentier v. Goers, 20 Ill.2d 272, 276 (1960); People v. Keeven, 68 Ill. App.3d 91, 96-97 (5th Dist.1979).)

Courts issue statutory injunctions to public bodies to restrain violations of a statute because irreparable harm to the public at large is presumed from the statutory violation alone. (People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d at 580.) To impose a preliminary injunction when a statute authorizes injunctive relief, the plaintiff need only allege and show (1) that the there has been a violation of the statute by the defendant and (2) that the plaintiff has standing to bring the action; It is not necessity to prove irreparable harm or the absence of an adequate remedy at law. (People v. Keeven, 68 Ill. App.3d at 97.)

In the instant case, the Attorney General is seeking injunctive relief as specifically provided

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for in the Charitable Trust Act. Plaintiff has brought suit against the Defendants seeking injunctive relief pursuant to Section 16(b) of the Trust Act, which authorizes injunctive relief in circumstances where it is alleged that a charitable trust needs to be protected or a trustee of a charitable trust has engaged in a breach of fiduciary duty. Section 16(b) provides:

> *"Sec. 16(b) Upon application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of such trustees is sought, the Court shall exercise its discretion as the equities require and may as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest."* (760 ILCS 55/16 (1997).)

1. **The Plaintiff Has Presented Facts Showing That Defendant Engaged In Statutory Violations Of The Illinois Charitable Trust Act Which Entitles Plaintiff To Injunctive Relief Pursuant To Statute.**

Plaintiff-Intervenor's Complaint has sufficiently shown that the Defendant has and continues to violate provisions of the Trust Act thereby entitling the Attorney General to seek injunctive relief. The Complaint alleges that Defendants multiple actions of breach of fiduciary duty constitute violations of Section 15(a) of the Trust Act.

In support of such allegations, Plaintiff adopts and incorporates the verified pleadings of the Plaintiffs GIDWITZ and BUNTRCK, who are current directors of the FOUNDATION, and who alleged and verify that Defendants JUDITH TERRA, PAUL HAYES TUCKER, and ALEN L. SIPMSON, have and are engaging in actions ultra vires and against the interest and purposes of the FOUNDATION, alleging said Directors are:

a) Attempting to cause the closing of TM operations in Illinois contrary to the long standing promise of its founder that such would be an institution for the public here in Illinois.

b) Attempting to gain position and self recognition in a Washington DC charitable

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organization in exchange for the delivery of the assets of TM, the termination of operations in Chicago and the end of a Terra museum in the United States..

c) Attempting to cause the closing of the Terra Museum operations in Illinois contrary to its name sakes, Mr. Dan Terra's intentions and suggesting a use of its assets contrary to the use Dan terra intended.

d) Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

e) Caused the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, which jeopardizes the security of the $100 million of art displayed and collected at Terra Museum;

f) Permitted a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

g) Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in operating Terra Foundation.

J. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel; and

k) Misusing the art collection of Terra Foundation and allowing Judith Terra to personally possess and use museum art items and in a manner that placed the collection in danger and

jeopardy.

As a consequence of the aforesaid, violations of the Trust Act have occurred and are continuing to occur, which violations are verified and supported by the Verified Complaint of Plaintiffs GIDWITZ and BUNTRCK. Defendants are therefore subject to the injunctive relief authorized under Section 16(b) of the Trust Act for violations of the Act.

2. **The Attorney General Has Standing To Enforce The Statute Providing For Injunctive Relief In This Matter.**

Having shown that the Illinois Charitable Trust Act expressly authorizes injunctive relief in circumstances where it is alleges that a charitable trust needs to be protected or a trustee of a charitable trust has engaged in a breach of fiduciary duty, and having shown that the Plaintiff has presented sufficient evidence to show that the Defendant breached his fiduciary duty and violated the Trust Act requiring the monies he wrongfully took to be protected, the Plaintiff must also show that he has standing to exercise the authority given to seek injunctive relief by the Illinois Charitable Trust Act.

The purpose of the Charitable Trust Act is to assist the Attorney General in carrying out his common law powers and duties to enforce charitable trusts and to see the application of their funds to their intended charitable uses. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) The Act is intended to give the Attorney General the tools with which to discharge his responsibilities. (Id.) As stated previously herein, the Attorney General has been judicially recognized as the proper representative of the State, which is the ultimate beneficiary of charitable assets collected and held for charitable purposes, in all actions concerning the enforcement or administration of a charitable trust. (In re Estate of Laas, 171 Ill. App. 3d at 920; People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) At common law, the Attorney General is charged

with the duty to see that charitable funds are applied to their intended charitable uses. (Id.) As noted earlier, the right of the State, acting through the Attorney General's authority under the Charitable Trust Act to protect a public charity to prevent or correct abuses of charitable assets on the PEOPLE's behalf cannot be denied. (Id, at 276.) Furthermore, Section 16(b) of the Trust Act specifically authorizes the Attorney General to seek injunctive relief in circumstances where he alleges that a charitable trust needs to be protected or the trustee of a charitable trust has engaged in a breach of fiduciary duty and he is the proper plaintiff to seek such relief.

For all of these reasons, Plaintiff has standing to exercise the authority given to seek injunctive relief by the Illinois Charitable Trust Act.

3. **The Attorney General Has Satisfied All Requirements For Injunction Pursuant To Statutory Authority And This Court Should Issue A Preliminary Injunction.**

Because injunctive relief is authorized in the Illinois Charitable Trust Act, there has been a violation of that statute by the Defendants, and the Attorney General has standing under the statute to bring an action for injunctive relief, Plaintiff is entitled to a preliminary injunction to stop defendants from engaging in harm to the public at large, which harm is presumed from the statutory violation.

In People v. Keeven, 68 Ill. App. 3d 91 (1979), the Attorney General brought an action to enjoin two defendants, Leonard and Agnes Keeven, from violating certain sections of the Illinois Environmental Protection Act. The trial court refused to enter a preliminary injunction because the Plaintiff failed to allege or prove facts showing irreparable injury and lack of an adequate remedy at law. (Id. at 96.) On appeal, the Appellate Court determined that because the Statute in question specifically authorized the Attorney General to seek injunctive relief, he needed only allege and show that the there had been a violation of that statute by the defendants. (Id. at 97.) Since the

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Attorney General had already presented evidence showing that the defendants failed to obtain an operating permit in violation of one section of the Act and that they were allowing tenants to generate wastewater without a permit, the court held that a preliminary injunction was warranted. (Id.)

Similarly, in People *ex rel* Hartigan v. Stianos, 131 Ill. App. 3d 575 (2nd Dist. 1985), the Attorney General sought a preliminary injunction against the defendants for violating the Illinois Consumer Fraud Act, which authorized the Attorney General to enjoin any person engaged in a trade or commerce who engaged in unfair or deceptive acts or practices in the conduct of that trade or commerce. (131 Ill. App. 3d at 580.) The Appellate Court found that the Plaintiff had alleged sufficient facts to show that the defendants had engaged in unfair and deceptive acts in violation of the Act. It thereafter held that a preliminary injunction was appropriate because the Attorney General needed only to allege and prove what the statute required in order to obtain the authorized injunctive relief. (Id, at 581-582.)

Like People v. Keeven and People v. Stianos, the present action concerns a request for temporary injunctive relief pursuant to statutory authority that provides for injunctive relief. Such conduct, described in detail in Plaintiff's Complaint constitutes a breach of the Defendant's fiduciary duties to the charity and a violation of Sections 15 of the Illinois Charitable Trust Act, and injunctive relief is authorized pursuant to Section 16(b) of said Act. (760 ILCS 55/16(b) (1997).) As in People v. Keeven and People *ex rel* Hartigan v. Stianos, the Court should enter a temporary injunction against the Defendant to prevent ongoing and continuous harm cause by Defendants' violations of Illinois statutory law.

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CONCLUSION

For all of the reasons stated herein, the Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois requests this Honorable Court to grant its Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
BARRY S. GOLDBERG
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601
(312) 814-2595

16di-000240

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation

Defendants.

No. 00 CH 13859

EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of the Terra Foundation for the Arts ("Terra Foundation" or "Foundation"), by their attorneys, Quinlan & Crisham, Ltd., respectfully move this Court for the entry of a temporary restraining order to maintain the *status quo* until this Court can rule on the merits of plaintiffs' claims. Specifically, plaintiffs seek an order restraining defendants from: (1) holding an illegal meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000; (2) taking any action at the annual Board of Directors meeting scheduled for Tuesday, September 26, 2000, to elect or remove any member of the Board of Directors and taking action to change any committee assignment; (3) closing

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the Terra Museum in Chicago; (4) transferring any assets or artwork of the Terra Museum or Terra Foundation outside of the State of Illinois; and (5) taking any other action contrary to the by-laws of the Terra Foundation, all until further order of Court. In support of this motion, plaintiffs submit their Verified Complaint and the exhibits attached thereto, and their memorandum of law in support of this motion, and further state as follows:

1. By this action, Buntrock and Gidwitz seek to enjoin defendants' continuing improper and wasteful conduct in connection with the management and operation of the Terra Foundation, an Illinois not-for-profit corporation dedicated to preserving and exhibiting American art, and to promoting the appreciation and awareness of American art in Illinois and, specifically, the Chicago area. Buntrock and Gidwitz are both directors of the Foundation committed to furthering these specific intended goals of the Foundation as recognized in its original articles of incorporation.

2. Contrary to the intended purpose of the Foundation, defendants have taken various actions in furtherance of a plan to gain control of the Foundation and use its assets to carry out their own personal agenda. In culmination of this improper and illegal plan, defendants have, in violation of the Foundation's by-laws, scheduled a Board of Directors' meeting for this Sunday, September 24, 2000 in France.

3. On information and belief, defendants plan to use the September 24, 2000 meeting to remove Buntrock from the Board of Directors because of his persistent criticism of defendants' mismanagement and waste of assets of the Foundation and their improper efforts to close the Chicago museum and, on information and belief, defendants intend to use the September 26 meeting to vote to close the Foundation's Chicago Museum and move the Foundation and its assets to Washington, D.C.

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4. As set forth below and in the accompanying memorandum of law, Buntrock and Gidwitz meet all the requisite elements for the issuance of temporary injunctive relief under Illinois law. The issuance of a temporary restraining order is appropriate where the facts demonstrate a "fair question" that: (1) the party seeking relief has a protected right; (2) the party will suffer irreparable injury if injunctive relief is not granted; (3) the party has an inadequate remedy at law; and (4) there is a likelihood that the party seeking injunctive relief will succeed on the merits. *Tierney v. Village of Schaumburg*, 182 Ill. App. 3d 1055, 538 N.E.2d 904, 907 (1st Dist. 1989). Moreover, a temporary restraining order is properly issued where it is necessary to maintain the status quo. *People's Gas, Light & Coke v. City of Chicago*, 117 Ill. App. 3d 353, 355, 453 N.E.2d 740, 741 (1st Dist. 1983). Here, each of the above factors is met.

5. As directors of the Terra Foundation, Buntrock and Gidwitz possess a protectible right in that they are expressly authorized that by Section 103.15 of the Not for Profit Corporation Act, 805 ILCS 105/103.15 to "enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation."

6. Plaintiffs will also suffer irreparable injury with no adequate remedy at law if temporary injunctive relief is not granted in this case. Under Illinois law, "an injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated or when damages cannot be measured by any pecuniary standard." *Falcon Ltd. v. Corr's Nat'l Beverages, Inc.*, 165 Ill. App. 3d 815, 820, 520 N.E.2d 831, 835 (1st Dist. 1987); *A.W. Chesterton Co., Inc. v. Chesterton*, 128 F.3d 1, 8-9 (5th Cir. 1997); *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124, 556 N.E.2d 1265 (2d Dist. 1990) (finding that showing irreparable harm "is the most common method of proving an inadequate remedy at law . . ."). Without this Court's intervention, defendants will be free to close

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the Terra Museum in Chicago, thereby violating the purpose of the Foundation and depriving the people of Illinois of the intended benefits of the museum. An improper closing of the museum will also result in a loss of jobs, as well as loss in goodwill of benefactors and patrons. Moreover, directors Buntrock and Gidwitz will be unable to fulfill their fiduciary duties to prevent the mismanagement of the Foundation by defendants without injunctive relief from this Court.

7. Buntrock and Gidwitz also have a strong likelihood of success on the merits of their underlying claims against defendants. Notably, plaintiffs are not required at this juncture to "make out a case that would entitle them to relief on the merits." *Mister v. A.R.K. Partnership*, 197 Ill. App. 3d 105, 553 N.E.2d 1152, 1155 (2d Dist. 1990). Rather, they need only raise a "fair question" about the existence of their rights and the need for this Court to preserve the *status quo*. *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 523, 532 N.E.2d 464, 467 (1st Dist. 1988) (holding that a plaintiff only need show a "fair question"). As detailed in the accompanying memorandum of law, Buntrock and Gidwitz raise more than a fair question as to the following claims:

- That the purported meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000 is unlawful and violative of the by-laws of the Foundation because (1) notice of the meeting was not provided in the form and manner required by the by-laws; (2) notice was not provided by the Secretary of the Foundation as required by the by-laws; and (3) the meeting's sole purpose is to conduct elections for directors of the Foundation *prior to* the scheduled annual meeting, in violation of the by-laws.

- That the Terra Foundation for the Arts is a charitable corporation established under the laws of the State of Illinois for the benefit of its citizens, and that under Illinois law, the defendants cannot take any action contrary to the Foundation's charitable purpose.

- That the members of the Foundation's board of directors owe a fiduciary duty to the corporation and its benefactors to preserve the corporate assets for use in the stated charitable purpose of the corporation, and that defendants' mismanagement of the Foundation and their efforts to deprive the people of

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Chicago and the State of Illinois of the Terra Museum are contrary to the purpose for which the Foundation was formed, and violate the fiduciary duties of defendants.

- That defendants' efforts to close the Terra Museum in Chicago and transfer its assets out of state, as well as the exclusion of Buntrock from the Board of Directors to facilitate this closure and transfer of assets, are *ultra vires* acts of the corporation and are therefore void.

8. Finally, the balance of harm in this case clearly weighs in favor of plaintiffs and supports the issuance of temporary injunctive relief. Defendants will suffer no harm if a temporary restraining order is entered to preserve the status quo in this case. On the other hand, plaintiffs and the public at large will suffer greatly if this Court does not maintain the status quo. As discussed more fully in plaintiffs' memorandum of law, if plaintiffs are allowed to carry their improper plans to fruition, the charitable purpose of the Foundation will be frustrated, jobs will be lost, and the people of the State of Illinois, as well as the benefactors of the Foundation, will lose a unique center for American Art if the Terra Museum in Chicago is closed.

WHEREFORE, plaintiffs Dean Buntrock and Ronald Gidwitz respectfully request that this Court enter an order temporarily restraining and enjoining the Terra Foundation and all officers, directors and employees of the Terra Foundation, including, but not limited to Judith Terra, Paul Hayes Tucker, and Allan K. Simpson, as well as third parties with knowledge of this order, including Neftali Michaeli, from: (1) holding an illegal meeting of the Foundation's Board of Directors scheduled for this Sunday, September 24, 2000; (2) taking any action at the annual Board of Directors meeting scheduled for Tuesday, September 26, 2000, to elect or remove any member of the Board of Directors and taking action to change any committee assignment; (3) closing the Terra Museum in Chicago; (4) transferring any assets or artwork of the Terra Museum or Terra Foundation

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outside of the State of Illinois; and (5) taking any other action contrary to the by-laws of the Terra Foundation, until further order of Court, as well as for any other relief this Court deems fair and just.

Dated: September 22, 2000

Respectfully submitted,

DEAN BUNTROCK and RONALD GIDWITZ,
Directors of the Terra Foundation for the Arts

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Michael I Rothstein
James A. Niewiara
Quinlan & Crisham, Ltd.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm ID No. 33745

16di-000246

In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
September 25, 2000

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DEAN L. BUNTROCK, ET AL v. JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
September 25, 2000

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION
DEAN L. BUNTROCK, a Director)
of the Terra Foundation for)
the Arts, and RONALD GIDWITZ,)
a Director of the Terra)
Foundation for the Arts,)
Plaintiffs,) Case No.
vs.) 00 CH 13859
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
NAFTALI MICHAELI, and the TERRA)
FOUNDATION FOR THE ARTS, an)
Illinois Not-For-Profit)
Corporation,)
Defendants.)
PROCEEDINGS SEPTEMBER 25, 2000

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel., JAMES E. RYAN,)
Attorney General of Illinois,)
Plaintiff-Intervenor,)
vs.)
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
and the TERRA FOUNDATION FOR THE)
ARTS, an Illinois Not-For-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 25th of September, A.D. 2000, at 2:37 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

PRESENT:

QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL,
MR. MICHAEL L. ROTHSTEIN and
MR. MARTIN J. O'HARA,
appeared on behalf of the Plaintiffs;

SIDLEY & AUSTIN,
(One First National Plaza,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON,
-and-
WINSTON & STRAWN,
(35 West Wacker Drive,
Chicago, Illinois 60601), by:
MR. TERRY M. GRIMM,
appeared on behalf of Defendant
the Terra Foundation for the Arts;

PRESENT: (Continued)
HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, and
MR. BARRY GOLDBERG, Assistant Attorney
General,
appeared on behalf of the
Plaintiff-Intervenor;
McBRIDE BAKER & COLES,
(500 West Madison Street, 40th Floor,
Chicago, Illinois 60661-2511), by:
MR. DONALD G. MULACK,
appeared on behalf of James Terra,
Plaintiff-Intervenor.

REPORTED BY: JACQUELINE M. TIMMONS,
C.S.R., R.M.R., R.D.R.
Certificate No. 84-2949.

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THE COURT: Good afternoon. You may be seated.
THE CLERK: Buntrock versus Terra, 00 CH 13859.
THE COURT: Is everyone here? I am told we were waiting for the Attorney General. Is everybody now here?
MR. CARROLL: Yes, sir.
THE COURT: Would you step up and identify yourselves, please.
MR. GRIMM: Your Honor, my name is Terry Grimm from Winston & Strawn. I was before Your Honor on Friday, and I regret to tell Your Honor when I raised the question that one of the named plaintiffs, Mr. Gidwitz, was a client of Winston & Strawn and he might raise the issue of conflict and not waive it, he will not waive the conflict. So we are withdrawing in favor of the firm of Sidley & Austin.
THE COURT: Okay. Just wait one moment, please. And let's start, to make it easier for the reporter, start on the right side, please.
MR. ROTHSTEIN: Michael Rothstein on behalf of the plaintiffs.

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MR. CARROLL: James Carroll on behalf of the plaintiffs.
MR. QUINLAN: William R. Quinlan on behalf of the movants, plaintiffs.
MR. MULACK: Donald Mulack on behalf of James Terra, the sole surviving son of Dan Terra, seeking to intervene.
THE COURT: Is there a petition to intervene from James?
MR. MULACK: I do have that, Your Honor.
THE COURT: I haven't gotten that with all the things that have come in in the last couple hours.
MR. MULACK: I hand that to the court now.
THE COURT: Has everyone seen that one?
MR. QUINLAN: Yes, Your Honor.
THE COURT: Okay. Keep going. Mr. Perkins.
MR. PERKINS: Yes, Judge, Floyd Perkins and Barry Goldberg on behalf of the People of the State of Illinois and the Attorney General. We are here on a motion to intervene and bring our complaint, a motion for temporary restraining order. We sent over courtesy copies.

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Your Honor,
THE COURT: I am just trying to get everybody identified. Okay. And we have Mr. Gidwitz.
MR. CARLSON: No, Your Honor. I am Steve Carlson from the firm of Sidley & Austin, here solely on behalf of the Terra Foundation for the Arts.
THE COURT: Okay. Let me tell you what I have received. On Friday, as you know, I had only the complaint and an emergency motion for temporary restraining order and a memorandum in support. Later that afternoon I received copies of cases from the plaintiff.
Today, this morning, I received from Sidley an opposition to the emergency motion for a temporary restraining order, and that was followed by the Attorney General's motion to intervene as a matter of right, the Attorney General's complaint, the Attorney General's emergency motion for a TRO, the Attorney General's memorandum in support of its motion, and cases that were in there, I already had or already read.

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I received about half an hour ago, the plaintiffs' motion to disqualify counsel, and that is seeking to disqualify Sidley & Austin, and also plaintiffs' reply, which has Mr. James Terra's affidavit attached to it. And I have just now received Mr. James Terra's emergency petition to intervene as a matter of right or permissively, and I assume there is an initial pleading?
MR. MULACK: There is a motion attached, Your Honor, and we didn't have time to prepare a complaint, but we have a motion for temporary restraining order tracking the language of the one that is before the court at the present time.
THE COURT: Okay.
Before we start with any of this, I need to find out who is representing who, and mostly we have to find out who is representing the defendants. I take it that there is no counsel here representing any of the individual defendants; is that correct?
MR. CARLSON: As far as I know, that is correct, Your Honor.

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THE COURT: And we have Sidley representing the Terra Foundation?
MR. CARLSON: That's correct, Your Honor.
THE COURT: And you want them not to do that?
MR. QUINLAN: Well, we don't care if they were to represent them. We challenge their authority to do so, and what they are doing is, in fact, using the Foundation to represent the interests of the three directors who have been sued and charged with irregularities and improprieties in exercising their fiduciary duty, which is an inherent conflict and they couldn't possibly be joined together, but, in any event, because of what took place over the weekend, there is no possibility that any appropriate action could have taken place.
First of all, my clients received no notification, no information whatsoever about the appointment process.
THE COURT: Let me stop you for one second.
MR. QUINLAN: Yes.
THE COURT: The board couldn't meet because we had an agreed order. I didn't enter a

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temporary restraining order as such on Friday. We had an agreed order that there wasn't going to be this half hour meeting on Sunday. So that left only the executive committee who possibly could have met. As I see it, everyone exists; is that right?
MR. QUINLAN: That's right.
THE COURT: The executive committee is Stephanie Marshall, Paul Tucker, Judith Terra and Dean Buntrock.
MR. CARROLL: And Mr. Gidwitz.
MR. QUINLAN: Ron Gidwitz, as well.
THE COURT: That wasn't in your motion. Okay. So two of the five didn't get notice of any kind of a meeting.
MR. QUINLAN: They clearly didn't get any notice, at least two of the five.
THE COURT: Was there a meeting of the Executive Committee to retain Sidley?
MR. CARLSON: Your Honor, I cannot answer that question. Sidley was retained through one of my partners, Susan Stone. I don't see anything. I have just gotten this motion to disqualify, and I haven't had a chance to study

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it or read it.
Mr. Quinlan is absolutely wrong that I am here representing any of the individual defendants. I am here solely on behalf of the Foundation, and I have been retained, Sidley & Austin has been retained solely on behalf of the Foundation. I would think as an ordinary matter, officers of a corporation are entitled to retain counsel to represent the corporation when they have a matter that needs representation on. I don't know if we were retained by an officer, or officers of the Foundation or exactly who was involved in the discussions.
THE COURT: I assume when everybody gets together in a meeting tomorrow, this lawsuit might be the subject matter of that meeting and there might be a vote about having counsel represent the Foundation.
I mean, we had an emergency situation Friday afternoon. What was the Terra Foundation supposed to do? Were they supposed to — I don't mean to be facetious, but were they supposed to call a committee meeting and have a

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formal vote to see who should get over here to respond?
MR. QUINLAN: Your Honor, I think what they should have done, what we have been after them to do all along, is follow their requirements under the articles of incorporation and the process they followed in the past; namely, counsel is only appointed by the board of directors and has only been appointed by the board of directors in the past.
That's the procedure that has been followed when everybody was appointed. When Winston & Strawn was appointed, when Mayer, Brown was appointed. All of these appointments are by the board of directors. It is the only way it can be done. It is only inviting all the members to participate in this. Surely, they could have had a conference, surely they could discuss this, and surely this issue could be addressed.
That's what I am really arguing about here is that they are continuing to do the very thing that we have argued about before, they run this as their own personal charity, their own

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personal fund. And that's what they are doing.
THE COURT: What should they have done on Friday afternoon when they got served by you with papers that they were coming over here? How should they have gotten a lawyer to get over here within a half hour, whatever notice they got?
MR. QUINLAN: There was counsel at that time, and that was — Winston & Strawn was counsel, and they did come over and appear. We did serve them. And we did serve their registered agent. By the way, Your Honor — and they were appointed by the board. By the way, Your Honor, though, all of these things are not our problems. They chose to hold this important meeting in France. The meetings, the normal annual meetings are not held in France.
What we are doing is the two most important things taking place here; namely, about moving outside of the State of Illinois and doing away with a director, at least one, and maybe two, who have raised significant issues, we do this in France.
Do our corporations in Illinois have

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their annual meetings in France? No.
And so we didn't know anything about the process or procedure of what was going to be taking place, so we end up in France at this meeting, which is a nice social place to have a meeting, but what we find out is the two most critical things that are taking place, are taking place there, out of the light of the press, out of the light of the Attorney General, out of the light of anybody, in Paris, France, for an annual meeting of this nature. And you are suggesting —
THE COURT: Is there anything wrong with having an annual meeting in France? Is that prohibited by law? They have another museum over there. They have another property. Are any members of this board upset this meeting got called in France?
MR. QUINLAN: Your Honor, nobody had any idea what was going to take place, and that is what everybody is upset with, and that is the important thing here. That is what caused everybody to be concerned. That is why the Attorney General is here. That's why we have

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Jim Terra here. We only found these things out, and, yes, it is improper if those type of significant things and those things that go to the very existence of this Foundation, and its situs is here in Illinois, is being — taking place in France, yes, there is something wrong with that. It should be taking place here in Illinois, in front of the public in Illinois, in front of the Attorney General in Illinois, and if these issues are going to be discussed and somebody is going to try to move this out of Illinois, it should be done here where everybody knows what is going on.
The appointment of this counsel in this instance is exactly what is going on in terms of the running of this Foundation, and that is what we are arguing about. And Your Honor is suggesting that somehow this is unfair to these people. They surely could hire people to represent themselves, use their own money to do it, to represent their own interests. What I am suggesting here is that Sidley & Austin, who purports to represent the Foundation, cannot argue the case on behalf of the individual

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members who are being charged with serious matters. There is a direct conflict.
THE COURT: I don't see anything in here that —
MR. QUINLAN: That's what the whole argument is about is, Your Honor.
THE COURT: — that they are arguing something on behalf of the individual directors.
MR. QUINLAN: They are arguing that these are not ultra vires acts, that these people didn't engage in ultra vires acts, that they are doing nothing other than what they are authorized to do. That is — the Foundation's position on that is really neutral, Your Honor. The Foundation's position is protect the Foundation and to protect the Foundation's interest.
And it is the same as when the City of Chicago is charged with representing police officers who have been charged with acting beyond the scope of their authority. These are allegations of intentional acts. When a police officer is charged with that, the City of

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Chicago cannot represent them. They must be represented by individual counsel. It is the same thing here.

But, Your Honor, they didn't even attempt to follow the process here. I have nothing against Sidley & Austin. I have nothing against the Foundation being represented. But, Your Honor, it is the very thing that we have been complaining about. That's what's wrong with what's going on in this Foundation. That's what's taking place and has taken place over the last year.

MR. GRIMM: May it please the court. As Your Honor noted on Friday, I was relatively patient while I sat — I am Terry Grimm.

I am now trying to be the first lawyer out of this case because Mr. Gidwitz has objected to our representing the Foundation in this litigation as counsel. But, Your Honor, I know my personal knowledge, that Mr. Gidwitz does know and did know that the board was seeking counsel to represent it, individuals were seeking counsel to represent it, and I was told that Mr. Gidwitz had no objection to Sidley

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coming in to represent the Foundation.

That doesn't answer the questions of the other defendants. But Mr. Gidwitz did know that Sidley wanted to come in for Winston & Strawn to meet his objection that Winston & Strawn had a conflict, and Mr. Gidwitz, and I could be sworn on this, raised no objection to Sidley, didn't feel they had a conflict, and I know that happened over the weekend.

MR. QUINLAN: Your Honor, let me respond to that. Of course, I talked to Mr. Gidwitz, too. He said that he had personal issues with Sidley and there are personal matters in which Sidley has represented him in the past and may represent him in the future. He said he would not raise that objection. I queried him about that. He did not waive the process issue, which is exactly what I am arguing about, and he was not included in any process. He is unaware of how they were appointed or whether there was any kind of board meeting, any kind of contact with anybody.

THE COURT: Let's go back to the process. You want to stop something tomorrow. I have

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individual defendants who are in Paris, and I have a Foundation that is outside of Paris. We will say Paris.

MR. QUINLAN: The Foundation is located there. Their situs is in Illinois. It cannot be moved from Illinois other than changing the articles of incorporation.

THE COURT: And I have all the members of it, shall we say right now of the board, is out of the country; is that correct?

MR. QUINLAN: Members of this are the public for the State of Illinois.

THE COURT: The members of the board. All members of the board today are not located in the state of Illinois.

MR. QUINLAN: That may well be true.

THE COURT: The board is the one that decides who their attorney is going to be. There was an order saying the board couldn't meet over the weekend. So that leaves it up, I guess, to the Executive Committee and, quite frankly, if the Executive Committee had some kind of meeting to try to take some action, you probably would have been in there on a contempt

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thing, wouldn't you?

MR. QUINLAN: No, Your Honor, if —

THE COURT: If they'd done something over the weekend?

MR. QUINLAN: No, Your Honor, I would not have objected if there was a meeting, an effort was made to include everybody in that to appoint Sidley & Austin to be counsel. I am not complaining about that. What I am complaining about is that they didn't even bother to go through that process. They didn't bother to include my clients in that process. They did not include Mrs. Daley, who is on the board.

THE COURT: She is not on the Executive Committee.

MR. QUINLAN: She is a member of the board, though, and she was not included with any information about this. She didn't know any more than any of the other people. And what we are seeing here is exactly the things that we have alleged in our complaint.

THE COURT: Are you suggesting that there should be nobody here representing the defendants in today's hearing?

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MR. QUINLAN: I guess I am not suggesting anything, Your Honor.
THE COURT: I am trying to figure out, should I have a hearing today with nobody representing, able to talk on their side or take the best of what I have got?
MR. QUINLAN: Well, Your Honor —
MR. CARLSON: Thank you, Your Honor, for your confidence.
MR. QUINLAN: You know, with all due respect, Your Honor, I don't think they could be heard. And I don't think it is a problem that you have to worry about. The problem that has to be worried about is by the defendants who have been charged with illegal activities that they have engaged in, and they have continued to engage in it by trying to hire counsel to represent the Foundation and indirectly represent them. That's the real issue. They are using Sidley & Austin's representation of the Foundation to represent them. That's what is wrong.
Sidley was not properly appointed because they must have chosen to pick up the phone and call and say, Sidley, we are hiring you. They cannot do that. I think we should have more concern about what they're doing. They chose to be in Paris, Your Honor. We didn't chose to be in Paris. We didn't chose to address those issues in Paris. They choose to address those issues in Paris.
What we are asking you to do is to stay this, to give us and the Attorney General time to prove our case on these serious allegations. And somehow we're worried about whether or not we are putting an inconvenience on these people who have been charged with these activities, that somehow they had a problem hiring counsel for the Foundation.
I assure you that will not be a problem. It may be a problem in terms of what the Foundation can say in terms of representing them or in participating in any way in the defense of them for the allegations that have been made.
No corporation can do that. And they can't under these circumstances properly represent them. They are supposed to be represented by independent counsel. Somebody has to step up and represent them apart from the Foundation. And we shouldn't be here worrying about how they go about getting this counsel over here. Easily, talk to all the members, include the people who should have been included in all of these decisions all along. This can be resolved.
I am not trying to take unfair advantage of the Foundation. That's not the issue here. And I take no exception to Sidley & Austin, but Sidley & Austin, I think, as being good lawyers and being good members of the Bar, should be just as concerned as I am about the process about how this has been done. Counsel himself says he has no idea how this has been done, and I can tell you that my board, my board members were not participants, and they are on the executive committee, and neither was Mrs. Daley, who is also on the board of directors. So none of this was discussed with them.
THE COURT: Let me just ask. I know you are not in yet. That's the next item of business.

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Let's assume you are in, Mr. Perkins, on behalf of the Attorney General. Is the Attorney General joining in this motion to disqualify?
MR. PERKINS: Judge, we did not prepare that motion and, therefore, we did not really focus on that issue. We are not as familiar with all the facts that come to the issue about who chose Sidley & Austin, so we find ourselves standing here this afternoon understanding why the plaintiff here is concerned, understanding why the court is concerned that the Foundation have somebody. I can tell you this, Your Honor, I spoke with lawyers from Mayer, Brown & Platt today who tell me they are still of record for the Foundation in the probate proceeding of the Dan Terra estate. So I do know there are other law firms in the city that have represented this Foundation for a period of time, and what is a very big concern to us, is that we have an awful lot of issues that are starting to pile up, and we need to get some kind of order entered against the Foundation.
I understand Your Honor's concern that

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the Foundation have a —
MR. CARLSON: No objection.
MR. PERKINS: — lawyer here this afternoon. I don't know if lawyers from Mayer, Brown want to come up here as well. I don't know what the answer is in this regard, but I do know that we need to proceed against the Foundation this afternoon.
THE COURT: Let's go back to last week before this whole thing was filed.
There is a probate case, and Mayer, Brown is the counsel who is representing the Foundation in the probate case?
MR. PERKINS: That's correct, Your Honor.
THE COURT: And there is a lawyer who is over there with the Foundation assisting them and advising them in this board meeting; is that correct?
MR. PERKINS: In the probate estate of — Daniel Terra's probate estate.
THE COURT: Not just on that, but I believe it was Mr. Grimm told me that there was someone from Winston?
MR. GRIMM: You're correct, Your Honor.

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Mr. Heatwole, H-e-a-t-w-o-l-e, who was hired as corporation counsel for the Foundation.
THE COURT: First name is Mark?
MR. GRIMM: Mark.
THE COURT: And he is in minutes, the minutes —
MR. GRIMM: Yes.
THE COURT: — of the meeting in August. He attended the —
MR. GRIMM: He attended —
THE COURT: — board meeting.
MR. GRIMM: — as general counsel for that board meeting, yes.
THE COURT: Okay. So the general counsel attending at least at the last time — was that the last time the board met?
MR. GRIMM: That's the last meeting of the board before the one scheduled for tomorrow, Your Honor.
THE COURT: That was August 24th. And Mark Heatwole, H-e-a-t-w-o-l-e, was there and he is —
MR. GRIMM: My partner.
THE COURT: — from Winston. And he was —

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is to be there at the board meeting tomorrow?
MR. GRIMM: Absolutely. They are all together in a room about the size of this courtroom.
THE COURT: Okay. And is there anyone, any other lawyer who is there on behalf of the board in the meeting in France tomorrow?
MR. GRIMM: I am unaware of that, Your Honor.
MR. CARLSON: Your Honor, I believe that one of my partners, Mr. Ralph Lerner from our New York office —
THE COURT: He was also there by invitation on August 24th.
MR. CARLSON: That's correct, Your Honor. I don't know the details of Mr. Lerner's involvement with the Foundation, either. I do know, however, Mr. Lerner, I believe, is acting as counsel on art related matters to the Foundation. And I don't believe anyone has ever objected to Mr. Lerner of Sidley & Austin assisting the Foundation in that regard.
THE COURT: Okay. For —
MR. CARLSON: And I know Mr. Lerner is there

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because I spoke with Mr. Lerner over the weekend.
THE COURT: So both Mr. Heatwole and Mr. Lerner are going to be at the meeting that takes place tomorrow?
MR. CARLSON: That is my understanding, Your Honor.
THE COURT: And Sidley is here, as far as you are concerned, only representing the Foundation and not representing the individual interests of any of the defendants?
MR. CARLSON: That's absolutely correct, Your Honor. In fact, I don't think that the court file shows there has even been service on any of the individuals yet. And I am certainly not here on behalf of any of the individuals.
THE COURT: Okay. I am going to deny the motion to disqualify Sidley for purposes of today. If tomorrow, at tomorrow's board meeting there is a vote taken and it turns out that Sidley's representation is ratified, there is no issue whatsoever. If it turns out that Sidley's representation is not ratified and the board says we don't want Sidley, at least we have a

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situation where the Foundation is represented by able counsel for purposes of today.
MR. QUINLAN: I appreciate Your Honor's concern and I appreciate Your Honor's decision in this matter. And we, of course, will abide by that.
THE COURT: Next, to the Attorney General. Petition as a matter of right for leave to intervene. Does anyone think that the Attorney General doesn't have a matter — doesn't have a right to intervene?
MR. CARLSON: Your Honor, I am not willing to say that. What I would say, if I have a chance, is I just received these papers at about noon today. Obviously, I have had no opportunity to study them in any detail or to review them with the Foundation itself, I frankly would ask the court for time to respond to the petition to intervene, and I don't believe that anybody will suffer any prejudice in any way, because it's obvious on the face of the papers, even the little bit I was able to look at them, that they are basically a derivative of the plaintiffs' papers. They

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start with the verified, supposedly verified allegations of the complaint, they seek for purposes of the TRO, essentially the same relief, and I would like some relatively short period of time to respond to the petition to intervene.
THE COURT: The only issue that anybody, I think, might take with that, is the standards for a TRO are somewhat different when the Attorney General is here seeking to enforce a statute. There are certain things that don't need to be proven. They are just assumed.
MR. CARLSON: That may be true, Your Honor. I, frankly, think that the argument, though, will proceed essentially the same, whether it is totally Mr. Quinlan arguing on behalf of the individual directors who have sued, or whether Mr. Perkins is involved in any way.
THE COURT: Mr. Perkins?
MR. PERKINS: Judge, with regard to that, Judge, we came to this court last Friday finding out the things that were alleged by certain plaintiff directors. We had heard some facts about that, but we learned a great deal of facts

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through those papers, and it is real clear to the Attorney General that the people of the State of Illinois need to be in the case. This is a charitable trust that belongs to the people, and as our papers show, the directors who are the directors of this Foundation today, only two of them were directors at the time Dan Terra was alive and a director. At the time Dan Terra, last time, in 1996, when Dan Terra was alive and he was a director, there were six directors. Only two of those people are currently on the board of 11 people. And we have 11 people who have only been stewarding this organization for a short period of time. There are terrific allegations from some of the directors lodged against the others. There are facts that we know about certain acts of the directors, particularly Judith Terra, that we find are actionable, and we believe that this trust is in jeopardy and the principal concern and the reason it is of an emergency nature, are particularly twofold.
One is the serious concern that the collection and the materials that are

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compromising the museum's collection, are in the hands of people who are no longer impugned with the long-term institutional knowledge of this organization. They are new employees. The head of security is not there, the long-term head of security. We are concerned about what happened to the — what is happening to the collection. We are told that people have brought the collection, parts of the collection to their homes. We are very concerned about where the collection is. We think we need quick relief to ascertain and account for the collection, find out exactly where it is and if it is all still in the possession of the Foundation.
In addition, this thought in these papers that we received on Friday and some other papers that we managed to obtain over the weekend, show that there is definitely an intent by a number of the people on this board to move this Foundation out of Chicago. It's very clear from the papers that there is a group of people who are on that board, brand new to that board in terms of running an institution of this sort, who want to move it to Washington, D.C., want to

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combine it with other organizations, want to take $400 million worth of assets from Chicago —
THE COURT: They are not all in Chicago.
MR. PERKINS: Well —
THE COURT: Some of them are already in Paris, correct?
MR. CARLSON: Absolutely. They are in Giverny.
THE REPORTER: I'm sorry?
THE COURT: Giverny.
MR. CARLSON: G-i-v-e-r-n-y, Monet's home.
MR. PERKINS: Judge, you are correct. Some of the artwork is there. However, artwork is exchanged because the purpose of a museum is for people to see different pictures. If you only had a certain set on the wall forever, people would only come once and they wouldn't come back again. These museums often trade art pieces so that the public gets a greater array of them. Yes, there are some in France, however —
THE COURT: Isn't the 450 million, the property in Chicago, the property in Giverny, if I'm pronouncing it right, and the collections at

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both places? So it is not all collections. It is not all art.
MR. MULACK: Cash and collections.
MR. PERKINS: The art — I think the art is 180 million, somewhere in that neighborhood. The money is in the 200 million plus range situation.
THE COURT: Some of it is real estate, right?
MR. MULACK: Yes, there is real estate, also.
MR. PERKINS: There is real estate.
MR. CARROLL: 30 to 40 million here, Your Honor. And whatever Giverny is.
MR. CARLSON: It's my understanding, Your Honor, that the Foundation owns one-third of the real estate in the town of Giverny. We have a very substantial presence.
THE COURT: Go ahead, Mr. Perkins.
MR. MULACK: That is an exaggeration, but that is okay.
MR. PERKINS: In any event, Judge, the center here is in Chicago. That is where Dan Terra intended it to be.

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Today we received James Terra's affidavit which clearly sets that forth. He was with his father when it was founded. This Foundation is a family founded foundation in the name of Daniel Terra who made hundreds of millions of dollars and donated them to an art museum and located it here in the City of Chicago, and we know from both his son and newspaper accounts and his actions, that he wanted that museum here in Chicago.
To allow certain people to just decide that it is better that it's in Washington, DC, that maybe the collection is merged with the national gallery or given to some other institution like some other art museum in Washington, DC, and they will join the boards and they will be part of the social circle in Washington, DC, is certainly against the interest of the people of the State of Illinois.
THE COURT: We are just talking right now about whether or not you need to be in today.
MR. PERKINS: And, Judge, therefore, whether Mr. Quinlan can persuade Your Honor and his clients have enough facts and ability to

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persuade Your Honor, the people cannot depend upon that. So we, with all due respect, would like to represent ourselves and our interest with regard to this Foundation in this case with regard to the allegations. So we believe we definitely need to be in here today. I don't think there is any question that we have a right to be here.
THE COURT: You have been in this business and the charitable section for a long time, Mr. Perkins, right?
MR. PERKINS: Yes, Your Honor.
THE COURT: Are you aware of any case law where the court ever said the Attorney General doesn't have a right to intervene in a case involving the charitable trust?
MR. PERKINS: At the trial court level, a few, Judge, which were reversed in Appellate Court and the Supreme Court has said we have the right to be here. It is very clear in Illinois law that the Attorney General is, with a few exceptions, the only person who can enforce a charitable trust. Maybe the family of the founder has a right to also appear and try to

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enforce a charitable trust, but certainly the public and the Attorney General's representative have a right.

THE COURT: Mr. Carlson, I know you are at a disadvantage. You just got the papers several hours ago. There are quite a lot. I did get through them myself this morning, as soon as they came, and I am not aware of any case law that says that they wouldn't be able to come in. And in looking at all of the cases that have been cited, including the one in — I think there is only one involving another museum, the Harding Museum, the Attorney General was in on one. Has your quick research in your firm found anything that would justify their not being able to be here?

MR. CARLSON: I am not quite that quick, Your Honor, and, frankly, on behalf of the Foundation, I don't know that we would have any objection to their intervention. On behalf of the Foundation, all I wanted was a chance to study the papers, study the case law, respond in some way. In fact, paragraph 9 of Mr. Perkins' petition says basically that the Attorney

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General doesn't know whether and to what extent any of the individual defendants or the Foundation may have violated the Charitable Trust Act. We are, in fact, an Illinois not-for-profit corporation, and on behalf of the Foundation, I have no problem answering whatever questions Mr. Perkins or his office may have about the Foundation, the Foundation's activities, their plans or anything of that sort.

The board of the Foundation is over in France, as are the officers, but if Mr. Perkins would get me whatever questions he may have about the conduct of the Foundation sometime this week, as soon as the people from the Foundation are back here in the United States, I will start to provide him whatever answers he may be seeking as indicated in paragraph 9. And that would at least give me a chance to take a look at his papers and decide, talk to the Foundation and decide what our response to the petition is.

THE COURT: Okay. I am going to let the Attorney General in as a matter of right. Just

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for the record, when you all dropped off the orders on Friday, I was also presented with a one sentence order granting the Attorney General leave to intervene, and I refused to sign that order because I had no petition. I had no initial pleading, and it wasn't with any kind of notice, so that notice did not get entered. An order will be entered today granting leave to come in as a matter of right, and I am certainly willing to reconsider at a later time if the Foundation comes in with some authority that says they don't belong here, I am always open to being educated.

MR. CARLSON: Thank you, Your Honor.

THE COURT: You can do that at another time.

MR. GRIMM: May it please the court.

THE COURT: You don't have to hang around if you don't want to.

MR. GRIMM: That's what I was going to ask, Your Honor.

THE COURT: Anybody feel that Mr. Grimm needs to stay here?

MR. GRIMM: Unless they want to put me on

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the stand, I would like to escape back to the friendly confines of Winston & Strawn.

THE COURT: Anybody have any objection?

MR. CARROLL: It's not raining today.

MR. QUINLAN: I guess the weather improved today, Terry.

(WHEREUPON, Mr. Terry Grimm left the proceedings.)

THE COURT: Now, we have petition to intervene of James Terra, and that one I am not going to rule on today. I have not read it. I don't know that any counsel read it. It just came in, and although, I have read Mr. James Terra's affidavit, which just came in this afternoon, I think that anybody who wants to object should be given an opportunity to do that. That's not necessarily the slam dunk situation that the Attorney General wants.

MR. MULACK: May I respond, Your Honor?

THE COURT: Yes.

MR. MULACK: Donald Mulack on behalf of James Terra. Mr. Terra is, by way of background information, probably the only person who can shed light on what happened back in 1978 when

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the museum was first created. Jim Terra is the sole surviving family member who was instrumental and part of the creation of the museum in 1978. His daughter — his sister, I should say, Penny, died, his mother died and his father has died. So Jim was there when it was originally incorporated.

THE COURT: And he is the executor.

MR. MULACK: And he happens to be the executor.

THE COURT: And he may be a key witness if we ever get to an evidentiary hearing in this case. The only issue I have today is, does he have a standing, should I let him come in right now and intervene without letting anybody else object?

MR. MULACK: Well, our position is that he certainly has the right as a matter of right to intervene because — representation of his interests and his family's interest and his father's and mother's intent, who created the museum back in 1978, is not adequately represented. Based on that position alone, we think he would have a right to come in. Falling

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short of that, Your Honor, if Your Honor should decide that that should not be the case, he should have a right to intervene as a matter of discretion because the facts, the law are the same with respect to his position, and what has been filed in this case so far. So he would bring a perspective to this, Your Honor, and protect the family and be able to tell this court and advocate those interests very vociferously, that he should — that the court should look to this intent that was created by Daniel Terra and Adeline Terra when they set up this museum and when he was incorporated, as well, to keep this museum in Chicago.

This was a gift to the City of Chicago, the Chicagoland area, and the people of this area, and that is what he is very strong on. His mother and his father talked about it. Jim was part of those conversations, and they said, it should stay here in Chicago, because there is not, within a 400 mild radius of this area, a museum devoted exclusively to American art. And so we believe that no one else has the intimate knowledge that he does to be able to

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articulate and develop those points before this court and, therefore, he seeks intervention on that.

THE COURT: It doesn't say whether he is seeking to intervene as party plaintiff or party defendant.

MR. MULACK: Party plaintiff. If it's not in there, it is a mistake, Your Honor, an oversight, Your Honor. And that is party plaintiff. We support the position of the plaintiffs in this case, and Mr. Terra, frankly, is quite shocked about the conduct of what he read over the weekend, alleged in this complaint, verified complaint, that these things are taking place, that they are trying to take his mother's and father's gift from this City to another city where there is just no family connection with respect to Jim or his mother.

THE COURT: Mr. Quinlan, does the — do the plaintiffs believe that James Terra has standing in their — as a matter of right or permissively to be a party to this case?

MR. QUINLAN: We surely would believe that they have at least permissively, and maybe as a

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right. I have not sat down and investigated that.

THE COURT: And what about the Attorney General?

MR. PERKINS: Your Honor, we are very familiar with the law with regard to that and, generally, I would be standing here telling Your Honor in any court, that the Attorney General is the exclusive party to protect the charitable trust. However, if one reads the cases, there are — I think it is Castle versus The Art Institute, I think, might be the case that it is referenced, and it — there is clearly — or Ferguson versus Russell, one of those two.

MR. MULACK: It's Ferguson.

THE COURT: Ferguson.

MR. PERKINS: In any event, there is a right by the family members to enforce family gifts to charity. At least the courts have recognized the family members can come forward, and, in certain circumstances, have a right to participate to attempt to enforce the charitable intent of their ancestors.

THE COURT: And do the courts allow those as

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interventions as party plaintiffs in those cases?
MR. PERKINS: Judge, I can't say that I have studied exactly how they come in, but I would think that in a situation, but there were cases, I am sure, where the Attorney General was both a party and the family member was attempting to participate, as well, and whether they were by intervention or — I presume at some point it would have been by intervention, because it is generally not the situation where the Attorney General would be — be in filing a pleading with the people and somebody else initially, so I presume that those cases come about in that way in which someone is trying to enforce the family charity intent.
Normally, Your Honor, and I probably will be sorry I say this today, but, you know, there are a few instances when other people have a right to come in and try to enforce a charitable trust. And I think it is true when it is a family member. Having said that —
THE COURT: Mr. Carlson, have you read the paper?

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MR. CARLSON: I have not read the paper, Your Honor, especially because Your Honor has deduced and I guess he has revealed here, that he is not seeking to come in to help me, and I am standing here all by myself. I would like some short period of time, perhaps 10 to 14 days, to review the paper and respond.
THE COURT: Well, I think it is reasonable to give you a short period of time. I am not granting the intervention right now. But we will talk about the short time after we see what else happens.
MR. CARLSON: That's fine, Your Honor.
THE COURT: And, Mr. Mulack, you we are welcome to stand, however, you are welcome to have a seat if you want to, however you feel more comfortable.
MR. MULACK: No problem standing.
THE COURT: Now, let's get to the motions for a temporary restraining order. I have a couple questions. One, there is definitely a board meeting that is going ahead tomorrow; is that correct?
MR. CARLSON: That is my understanding,

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Your Honor.
THE COURT: And all of the board members received this agenda that is attached to the defendant's — I'm sorry, the plaintiffs' complaint, which is tab 9, which is the board meeting agenda?
MR. CARLSON: That is my understanding, Your Honor.
THE COURT: Now, did the board members receive anything else with this agenda?
MR. CARLSON: I believe they may have, Your Honor. The agenda itself indicates that there were tabs involved, so there may have been the documents that relate to this particular agenda.
THE COURT: Has anyone seen any of — the complete packet? And the reason I ask that, is If is, review and approval, acceptance of minutes, and there are a whole bunch of board minutes of committee meetings there. And in the pleadings that I have been given, I have strategic planning minutes of March 13th, which I have read, the strategic planning minutes of April 5th, which I've read, I do not have the

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ones from May 10th, which looks like maybe the last meeting of the strategic planning committee. So I don't know whether or not — it is very, very preliminary discussions. These discussions were about The Art Institute. They were about all kinds of things, and they weren't just simply, let's close up and move to Washington.
Does anybody know if the board was given — that's my first question — all these minutes?
MR. QUINLAN: We don't know that, Your Honor.
THE COURT: Has anybody seen the meeting minutes?
MR. CARLSON: Yes.
MR. QUINLAN: We have a packet of materials — I am trying to pull out for Your Honor now — which are primarily the minutes, and Your Honor is correct, but I did not go through and check them off as to whether each one of those were part of it.
THE COURT: I was wondering whether they made any more progress because they weren't very

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far along by April 5th. So I am interested what happened on May 10th.
And then the other thing was, there was going to be a committee report from the strategic planning committee. I think that is where all the action is. Does anybody have a report from the strategic planning committee? Does anybody have a clue what they are going to be talking about tomorrow?
MR. CARLSON: I know, Your Honor, Mr. Gidwitz, one of the plaintiffs here, is, in fact, chairman of that committee. I don't know if he prepared a written report or not. I haven't seen one. I do have with me here today here in court strategic planning minutes from May 10th of the year 2000, Your Honor, and I do have in my possession, although not with me in court, what may very well be the set of minutes that were given to the board members prior to this meeting. I know this meeting was scheduled since last June. I know that materials were distributed and that everybody got long in advance of tomorrow's scheduled meeting.
MR. QUINLAN: Your Honor, I can tell you

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Mr. Gidwitz —
MR. QUINLAN: Right.
THE COURT: — is head of strategic planning, and they are giving their report tomorrow. And I assume that they are either recommending something or not.
MR. QUINLAN: On that issue, they are not.
THE COURT: Okay. So where on the agenda is this item going to come up tomorrow?
MR. QUINLAN: I do not know. What we presented to you the other day, which was called the white paper —
MR. CARROLL: Exhibit 2, which we sent to you today, Your Honor.
MR. QUINLAN: Exhibit 2 was what they had just received when they arrived there and they faxed us — faxed it to us.
THE COURT: Hold it one second.
MR. CARROLL: With our reply that we just filed a short time ago.
THE COURT: With the reply you filed right now. Just a second.
MR. CARROLL: That's Exhibit 2.
THE COURT: You mean B?

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this, and, as I say, we are looking for our packet. There was a packet of materials many of the people got when they were there. Some people got it immediately prior to when they went over, but on the agenda, the agenda is normally this way, and it does not detail and does not say what is going to be discussed, did not discuss some of the material. The backup material is helpful in ascertaining that, but what was not included anywhere, and that — my people have advised me that, is any discussion about removing the procedure from or moving the Foundation from Chicago, away from Chicago to Washington. There has been general discussions in the past about other facilities, other uses, other relationships. I think Mr. Terra attested to that himself, and that generally is all that has taken place.
There has been continuing discussion about other facilities, other arrangements, the possibilities of making some arrangements with other people, some here, sometimes some other places, but never moving this out of Chicago.
THE COURT: Well, your gentleman,

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MR. CARROLL: Yes, excuse me, B.
THE COURT: A vision of the future?
MR. CARROLL: Yes, ma'am.
THE COURT: Okay.
MR. CARLSON: Probably also, Your Honor, Exhibit E to the Attorney General's petition. The Attorney General has attached Exhibit E to his petition or to his complaint, board meeting minutes from August 24, 2000.
THE COURT: I have read those. I have read those, but did that — did those board minutes, board meeting minutes in August say we are all going to vote on this issue in France in September?
MR. CARLSON: No, there is discussion about recommendations and suggestions that a decision be made in September, but there is nothing in these minutes, Your Honor, that a decision will definitely be made in September.
THE COURT: This is everybody talking on the telephone?
MR. PERKINS: I might want to point out, on page 3 of that, it says, the board concluded it will have to address the above 12 issues, as

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well as the issue of determining the strategic partner. That is two-thirds of the way, right at the bottom of the list of 12 and it says, ownership of the collection, where the collection would be housed, the question of office space.

And when you read through these, these 12 things, and you read the two pages that precede it, it is about closing Chicago and moving to Washington, DC, and the 12 things are who will own the collection, how will it all be done. And then it says, the board concluded it will have to address the above 12 issues, and it goes on and says —

THE COURT: As well as the issue of determining a strategic planner. I mean, I —

MR. PERKINS: Partner.

THE COURT: Partner, I'm sorry. As I am looking at this, I am not seeing anything to suggest that something is going to happen tomorrow. And that's what we are here for. I have a complaint that is pled and a motion that is pled on information and belief.

MR. CARROLL: No, Your Honor,

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MR. QUINLAN: That's not correct. If you look at the complaint, it is not on information and belief, and we have struck the other ones that were in inadvertently when going through and preparing this in the motion for temporary restraining order.

The complaint is not on information and belief. The complaint itself is, and they don't even suggest that, Sidley does not suggest —

THE COURT: The motion, then. The motion is.

MR. QUINLAN: But as you know, Your Honor —

MR. CARROLL: Two times.

MR. QUINLAN: — it is based on the complaint, not on the motion, and the motion we are striking and substituting a clarified copy.

THE COURT: Paragraph 3 is not meant to be on information and belief?

MR. QUINLAN: No, strike that.

MR. CARROLL: We have a corrected copy, Judge. We can substitute right now. We were going to do it later, but we have a corrected copy here with us that we can substitute that we

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gave to counsel before we started.

THE COURT: So the allegation is that defendants plan to use tomorrow's meeting to close the museum and move the Foundation and its assets to Washington?

MR. QUINLAN: That is correct. And that — and with the vision for the future it becomes clear that that is —

THE COURT: Help me out on this. Vision for the future. Whose document is this?

MR. QUINLAN: This is Paul Tucker's, who passed this out.

THE COURT: The president.

MR. QUINLAN: Passed it out, I believe.

MR. CARROLL: Chairman, too, Your Honor.

THE COURT: Chairman.

MR. QUINLAN: Chairman and president. The first introduction of that that we are aware of, it was submitted to Mrs. Daley for consideration at her committee on education, which really, this isn't the jurisdiction of that committee. It was brought to the attention of the other members, that is, our other members, right after she had received it.

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THE COURT: Excuse me, I am sorry to keep interrupting. This isn't new. This has been around for a couple months.

MR. QUINLAN: No, this vision, absolutely, brand new. What is not new is the discussion of various things about where they are going to be, what they are going to do, looking for partners, all of those kind of things, that these were issues to be discussed. But there also was to be a study committee who were going to be involved in studying these issues, getting the study committee to make a report, and this report was then going to be presented to all the members.

The report then turns out to be Mr. Tucker's vision of the future, and this is what caused the great concern of our members when they received this for the first time about two or three days ago.

MR. CARROLL: When they arrived.

MR. QUINLAN: When they arrived in Paris. And, as Your Honor can see from looking at this, this is a comprehensive plan and scheme which Mr. Tucker talks about having gone through, and

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found a place, having talked to people about placing it there. He personally is engaged in all these conversations, and that it has come down — he has decided that the best thing to do is move the Foundation, to move it to the Pharmaceutical Building, and at the same time to then go to the National Gallery with the art museum. None of this was discussed. None of this was part and parcel of the strategic planning discussion.

Mr. Gidwitz is not aware of anything in here having been completed by Mr. Tucker. And this is dropped on them at the very last minute. Now, this is to be the new program and this is what we are going to consider.

THE COURT: That was drafted some day last week is what you are saying?

MR. QUINLAN: I don't know.

THE COURT: Or received. This is — the first time any of you heard anything about it was sometime last week.

MR. QUINLAN: Any of our people heard about it. That's all I can say. I cannot say what any others may know or what they don't know. I

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do not know the date of this document. I don't know who it went to besides Mrs. Daley, who was the first one we were aware of.

THE COURT: So this is a document that may or may not be the subject of discussion tomorrow?

MR. QUINLAN: Well, we assume that this is, then — the intention was to discuss this and to make this decision and that is what my people were led to believe was going to take place tomorrow.

THE COURT: That's what I am trying to find out, your people were led to believe. How? Was it somebody — I don't have an affidavit from any of those people that said, you know, it is going to be called for a vote. We have been — we have been informed there is going to be a vote tomorrow. Normally, when I get TROs, the first thing I do is flip to the affidavits. I don't have any of that here.

They are going to have a meeting, an annual meeting. They are going to elect their officers. I don't even have an officer — I don't even have an affidavit who's running, who

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is withdrawing, there may be some people on this board that don't want to be on this board anymore. People may have submitted their resignations. You want me to stop their election. You don't want me — you want me stop them from making, you know, new terms. You want me to stop committee assignments and you want me to really stop them from doing anything tomorrow.

MR. QUINLAN: No. I don't want you —

THE COURT: Maybe I don't understand it right.

MR. QUINLAN: Right.

THE COURT: That's the way that it seems to be pled.

MR. QUINLAN: What I am talking about — well, first of all, we don't know. Okay. We don't have the nominations even. The normal procedure is the same people are nominated, unless there is some indication that they weren't going to be nominated.

THE COURT: Is there an indication that they are not going to be nominated?

MR. QUINLAN: Yes, on Mr. Buntrock. Now,

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Mr. Gidwitz was talked to, Mr. Buntrock was talked to, I guess Mrs. Daley was talked to as well, and they were informed of that through Mr. Tucker. Now, the intention was not to replace him but just to remove him, and that was clearly the intent that they had to conduct this meeting on Sunday. And I was told that last night.

THE COURT: Is that the intent for tomorrow?

MR. QUINLAN: As far as my plaintiffs know at the present time, if, in fact, you do not enjoin them from doing so, they will remove Mr. Buntrock and may well remove Mr. Gidwitz, who has also filed this lawsuit in retaliation as they believe for taking these positions and raising these issues. That's the reason for the emergency.

None of this information has been shared. None of this information has been made known to the board, generally. It is selectively handled. That's our allegation. That's what we are contending is the problem here and that's what's taken place. We are not

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trying to stop all the work of the meeting tomorrow. The only thing we are trying to stop are those things that directly go to the allegations of our complaint.

THE COURT: Do I have a verified allegation that it is the intention of this board to kick off Mr. Gidwitz or Mr. Buntrock tomorrow against their will?

MR. QUINLAN: You have nothing in relation to Mr. Gidwitz because Mr. Gidwitz has only come to that belief now. He was not the target prior to the filing of this lawsuit. He now believes, based on his discussions there and the people that he has talked to on his side, apparently, having talked to Mr. Tucker, that he may well also be the target if we go forward, and he informed me of that last night.

THE COURT: Mr. Carlson, are there any plans, to your knowledge, to remove any directors against their will tomorrow?

MR. CARLSON: Your Honor, what I assume is going to take place is the — if we are lucky enough to not have the court enjoin us, is the annual meeting of the board and the election of

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officers, I assume Mr. Gidwitz can nominate Mr. Buntrock if he wishes to, and Mr. Buntrock could nominate Mr. Gidwitz. And there will be a vote. I don't have any idea what the result of that vote will be. But there are 11 directors, as I understand it, two plaintiffs here and only three directors have been sued as defendants. There are at least six other directors who aren't even in this litigation, who I guess the plaintiffs don't even have a complaint against. And I assume there will be an election, and I don't know if Mr. Buntrock or Mr. Gidwitz or anyone, particularly, will be elected or not.

MR. PERKINS: Judge, I just want to point back to the August 24, 2000, board meeting minutes. Page 2, where the discussion says, there are two issues on the agenda and in September we should make sure there are two issues on the agenda at the September meeting: Giverny and —

THE COURT: I'm sorry, which page?

MR. PERKINS: Page 2, Your Honor.

THE COURT: Where on this page?

MR. PERKINS: Down at the bottom. There is

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like two little dots towards the very bottom.

THE COURT: I see it, all right.

MR. PERKINS: Giverny and being central, and closing Chicago, and Dr. Tucker suggested that we definitely make a decision in September about closing Chicago. And when you read the totality of these minutes of August 24, 2000, there is no question, that there is an intent to vote in the September meeting about closing the museum here in Chicago. They talk about strategic partners. We receive a vision statement of the future from Mr. Tucker that says, we want to take the collection, give it to National Gallery. We want to buy some building on the Mall in Washington, DC, to have some kind of teaching facility there. We want to get out of Chicago.

And that's why the Attorney General spent the weekend putting these papers together and has come here this afternoon to point out to Your Honor that this isn't really — this is their minutes, and it is clearly their intention to have this discussion. They set forth that they are going to do it in September. Now, we

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have the additional benefit of Mr. Gidwitz and Mr. Buntrock explaining their surprise by these things, the concern about these things. This is not a decision that should be made by this board under the allegations and circumstances we have here. And to let them go forward and remove the two directors who have brought this to light, of course, that is what is probably going to happen.

Would they not do that? Wouldn't they be foolish to tomorrow say, let's continue to have these two directors who have sued us on the board so they can continue their lawsuit? They are not going to do that, Judge. It is a situation where if you permit them to go forward tomorrow and remove directors, and permit them to have a vote on whether they are closing Chicago, we face a very grave danger to this Foundation, and that is why we are here on an emergency basis. It is based on their own papers, and we are not asking Your Honor to remove people today.

THE COURT: You are asking me — you are asking me to do two limited things, which is

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prevent the Terra Foundation board tomorrow from removing any director against his will —
MR. PERKINS: That's correct.
THE COURT: — period.
MR. PERKINS: That's correct.
THE COURT: And prevent them from taking a final vote to close Chicago.
MR. PERKINS: That's correct, Judge.
THE COURT: Is that what you are really look —
MR. QUINLAN: Essentially the same thing.
THE COURT: What is all this business about committee assignments, changing committee assignments, all that?
MR. QUINLAN: Well, the reason for that, though, is what we are trying to do is, we have alleged a plan or scheme. As part of that plan or scheme, which is in paragraph 53 of our complaint, they are trying to silence those people who have an objection to them violating their duties under the articles of incorporation and in the mission statement of Dan Terra. Plus, they are trying to stifle any debate here or any question of their procedures and their

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activities, such as acting without board approval involve, acting without Executive Committee approval and conducting business as their own private business, so they want to shut down those voices and removing people as the chair people of the various committees, who happen to be supportive of our clients. My clients do not stand alone.

There is probably at least two other members and maybe three other members who are supportive, at least, of their issues here that we raise in court. But to have them identified and to be part of that, they could well become targets, so we are not getting into that kind of discussion. But the point of changing chairs is that by them restructuring, they would then be harmful, harming the entire operation of this and be taking sanctions against those people who they believed are part of this process of basically saying we have to obey the law and we have to abide by fiduciary duty, and we would be we regarding — all we are asking, that those kind of assignments, that those — removing anybody against their will and taking final vote

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be deferred. This is an important vote and these important decisions should be taking place here in Chicago under the eyes of the Attorney General, under the eyes of the public of the State of Illinois.
THE COURT: Is the Attorney General allowed to attend their meeting?
MR. QUINLAN: He has reason to intervene to raise the issue.
THE COURT: I mean, are these public meetings, you say, under the right of the public and press and Attorney General? These are Foundation meetings. I mean, in their own minutes they ask, by invitation, their own attorney to show up. It sounds, I mean, it sounds good but does — if it is here in Chicago, does the Attorney General get to walk in?
MR. QUINLAN: The Attorney General can go in by court order as he is trying to do here. What I am saying, in taking place here in Chicago, just as you're suggesting it is very difficult for you to make judgments about what is taking place and what isn't taking place, and, quite

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frankly, it is quite difficult for us because we have to communicate with our clients, the seven-hour difference, which has already been anticipated, they are already in the next day there, so for us to be dealing with our —
THE COURT: No, about that time. Isn't —
MR. CARROLL: About 11 o'clock.
THE COURT: 11 o'clock at night.
MR. QUINLAN: Basically, the next day. Dealing with them, dealing with that type of situation is difficult for counsel, it is difficult for the court. And we appreciate that there is very little harm, if any, to do this, found to this Foundation to be in a situation of just merely conducting that at a later time. They have done that in the past. And the bylaws basically provide that if they don't elect the officers at the annual meeting, they are to do it later, not sooner.
THE COURT: Okay. You have asked in your motion that I enjoin them from electing anyone. What if they elect — what if they want to elect the same board? Are you seeking to prevent that, to have an election of the same board?

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MR. QUINLAN: Your Honor, the problem is, I don't know what the scheme or plan is. We are trying to take the most limited relief possibly to prevent them from effectuating an illegal plan or scheme. And it is the status quo that we are trying to preserve, which is merely what has been operating as it is. There is no emergency here to change anybody. There is no emergency to fire anybody.

They don't have any compelling interest to do this. It isn't suggested. There isn't anything. The Foundation will not fall apart. The annual meetings normally replace, continue to reelect the same people unless there is somebody who is desirous to step down, and there is nobody that, I am aware of, that does.

THE COURT: That is what you just said a moment ago, you said, traditionally, this hasn't been always done at the annual meeting, isn't this board traditionally every annual meeting elects its officers.

MR. QUINLAN: That is when they are supposed to elect them. I am saying that it doesn't necessarily and hasn't — in the past, it has

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not always happened. I don't mean to say that it is regularly it doesn't happen, but regularly meetings are held here in Chicago.

THE COURT: But I don't have anything in the paper that say they have in the past elected officers other than their September meeting, do I?

MR. QUINLAN: Oh, no. That's true. But the bylaws themselves provide that they can. They are empowered to do that, and all I am saying, is the bylaws themselves envision it is not a critical date to do it. All they are saying is you can do it later. It is no big deal. At the convenience of the board. So it doesn't say you have to do it within ten days, you must do it within 30, it says at the convenience of the board.

THE COURT: Mr. Carlson, I think we have limited it down, now. What I understand is being talked about is, they can meet tomorrow, they can have their meeting, they can do their committee reports, they can do whatever else that they were planning to do, they can even have an election, as long as they do not

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elect — I mean vote to remove someone against their will, which could then be interpreted as retaliatory measure for this lawsuit. And they can discuss all they want moving out of Chicago or moving to Washington or doing whatever. They just cannot take a final vote or a vote to — take any steps that would effectuate that move.

What would be your response to that?

MR. CARLSON: I was following Your Honor until the last comment about not taking steps to effectuate that vote.

THE COURT: I could conceive of a situation where they might not take a final vote but they could also take a vote to start moving paintings out of Chicago elsewhere.

MR. CARLSON: Well, frankly, Your Honor, the collections that are owned by the Foundation —

THE COURT: Goes back and forth all the time.

MR. CARLSON: They go back and forth all the time. They are loaned out and everything else. I am terribly concerned about the motion for TRO that would tell this private not-for-profit corporation that operates two museums — the one

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in Giverny is probably more substantial than the one here in Chicago — that we can't move any of our artwork.

THE COURT: Well, I am worried — I was concerned also about whether or not you have any inner museum agreements in effect right now, where you have some kind of agreement that —

MR. CARLSON: We have obligations.

THE COURT: — next week you have got to loan a painting to New York, or something like that?

MR. CARLSON: What also concerns me, as I like at Exhibit D and Exhibit E —

THE COURT: To the complaint.

MR. CARLSON: That's to the Attorney General's complaint, Your Honor, and I believe I guess they are also attached to the reply belief handed to me this afternoon, but I haven't had a chance to look at it, the white paper memo from Mr. Tucker —

THE COURT: Okay.

MR. CARLSON: — and the minutes of August 24th, counsel makes all sorts of assertions about how these documents show we are

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going to do a terribly evil thing and we are going to close the museum tomorrow. These documents to me, on their face, are nothing more — look at D, for example — than an expression of opinion by one board member out of 11 that he thinks certain things might make sense. He talks about how he believes things, he believes the Foundation should do certain things. And, in fact, he believes certain things are wise.

In the end, he simply expressed an interest in reviewing all of this at Giverny, and as I read the board meeting minutes of August 24th, we said Mr. Tucker — Dr. Tucker is just suggesting a decision in September. That is an these documents show is just mere suggestions, mere considerations of possibilities that have existed since last March and before. And yet plaintiffs' counsel comes in and argues that these show that were plans and plots and schemes — I heard that word a lot — to accomplish certain things tomorrow, and I am concerned about moving in any direction where the court intervenes in a properly

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constituted, properly called annual meeting. And there is no allegation that this annual meeting hasn't been properly called or is proceeding improperly.

All of the board members that are there in Giverny support it. It is not that easy, Your Honor, to get the board of this Foundation together. We have many French nationals who serve on our board. It makes perfect since while all there to conduct an annual meeting and to do an election of officers, such as they ordinarily do, and to do whatever other things they would do to review or consider proposals or options, whatever business might come before the board. And I have some concern if the court is suggesting that the meeting can go ahead, but there shouldn't be the election of officers. You know, Mr. Buntrock and Mr. Gidwitz are free to convince their other two or three friends. All they need is one more friend, just four, and it will be a majority of the board and they can reelect themselves. And they are free to say whatever they want to.

THE COURT: You are shaking your head no.

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MR. CARROLL: There are 11 members, Your Honor.

THE COURT: There are 11 members.

MR. CARLSON: Well, I thought if they had four friends and they added the two, that is six, and that becomes a majority of 11.

THE COURT: Is it majority vote for officers?

MR. QUINLAN: It is, but it would be six to five, Your Honor. And, frankly, if counsel is saying this is nothing more than just their intent to talk about it, then what is he concerned about an injunction?

THE COURT: That was going to be next question.

MR. CARLSON: That was going to be the final point I was coming to, Your Honor. I was getting around to it, Your Honor. I apologize.

Courts do not ordinarily enter orders prohibiting the boards of not-for-profit corporations or any other kind of corporation from going ahead and conducting the business of the corporation. I understand, perhaps, the court's feeling or Mr. Quinlan's feeling, hat if

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there is no intention to do these things, what difference does a court order make?

I come to court under a flurry of motions alleging all sorts of things, including how I wasn't properly retained. I hesitate to agree.

THE COURT: You couldn't possibly agree. You couldn't possibly agree. I am not asking you to agree.

MR. QUINLAN: Your Honor —

THE COURT: Wait one second. I have got to go back to the issue. I am still not really sure, though, that as far as you know, that there is really even a definitive plan to place before this board tomorrow a vote to finalize, this is it, we are closing the museum.

MR. CARLSON: In fact, Your Honor, it is my understanding that there will not be any final vote on plans or proposals for any of the museum facilities, particularly the Chicago facility or any the Foundation's facilities tomorrow. There is certainly no intention, as far as I understand, to vote to close the Terra museum on Michigan Avenue tomorrow at the annual meeting.

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THE COURT: Is there going to be — I think you told me, yes, a moment ago, a few minutes ago, that there is going to be counsel from Sidley going to this meeting tomorrow?

MR. CARLSON: Your Honor, I believe Mr. Lerner may, in fact, be present. I know he is present in Giverny. I spoke to him in Giverny yesterday. I frankly don't know for sure if he was going to be present at the board meeting, but I can find out.

THE COURT: I take it that when the board was — had been considering over the months in committee meetings and then in this telephone meeting in August, the possible closing of the museum, it was doing so without the knowledge that it is — that is it the position of the Attorney General that they can't close the museum and move out of Illinois?

MR. CARLSON: I am shocked that the Attorney General takes that position. It is so contrary to the articles of incorporation and bylaws. So it is certainly not the belief of the Foundation that the Attorney General has any problem whatsoever with a decision like that.

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THE COURT: But I would assume that that knowledge that the Attorney General has come into court and is trying to stop them from closing the museum, would perhaps make counsel do some research or discuss or look into the situation for the board tomorrow. I mean, I can't imagine that the board would be voting to close the museum.

MR. CARLSON: You are correct, Your Honor. The Foundation is certainly interested in the opinions and beliefs of the Attorney General's office of the State of Illinois. We are an Illinois not-for-profit corporation. To the degree I have had a chance to look at Mr. Perkins' papers, I believe they are simply wrong as a matter of law. I believe we are entitled, pursuant to our articles of incorporation, pursuant to our bylaws, pursuant to the Illinois Not-For-Profit Corporation Act, to close the facility on North Michigan Avenue if that is what the board chose to do, but no one has any intention to do that tomorrow, Your Honor.

THE COURT: Let me just go back to

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Mr. Perkins for a moment. I take it that ultimately you are suggesting that this case is going to get resolved through a preliminary injunction hearing or permanent injunction hearing where the issue is going to be the intent of those who have contributed to the museum and the intent of he who — those who created it, and that that would be not a summary judgment motion, that would be an evidentiary matter that the court would have to hear testimony on?

MR. PERKINS: Yes, Judge, it is not something that I believe can be resolved by summary judgment and to just correct a couple quick remarks. Articles of incorporation say many things, and, in fact, it permits the board to just dissolve the corporation to give it to another 501(c)(3). I suppose they could give it to some animal charity if they thought that was — because that's what the articles, really, I guess, under some interpretations would permit.

However, we would not agree with that, and we believe that as Your Honor has just

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stated, it is often necessary to consider who gave the money and for what purposes. In this particular instance, our papers are replete with that, but I won't repeat it for Your Honor. But it is pretty clear that the founders, in our opinion, did not want it to leave Chicago.

And just to correct the record in one respect, the museum here in Chicago is quite substantial. Giverny may be a wonderful place and it may have some of the collections, but the Chicago museum is no stepchild to the Foundation's activity. It is a jewel for Chicago and it is an important part of Chicago and it is an important part of Chicago's charitable treasures.

THE COURT: And you would be seeking a permanent injunction hearing to prove that that was the original intent, and it is your position that once you prove that, that will be sufficient and you also want a declaratory judgment that they may not close the museum and move the collection outside the state, period?

MR. PERKINS: Yes, Your Honor.

THE COURT: And would we be at that time

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talking about how much could be closed, how much of the collection could be moved? What is your position going to be at that point?
MR. PERKINS: Well, Your Honor, I think we all recognize that this is a situation where a museum can have other locations and they exchange collections not only among those locations, but with other institutions. We are expecting there to be this substantial museum that we see in Chicago in perpetuity, and that that is the intent Dan Terra when he founded it, when he went out and personally selected all of this art. This is the situation. He probably picked 90 percent of the pieces of art that are in this museum, and we will be able to prove that. We have the son, who is — who has been with him through the entire process, and this is the situation where I don't think the facts, really, are going to be that much in dispute. It may become a question for a chancellor or a trier of fact, so to speak, to decide what that is and apply the law, but I think it is very clear what Dan Terra had in mind. He named it after himself. He put it in he city that he

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grew up in and did business in and became successful in and I think he wanted to give back.
THE COURT: Except for the Harding case, has there been any other museum case in Illinois where private or a not-for-profit— you don't want me to use the word "private," a not-for-profit corporation is precluded from closing if it chose to do so?
MR. PERKINS: Judge, I think it is a question of when we say closing, a great example are not-for-profit hospitals that find themselves in situations where they must close down.
THE COURT: Because they can't make it financially, and this is not that situation.
MR. PERKINS: But in the question — the reason I point that out, Judge, there is money left over, substantial moneys often. In fact, they sell often to a for-profit or they sell to another not-for-profit to gather back a whole bunch of money for a foundation. And the question is, always, what will that money go for. And I can tell you this, it is always very

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parochial, I mean, it can be such that a Southern Illinois community isn't interested in seeing that money migrate up into the Chicagoland area to be given for other purposes.
And so I think these concepts are very rooted in community and very rooted in the common law, which is the state, the sovereign state, and the community that creates the charitable trust should remain the beneficiary of that charitable trust. That is the heart of what the common law provided. And, true, as we move forward in society and we have United States with different states and different locations, it becomes a little harder always to apply that in each circumstance. But I think when the founder has so clearly indicated his intent, and I think when the situation is so clear that it belongs in the State and in the City of Chicago, I think it is a situation where that trust must stay under the protection of the people of the State of Illinois, under its representatives, under the protection of this court.

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THE COURT: So it is going to be your position, ultimately, let's assume it is not this particular case, but let's assume there is a museum in town that is simply not making it. There is not attendance, it is not doing well. It just is not supporting its efforts, it is not growing and, for whatever reason, it has to close. It is your position that even if that were the case, the assets would have to ultimately remain in the State of Illinois or the collection would be sold for the benefit of the people of the State of Illinois.
MR. PERKINS: Yes, Judge, absolutely.
THE COURT: And that is really what it comes down to. They can't ever move these assets elsewhere.
MR. PERKINS: Your Honor, I have been on many cases and that is our position in every case.
THE COURT: Okay. Is there anything else? Mr. Quinlan, you have been very patient.
MR. QUINLAN: No, not at all. I obviously concur with what the Attorney General says and his perspective, obviously, is a little

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different than ours, but I think maybe counsel representing the Foundation here does not really offer the court anything other than it is offering form over substance.

I would note that the cases that he cites are really private corporation cases, not corporations that are charged with a public purpose and a not-for-profit situation. As Your Honor knows, obviously, in the not-for-profit situation, they are treated as charitable trusts when it is the public who is the one that is the foundation or the trust is dedicated for whose purpose it is they are furthering. They receive tax deductions, obviously, from the State of Illinois. And in this case, Mr. Terra chose to put it here, chose to incorporate it here, and chose to take advantage of the tax deductions and the benefits which were available to him, and that was his intent to have it here. We see nothing else other than that.

And, frankly, that's what my people have been trying to do, is to further the interest of making that Foundation or museum and display of that art available here in Illinois

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for the educational purposes that he founded. And that is what would happen if, in fact, they take any final action.

The fact of enjoining the corporation from taking actions, enjoining them from holding a board meeting. Your Honor, we have cited you some cases in our packet that surely say that can be done. And, surely, in a situation to try to remove somebody for purpose of trying to exercise their rights under the statute and to call upon others to respond to their obligations and their rights in a fiduciary obligation, the Winston & Strawn case I think is clear in that situation, surely they have a right to, in that instance, even if they have an absolute right in ordinary circumstances to fire somebody, they can't do it in that setting.

THE COURT: Let me try one other thing, and I am sorry to interrupt you again.

MR. QUINLAN: That's all right.

THE COURT: But let's assume that the board, as a whole, except for the three that you mostly complain of, are really upset about this lawsuit and they are really mad tomorrow, and they get

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to their meeting and they want to oust Mrs. Terra and Mr. Tucker and Senator Simpson. They couldn't do that under the injunction that you are asking for?

MR. QUINLAN: No. I would rather that we take the time here to look at this in a responsible, reasonable way and not allow motions on either side to make these choices. I am very comfortable with the Attorney General speaking on behalf of the people of the State of Illinois. My people, my clients, are really just trying to do what they believe the law requires and trying to exercise their fiduciary responsibilities.

Both of these gentlemen sit on major boards and major art foundations and museums in this city and around the country. And they are no come to this table without a great deal of experience and knowledge of their responsibilities in this setting, and they have so exercised them in prior situations on boards and art foundations and groups. Some of the major ones in this country, both Mr. Buntrock and Mr. Gidwitz, sit on. So they are not people

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who are not aware of what their obligations and responsibilities are.

So what they are asking is merely that they have the right to make these observations, these objections, and if the board acts as a responsible board. Their fear is primarily that nobody will serve on this board if this is allowed to continue. That has been part of the problem since the new administration has taken over. A lot of changes are taking place, a lot of people that have come and gone.

Most of the people will not take the step to file a suit. Not say this is enough, we want to do something about it. These people are here this Chicago, residents of the City of Chicago, the State of Illinois, business people from here, and they are gravely concerned about what they have seen that has taken place.

All we ask Your Honor to do is to put this off for a reasonable period of time so Your Honor can look at this case, listen to our arguments and, of course, the Attorney General's arguments as to why we needed the protections we need and why these things should be changed.

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We have filed a verified affidavit alleging these things are going to take place, and I think under the rules that Your Honor knows, those stand as the evidence in this case, and that is the basis upon which we should decide this. And I do believe it's fair and reasonable, and there is no harm. And balancing the harm in this instance surely does not harm the Foundation. If there is any kind of transfer of something to meet a schedule, surely that can be addressed by this court. Surely, that can be addressed in a more proper setting, than 5,000 miles away in this type of setting and all of a sudden it all has to happen on Tuesday. There is no in the meeting minutes here, there is nothing in the agenda that suggests any of those things.

THE COURT: Does the board meet every month?

MR. CARROLL: Quarterly.

MR. QUINLAN: Quarterly, Your Honor. But the executive continue continues, and that is one of the reasons.

THE COURT: I'm sorry, they did meet in

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August by phone. Was that a special meeting called for some reason? Do they do telephone meetings frequently?

MR. CARLSON: I am afraid I don't know the answer to that.

MR. QUINLAN: They do them. I don't know how frequently. Their normal meeting schedule is quarterly, but they do meet from time to time, and the executive committee, of course, exits in the interim to take up thing that needs. to be taken.

THE COURT: And the executive committee does not have authority to close the museum?

MR. QUINLAN: That's correct.

THE COURT: And get rid of the collection, os it can only be done in a board meeting?

MR. QUINLAN: That is correct.

THE COURT: Do you want the last shot?

MR. CARLSON: I would appreciate it, Your Honor.

THE COURT: Okay.

MR. CARLSON: Your Honor obviously has read my opposition papers and I will not spend the time to go through every point made in the

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opposition papers. As a factual matter or as a legal matter, I would simply like to state for the record, Your Honor, that is, of course, true that a TRO is a drastic emergency remedy that should be issued only with the utmost care and not in the case that is doubtful.

This is a lawsuit brought by two individual members of an 11-member board against three other individual members of that board and against the Foundation, itself. They purport to bring it as individuals. They apparently have no complaint with the other six members of the board who aren't involved in this lawsuit. I, frankly, Your Honor, believe there is substantial legal question as to whether these plaintiffs even have the standing to bring this lawsuit. And I do intend to address that.

Your Honor was asking Mr. Perkins about evidentiary hearings and things of that sort. At least my preliminary examination of this causes me to wonder whether the plaintiffs even have a legally cognizable claim or whether we cannot dispose of this on behalf of the Foundation on the motion. And to sort of

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highlight that problem, and I think it is a problem that relates to a request for a TRO, they cite only one source of any protectible right, any protectible interest. They cite that portion of the Not-For-Profit Corporation Act dealing with actions that are ultra vires and they are coming in this court, Your Honor, seeking to prohibit the Foundation's board from conducting its board election at its annual meeting. And two other things, closing the Terra Museum on Michigan Avenue and transferring or moving around any artwork or assets. As we have demonstrated in our opposition papers, Your Honor, it is clearly not ultra vires for the Foundation to do any one of those three things, conduct an election tomorrow, close the Terra Museum, transfer the Terra Museum's assets. It is specifically authorized by the Not-For-Profit Corporation Act, and Mr. Quinlan makes all these comments about how can you be doing this in France, why don't you do it here in Chicago. Somebody may suggest we have got to have the Attorney General present and everything else.

805 ILCS 105/103.10(j) specifically

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allows this foundation and any not-for-profit corporation to carry on its operations either within or without this state to exercise any of its powers, either in a foreign country or in any part of the United States. It is really preposterous, Your Honor, to argue that anyone has alleged any possible action by the Foundation that is truly ultra vires.

It doesn't make any difference what Mr. Terra's son may say in an affidavit or any of the other supposedly factual matters that they refer to in the complaint. There are two documents to look at to see what Mr. Terra's intent was, if that intent is relevant, the articles of incorporation and the bylaws. Nothing in the articles of incorporations or the bylaws requires this Foundation to conduct a museum facility where it is on North Michigan Avenue, to have a museum anywhere in the City of Chicago. It was, in fact, started in Evanston, not in Chicago, nor is there anything in the articles of incorporation or bylaws that requires us to even have a museum anywhere in the United States.

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Now, the fact of the matter is, that Your Honor's initial questions were exactly right, all that is happened is preliminary discussion and consideration of a number of possibilities and options, many of which were proposed by Mr. Gidwitz himself at the March 13, 2000, strategic planning committee meeting.

The board would like to consider the possibility of possibly making changes to the Michigan Avenue facility, perhaps building another museum facility somewhere else in Chicago, possibly entering into an arrangement with The Art Institute of Chicago where the collection would be housed there.

On the basis of the complaint they have filed and on the basis of their motion, they have not proven any of the elements that is necessary for them to prove in order to get a TRO from this court, that extraordinary remedy. They haven't demonstrated any emergency, any need for this type of relief. And contrary to what Mr. Quinlan says about balance of the hardships, for Your Honor to interfere in the board election tomorrow would mean that

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Your Honor is in effect entering a mandatory injunction that the existing board has to continue in place as the board of this, the Foundation, for Your Honor to enter any kind of an order that the board can't debate and decide and do whatever it may deem appropriate tomorrow in terms of moving artwork or transferring assets or closing the Michigan Avenue facility, whether or not the board intends to do that, and I do represent to the court that the board does not intend to do that, but for this court to enter an order saying that they can't do those kinds of things runs dangerously close to having this court come in and start to manage the affairs of a not-for-profit corporation.

And I would just make reference again to the argument we have made in the balancing hardship argument on papers. I think it is clearly, ordinarily the courts defer to the business judgment of the boards of directors, courts do not interfere in the internal affairs of private, not-for-profit corporations, and I would assert, Your Honor, that the plaintiffs have not established the elements they need to

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establish in order to get a temporary restraining order such as they are seeking in their motion.

THE COURT: Thank you.

Is there anything further?

MR. QUINLAN: If you want me to respond. He is challenging our right under 103.15. And it clear any director has the right to, any act, it says, in any proceeding by a member entitled vote or by a director —

THE COURT: Slow down. Slow down.

MR. QUINLAN: I'm sorry. It is 103.15(a). In a proceeding by a member entitled to vote or by a director against the corporation to enjoin the doings of any act or acts and including the transfer of real property or personal property, we may challenge and raise the issue and seek injunctive relief against an ultra vires act or raise the capacity of the person to do that. And what we are doing is we are raising that, the act being ultra vires, which is outside the authority that they received through the articles and through the mission statement. And in determining what is the mission statement and

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what is the intent of the testator, then you have to look also to surrounding circumstances and that's the reason that we have raised those issues about statements that he has made in the past, his statements at the time of making the transfer, his statements at the time of setting it up and Mr. Jim Terra's affidavit clearly sets forth his personal knowledge of its intent.

So surely the intent of this to be located in Chicago, in Illinois, is crystal clear. And the only thing we have to do, we don't have to prove our case, as counsel suggested, all we have to do is raise a fair question about whether or not, a fair question concerning our right to this relief. And we have no problem about discussions and considering this. What we have a problem with, as Your Honor has clearly stated, taking any final decision or making a final decision to do something that would be, as we allege and the Attorney General, ultra vires and outside of their authority to do that and they cannot do it. All it has to be is a fair question. All we ask is for a reasonable period of time to get

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our case and present is to Your Honor to allow Your Honor to rule on those things.

THE COURT: Okay. I am going to grant a very limited temporary restraining order in this case. The courts are not supposed to interfere with corporations and their operations unless there is some real reason to do so. In this case, as I see it, the issue is whether or not the closing of the museum and the moving of its assets and collection outside of the State of Illinois, whether that act is an ultra vires act. That is the only issue in the case, whether they can do it or whether they can't do it.

And, as I see it, the plaintiffs have at least raised enough of a fair question to entitle them to very limited relief. I am not going to tell this corporation that they can't elect officers tomorrow. I am not going to tell them that they can't elect directors tomorrow. I am going to say that they may not remove any current director from office against his or her will, and only that. They can do their committee assignments. They can take whatever

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kinds of votes in leadership that they think is appropriate. They may not take any final action to close the Terra Museum in the State of Illinois or to remove the bulk of its collections or assets from the State of Illinois. And I say the bulk of it, because I am not going to interfere with any contracts that may be in existence or inner museum loans or anything else that they would normally be doing in their regular course of business.

MR. QUINLAN: Would you limit your order to that, so there can't be any exercise of this unless there are prior committed obligations to do something?

THE COURT: They may make a commitment tomorrow for a new museum. There may be some types of negotiations that have been going on. I know there are allegations in these pleadings which counsel cannot address, since he is representing the Foundation and not the individuals, about certain pieces having been in improperly used. I assume that these — this complaint and these allegations have now been made available to all board members, and I

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assume there is going to be some discussions about some of these issues tomorrow. I am not going to squelch any of those discussions. I am not going to prevent the board from — from in any way talking about what all the alternatives might be. They can certainly do that, but they can't take any final action, at least for a period, and that is what we need to talk about, 10, 20 days, whatever. I am concerned that there is no notice here or there is question of notice to the unserved individual defendants, so my preference is to do this for only about ten days.

MR. QUINLAN: Well, We gave the best practical notice, Your Honor, under the circumstances, and we do everything we possibly could. They have been served by mail, telephonic communication, where those efforts attempted to be made, has been sent to Giverny, France. I am sure they know what is taking placement. These things —

MR. CARROLL: Federal Express, Your Honor.

MR. QUINLAN: Overnight Federal Express. Under those circumstance, that is a TRO with

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notice, Your Honor. Frankly, ten days under these circumstances, just getting people back here so that we can have some ability to deal with this situation is going to take at least that kind of time. And, also, Your Honor —

THE COURT: Let me just ask. I know counsel hasn't had a chance to talk to his client very much, is it going to make much of a difference whether it is 10 or 20? I assume some of these folks have vacations planned. I also have a motion for expedited discovery, that I have to deal with next, and they are going to want to take somebody's deposition real quick.

MR. CARLSON: I think, Your Honor, for the first time this afternoon I agree with Mr. Quinlan on something. I think ten days probably is unrealistically short. Without conceding that the entry of the order was proper, Your Honor, it frankly is the case, we weren't intending to do any of the things that the court has enjoined, except I don't know how board election would come out.

THE COURT: There may still be a board election of officers and you could still, and I

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want to make it clear, you can elect all the people that are still there, and if some officers wish to resign, they can elect replacements.

MR. CARLSON: I don't know, frankly, Your Honor, whether Mr. Gidwitz or Mr. Buntrock want reelection or not want reelection, and I don't know whether they wish to be reelected or not. Be that as it may, Your Honor, I was going to suggest, I think the Foundation would be interested, as I indicated I think there are legal deficiencies with this complaint. And there may way well be legal deficiency with Mr. Perkins' complaint that I just received and haven't had a chance to take a look at.

So from the Foundation's perspective, I can't say for the individual defendants, if Your Honor is going to schedule a preliminary injunction hearing, we would almost rather have that be sometime in the middle or latter time part of October than sometime as quickly as ten days from how.

THE COURT: Well, I won't — what I am going to do is, why don't I enter an order for only

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ten days and have you back at the conclusion of those ten days for the purpose of extending the order. You will know, there will not be a preliminary injunction hearing at that time. The purpose of that will be to extend the order to a time that is reasonable after you have had an opportunity to — well, first of all, after counsel has had a chance to find out whether or not Sidley is representing the board.

MR. CARLSON: This may be the last time you see me, Your Honor.

THE COURT: There may be motions to dismiss. I don't have to deal in any event with the motion on the intervention of James Terra. And until the individual defendants are served, I really don't want to deal with that issue until I know that they are properly here and before the court. And I will know that more in ten days.

Can I have my book, please.

MR. QUINLAN: Your Honor, one other thing I would ask, I don't know if Your Honor decided not to do this or overlooked it, but I will address the issue of the executive committee

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which has the right to take management decisions in the interim, and I ask that they not be allowed to make any changes in makeup of that committee, which we have alleged would only take place on the basis of them taking unauthorized action in retaliatory action against our clients, both of whom are on that same —

THE COURT: I'm sorry. You lost me. The executive committee isn't empowered under the bylaws to make final decisions about the collection and the museum?

MR. QUINLAN: About moving.

THE COURT: About moving. But the executive committee can pretty much run the corporate or the Foundation —

MR. QUINLAN: Right.

THE COURT: — in between meetings?

MR. QUINLAN: Right.

THE COURT: Right now the executive committee is different than what — who is on the executive committee?

MR. QUINLAN: The executive committee is —

where is our list?

MR. CARROLL: Gidwitz, Buntrock.

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MR. ROTHSTEIN: Terra.
MR. CARROLL: Terra, Tucker.
MR. QUINLAN: Tucker.
MR. CARROLL: And Stephanic.
MR. QUINLAN: Marshall.
THE COURT: Marshall. Okay. So the two plaintiffs, Judith Terra and Paul Hayes Tucker and —
MR. CARROLL: Two plaintiffs, two defendants Your Honor. There is one independent left, so to speak.
THE COURT: Okay,, and you are seeking that they not be able to change that composition?
MR. QUINLAN: During this same time.
THE COURT: Do you want to be heard on that one?
MR. CARLSON: On behalf of the Foundation, Your Honor, I would object to that. Your Honor has already put her finger on what is, in fact, the central issue in the lawsuit, and, that is, whether it is ultra vires to close Michigan Avenue and/or move its assets, its artwork out of the State of Illinois. The executive committee, as Your Honor suggested, I don't

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believe, has the authority to do that in any event. So it doesn't make much difference on one issue that exists in this lawsuit, what the composition of the executive committee is. And I would not agree that on behalf of the Foundation, it would be proper on the basis of anything alleged here, for the court to enter an order to interfering with the day-to-day management of the Foundation by ordering the executive committee to stay the way it is if the board chooses to change the composition of the executive committee.
THE COURT: Now, the only thing that I remember from these papers that the executive committee might have done wrong over this period of time, is have they actually approved the participation in the Foundation of the defendant, is it Michaeli.
MR. QUINLAN: Yes, he participates with them, Naftali Michaeli?
THE COURT: Yes.
MR. QUINLAN: He is a nonemployee, he is a nondirector, a nonofficer and he participates in the decision-making process and direction of

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employees, and that is our allegation, as well.
THE COURT: And he was the one who was involved in removal of the staff and all of the — the loss of the staff?
MR. QUINLAN: He is not the only one, but he was involved in that, in those activities, and clearly acts without any portfolio with any — without any authority, without any justification, and so we were asking — we would ask that we continue this because they conduct the business here, and they can do anything and have done anything.
THE COURT: Okay. But —
MR. QUINLAN: And they make all the decisions regarding any of the board activities during the interim.
THE COURT: But the ones who have been doing it and making these decision in the interim, you want to prohibit the board tomorrow from changing that?
MR. QUINLAN: The only reason I would do that, is at least we would have, arguably, notice. They actually have been operating around the board. They have been operating

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around the committee. They don't call the committee meeting during this. We are asking that be enjoined from doing that, that they could not bypass the executive committee. That was one of the things we were asking as our relief. Hence, I would want to at least keep it the same. We surely aren't going to be able to get them to get off the executive committee, but the last thing in the world we want is to have them stack the executive committee, and then, of course, once you have enjoined, they may accomplish almost everything else during the interim and go on with their business.
And we alleged that is part of the mismanagement and the waste that is taking place because they are making critical decisions regarding the use of the facilities, all of the art, those type of things, and that is exactly what the Attorney General is complaining about. If this is allowed to go on during this period of time without even knowledge that it is taking place, I don't know how we protect our interest and protect the Attorney General's interest. I think it speaks to themselves.

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And these are the kind of acts the statute specifically envisions us complaining about when it talks about facts to be enjoined when they are acting without authority. And they are acting without authority when they go without the executive committee. But the problem is, that if we don't maintain the status quo now, we won't even get any notice. And then they can go about doing whatever they want, and their intention is to accomplish these other goals and we're just asking for a standstill. We don't think that that is any way that kind of a stretch.

MR. CARLSON: If I could say one more thing about the executive committee, Your Honor, I think that is a bizarre argument. There are only four out of 11 directors who have been sued and who are alleged to have done anything improper in connection with the Foundation.

THE COURT: I'm sorry, only three directors sued.

MR. CARLSON: I'm sorry, three, you are correct.

THE COURT: Because Mr. Michaeli is not a director.

MR. CARLSON: That is correct, Your Honor. Simply arithmetic, I miscounted. There are only three out of 11. The eight other directors, none of whom are alleged to have done anything improper ought to be free at tomorrow's annual meeting to compose the executive committee however they see fit. If fact, the entirety of the 11-member board ought to be free to compose the executive committee as they see fit. And for counsel to suggest there has somehow been all sorts of bad things that have happened under the stewardship of the current five person executive committee and to ask that court to enter an order requiring that same executive committee to stay in place, just seems to me truly bizarre. And I think the corporation ought to be left alone to manage its internal affair as its own board sees fit.

MR. QUINLAN: Your Honor, I would agree to just have — that Mr. Gidwitz and Mr. Buntrock cannot be removed from the executive committee. Because that would be consistent with your order because if counsel is suggesting that maybe his

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people would step down, that is fine. The Attorney General has raised questions about their removal as members of the board because of these activities.

My clients have to this under oath. My clients have alleged these acts, which is justified in finding at least a fair question. If consistent with your order, then, what we ought to have is, Mr. Buntrock and Mr. Gidwitz cannot be removed other if they request to do so, just as you provided in your order.

THE COURT: I have no problem with putting an addition to the order that no member can be removed from the executive committee without his or her consent, and that includes Ms. Terra and that includes Paul Hayes Tucker and Ms. Marshall, is that?

MR. QUINLAN: I don't know it.

MR. CARROLL: Stephanie Marshall.

THE COURT: Stephanie Marshall, okay.

MR. QUINLAN: Ms., I think, would be correct.

THE COURT: If it includes those, great, but I am not going to enjoin them from electing a different executive committee if the individuals who are on it no longer choose to serve on it.

MR. QUINLAN: That's fine, Your Honor.

THE COURT: And now we need to talk about your discovery. There is a motion for expedited discovery.

MR. QUINLAN: Yes, Your Honor.

THE COURT: And I don't know whether or not Mr. Perkins is joining in that, but who do you want to depose? Or who do you want to get answers from and when?

MR. QUINLAN: At the moment we are asking for documents.

THE COURT: Okay.

MR. QUINLAN: And that was the first thing that we were asking for and we have a set of interrogatories that we would address based upon the documents but our initial request was for the documents and, obviously, the first three people will be deposing would be more likely than not be the defendants in this action.

THE COURT: Have there been any problem getting documents from the —

MR. QUINLAN: We — our documents —

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THE COURT: — corporation or Foundation?
MR. QUINLAN: There are documents that we just don't know where they are, if they exist or done exist. And these are requests to see if there are any documents of such.
MR. CARLSON: I frankly am at a disadvantage, Your Honor. I have not seen any proposed expedited discovery. I received a motion.
THE COURT: There is just a motion.
MR. CARLSON: So I don't know what documents counsel is talking about.
MR. QUINLAN: Well, if Your Honor grants the expedited discovery, we also have a request for documents that we are happy to file.
MR. CARLSON: Just briefly, Your Honor, I would say again that for the same reasons that the motion for TRO doesn't demonstration any true emergency, the motion for expedited discovery doesn't demonstrate any true emergency. They don't demonstrate any specific harm that will occur if they are allowed to proceed on their extraordinarily expedited schedule if they are allowed to proceed that

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way.
THE COURT: Well, I am going to grant the motion in part by allowing plaintiffs to serve its discovery immediately, but only that. And then once it gets served and you see what it is, you can discuss compliance dates.
MR. QUINLAN: That's fine.
THE COURT: Now, ten days from today is going to take us to when? Counting October 5th, and let me just see what that day looks like.
MR. QUINLAN: Your Honor, I am not available on October 5th or 6th. I am out of town. Do you want to do it on the 4th.
MR. QUINLAN: Do you know what — that makes it what, about eight days. Can we kick it over to Monday?
MR. CARLSON: I, frankly, on behalf of the Foundation would prefer to kick it over to Monday.
MR. CARROLL: The 11th.
THE COURT: Monday — we don't want the 9th. That is a court holiday.
MR. CARLSON: That is why I want to be here.

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THE COURT: Okay. Monday, the 10th, is totally out of the question here. So is the 11th.
MR. QUINLAN: The 12th, Your Honor?
MR. CARLSON: Again, I would have no problem on behalf of the Foundation to do it on Thursday, the 12th.
THE COURT: That's fine. Why don't we do Thursday, the 12th, at 11 o'clock. TRO expires Thursday, the 12th, at 5:00, and that —
MR. QUINLAN: Unless continued by the court?
THE COURT: And the purpose of the October 12th hearing is to extend the TRO, to discuss the status of the expedited discovery, and to schedule a preliminary injunction hearing which will be scheduled on the 12th.
MR. QUINLAN: I appreciate that. I am sure what Your Honor is suggesting that you recognize we have no way to prove our case in that short period of time and, frankly, don't have a hearing date.
THE COURT: So you will get a hearing date on the 12th, but I want, since the case law says

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I have to set a preliminary hearing or I have to set a preliminary injunction hearing when I issue a temporary restriction order, I want to make clear, it is the intent of the court to extend the TRO on that date. But we will be dealing at that time with any motions that might have been filed by the defendant. Hopefully, all individuals will be served by that time. If I have everybody in front of me on that day, we will set down James Terra's motion for petition for leave to intervene, the question just being when we are going to hear it, not hearing it that day. So it is a status on discovery, extend the TRO, set any pending motions, including a petition for leave to intervene filed by James Terra.
And I am going to need some specific findings in today's injunction, the slowing down and hardship because I put that in all my TROs. Mr. Carlson?
MR. CARLSON: I was just going to ask Your Honor, it is probably self-evident under the rules, but I haven't had a chance to pull them out, since the plaintiffs are granted leave

to go ahead and file their discovery, I submit we be given the appropriate discovery leave.

THE COURT: Sure. Expedite discovery on both sides.

And, of course, just add the words that this TRO is entered without bond.

MR. CARROLL: Judge, I believe earlier, just one housekeeping matter, we talked about the corrected emergency motion that we would like to —

THE COURT: Right. You have leave to file an amended or corrected emergency motion and this is the original?

MR. QUINLAN: Original, yes. We can file the original.

THE COURT: I will give the original to the clerk and ask her to stamp it.

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

THE COURT: And I will get the copy. Please draw me up an order.

MR. QUINLAN: Judge, given the hour of the day, can we bring up our order first thing tomorrow morning?

THE COURT: Definitely not. There is a meeting. There is a time change.

Do it right now.

(WHICH WERE ALL OF THE PROCEEDINGS HAD IN SAID CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

I, JACQUELINE M. TIMMONS, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 26th day of September, 2000.

Certified Shorthand Reporter

C.S.R. Certificate No. 84-2949.

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MR. QUINLAN: Your Honor, the problem is, I don't know what the scheme or plan is. We are trying to take the most limited relief possibly to prevent them from effectuating an illegal plan or scheme. And it is the status quo that we are trying to preserve, which is merely what has been operating as it is. There is no emergency here to change anybody. There is no emergency to fire anybody.

They don't have any compelling interest to do this. It isn't suggested. There isn't anything. The Foundation will not fall apart. The annual meetings normally replace, continue to reelect the same people unless there is somebody who is desirous to step down, and there is nobody that, I am aware of, that does.

THE COURT: That is what you just said a moment ago, you said, traditionally, this hasn't been always done at the annual meeting. Isn't this board traditionally every annual meeting elects its officers.

MR. QUINLAN: That is when they are supposed to elect them. I am saying that it doesn't necessarily and hasn't — in the past, it has

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not always happened. I don't mean to say that it is regularly it doesn't happen, but regularly meetings are held here in Chicago.

THE COURT: But I don't have anything in the paper that say they have in the past elected officers other than their September meeting, do I?

MR. QUINLAN: Oh, no. That's true. But the bylaws themselves provide that they can. They are empowered to do that, and all I am saying, is the bylaws themselves envision it is not a critical date to do it. All they are saying is you can do it later. It is no big deal. At the convenience of the board. So it doesn't say you have to do it within ten days, you must do it within 30, it says at the convenience of the board.

THE COURT: Mr. Carlson, I think we have limited it down, now. What I understand is being talked about is, they can meet tomorrow, they can have their meeting, they can do their committee reports, they can do whatever else that they were planning to do, they can even have an election, as long as they do not

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elect — I mean vote to remove someone against their will, which could then be interpreted as retallatory measure for this lawsuit. And they can discuss all they want moving out of Chicago or moving to Washington or doing whatever. They just cannot take a final vote or a vote to — take any steps that would effectuate that move.

What would be your response to that?

MR. CARLSON: I was following Your Honor until the last comment about not taking steps to effectuate that vote.

THE COURT: I could conceive of a situation where they might not take a final vote but they could also take a vote to start moving paintings out of Chicago elsewhere.

MR. CARLSON: Well, frankly, Your Honor, the collections that are owned by the Foundation —

THE COURT: Goes back and forth all the time.

MR. CARLSON: They go back and forth all the time. They are loaned out and everything else. I am terribly concerned about the motion for TRO that would tell this private not-for-profit corporation that operates two museums — the one

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in Giverny is probably more substantial than the one here in Chicago — that we can't move any of our artwork.

THE COURT: Well, I am worried — I was concerned also about whether or not you have any inner museum agreements in effect right now, where you have some kind of agreement that —

MR. CARLSON: We have obligations.

THE COURT: — next week you have got to loan a painting to New York, or something like that?

MR. CARLSON: What also concerns me, as I like at Exhibit D and Exhibit E —

THE COURT: To the complaint.

MR. CARLSON: That's to the Attorney General's complaint, Your Honor, and I believe I guess they are also attached to the reply belief handed to me this afternoon, but I haven't had a chance to look at it, the white paper memo from Mr. Tucker —

THE COURT: Okay.

MR. CARLSON: — and the minutes of August 24th, counsel makes all sorts of assertions about how these documents show we are

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intevenor

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

No. 00 CH 13859

FILED
SEP 25 2000
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

ATTORNEY GENERAL'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COMES the Plaintiff-Intervenor, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, and moves this Court to enter an Order temporarily

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restraining and preliminarily enjoining Defendants JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, and in support thereof states as follows:

1. The Attorney General has filed a Complaint For Injunction, Breach of Fiduciary Duty, Removal, Accounting, Receiver, and Appointment of New Directors (hereinafter referenced as the Complaint).

2. The Complaint alleges that the Defendant the TERRA FOUNDATION FOR THE ARTS, an Illinois not-for-profit corporation (hereinafter "the FOUNDATION"), was incorporated on December 13, 1978, and that it was created specifically as an Illinois charitable trust with certain obligations and commitments to the ultimate beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS, taken from Illinois statutory law as specifically referenced in and incorporated by the Trust's Illinois not-for-profit Articles of Incorporation as well as by its By-laws. The Complaint also alleges that said charity has been subjected to fiduciary breach and abuse by certain of its directors; that the assets of the FOUNDATION have been misused, that the assets of the FOUNDATION are in jeopardy and danger; and that certain directors have acted to try to cause the closing of the Terra Museum of Art in Chicago here in Illinois.

3. The Complaint alleges that The FOUNDATION's specific charitable purpose is to preserve and exhibit collections of American art, to expand the artistic horizons of the public through educational programs, and that in furtherance of its charitable purpose and obligations to the PEOPLE OF THE STATE OF ILLINOIS, the FOUNDATION owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Avenue, Chicago, Illinois.

4. The Complaint alleges that the FOUNDATION was established by Daniel Terra, a

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successful Chicago area businessman in December 1978 and that from the time of its inception the FOUNDATION has had as its central and core purpose the establishment of an art museum in the Chicagoland area, specializing in bringing American art to the public and the People of the State of Illinois. The Complaint alleges that it was Daniel Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art and that Daniel Terra publicly stated that the FOUNDATION was committed to building and operating a world class museum in the Chicagoland area.

5. The Complaint alleges that from its inception the FOUNDATION was substantially funded by Daniel Terra who contributed hundreds of millions of dollars to and for the Terra Museum, and that as a result of Daniel Terra's efforts, others became supportive and made contributions to the FOUNDATION.

6. The Complaint alleges that the FOUNDATION is an Illinois not for profit corporation, which is governed and controlled by a board of directors, each of whom are elected to serve a term of one year, and chosen and elected by the sitting directors in office at the time of election, and that the board of directors is the ultimate corporate authority controlling the FOUNDATION. The Complaint alleges that Defendants, by serving as Directors of the FOUNDATION and by their actions holding charitable assets as alleged herein, have each became a trustee and fiduciary at common law over the charitable assets held by the FOUNDATION and are each a charitable "trustee" as that term is defined in Section 3 of the Charitable Trust Act (760 ILCS 55/3 (1997), and as such owe statutory fiduciary duties to the charitable trust beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS, as provided in Section 15(a) of the Trust Act (760 ILCS 55/15(a) (1997).)

7. The Complaint alleges that from the time of the FOUNDATION's inception through Daniel

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Terra's death on June 28, 1996, the FOUNDATION had been controlled a small board of directors of no more than six, whose members were substantially influenced by Daniel Terra, but that following Daniel Terra's death in 1996 the Board of Directors of the FOUNDATION has substantially changed and the FOUNDATION currently now has eleven directors.

8. The Complaint alleges that Plaintiffs GIDWITZ and BUNTRCK, who are current directors of the FOUNDATION, have alleged and verified that certain and several directors of the board of directors of the FOUNDATION, including Defendants JUDITH TERRA, PAUL HAYES TUCKER, and ALEN L. SIPMSON, have and are engaging in actions ultra vires and against the interest and purposes of the FOUNDATION, alleging said Directors are:

a) Attempting to cause the closing of the Terra Museum operations in Illinois contrary to the long standing promise of its founder that such would be an institution for the public here in Illinois.

b) Attempting to gain position and self recognition in a Washington DC charitable organization in exchange for the delivery of the assets of FOUNDATION, the termination of operations in Chicago and the end of a Terra museum in the United States..

c) Attempting to cause the closing of the Terra Museum operations in Illinois contrary to its name sakes, Mr. Dan Terra's intentions and suggesting a use of its assets contrary to the use Dan terra intended.

d) Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

e) Caused the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, which jeopardizes the

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security of the $100 million of art displayed and collected at Terra Museum;

f) Permitted a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

g) Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in operating Terra Foundation.

j) Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel; and

k) Misusing the art collection of Terra Foundation and allowing Judith Terra to personally possess and use museum art items and in a manner that placed the collection in danger and jeopardy.

10. The Complaint then incorporates the verified allegations of Plaintiffs GIDWITZ and BUNTROCK as summarized in paragraph 9 of this motion and thereby shows that the Defendant members of the Board of Directors of the FOUNDATION have been acting towards, or have been otherwise distracted by, self interest matters and have ignored and/or have permitted the Terra Museum in Chicago to lose its key staff and to jeopardize its charitable purposes and to place the organization in jeopardy without proper security for the collection and without sufficient historical institutional knowledge to assure the assets are safe and accounted for.

16di-000295

11. The Complaint alleges and shows that Defendant JUDITH TERRA had a history of conflict with the FOUNDATION. The Complaint alleges that shortly after the creation of the FOUNDATION in 1978 as aforesaid, Daniel Terra's first wife, Adeline, died, and that Daniel Terra subsequently married Defendant JUDITH TERRA on June 28, 1996. The Complaint alleges that prior to his marriage to Defendant JUDITH TERRA, Daniel Terra entered into a prenuptial agreement signed by Defendant JUDITH TERRA, whereby JUDITH TERRA acknowledged that she fully understood that the bulk of Daniel Terra's estate would go to the FOUNDATION in the event of his predeceasing her, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the said prenuptial agreement. The Complaint alleges that under the aforesaid prenuptial agreement, Defendant JUDITH TERRA agreed she would receive only a fixed amount of money and assets upon Daniel Terra's death, and that the bulk of his estate would go to the FOUNDATION.

12. The Complaint alleges that several days prior to his death on June 28, 1996, Daniel Terra was confined to a hospital, his life being sustained by the use of life supporting devices, and that shortly after midnight on June 28, 1996, the tenth anniversary date of his marriage to JUDITH TERRA, the life supporting devices employed to keep Daniel Terra alive were ceased, allowing JUDITH TERRA to seek and receive from Daniel Terra's Estate $4.5 million pursuant to the terms of the aforesaid prenuptial agreement. The Complaint also alleges that the aforesaid prenuptial agreement also provided that while Daniel Terra was alive, JUDITH TERRA would not agree to be a member of the board of directors of the FOUNDATION, and that she was not a member of the FOUNDATION's Board of Directors until Daniel Terra's aforesaid illness and death in 1996.

13. The Complaint alleges that in January 1997, Defendant JUDITH TERRA filed four further and additional claims for money against Dan Terra's estate despite the express terms of her

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Prenuptial agreement with Daniel Terra, and amounts paid thereunder, and in said claims, Defendant JUDITH TERRA sought art work and in excess of $42 million, which would otherwise pass as a bequest to the FOUNDATION, to be kept at the Terra Museum in Chicago, and that James Terra, Daniel Terra's son, and a founding Director of the FOUNDATION, who was named as the Executor of the Daniel Terra Estate, and who was represented by Bell, Boyd and Lloyd as counsel to the Executor, denied JUDITH TERRA's claims against the Estate and defended and litigated her $ 42 million in claims, asserting that none of her claims had any merit. The Complaint alleges that such litigation settled in the amount of $ 1 million, paid to JUDITH TERRA.

14. The Complaint alleges that JUDITH TERRA acted out of self interest and in breach of her fiduciary duty to the FOUNDATION in that:

(a) the funds paid to JUDITH TERRA under the prenuptial and the $1 million settlement of her claims would otherwise have passed to the FOUNDATION, and that her actions in filing the aforesaid claims was against the interest of the FOUNDATION;

(b) She caused the law firm of Bell, Boyd and Lloyd to be terminated as regular counsel for the FOUNDATION after 20 years of service out of retaliation for the adverse position James Terra and Bell Boyd and Lloyd took against Defendant JUDITH TERRA in the aforesaid litigation of JUDITH's claims against the Estate of Daniel Terra;

(c) She caused art pieces of the FOUNDATION and Terra Museum in Chicago to be brought to her home, despite objection from Museum staff; and

(d) She has engaged in discussions with defendant Director PAUL HAYES TUCKER to have the FOUNDATION close the Terra Museum in Chicago and move its operation to Washington D.C., where JUDITH TERRA resides, and/or to

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cause the FOUNDATION to merge with another institution in Washington D.C., which intended acts are contrary to Daniel Terra's intent.

15. The Complaint alleges that Defendant PAUL HAYES TUCKER acted out of self interest and in breach of her fiduciary duty to the FOUNDATION in that:

(a) He sent his white paper entitled " A Vision for The Future" to the FOUNDATION's Board of Directors which states that PAUL HAYES TUCKER seeks to close the Terra Museum in Chicago and to move the FOUNDATION and its art collection to Washington D.C., give its collections to the national Gallery and set up an educational facility in Washington D.C.;

(b) He made remarks suggesting that the FOUNDATION should move to Washington D.C. and that it should close down the Terra Museum in Chicago;

(c) He has allowed and/or caused the FOUNDATION's staff to be depleted of long term staff, has allowed and/or caused the FOUNDATION's long term security personnel to quit, has allowed and/or caused its executive director to quit, and has directed that art belonging to the FOUNDATION be delivered from France to Defendant JUDITH TERRA's home.

16. The Complaint alleges that Defendant ALAN K. SIMPSON acted out of self interest and in breach of her fiduciary duty to the FOUNDATION by supporting the plan to close the Terra Museum in Chicago and to move the FOUNDATION's operations and assets to Washington D.C. in defense of JUDITH TERRA, and in complete disregard of the intent of Daniel Terra.

17. The Complaint alleges that the totality of the issues presented in the Complaint establish that the FOUNDATION is a charitable trust in jeopardy, whose long term institutional employees have quit, whose controlling number of Board members are more interested in their own vision, self interest, and/or personal goals of promoting their status in society,

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than in properly safeguarding the FOUNDATIONS mission. The Complaint also alleges that a small group of Directors, loyal to the announced purposes of the organizations principal benefactor, Daniel Terra, are being subjected to retaliation, removal or neutralization.

18. The Complaint alleges that the Defendants acting in a manner that in endangering the trust's assets, and that based on the totality of the equities, new fiduciaries are needed to protect the trust from the self interest and improper action of the aforesaid Defendant Board members of the FOUNDATION. The Complaint alleges that Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALEN L. SIPMSON, and the FOUNDATION have breached their fiduciary duties to the FOUNDATION as a consequence of the aforesaid, and that the FOUNDATION is in need of protection from Defendants pursuant to Section 16(b) of the Trust Act. (760 ILCS 55.16(b) (1977).)

19. Section 16 of the Trust Act provides that the actions of Defendants as set forth in the Complaint, which are violations of Section 15 of the Trust Act, subject Defendants to statutory injunction, said section providing as follows:

"Sec. 16 (b) Upon application to a court of competent jurisdiction, in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and he seeks injunctive relief and removal of such trustees, the Court may, as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest."

(760 ILCS 55/16(b) (1997).)

20. The conduct of Defendants have caused, is causing, and will continue to cause THE PEOPLE OF THE STATE OF ILLINOIS immediate and irreparable harm for which

16di-000299

there is no remedy at law.

WHEREFORE, Plaintiff-Intervenor prays that this Honorable Court Enter an Order :

A. Temporary restraining defendants from the following:

(1) Holding any further meetings of the Foundation's Board of Directors, until a new board is constituted by this court;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

(5) Transferring, moving, disbursing, selling or exchanging any assets of the Terra Foundation.

B. Preliminarily and permanently enjoining defendants from the following:

(1) Holding any further meetings of the Foundation's Board of Directors, until a new board is constituted by this court;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

(5) Transferring, moving, disbursing, selling or exchanging any assets of the Terra Foundation.

C. Appointing, temporarily, a receiver to operate and maintain Terra Foundation pursuant to: the Court's equitable powers, the common law, the Charitable Trust Act and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

D. Temporarily appointing a receiver to conduct an accounting of all assets of the Terra Museum and Terra Foundation and determine and locate all assets of the Foundation.

E. And such additional relief as the Court deems just and equitable.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JAMES E. RYAN, Attorney General of Illinois

BY: Assistant Attorney General

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16di-000301

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED

SEP 25 2000

AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intevenor

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants

PLAINTIFF'S MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NOW COMES the Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES

16di-000302

E. RYAN, Attorney General of Illinois, and in support of his Emergency Motion For Temporary Restraining Order and Preliminary Injunction, and states as follows:

INTRODUCTION

Plaintiff is requesting that this Honorable Court enter an order imposing a Temporary Restraining Order and Preliminary Injunction on Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, and the TERRA FOUNDATION FOR THE ARTS (hereinafter "FOUNDATION"), in conjunction with its Complaint, which Plaintiff has filed in this case pursuant to the Charitable Trust Act (760 ILCS 55/1 et seq. (1997)) (hereinafter "the Trust Act") and his common law duty to safeguard charitable assets. Plaintiff is seeking to prevent Defendants from (a) mismanaging the Terra Museum in Chicago to create the impression that the museum needs to be closed; (b) seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals; (c) attempting to remove employees and directors of the Museum that opposed the self interested acts aforesaid and to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law; and (d) endangering the assets of the Terra Foundation, as well as to prevent Defendants from engaging in ongoing violations of the Trust Act which Plaintiff has set out in his Complaint.

Plaintiff is seeking injunctive relief to prevent Defendants from holding any further meetings of the Foundation's Board of Directors, until a new board is constituted ; taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments; taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and taking any other action contrary to the by-laws of the Terra Foundation.

16di-000303

ARGUMENT

A Temporary Restraining Order is appropriate in this case in order to protect charitable assets held by the FOUNDATION and to prevent Defendants from engaging in any further breach of their fiduciary duties and misuse or waste of charitable funds. Such injunctive relief is necessary to preserve the status quo pending a hearing on the case to prevent Defendants from effectively divesting the PEOPLE OF THE STATE OF ILLINOIS of their charitable interests in the FOUNDATION, and closing the FOUNDATION's Illinois facilities and moving the FOUNDATION to Washington D.C. in violation of the Trust's Purpose. Plaintiff is seeking this injunctive relief pursuant to his statutory and common law powers and duty to protect and safeguard charitable assets and to ensure that monies designated for charitable purposes are devoted to their proper use. Such relief is proper under traditional common-law standards of equity and also because such relief is expressly authorized by a statute under which Plaintiff is suing.

I. A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED TO PROTECT THE RIGHTS OF THE PEOPLE IN CHARITABLE ASSETS AND TO PREVENT IRREPARABLE HARM AND LOSS OR MISUSE OF CHARITABLE FUNDS.

A Temporary Restraining Order is an emergency remedy issued upon a summary showing of the necessity of the order to prevent immediate and irreparable harm. (Stanton v. City of Chicago, 177 Ill. App. 3d 524 (1st Dist. 1988).) A temporary restraining order requires only a summary showing by a plaintiff that the order is necessary to prevent immediate and irreparable harm and that there is no adequate remedy at law. (Id.) It is well established that a party seeking a Temporary Restraining Order is not required to make out a case which would entitle him to relief on the merits, but needs only to show that he raises a "fair question" regarding the existence of his right and that the court should preserve the status quo until the case can be decided on the merits to prevent

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immediate and irreparable harm. (Buzz Barton & Associates, Inc. v. Giannone, 108 Ill. 2d 373 (1985.); Stanton v. City of Chicago, 177 Ill. App. 3d at 524.) A motion for Temporary Restraining Order is properly granted on the uncontroverted facts of a complaint. (Id.)

In the present action, Plaintiff has filed a complaint alleging significant wrongdoing by Defendants regarding the misuse of charitable assets. To satisfy the requirements of a Temporary Restraining Order as requested in Plaintiff's Motion, all Plaintiff would need to show at common law is (1) that there is a "fair question" regarding the existence of the PEOPLE OF ILLINOIS' right or interest in the charitable assets at issue here, (2) that the Court should preserve the status quo to prevent immediate and irreparable harm, and (3) that there is no adequate remedy at law. (Stanton v. City of Chicago, 177 Ill. App. 3d at 524.)

A. The PEOPLE OF ILLINOIS Have A Clear And Ascertainable Right To The Charitable Assets In Question And Therefore Raise A Fair Question Regarding The Plaintiff's Right Or Interest In the Terra Foundation.

At common law, the PEOPLE OF ILLINOIS are the ultimate beneficiaries of charitable trusts and charitable assets held in Illinois. (In re Estate of Laas, 171 Ill. App.3d 916, 920-921 (1st Dist. 1988).) In this connection, it is well established that the Attorney General's authority under the Charitable Trust Act to protect a public charity to prevent or correct abuses cannot be denied. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d 269, 276 (1st Dist. 1984).) The Attorney General is the sole officer authorized to represent the People of this State in any litigation in which the PEOPLE OF ILLINOIS are the real party in interest pursuant to article V, section 15 of the Illinois Constitution (In re Estate of Stern, 240 Ill. App. 3d 834, 836 (1st Dist.1992); People v. National Anti-Drug Coalition, 124, Ill. App. 3d 269, 275 (1st Dist. 1984)), and it has been judicially recognized that the Attorney General is the proper representative of the PEOPLE OF ILLINOIS in all actions concerning the enforcement or administration of a charitable trust. (In re Estate of Laas,

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171 Ill. App. 3d 916, 920 (1st Dist. 1988); People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) Since, at common law, the PEOPLE OF ILLINOIS are the ultimate beneficiary of charitable assets and property held for charitable purposes, the Attorney General of Illinois has standing to enforce charitable trusts and to see that charitable funds are applied to their intended charitable uses. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.)

In the present action, the PEOPLE's Complaint has alleged specific facts showing that Defendants have engaged in multiple acts in breach of their fiduciary duties to the FOUNDATION, and a need to safeguard such charity. Taking such allegations as true, as they must be in the absence of an answer to the Complaint, Plaintiff has clearly satisfied the requirement of showing the existence of a "fair question" regarding the existence of Attorney General's right or interest in charitable assets wrongfully taken.

B. The PEOPLE Will Suffer Immediate and Irreparable Harm If The Status Quo Is Not Preserved.

As already stated, Plaintiff's Complaint alleges that Defendants have mismanaged the Terra Museum in Chicago to create the impression that the museum needs to be closed; have sought to close the Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals; have attempted to remove employees and directors of the Museum that opposed the self interested acts aforesaid and to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law; and have endangered the assets of the Terra Foundation. The injury that would be perpetrated on the FOUNDATION and its beneficiaries the PEOPLE OF THE STATE OF ILLINOIS would be to irreparably deprive them of the benefit of the art collection held at the Terra Museum in Chicago. In effect, without the imposition of a Temporary Restraining Order, the

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PEOPLE OF THE STATE OF ILLINOIS will suffer a loss of at least $450 million in charitable assets, and based on the allegations of past wrongdoing, will be prevented from truly discovering the extent to which charity has been harmed. Only the imposition of a Temporary Restraining Order pending the holding of a hearing or further action by the Court will enable the PEOPLE to safeguard the charity which Defendants have wronged.

C. **There Is No Adequate Remedy At Law.**

Plaintiff's Complaint alleges that extensive harm to the public at large has occurred, the full extent to which is unknown at the present time. The Complaint shows that while Defendants have engaged in multiple acts of wrongdoing against the charitable trust, Plaintiff does not know the full extent of the wrong committed by Defendants and therefore needs an accounting at equity as part of the relief sought. Furthermore, immediate and irreparable injury will occur in the absence of a Temporary Restraining Order. Plaintiff has alleged that the FOUNDATION, and the Defendant directors are at risk of escaping out of an Illinois jurisdiction. If injunctive relief is not granted to prevent Defendants from divesting the PEOPLE OF ILLINOIS of its charitable interest, Defendants may succeed avoiding a need to fully account and the PEOPLE will never know the full extent to which they have been wronged and may be permanently precluded from recovering their assets. The public has already suffered injury in that Defendants have breached their fiduciary duties to the FOUNDATION. If equitable relief is not granted immediately, then charity will likely suffer further in that funds devoted for public benefit purposes will never reach their intended charitable destination. Because the full extent of Plaintiff's injury is as yet unknown and because the risk of irreparable injury to Plaintiff is so great, there is no adequate remedy at law that will cure the harm caused to the PEOPLE OF ILLINOIS. Only the imposition of a Temporary Restraining Order will enable the PEOPLE to safeguard its charitable interest.

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II. THE COURT SHOULD ALSO GRANT A PRELIMINARY INJUNCTION BECAUSE PLAINTIFF ATTORNEY GENERAL IS SEEKING INJUNCTIVE RELIEF AUTHORIZED BY A STATUTE.

In addition to a temporary restraining order entered based on common-law equitable grounds as aforesaid, a temporary restraining order and preliminary injunction should also be entered because Plaintiff is seeking injunctive relief pursuant to specific statutory authority.

Traditionally, the equitable remedy of preliminary injunction is granted where plaintiff shows: (1) he has a right which needs protection; (2) he will suffer irreparable harm without the protection; (3) he has no adequate remedy at law; and (4) he is likely to succeed on the merits. ((People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d 575, 580 (2nd Dist. 1985); People *ex rel.* Edgar v. Miller, 110 Ill. App. 3d 264, 269 (4th Dist.1982).) However, because Plaintiff is a public official or body seeking injunctive relief pursuant to a statute, the requirements of the statute authorizing the injunctive relief control rather than the traditional equitable factors enumerated above. (People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d at 580; People *ex rel.* Edgar v. Miller, 110 Ill. App. 3d at 269; People *ex rel.* Carpentier v. Goers, 20 Ill.2d 272, 276 (1960); People v. Keeven, 68 Ill. App.3d 91, 96-97 (5th Dist.1979).)

Courts issue statutory injunctions to public bodies to restrain violations of a statute because irreparable harm to the public at large is presumed from the statutory violation alone. (People *ex rel.* Hartigan v. Stianos, 131 Ill. App. 3d at 580.) To impose a preliminary injunction when a statute authorizes injunctive relief, the plaintiff need only allege and show (1) that the there has been a violation of the statute by the defendant and (2) that the plaintiff has standing to bring the action; It is not necessity to prove irreparable harm or the absence of an adequate remedy at law. (People v. Keeven, 68 Ill. App.3d at 97.)

In the instant case, the Attorney General is seeking injunctive relief as specifically provided

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for in the Charitable Trust Act. Plaintiff has brought suit against the Defendants seeking injunctive relief pursuant to Section 16(b) of the Trust Act, which authorizes injunctive relief in circumstances where it is alleged that a charitable trust needs to be protected or a trustee of a charitable trust has engaged in a breach of fiduciary duty. Section 16(b) provides:

> *"Sec. 16(b) Upon application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of such trustees is sought, the Court shall exercise its discretion as the equities require and may as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest."* (760 ILCS 55/16 (1997).)

1. **The Plaintiff Has Presented Facts Showing That Defendant Engaged In Statutory Violations Of The Illinois Charitable Trust Act Which Entitles Plaintiff To Injunctive Relief Pursuant To Statute.**

Plaintiff-Intervenor's Complaint has sufficiently shown that the Defendant has and continues to violate provisions of the Trust Act thereby entitling the Attorney General to seek injunctive relief. The Complaint alleges that Defendants multiple actions of breach of fiduciary duty constitute violations of Section 15(a) of the Trust Act.

In support of such allegations, Plaintiff adopts and incorporates the verified pleadings of the Plaintiffs GIDWITZ and BUNTRCK, who are current directors of the FOUNDATION, and who alleged and verify that Defendants JUDITH TERRA, PAUL HAYES TUCKER, and ALEN L. SIPMSON, have and are engaging in actions ultra vires and against the interest and purposes of the FOUNDATION, alleging said Directors are:

a) Attempting to cause the closing of TM operations in Illinois contrary to the long standing promise of its founder that such would be an institution for the public here in Illinois.

b) Attempting to gain position and self recognition in a Washington DC charitable

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organization in exchange for the delivery of the assets of TM, the termination of operations in Chicago and the end of a Terra museum in the United States..

c) Attempting to cause the closing of the Terra Museum operations in Illinois contrary to its name sakes, Mr. Dan Terra's intentions and suggesting a use of its assets contrary to the use Dan terra intended.

d) Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

e) Caused the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, which jeopardizes the security of the $100 million of art displayed and collected at Terra Museum;

f) Permitted a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

g) Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in operating Terra Foundation.

J. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel; and

k) Misusing the art collection of Terra Foundation and allowing Judith Terra to personally possess and use museum art items and in a manner that placed the collection in danger and

jeopardy.

As a consequence of the aforesaid, violations of the Trust Act have occurred and are continuing to occur, which violations are verified and supported by the Verified Complaint of Plaintiffs GIDWITZ and BUNTRCK. Defendants are therefore subject to the injunctive relief authorized under Section 16(b) of the Trust Act for violations of the Act.

2. **The Attorney General Has Standing To Enforce The Statute Providing For Injunctive Relief In This Matter.**

Having shown that the Illinois Charitable Trust Act expressly authorizes injunctive relief in circumstances where it is alleges that a charitable trust needs to be protected or a trustee of a charitable trust has engaged in a breach of fiduciary duty, and having shown that the Plaintiff has presented sufficient evidence to show that the Defendant breached his fiduciary duty and violated the Trust Act requiring the monies he wrongfully took to be protected, the Plaintiff must also show that he has standing to exercise the authority given to seek injunctive relief by the Illinois Charitable Trust Act.

The purpose of the Charitable Trust Act is to assist the Attorney General in carrying out his common law powers and duties to enforce charitable trusts and to see the application of their funds to their intended charitable uses. (People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) The Act is intended to give the Attorney General the tools with which to discharge his responsibilities. (Id.) As stated previously herein, the Attorney General has been judicially recognized as the proper representative of the State, which is the ultimate beneficiary of charitable assets collected and held for charitable purposes, in all actions concerning the enforcement or administration of a charitable trust. (In re Estate of Laas, 171 Ill. App. 3d at 920; People v. National Anti-Drug Coalition, 124, Ill. App. 3d at 275.) At common law, the Attorney General is charged

with the duty to see that charitable funds are applied to their intended charitable uses. (Id.) As noted earlier, the right of the State, acting through the Attorney General's authority under the Charitable Trust Act to protect a public charity to prevent or correct abuses of charitable assets on the PEOPLE's behalf cannot be denied. (Id. at 276.) Furthermore, Section 16(b) of the Trust Act specifically authorizes the Attorney General to seek injunctive relief in circumstances where he alleges that a charitable trust needs to be protected or the trustee of a charitable trust has engaged in a breach of fiduciary duty and he is the proper plaintiff to seek such relief.

For all of these reasons, Plaintiff has standing to exercise the authority given to seek injunctive relief by the Illinois Charitable Trust Act.

3. **The Attorney General Has Satisfied All Requirements For Injunction Pursuant To Statutory Authority And This Court Should Issue A Preliminary Injunction.**

Because injunctive relief is authorized in the Illinois Charitable Trust Act, there has been a violation of that statute by the Defendants, and the Attorney General has standing under the statute to bring an action for injunctive relief, Plaintiff is entitled to a preliminary injunction to stop defendants from engaging in harm to the public at large, which harm is presumed from the statutory violation.

In People v. Keeven, 68 Ill. App. 3d 91 (1979), the Attorney General brought an action to enjoin two defendants, Leonard and Agnes Keeven, from violating certain sections of the Illinois Environmental Protection Act. The trial court refused to enter a preliminary injunction because the Plaintiff failed to allege or prove facts showing irreparable injury and lack of an adequate remedy at law. (Id. at 96.) On appeal, the Appellate Court determined that because the Statute in question specifically authorized the Attorney General to seek injunctive relief, he needed only allege and show that the there had been a violation of that statute by the defendants. (Id. at 97.) Since the

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Attorney General had already presented evidence showing that the defendants failed to obtain an operating permit in violation of one section of the Act and that they were allowing tenants to generate wastewater without a permit, the court held that a preliminary injunction was warranted. (Id.)

Similarly, in People *ex rel* Hartigan v. Stianos, 131 Ill. App. 3d 575 (2nd Dist. 1985), the Attorney General sought a preliminary injunction against the defendants for violating the Illinois Consumer Fraud Act, which authorized the Attorney General to enjoin any person engaged in a trade or commerce who engaged in unfair or deceptive acts or practices in the conduct of that trade or commerce. (131 Ill. App. 3d at 580.) The Appellate Court found that the Plaintiff had alleged sufficient facts to show that the defendants had engaged in unfair and deceptive acts in violation of the Act. It thereafter held that a preliminary injunction was appropriate because the Attorney General needed only to allege and prove what the statute required in order to obtain the authorized injunctive relief. (Id, at 581-582.)

Like People v. Keeven and People v. Stianos, the present action concerns a request for temporary injunctive relief pursuant to statutory authority that provides for injunctive relief. Such conduct, described in detail in Plaintiff's Complaint constitutes a breach of the Defendant's fiduciary duties to the charity and a violation of Sections 15 of the Illinois Charitable Trust Act, and injunctive relief is authorized pursuant to Section 16(b) of said Act. (760 ILCS 55/16(b) (1997).) As in People v. Keeven and People *ex rel* Hartigan v. Stianos, the Court should enter a temporary injunction against the Defendant to prevent ongoing and continuous harm cause by Defendants' violations of Illinois statutory law.

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CONCLUSION

For all of the reasons stated herein, the Plaintiff, the PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois requests this Honorable Court to grant its Emergency Motion for Temporary Restraining Order and Preliminary Injunction.

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

JAMES D. TERRA,

Intervenor-Applicant,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation,

Defendants.

FILED

SEP 25 2000

AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

No. 00 CH 13859

JAMES D. TERRA'S EMERGENCY PETITION TO INTERVENE AS OF RIGHT AND/OR PERMISSIVELY

James D. Terra, by his attorneys, McBride, Baker and Coles, files this emergency petition under 735 ILCS 5/2-408(a)(2) and (3) and (b)(2) to intervene as of right and/or permissively as a plaintiff in this action. James Terra only recently learned the nature and extent of this litigation and the direct effect it has on the assets of the Terra Foundation For The Arts ("Foundation"). James D. Terra seeks leave to intervene so that he may present a motion for a temporary restraining order to prevent the defendants from closing the Terra Museum of American Art ("Terra Museum") and removing Dean L. Buntrock from the Board of Directors of the Terra Foundation. The closing of the Terra Museum and the removal of a Chicago civic leader like

D.O.D.

Mr. Buntrock who favors keeping the Terra Museum in Chicago is directly contrary to the purpose of Daniel L. Terra and Adeline E. Terra in establishing the Terra Foundation. In support of this petition, Intervenor attaches the Affidavit of James D. Terra as Exhibit A, and also states:

INTRODUCTION

James D. Terra is the son of Daniel J. Terra and Adeline E. Terra, founders of the Terra Museum of American Art. He was one of three incorporators of the Foundation in 1978. (Affidavit, ¶3). In that capacity he was part of the planning and is acutely knowledgeable of his parent's intent in creating the Terra Museum and of the donation of their art to the people of Chicago. (Id., ¶3, 5-8). He has both a statutory right to intervene in these proceedings because the parties to this litigation do not adequately represent the Terra family interests, and permissively because there are common questions of law and fact between Intervenor's claim and plaintiffs' claims. These interests will be affected by an adverse order or judgment of this Court. The merits of plaintiffs' Complaint and Motions address the validity of the closure of the Terra Museum and the defendants' scheme to transfer the Terra Foundation's assets to Washington, D.C. However, said plaintiffs do not fully and adequately represent the settlors' intent.

Any judgment that affects the permanent transfer of assets of the Terra Foundation from the Chicagoland area materially affects the Terra family's rights to insure that the original intent of Daniel J. Terra and his wife Adeline E. Terra in protecting their gift to Chicago is carried out. The original gift and subsequent gifts to the Foundation by Daniel J. Terra approximate $450 Million. Consequently, this Court should grant the present Petition to Intervene.

I. BACKGROUND

1. On September 22, 2000, the plaintiffs filed a four-count Complaint which alleges

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that defendants have illegally concocted and participated in a scheme to close the Terra Museum and transfer the assets of the Terra Foundation to Washington, D.C.

2. The plan or scheme at issue in this litigation is only a single component of the improprieties that the plaintiffs allege to have occurred in the management of the Foundation. Also pleaded in the complaint are allegations of intentional waste and depletion of the Foundation's assets. In conjunction with the closure and transfer of assets, the defendants are alleged to have intentionally deteriorated the infra-structure and assets of the museum.

3. As set forth in the James Terra's Motion for a Temporary Restraining Order, attached hereto as Exhibit B, this Court should enter an order enjoining the defendants from (i) illegally proceeding with their scheme to close the Terra Museum, (ii) transferring Terra Foundation assets to Washington, D.C., and (iii) removing Dean L. Buntrock as director.

II. THIS COURT SHOULD GRANT JAMES TERRA'S PETITION TO INTERVENE IN THIS LITIGATION.

4. The Illinois Code of Civil Procedure provides that a party, in certain circumstances, has the right to intervene in pending litigation:

> Upon timely application anyone shall be permitted as of right to intervene in an action . . .when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or when the applicant is so situated as to be adversely affected by a distribution or other disposition of property . . . subject to the control or disposition of the court . . .

735 ILCS 5/2-408(a)(2) and (3). In other cases, the Code allows a party to intervene by permission of the Court:

> Upon timely application anyone may in the discretion of the court be permitted to intervene in an action . . .when an applicant's claim . . . and the main action have a question of law or fact in common.

735 ILCS 5/2-408(b)(2).

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5. The purpose of intervention is to expedite litigation by fully disposing of an entire controversy among the persons involved in one action. *Serio v. Equitable Life Assurance*, 184 Ill. App. 3d 432, 435, 540 N.E.2d 800, 802 (1st Dist. 1989). The intervention statutes "are remedial and should be liberally construed to allow one to protect an interest jeopardized by pending litigation to which they are not a party." *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140, 468 N.E.2d 428 (1st Dist. 1984). Under Illinois law, "the allegations of an applicant's petition to intervene are to be taken as true in determining whether the interests of the applicant are sufficient." *Redmond v. Devine*, 152 Ill. App. 3d 68, 74, 504 N.E.2d 138, 142 (1st Dist. 1987); *Schwechter v. Schwechter*, 138 Ill. App. 3d 602, 606, 486 N.E.2d 340, 343 (2d Dist. 1985). "[D]oubts regarding intervention . . .should generally be resolved in favor of the applicant." *People ex. rel. Davis v. Chambers*, 125 Ill. App. 3d 451, 453, 466 N.E.2d 260, 262 (5th Dist. 1984).

A. Because James Terra's Interest In Protecting the Settlor's Intent Differs From The Plaintiffs' Interests In Fulfilling Their Fiduciary Duties; And Because Any Judgment Will Adversely Affect Those Interests, James D. Terra Has A Right To Intervene In This Litigation.

6. Intervention is "committed to the sound discretion of the trial court." *City of Chicago*, 127 Ill. App. 3d at 143. But in construing a statutory right to intervene under Section 408(a)(2), this Court's sound discretion is limited to determining (1) whether the Petition is timely; and (2) whether it meets the conditions set forth in 735 ILCS 5/2-408, the Illinois intervention statute. *Id.* Once a petition meets these threshold requirements, "the plain meaning of the statute directs that the petition be granted." *Id* at 144.

1. The James Terra's petition is timely.

7. As stated above, plaintiffs filed their Complaint on September 22, 2000. Intervenor only recently received notice of the nature of this action on that date. Consequently,

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Intervenor's petition is timely filed. *City of Chicago*, 127 Ill. App. 3d at 144.

2. **The Terra Estate has a sufficient interest in the claims at issue.**

8. To establish an interest sufficient to justify intervention as a matter of right, Intervenor need not show a direct interest in the pending suit. Rather, Intervenor need only establish an enforceable and recognizable right, and an interest in the subject matter of the suit greater than that of the general public, so that they may stand to lose or gain by the direct legal operation and effect of a judgment in the suit. *Caterpillar Tractor Co. v. Lenckos*, 84 Ill.2d 102, 112, 417 N.E.2d 1343, 1349 (1980).

9. James D. Terra has sufficiently demonstrated herein an interest in protecting his family's rights and to protect his parent's intent in the manner effectuated by his father, Daniel J. Terra and mother Adeline E. Terra. Further, as demonstrated by the defendants' plans to remove Mr. Buntrock from the Foundation Board of Directors, to close the Terra Museum, and to transfer property from the Foundation to Washington, D.C., the interests of Daniel J. Terra, and his wife as settlors and donors are presently in jeopardy.

10. As demonstrated in the attached Motion for a Temporary Restraining Order (Exhibit B), defendants must be enjoined from continuing to proceed in their unlawful actions that are against the intentions of the Daniel J. Terra and Adeline E. Terra and the purpose of the Foundation to maintain a Chicagoland museum. Consequently, because James D. Terra's interest in protecting his parent's intent differs from the Plaintiffs' interests in fulfilling their fiduciary obligations; and, because an adverse judgment will materially and adversely affect James D. Terra's rights, causing an "injury in fact to a legally recognized interest," James D. Terra has a right to intervene in these proceedings as a matter of right. *People ex rel. Collins v. Burton*, 282 Ill. App. 3d 649, 653, 668 N.E.2d 1185, 1186 (4th Dist. 1996) (internal quotation

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omitted); 735 ILCS 5/2-408(a)(2),(3).

B. Alternatively, James D. Terra Estate Should Be Allowed To Intervene Permissively.

11. In any event, it is clear that James D. Terra has satisfied "the less stringent requirements for permissive intervention" in these proceedings. *People ex. rel. Hanrahan v. Village of Wheeling*, 42 Ill. App. 3d 825, 356 N.E.2d 806 (1st Dist. 1976). James D. Terra's interest in protecting Daniel J. Terra's and Adeline E. Terra's intent arises out of the same facts which are at issue in Plaintiffs' Complaint, filed in this Court on September 22, 2000. Consequently, petitioner's intervention will not inject any new and complicated issues into the proceedings, or "unduly delay or prejudice the adjudication of the rights of the original parties." 735 ILCS 5/2-408(e). Other than intervention, James D. Terra has no adequate avenue to safeguard his interest in protecting his rights. *Schwechter*, 138 Ill. App. 3d at 608.

WHEREFORE, James D. Terra, requests that this Court enter an order permitting him to intervene in these proceedings, in order to, among other things, protect his parent's intent and seek the relief requested in its Motion for a Temporary Restraining Order (Exhibit B), attached pursuant to 735 ILCS 5/2-408(e).

DATED: September 25, 2000

Respectfully submitted,

JAMES D. TERRA, Intervenor

By:_____
One of His Attorneys

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16di-000321

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

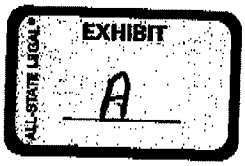
DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 00 CH 13859
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

AFFIDAVIT OF JAMES D. TERRA

James D. Terra, being duly sworn on oath deposes and states that if called as a witness in the above case he would testify as follows:

1. I am the only son of Daniel J. Terra and Adeline E. Terra, both deceased, their only daughter (and my sister) Penelope "Penny" Terra having predeceased them.

2. I am currently serving as the Executor of the estate of Daniel J. Terra, presently pending in the Probate Division, Circuit Court of Cook County, Illinois. The Terra Foundation For The Arts ("Foundation") is the sole beneficiary of the estate. When the estate is closed the Foundation will have received approximately $129 Million in artwork and cash from the estate, in addition to over $294 Million that my father gave the Foundation during his lifetime.



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3. In 1978 I became one of three founding incorporators and directors of the "Foundation For The Daniel J. Terra Museum," now known as The Terra Foundation For The Arts. As a result of said involvement, I became and was knowledgeable about the intent and the purpose of creating the Foundation.

4. My mother was a graduate of Northwestern University with a degree in art history. She had a very keen eye for quality art. Over the years while my father became successful in building his business, Lawter International, Inc., a specialty ink printing company, my mother acquired the paintings of various artists with a primary focus on nineteenth century American art, some of which were impressionist paintings. As the collection grew, my father became interested in this activity both as a hobby and as an investment. I learned from him that some of the American art, particularly the impressionist paintings, was artistically comparable to French paintings, and that they were less expensive during the period that my parents assembled their collection.

5. In 1978 my parents realized that their hobby had grown to become one of the best collections of early American paintings in the United States, and elsewhere. My mother believed that these treasures should be shared with others and prevailed upon my father to consider creating a museum devoted to early American Art.

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6. In 1978 my parents told me of their plans and asked that I participate. They were aware that the Chicagoland area did not have many museums compared to other major cities, and most importantly, that a museum devoted exclusively to early American art was rare. This fact intrigued my parents and they saw the possibilities of crating and maintaining a niche position that was not intended to rival any other museum. Both their actions and express intent was to create a museum of American Art in the Chicagoland area for people in this area. They chose Chicago because of their long residence here, and because of their social, civic and business ties to the community.

7. In discussions with my parents I learned that they intended to give their artwork to that museum as a gift to this community for the purposes of educating the public about early American art, and also to create local pride in such art which they dearly loved. I agreed that it was a good idea.

8. To carry out my parents' expressed intent as stated above, the Foundation was created in 1978 as an Illinois not for profit corporation and I signed the Articles of Incorporation. My father then worked with his lawyer, Robert Sugrue, to set up the museum. He chose to temporarily locate the museum in Evanston, Illinois rather than Chicago because the cost of real estate was less expensive there, and he needed to gain

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experience in running a museum before moving to downtown Chicago. The museum was then opened in Evanston in 1980 as the Terra Museum of American Art ("Museum"). At the grand opening of the Museum, it was repeatedly stated to the guests that the Museum was the Terra family's gift to this community. My parents were overjoyed with the reception and acceptance of that gift. Thereafter, in 1982 my mother died.

9. In 1987, the Museum moved to Michigan Avenue in Chicago and has remained in that location until the present date where it displays the majority of the Foundation's art collection, and where it has conducted educational programs for the people of the Chicagoland area in accordance with my parent's wishes.

10. From 1978 to my father's death on June 28, 1996, I either attended board meetings of the Foundation or reviewed the minutes from the meetings. As I recall, there never was any discussion of closing and moving the Museum from the Chicagoland area. However, there were discussions and steps taken by my father to find other locations for the Museum off Michigan Avenue to a smaller building to lessen the costs of operations of the Museum.

11. When the Museum was first opened it was clear that it was always meant to have a presence in the Chicagoland area. At no time during any board meetings, or in the minutes of said

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meetings, up to my resignation from the Foundation's board of Directors in September, 1998, or during all of my discussions with my father about Museum or Foundation matters, did he ever express any intent to move the Museum from Chicago.

12. Based upon my relationship with my father, and his connection to Chicago, I know that he would not have closed the Museum in Chicago and moved it elsewhere because he found the Museum to benefit people of the Chicagoland area as he and my mother originally planned. Although he did not discuss all Museum matters with me, I also know that he would have mentioned such a major action as closing or moving the Museum from Chicago.

FURTHER AFFIANT SAYETH NOT.

James D. Terra

JAMES D. TERRA

SUBSCRIBED AND SWORN TO before me
this 25 day of September, 2000.

Glena Brady

Notary Public

"OFFICIAL SEAL"
GLENA BRADY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 2/17/2002

16di-000326

2000 WL 35728516 (Ill.Cir.) (Expert Report and Affidavit)
Circuit Court of Illinois.
Chancery Division
Cook County

Dean L. BUNTROCK, a Director of The Terra Foundation for the Arts, and
Ronald Gidwitz, a Director of the Terra Foundation for the Arts, Plaintiffs,
v.
Judith TERRA, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts, an Illinois Not-For-Profit Corporation, Defendants.

No. 00 CH 13859.
October 17, 2000.

Affidavit of John M. Breen

Case Type: Fiduciary Duty >> Business Organizations
Jurisdiction: Cook County, Illinois
Name of Expert: John M. Breen
Area of Expertise: Legal >> Attorney Fees

Representing: Plaintiff

Honorable Dorothy Kirie Kinnaird.

The undersigned, upon oath, does hereby depose and state as follows:

1. I am John M. Breen, Assistant Professor of Law at Loyola University Chicago School of Law. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I have been asked by attorneys at Quinlan & Crisham, Ltd., counsel for plaintiffs in the above-captioned matter, to render an opinion with respect to certain questions involving legal ethics that are at issue in the case. Specifically, I have been asked to determine (a) whether, under the Illinois Rules of Professional Conduct and other applicable law, the attorneys at Sidley & Austin suffer from a conflict of interest that prohibits them from representing the Terra Foundation for the Arts ("Terra Foundation" or "Foundation") in the action brought against the Foundation and three sitting directors, Paul Tucker, Judith Terra and Alan Simpson, by plaintiffs Dean L. Buntrock and Ronald Gidwitz?; and, (b) whether, under the Illinois Rules of Professional Conduct and other applicable law, the attorneys at Winston & Strawn can continue to represent the Terra Foundation as corporate counsel despite their current relationship with Mr. Gidwitz?

Scope of Opinions

3. For the reasons set forth in detail below, it is my professional opinion that both Sidley & Austin and Winston & Strawn suffer from conflicts of interests that preclude each firm from continuing to represent the Terra Foundation, either in the present litigation or as corporate counsel. Under the rules of ethics that govern attorneys here in Illinois, Sidley & Austin is materially limited in its representation of the Foundation and so is precluded from continuing as its counsel in the

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above-captioned matter. This conflict of interest stems from the manner in which Sidley & Austin was retained as well as from the fact that Sidley & Austin takes direction in the litigation from another interested party, namely, defendant Paul Tucker. Likewise, the attorneys at Winston & Strawn will be materially and severely limited in what they can do on behalf of the Foundation because of their ongoing attorney-client relationship with Mr. Gidwitz. Moreover, in the case of both Sidley & Austin and Winston & Strawn, these conflicts of interest cannot be cured by waiver or otherwise. Accordingly, disqualification of Sidley & Austin and Winston & Strawn is required in each instance.

4. In reaching these conclusions, I have reviewed a number of papers involved in the case including the following: (a) Plaintiffs' Verified Complaint for Declaratory, Injunctive and Other Relief; (b) Opposition to James D. Terra's "Emergency" Petition to Intervene as of Right; (c) Defendant Terra Foundation for the Arts' Motion to Dismiss the Attorney General's Complaint; (d) Defendant Terra Foundation for the Arts' Motion to Dismiss Plaintiffs Buntrock and Gidwitz's Complaint; (e) Defendant Terra Foundation for the Arts' Consolidated Memorandum in Support of its Motion to Dismiss the Complaint; (f) Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for the Terra Foundation, and/or Receiver; (g) Opposition by Defendant Terra Foundation for the Arts to Plaintiffs' Motion to Appoint a Special Litigation Committee, Independent Litigation Counsel, and/or Receiver; (h) Transcript of Proceedings for September 22, 2000; and, (i) Transcript of Proceedings for September 25, 2000.

5. The lawsuit filed by Mr. Buntrock and Mr. Gidwitz contains serious allegations of wrongdoing with respect to the actions taken by Terra Foundation directors Paul Tucker, Judith Terra, and Alan Simpson. I have no opinion as to the truth of these allegations and I take no position with respect to the merits of the case. Nevertheless, the plaintiffs clearly contend that the individual defendants have engaged in ultra vires acts that have been harmful to the Foundation, and that they have violated their fiduciary duties to the Foundation through deliberate waste, mismanagement, and self-dealing. By any estimation, these allegations are serious and as such are worthy of investigation.

Professional Qualifications

6. In reaching the conclusions summarized above, I have also drawn upon my expertise in the field of legal ethics. I received my undergraduate degree from the University of Notre Dame and my law degree from Harvard Law School. I now serve on the full-time faculty at Loyola University Chicago School of Law where I teach courses in legal ethics and professional responsibility. I also serve as the Reporter to the Illinois Supreme Court Committee on Professional Responsibility. A copy of my Curriculum Vitae is attached hereto as Exhibit 1.

Analysis of the Ethical Obligations of Sidley & Austin

7. The lawyer who represents an organizational client such as a corporation, partnership, trade association or union owes his or her professional duties of loyalty, confidentiality, and competence to the organization that is the client and not to the directors, officers, employees or other constituents who work on behalf of the organization. When a lawsuit is filed against an organizational client and one or more of the directors for the organization, the role of the organization's counsel is clear. Under the rules of legal ethics, counsel for the organization must work to protect the interests of the entity and not the interests of the individual director named as a defendant. This fundamental duty is reflected in the Illinois Rules of Professional Conduct ("IRPC"). Rule 1.13(a) states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

8. It may be possible for the lawyer who represents an organizational entity in a lawsuit to also represent the "constituents" who work on behalf of the entity. These constituents may include the organization's directors, officers, employees, or other agents. Nevertheless, the organization's interests are always distinct from and may be adverse to the interests of the individual constituent. Accordingly, Rule 1.13(e) of the IRPC provides:

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A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

As an Illinois not-for-profit corporation, the Terra Foundation is precisely the kind of organizational client contemplated by Rule 1.13 of the IRPC.

9. The Illinois Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct (the "ABA Model Rules"). In adopting the IRPC, the Supreme Court of Illinois did not adopt the ABA's commentary. Nevertheless, Illinois courts often look to the ABA comments as persuasive authority in interpreting the rules. *See, e.g., Schwartz v. Cortelloni,* 177 Ill. 2d 166, 179-80, 685 N.E.2d 871, 877-78 (1997). Comment 12 to ABA Model Rule 1.13 notes that "derivative actions are a normal incident of an organization's affairs" but that "if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization."

10. Rule 1.7 of the IRPC is of course the main rule that addresses attorney conflicts of interest in concurrent representation. In general, Rule 1.7(a) prohibits a lawyer from representing two clients at the same time where their interests are "directly adverse." Likewise, Rule 1.7(b) prohibits a lawyer from representing a client where the lawyer would be limited in his or her representation of the client because of "the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." In its entirety, IRPC 1.7 provides as follows:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after disclosure.

(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

11. The vast majority of reported decisions prohibit the same lawyer from representing both the organizational client and the organization's directors, officers or shareholders. Indeed, courts routinely grant motions to disqualify the lawyer who tries to represent both the individual directors named as defendants in a stockholder derivative action and the corporate entity itself. *See, e.g., Musheno v. Gensemer,* 897 F. Supp. 833 (M.D. Pa. 1995); *In re Par Pharmaceutical, Inc. Derivative Litigation,* 750 F. Supp. 641 (S.D.N.Y. 1990); *Messing v. FDI, Inc.,* 439 F. Supp. 776 (D.N.J. 1977); *Lewis v. Shaffer Stores Co.,* 218 F. Supp. 238 (S.D.N.Y. 1963); *Forrest v. Baeza,* 67 Cal.Rptr.2d 857 (Cal. App. 1st Dist. 1997); *Tydings v. Berk Enterprises,* 565 A.2d 390 (Md. App. 1989). Courts in Illinois have likewise found that counsel must be disqualified where he or she attempts to represent both the corporate entity and the individual named defendant who has interests that are adverse or potentially adverse to the interests of the corporate client. *See, Cannon v. U.S. Acoustics Corp.,* 398

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F. Supp. 209 (N.D. Ill. 1975), *aff'd in relevant part,* 532 F.2d 1118 (7th Cir. 1976); *Lower v. Lanark Mutual Fire Ins. Co.,* 114 Ill. App. 3d 462, 448 N.E.2d 940 (2d Dist. 1983).

12. Where a lawsuit is filed against an organization and its directors, the better reasoned approach taken is for the board of directors to appoint a special litigation committee to evaluate the merits of the lawsuit and to recommend a course of action. Depending on the recommendation of the special litigation committee, the organization may then either move to dismiss the action or join the action as a plaintiff. *See, e.g., Byers v. Baxter,* 419 N.Y.S.2d 497 (Sup. Ct. App. Div. 1979); *In re Par Pharmaceutical. Inc. Derivative Action,* 750 F. Supp. 641 (S.D.N.Y. 1990); *see also Stepak v. Addison,* 20 F.3d 398 (11th Cir. 1994) (wherein Sidley & Austin served as "independent counsel" to a group of "outside directors").

13. Among the many cases in which courts have recognized the need for separate counsel when both the organization and its constituents are named as defendants, courts have adopted a variety of approaches as to how the organization's counsel should be selected.

(a) In one case, the court appointed independent counsel for the organization on its own because the court was convinced that if it did not, "[c]ounsel for the corporation would be subject to the control of those accused of wrongdoing." *Rowen v. LeMars Mutual Ins. Co.,* 230 N.W.2d 905, 916 (Iowa 1975).

(b) Some courts have tolerated the participation of directors who have been named as individual defendants in the selection of counsel for the organization. *See, e.g., Lewis v. Shaffer Stores Co.,* 218 F. Supp. 238 (S.D.N.Y. 1963); *Cannon v. U.S. Acoustics Corp.,* 398 F. Supp. 209 (N.D. Ill. 1975), *aff'd in relevant part,* 532 F.2d 1118 (7th Cir. 1976); *Lower v. Lanark Mutual Fire Ins. Co.,* 114 Ill. App. 3d 462, 448 N.E.2d 940 (Ill. App. 3d Dist. 1983). Even in these cases, however, the lawyer appointed by a majority of the board to represent the organization was not required to report directly and exclusively to an individual director named as a defendant in the lawsuit. By contrast, Sidley & Austin has been directed to report to Paul Tucker, an individual director named as a defendant in the lawsuit. See Opposition by Defendant Terra Foundation for the Arts to Plaintiffs' Motion to Appoint a Special Litigation Committee, Independent Litigation Counsel, and/or for a Receiver, Exhibit A, Terra Foundation Board Meeting Minutes, September 26, 2000 pp. 2-3 ("giving authorization to the Chair [Paul Tucker] for any and all actions regarding the lawsuit except for the settlement").

(c) Other courts have simply insisted that the board deal with the problem in the way that it would typically address other issues involving conflicts of interest. *See, e.g., Musheno v. Gensemer,* 897 F. Supp. 833, 838-39 (M.D. Pa. 1995); *Messing v. FDI Inc.,* 439 F. Supp. 776, 783 (D.N.J. 1977). The Verified Complaint indicates that the Terra Foundation has dealt with serious conflicts of interest in the past by excluding the person suffering from the conflict from the work of the Foundation. Paragraph 29 of the Verified Complaint states that as a result of "Judith Terra's attempt to seize $43 million of Dan Terra's bequest to Terra Foundation" she "was forced to take a leave of absence as a director of Terra Foundation." By contrast, no similar steps were taken to exclude Paul Tucker, Judith Terra or Alan Simpson with respect to the Terra Foundation's involvement in the lawsuit. On the contrary, each of the named defendants voted on the appointment of counsel for the Foundation and Paul Tucker was given authority to direct the litigation on behalf of the Foundation.

14. The best reasoned cases have held that the special litigation committee be composed of disinterested and independent members of the board of directors. *See, e.g., In re Oracle Securities Litigation,* 829 F. Supp. 1176, 1190 (N.D. Cal. 1993); *Miller v. Register and Tribune Syndicate,* 336 N.W.2d 709, 717-18 (Iowa 1983); *Zapata Corp. v. Maldonado,* 430 A.2d 779, 788-89 (Del. 1981); *Auerbach v. Bennett,* 393 N.E.2d 994, 1001 (N.Y. 1979). While respecting corporate governance, this approach ensures as much as possible that counsel is truly independent "unshackled by any ties to the [interested] directors [and] in the unique position of having only the corporation's interest at stake." *Messing,* 439 F. Supp. at 782. Moreover, this approach largely avoids the prospect of having to "apply to the court for additional relief" should further "difficulties arise." *Cannon,* 398 F. Supp. at 220.

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15. Even if the board of directors for an organization properly takes some action within the scope of its authority, legal counsel for the organization is not thereby relieved of the duty of examining its own ethical obligations with respect to the matter. "Resolving questions of conflicts of interest is primarily the responsibility of the lawyer undertaking the representation. ABA Model Rule 1.7, cmt. 15. Indeed, "[t]he lawyer should adopt reasonable procedures ... to determine whether there are actual or potential conflicts of interest." ABA Model Rule 1.7. cmt. 1.

16. Sidley & Austin argues that it does not suffer from a conflict of interest because it does not formally represent any of the Foundation's co-defendants. This analysis is wholly inadequate for resolving the ultimate question of whether or not the firm suffers from a conflict of interest. As noted above, an attorney may suffer from a conflict of interest under Rule 1.7(b) in that the lawyer "may be materially limited" by the responsibilities that the lawyer owes to another client, to a third person or by the lawyer's own interests. That is to say, the lawyer's relationship with a non-client, such as a co-defendant may give rise to a conflict of interest just as easily as the concurrent representation of two distinct clients. Such a relationship may interfere with the lawyer's fundamental duty to "exercise independent professional judgment and render candid advice" on behalf of the client. *See* Rule 2.1 of the IRPC.

17. The materials I have reviewed, including the Verified Complaint, demonstrate that Sidley & Austin suffers from precisely this sort of conflict. Sidley & Austin is unable to exercise independent professional judgment on behalf of the Terra Foundation. They cannot provide genuinely candid advice to the Foundation because of the influence of Mr. Tucker.

18. During the September 26th annual meeting of the board of directors the board authorized Paul Tucker "to deal with all matters regarding the litigation and to defend the Foundation against the charges brought by Mr. Buntrock and Mr. Gidwitz." See Opposition by Defendant Terra Foundation for the Arts to Plaintiffs' Motion to Appoint a Special Litigation Committee, Independent Litigation Counsel and/or for a Receiver, Exhibit A, Terra Foundation Board Meeting Minutes, September 26, 2000, pp. 2-3. This of course is the opposite of the approach taken by the majority of cases described above. *See also Ivy v. Illinois State Police,* 263 Ill. App. 3d 12, 636 N.E.2d 738, 744 (1st Dist. 1994) (impermissible conflict existed where same lawyer represented three defendants); Illinois Mun. *League Risk Mgt: v. Siebert,* 223 III. App. 3d 864, 585 N.E.2d 1130 (4th Dist. 1992) (impermissible conflict where nonprofit association represented municipality and police officer). Here, the conflict is actual and concrete because Tucker directs Sidley & Austin in this litigation. This materially limits the representation that Sidley & Austin is able to provide to the Terra Foundation. Rather than appoint a group of disinterested board members to oversee the litigation with the advice of independent counsel, the board for the Terra Foundation selected the man whose conduct is at the center of the lawsuit. Because he is a named defendant, Mr. Tucker cannot help but be keenly interested in the outcome of the lawsuit. More importantly, this personal interest cannot help but influence how he will direct Sidley & Austin to conduct the litigation on behalf of the Foundation.

19. Sidley & Austin's inability to provide the Foundation with independent professional advice is apparent in the way that the law firm has conducted the litigation thus far. Because the nature of the allegations against Paul Tucker, Judith Terra and Alan Simpson are gravely serious, truly independent counsel would take the time to investigate these matters before taking any decisive action. Indeed, such an investigation would be necessary in order for the lawyer to advise the Foundation as to how it should proceed. Thus, "[t]he initial decision then as to what role if any the corporation should take must in the first instance be made completely free from any actual or apparent conflict." *Messing,* 439 F. Supp. at 782.

20. Instead of taking the time to investigate the allegations behind the lawsuit, Sidley & Austin immediately filed a Section 2-615 motion to dismiss plaintiffs' complaint. Sidley & Austin could not have filed this motion to dismiss without first consulting with Mr. Tucker and receiving his approval to proceed. After all, the board voted to give Mr. Tucker authority "for any and all actions regarding the lawsuit except for settlement."

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It is clear that Mr. Tucker is an interested party in this litigation. He is a named defendant who is alleged to have violated his fiduciary duties to the Foundation. Nevertheless, the attorneys at Sidlev & Austin must, in effect, treat Mr. Tucker as if he were their client.

Consequently, Sidley & Austin suffers from an intractable conflict of interest. The firm's representation of the Foundation is, in the language of Rule 1.7(b) "materially limited" by its relationship with Mr. Tucker. Sidley & Austin cannot provide candid advice to the Foundation because that advice might be adverse to the interests of Mr. Tucker. It might, for example, be in the best interests of the Foundation to join Mr. Buntrock and Mr. Gidwitz as a plaintiff in the lawsuit. Similarly, it might be in the best interests of the Foundation to not oppose the intervention of James Terra in the lawsuit. Sidley & Austin cannot provide this advice to the Foundation because Mr. Tucker stands in the way. When a lawyer "cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests," the lawyer cannot ethically proceed with the representation. ABA Model Rule 1.7, cmt. 4. In effect, the conflict "forecloses alternatives that would otherwise be available to the client." *Id.* These alternatives should be available to the Terra Foundation, but they will only become available when Sidley & Austin is disqualified and an independent litigation committee is permitted to select its own counsel to represent the Foundation.

21. Finally, this is not the kind of conflict of interest that can be waived. Rule 1.7(b) demands that the lawyer who wishes to avoid a conflict of interest must both obtain client consent and "reasonably believe[] [that] the representation will not be adversely affected" by the lawyer's other responsibilities. Sidley & Austin could not satisfy the "reasonable belief" requirement of Rule 1.7(b) even if a group of disinterested board members consented to Sidley & Austin's continued representation. This is because Sidley & Austin cannot take any new positions that contradict its current litigation position even if such an alternative position would be in the best interest of the Foundation. For example, it may be in the best interest of the Foundation to join plaintiffs in this action. This contradicts Sidley & Austin's current stance. Therefore, Sidley & Austin is materially limited in asserting this new position. Consequently, any such waiver under Rule 1.7 would be without effect and Sidley & Austin must be disqualified from further representation of the Foundation. *See In re American Printers & Lithographers, Inc.,* 148 B.R. 862 (Bkrtcy. N.D. Ill. 1992) (waivers of conflicts by clients are "irrelevant" where law firm will still be affected by its representation of one client by its responsibilities to another).

Analysis of the Ethical Obligations of Winston & Strawn

22. Winston & Strawn appeared as counsel for the Foundation immediately after the lawsuit began. Even at this early stage the lawyers at the firm recognized that they suffered from a conflict of interest that precluded their continued presence in the case. As counsel from Winston & Strawn stated at the first hearing in the matter held on September 22, 2000: "we have no authority to appear for anyone else [other than the Terra Foundation], Your Honor, and before I get too deep in it, one of the plaintiffs, in this case Mr. Gidwitz, is a good client of Winston & Strawn. So unless Judge Quinlan has a waiver for me, there is a real question now how Winston & Strawn would be able to stay in this case." Transcript of Proceedings, September 22, 2000, p. 3. During the following hearing on September 25th, counsel from Winston & Strawn stated that he was "trying to be the first lawyer out of this case because Mr. Gidwitz has objected to our representing the Foundation in this litigation as counsel." Transcript of Proceedings, September 25, 2000, p. 17. He then withdrew from the proceedings. Nevertheless, although Winston & Strawn agreed to step aside as litigation counsel, the firm purports to continue to represent the Foundation as "corporate counsel."

23. Winston & Strawn's decision to withdraw from representing the Terra Foundation in the present action was the only appropriate action the firm could take under the rules of legal ethics. Rule 1.7(a) of the IRPC provides that an attorney may not represent a client "if the representation of that client will be directly adverse to another client." Winston & Strawn correctly concluded that, in the current posture of the case, the Terra Foundation's interests were directly adverse to the interests of Mr. Gidwitz, another current client of the firm. It does not matter that the subject matter of the firm's representation of Mr. Gidwitz has nothing to do with its work on behalf of the Terra Foundation. Ordinarily, a lawyer

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"may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." ABA Model Rule 1.7, cmt. 3. *See also Ransburg Corp. v. Champion Spark Plug Co.,* 648 F. Supp. 1040 (N.D. Ill. 1986) (disqualifying law firm from bringing patent infringement lawsuit on behalf of Ransburg against Champion Spark Plug where firm currently represented Champion in unrelated patent matters). Rule 1.7 does allow the lawyer to avoid the conflict by obtaining the consent of each client to the representation following disclosure. Because Mr. Gidwitz declined to provide such consent, Winston & Strawn had no alternative but to withdraw.

24. Winston & Strawn's withdrawal from the representation of the Foundation in the current lawsuit was correct, but it was not complete. Attorneys at Winston & Strawn continue to advise the Foundation on matters closely associated with the subject matter of the litigation. For example, at the September 26th board meeting, Mark Heatwole of Winston & Strawn advised the Foundation that it was appropriate to give Mr. Tucker authority to act for the Foundation in the litigation as "there was no conflict in this matter." Opposition by Defendant Terra Foundation for the Arts to Plaintiffs' Motion to Appoint a Special Litigation Committee, Independent Litigation Counsel, and/or for a Receiver, Exhibit A, Terra Foundation Board Meeting Minutes. September 26. 2000. p. 2. As the case law set forth in detail above demonstrates, this advice was simply incorrect. It is inappropriate for interested parties within an organization to select counsel for the organization. As a primary defendant in the lawsuit, Mr. Tucker is clearly an interested party. Moreover, under these circumstances it was improper for Sidley & Austin to accept the representation.

25. Mr. Heatwole's advice concerning an issue very much in dispute within the litigation shows that Winston & Strawn's withdrawal from its representation of the Foundation in the litigation was not a clean break. Indeed, it demonstrates that it will be impossible for Winston & Strawn to extricate itself from the litigation so long as it continues to represent the Foundation as corporate counsel. If it continues in this capacity it will not be able to avoid rendering legal advice with respect to matters that are at issue in the lawsuit. Indeed, it cannot decline to represent the Foundation with respect to the lawsuit and continue to represent the Foundation with respect to "other matters." For example, as corporate counsel Mr. Heatwole or some other attorney at Winston & Strawn may be asked to render legal advice with respect to the sale of the Foundation's artwork or property in Chicago. These matters touch on the very heart of the subject matter of the litigation. If Winston & Strawn takes a position that is adverse to the position advocated by Mr. Gidwitz in the lawsuit then the firm will, once again, be representing interests that are "directly adverse" to the interests of a current client. If on the other hand it is unable to render such advice to the Foundation, then it will be "materially limited" in its representation under Rule 1.7(b). In either case, Winston & Strawn cannot continue to represent the Foundation.

26. Significantly, the advice Winston & Strawn provided to the Foundation with respect to Mr. Tucker's management of the litigation was "directly adverse" to the interests of its current client, Ron Gidwitz. It is clearly adverse to Mr. Gidwitz's interest for Winston & Strawn to approve of the management of the lawsuit on behalf of the Terra Foundation by someone who is himself a defendant in the dispute. As noted above, a disinterested person might wish to have the Foundation join the action as a plaintiff, together with Mr. Gidwitz and Mr. Buntrock. Winston & Strawn's erroneous advice renders this scenario highly unlikely if not impossible because the subject matter of the litigation is the future of the Terra Foundation in every aspect. Winston & Strawn cannot continue as corporate counsel for the Terra Foundation under these circumstances.

Conclusion

For all the reasons stated above, I conclude that Sidley & Austin must be disqualified from further representation of the Terra Foundation in the above-captioned matter. I also conclude that Winston & Strawn must be disqualified from further representing the Terra Foundation as corporate counsel. Instead, the Terra Foundation should be represented by truly independent counsel who is free to exercise independent professional judgment and render candid advice in support of the best interests of the Foundation.

FURTHER AFFIANT SAYETH NOT.

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ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et.al.

v.

Judith Terra

NO. 00 Ch 13859

ORDER

This Cause coming to be heard on Plaintiffs' Motion To Appoint Independent Litigation Counsel et.al. and Motion to ~~Appoint~~ Enforce The TRO ~~et.al~~, due notice having been given and the Court being fully advised, and for the reasons set forth on the record IT IS ORDERED.

(1) The TRO remains in full force and effect through November 2, 2000 at 5:00 P.M.

(2) The October 12, 2000 Order remains in full force and effect.

(3) Plaintiffs Motion To Appoint Litigation Counsel et.al. is granted in part and denied in part. Defendant Tucker is removed as litigation director. The board of directors of the Foundation shall meet and appoint a special litigation committee. The defendants and plaintiffs may participate in the discussion but may not vote on the members the special litigation committee. The special litigation committee may be comprised of any and/or all of members of the board of directors who are not parties to the litigation and/or non members of the board of directors ~~who~~ as the voting members may determine. The special litigation committee may consider whether Sidley+Austin remains as counsel for the Foundation. ~~The Report~~

Atty No. 33715

Name John F. Kennedy

Attorney for Plaintiffs

Address 30 N. LaSalle

City / Zip Chicago Ill.

Telephone 263.0900

ENTER:

_____, _____

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-000336

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Jean L. Buntroch et. al.

v.

JUDITH Terra et. al

NO. 00 CH 13859

ORDER

3. (Cont.) The motion to Appoint Special Litigation Counsel et. al. is denied without prejudice with respect to disqualification of Winston & Strawn and Sidley + Austin. Motion to Appoint Receiver is Denied.

4.) The Motion to Enforce The TRO is denied without prejudice

5.) The Foundation's ~~and Defendants Terra and Simpson~~ 52-615 motion to Dismiss the Plaintiffs Complaint and Attorney General's Complaint are dismissed without prejudice.

6.) ~~The reasons stated by the Court in~~ The Report of Proceedings of October 20, 2000 ~~are~~ are incorporated herein. ~~by reference herein~~

7.) Plaintiffs are granted leave to file the "Supplement" to the Motion to Enforce et. al. and Reply in Support of Motion to Enforce the TRO.

Atty No. 33745

Name John F. Kennedy

Attorney for Plaintiffs

Address 30 N. LaSalle

City / Zip Chicago Il. 60602

Telephone 263-0900

ENTER:

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
OCT 20 2000
JUDGE DOROTHY KINNAIRD #276
DEPUTY CLERK

Judge **Judge's No.**

P. 2 of 2

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-000337

2000 WL 35728517 (Ill.Cir.) (Expert Report and Affidavit)
Circuit Court of Illinois.
Chancery Division
Cook County

Dean L. BUNTROCK, a Director of The Terra Foundation for the Arts, and
Ronald Gidwitz, a Director of the Terra Foundation for the Arts, Plaintiffs,
v.
Judith TERRA, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts, an Illinois Not-For-Profit Corporation, Defendants.

No. 00 CH 13859.
December 6, 2000.

Supplemental Affidavit of John M. Breen

Name of Expert: John M. Breen
Area of Expertise: Legal >> Other Legal
Case Type: N/A >> N/A
Case Type: Fiduciary Duty >> Business Organizations
Jurisdiction: Cook County, Illinois

Representing: Plaintiff

Honorable Dorothy Kirie Kinnaird.

The undersigned, upon oath, does hereby depose and state as follows:

1. I am John M. Breen, Assistant Professor of Law at Loyola University Chicago School of Law. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I understand that at a meeting of the board of directors held on November 30, 2000, an Independent Litigation Committee was elected, comprised of two current directors, Ted Stebbins and Jacques Andreani. I also understand that during a brief conference call meeting held on December 4, 2000, the Independent Litigation Committee decided to retain Sidley & Austin as counsel for the Terra Foundation in the above-captioned matter. Despite this selection, the ethics rules do not permit Sidley & Austin to accept this representation.

3. In light of this development I have been asked by attorneys at Quinlan & Crisham, Ltd., attorneys for plaintiffs in the above captioned matter, to supplement the Affidavit that I prepared and signed and which they filed with the court in support of Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for the Terra Foundation, and/or Receiver.

4. At a hearing held on Friday, October 20, 2000, Judge Kinnaird granted this motion in part and denied it in part. I make this Supplemental Affidavit in light of the comments made by Judge Kinnaird and by counsel at this hearing. I have read a transcript of the October 20th proceeding in its entirety. A copy of this transcript is attached hereto as Exhibit A. I have also reviewed the transcripts of proceedings before the court that took place on November 1, 2, and 6, 2000.

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5. As in my prior Affidavit, my opinion concerns whether, under the Illinois Rules of Professional Conduct ("IRPC") and other applicable law, the attorneys at Sidley & Austin suffer from a conflict of interest that prohibits them from representing the Terra Foundation for the Arts ("Terra Foundation" or "Foundation") in the action brought against the Foundation and its directors Dr. Paul Tucker, Ms. Judith Terra and Senator Alan Simpson by plaintiffs Dean Buntrock and Ronald Gidwitz.

6. After reviewing the materials described above, including the transcript for the October 20, 2000 hearing, it remains my professional opinion that Sidley & Austin suffers from an incurable conflict of interest that precludes the law firm from representing the Foundation in the current lawsuit. The Independent Litigation Committee's decision to retain Sidley & Austin cannot supercede the requirements of Rule 1.7(b). Rule 2.1 of the Illinois Rules of Professional Conduct requires every attorney to "exercise independent professional judgment and render candid advice" on behalf of his or her client. The facts demonstrate that Sidley & Austin is incapable of doing this with respect to the Terra Foundation. Consequently, Sidley & Austin is "materially limited" in its representation of the Foundation, a state of affairs that is prohibited under Rule 1.7(b) of the Illinois Rules of Professional Conduct. Thus, even though the Independent Litigation Committee decided to retain Sidley & Austin as litigation counsel, the attorneys at Sidley & Austin still suffer from an irreconcilable conflict of interest that precludes their representation of the Foundation in this case.

Sidley & Austin's Defense of Mr. Tucker as Litigation Director

7. At the hearing held on October 20, 2000, the court found that it was inappropriate for the individual parties in the lawsuit to vote in the selection of litigation counsel for the Foundation. The court further held that it was improper for Dr. Tucker to direct the litigation on behalf of the Foundation. Indeed, Judge Kinnaird made clear at the hearing that it was "not even a close call" that Mr. Tucker "should not be directing Sidley in this litigation." Transcript of Proceedings, October 20, 2000 (hereinafter "Transcript") p.1 12. Yet, Sidley & Austin defended Dr. Tucker's authority to direct the litigation. The fact that the law firm took this position demonstrates that Sidley & Austin is materially limited in its representation of the Foundation. A disinterested lawyer capable of exercising truly independent professional judgment on the part of the Foundation would have conceded, as the court found, that it was inappropriate for another named defendant like Dr. Tucker to act as the litigation director for the Foundation.

8. Sidley & Austin adamantly opposed the appointment of an Independent Litigation Committee. Although it cited no case law or other authority in support of its position, Sidley & Austin opposed the creation of such a committee in its brief and during argument before the court. Sidley & Austin even argued that the plaintiffs cited no authority for the court's power to order the creation of such a committee. At the hearing, Judge Kinnaird quickly corrected this misstatement noting that "for the special litigation committee, [the plaintiffs] have overwhelmed [the court] with authority at this point." Transcript, p. 59. If the lawyers at Sidley & Austin had been capable of rendering independent professional legal advice they would have acknowledged the existence of the overwhelming weight of authority filed by plaintiffs in support of the appointment of a special litigation committee. This, of course, would have required Sidley & Austin to tell Dr. Tucker that it was inappropriate for him to serve as director of the litigation on behalf of the Foundation. Sidley & Austin was unwilling to do this. That Sidley & Austin instead chose to advocate on behalf of Dr. Tucker's role as litigation director demonstrates that Sidley is materially limited in its representation of the Foundation.

Sidley & Austin's "Investigation" of the Allegations in the Complaint

9. Sidley & Austin's inability to render independent professional judgment is also demonstrated by its failure to conduct an investigation with respect to the allegations made against Dr. Tucker, Ms. Terra and Senator Simpson set forth in Plaintiffs' Verified Complaint. At the hearing held on October 20th, Sidley & Austin argued that it had conducted an investigation with respect to the allegations of ultra vires acts simply by looking at the Foundation's articles of

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incorporation and by-laws and the Illinois Not-for-Profit Corporation Act. Such minimal work on the part of Sidley & Austin is inadequate to constitute an "investigation" into the allegations of ultra vires acts. For example, no mention is made of Dan Terra's will or the restrictions on the different accounts that are at issue in the lawsuit.

10. Regardless of the adequacy of this conduct, in defending its purported "investigation" of the alleged ultra vires acts, Sidley & Austin ignored the bulk of the Complaint. As Judge Kinnaird pointedly told Sidley & Austin, the ultra vires claims are "not the only issue." Transcript, p. 106. As part of her ruling at the end of the hearing, Judge Kinnaird denied the motions to dismiss the case filed by Sidley & Austin. In denying these motions sua sponte Judge Kinnaird made clear: "There is a lot more in this complaint than just those ultra vires issues. There is a serious breach of fiduciary duty allegations which are not even addressed in this motion." Transcript, p. 115.

11. As Judge Kinnaird observed, the Complaint contains serious allegations with respect to the individual defendants' breach of their fiduciary duties. The Complaint alleges that Dr. Tucker, Ms. Terra, and Senator Simpson violated their fiduciary duties to the Foundation through deliberate waste, mismanagement and self-dealing. These allegations are factual in nature. Accordingly, the Foundation needs independent litigation counsel to conduct a factual investigation in order to determine whether or not these allegations are true. Only then can the Foundation make an informed decision as to whether or not it should file a motion to dismiss the complaint or instead support the plaintiffs in their case against the individual defendants. Indeed, the overwhelming weight of authority demonstrates that where a complaint is filed against an organization and its directors, a genuine investigation into the allegations conducted by truly independent counsel often requires months of work. *See e.g. Einhorn v. Culea,* 612, N.W.2d 78, 83 (Wis. 2000) (special litigation committee met for 500 hours over five months); *Byers v. Baxter,* 419 N.Y.S.2d 497, 499 (N.Y. App. Div. 1979) (litigation committee and special counsel investigated matter for nearly nine months); *Bell Atlantic Corporation v. Bolger,* 2F.3d 1304, 1316 (3d Cir. 1993) (noting importance of independent counsel's "exhaustive investigation" prior to determination that suit was not in corporate best interests); *Weiland v. Illinois Power Company,* 1990 WL 267364 (C. D. Ill. 1990) (board appointed special litigation committee which conducted a thirteen month investigation, met 39 times, spent more than 700 hours investigating the merits of the claim and filed a 236 page report to the court); *See also In re Par Pharmaceutical. Inc. Derivative Litigation* 750 F.Supp. 641, 647-48 (S.D. NY 1990) (committee's investigation only from November, 1989 to January, 1990, failure to seek independent counsel and failure to document procedures, reasoning or conclusions deemed inadequate). *Alford v. Shaw,* 320 N.C. 465, 358 S.E.2d 323 (N.C. 1987) (court is required to evaluate the merits and adequacy of the special litigation committee's recommendation); *Zapata Corp. v. Maldonado,* 430 A.2d 779, 788 (Del. 1980) (requiring that an independent litigation committee perform an objective and thorough investigation prior to any pretrial motion to dismiss, and that the motion to dismiss include a thorough written record of the investigation and its findings); *Auerbach v. Bennett,* 47 N.Y.2d 619, 393 N.E.2d 994 (1979) (business judgment rule only protects boards when proper procedures and methodologies have been followed by special litigation committee). Plainly, a cursory examination of the organization's articles of incorporation and by-laws will not suffice.

12. Rather than conduct an independent investigation into the facts of the case, Sidley & Austin chose instead to align itself with Dr. Tucker, Ms. Terra and Senator Simpson. Immediately after being hired, Sidley & Austin filed a motion to dismiss Plaintiffs' Verified Complaint. Sidley & Austin did not assume the neutral and disinterested perspective required by the ethics rules. As litigation counsel for the Terra Foundation, Sidley & Austin has an obligation to act in the best interests of the Foundation, but it cannot know for certain what those interests are in the absence of a real investigation as to the allegations in the Complaint. The fact that Sidley & Austin deliberately chose not to initiate such a thorough factual investigation - and then chose to defend its failure to do so - demonstrates that the firm is not capable of providing the Foundation with the kind of independent professional judgment and candid advice required by Rule 2.1. Thus, under Rule 1.7(b), Sidley & Austin suffers from a conflict of interest in that it is "materially limited" in its representation of the Foundation. Moreover, it would not be reasonable for the attorneys at Sidley & Austin to believe that they are not impaired in their representation of the Foundation. Their actions demonstrate their severe limitations in this matter. Consequently, it would be unethical for Sidley & Austin to continue to represent the Terra Foundation.

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Sidley & Austin's New Legal Position Demonstrates its Incurable Conflict of Interest

13. In addition to the materials described in paragraph 4 of my original Affidavit and in paragraph 4 above, I have also reviewed Terra Foundation's Motion to Continue Stay of Proceedings Pending Independent Litigation Committee Investigation, as well as the attached exhibits. These exhibits include: (1) Terra Foundation for the Arts Partial Minutes of the November 30, 2000 Board Meeting and (2) Terra Foundation for the Arts Independent Litigation Committee December 4, 2000 Meeting Minutes and Resolutions. In the Independent Litigation Committee meeting, the two members chose to retain Sidley & Austin as counsel.

14. Following Mr. Andreani and Mr. Stebbins' decision to retain Sidley & Austin as counsel, a lawyer from Sidley & Austin joined the meeting by phone. The minutes state that this lawyer "discussed the possibility of Sidley & Austin investigating the allegations [in the Complaint]" and that "[b]oth members of the committee agreed with this idea." This advice is clearly at odds with counsel's earlier position on the matter and demonstrates Sidley & Austin's lack of independence requiring its removal from the case.

15. Earlier in the case, counsel from Sidley & Austin argued that the law firm had already conducted all the investigation that was necessary in order to conclude that the Complaint should be dismissed. During the October 20th hearing, counsel argued:

They say we have done no investigation, that we filed this motion to dismiss willy-nilly, I guess is their point. Your Honor, we were charged with having committed an ultra vires and what did we do? We looked at the governing documents of the Foundation, the articles, the bylaws, the Not-For-Profit Corporation Act and lo and behold we find out that nothing that what is contained in the pleadings is an ultra vires act. We don't need to do more investigation that that.

Transcript, p. 103-04. That Sidley & Austin now believes that further investigation is required shows that the firm suffered from a conflict of interest when it appeared before the court in October. During this time, Sidley & Austin was directly under the control of Dr. Tucker. At the October 20th hearing, Sidley & Austin informed the court that it did not "need to do [any] more investigation" of the matter. Presumably this represented Sidley & Austin's best, professional, legal advice in the interest of the Foundation. Yet this advice was wholly at odds with what the law requires. The overwhelming weight of legal authority discussed above provides that a corporate entity should thoroughly investigate serious allegations of wrong-doing made against its directors. In arguing to the court that it had already conducted a sufficient investigation by reading the articles of incorporation and by-laws, Sidley & Austin chose to ignore this law. Because Sidley & Austin willingly took a position that it now implicitly concedes was not in the best interest of the Foundation, Sidley & Austin impliedly admits that it was "materially limited" because of its relationship with Dr. Tucker.

16. Although Dr. Tucker has been removed as litigation director, Sidley & Austin cannot avoid the conflict of interest from which is continues to suffer. The control Dr. Tucker had over Sidley & Austin dissuaded the law firm from conducting any factual investigation at all into the allegations made against Dr. Tucker, Ms. Terra and Senator Simpson. It is unreasonable to believe that this influence has suddenly disappeared. It is untenable to believe that Sidley & Austin can now conduct a thorough and impartial investigation as to whether Dr. Tucker, Ms. Terra and Senator Simpson engaged in deliberate waste, mismanagement and self-dealing. Indeed, a disinterested lawyer could not reasonably believe that Sidley & Austin's representation of the Foundation will not be "adversely affected" by the law firm's relationship with Dr. Tucker. See IRPC 1.7(b). This serious conflict of interest cannot be made to disappear simply by Mr. Andreani and Mr. Stebbins' vote to retain the law firm.

Sidley & Austin's Prior Work and Its Impaired Representation

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17. Under the court's October 20th ruling, the Independent Litigation Committee was to consider the selection of counsel to represent the Foundation throughout the remainder of the case. Although, as a technical matter, the court's order did not prohibit the Independent Litigation Committee from retaining Sidley as its litigation counsel, the Illinois Rules of Professional Conduct prohibit Sidley & Austin from accepting this representation. By deliberately refusing to conduct a meaningful investigation as to the allegations in the Complaint and by filing a motion to dismiss the lawsuit, Sidley & Austin has already committed itself to a certain view of the litigation. Further, Sidley & Austin has already taken direction from Dr. Tucker, a named defendant in the case whose interests may well be adverse to the interests of the Foundation. Sidley & Austin cannot now represent the Foundation consistent with the requirements of Rule 1.7(b) because Sidley & Austin may be required to repudiate its own prior work in the case. This work includes not only the motion to dismiss, but also Sidley & Austin's opposition to the appointment of a receiver, its opposition to the intervention of James Terra, and its opposition to the entry and enforcement of the temporary restraining order entered by the court. Sidley & Austin lost the ability to fairly evaluate the current lawsuit and exercise independent professional judgment when it agreed to take direction in the case from Dr. Tucker. Thus, notwithstanding the Independent Litigation Committee's decision to reappoint Sidley & Austin, the law firm is still "materially limited" in its representation of the Foundation because it "cannot consider, recommend or carry out" certain courses of action that may be in the client's best interest. See ABA Model Rule 1.7, cmt. 4. It would be unethical for Sidley & Austin to attack its own prior work product in this case. *See e.g. In re Williams,* 57 Ill. 2d 63, 66, 309 N.E.2d 579, 581, (1974) (noting that attorney cannot attempt to nullify the effectiveness of prior legal services that the attorney provided); *Sullivan County Regulation Refuse Disposal Dist. v. Town of Acworth,* 686 A.2d 755, 758 (N.H. 1996) (noting that "an attorney owes a duty of loyalty to former client that prevents that attorney from attacking or interpreting work [the attorney] performed or supervised, for the former client"). Legitimate litigation counsel, however, must be free to consider all alternatives that are available to the Foundation, including alternatives foreclosed by Sidley & Austin's prior work product. Because Sidley's prior actions have "foreclose[d] alternatives that would otherwise be available to the client", the conflicts rules require that Sidley & Austin may no longer represent the Foundation. *See* ABA Model Rule 1.7, cmt. 4.

Ralph Lerner and Sidley & Austin's Conflict of Interest

18. Wholly apart from its involvement in the litigation to date, Sidley & Austin also suffers from an irreconcilable conflict of interest because of the work of one of its partners, Ralph Lerner. Mr. Lerner is a partner in Sidley's New York office. At the October 20th hearing, Sidley & Austin characterized Mr. Lerner's work on behalf of the Foundation as only providing "certain strategic advice about art law." Transcript, p. 52. Indeed, Sidley & Austin attempted to minimize Mr. Lerner's involvement, describing him as a sort of "technician" who merely suggested "possible contract language." Transcript, pp. 54-55.

19. Notwithstanding Sidley & Austin's characterization of Mr. Lerner's work on behalf of the Foundation, a review of the minutes for the board of directors meeting on August 24, 2000 reveals that Mr. Lerner provided extensive legal advice to the Foundation on a subject central to this litigation – the possible relocation of the Foundation. Indeed, Mr. Lerner's advice involved such issues as the sale or donation of the Terra Foundation's art collection and the Foundation's continued presence in Chicago. The minutes also show that Mr. Lerner's advice to the Foundation was premised upon the closure of the Terra Museum in Chicago. Thus, it is apparent that Mr. Lerner served as an attorney for the Foundation and rendered legal advice to the Foundation.

20. However, because this legal advice is at the heart of the present lawsuit, as litigation counsel Sidley & Austin finds itself in the awkward position of having to review both the soundness and the legal validity of Mr. Lerner's advice. Indeed, this position is not only awkward it is untenable. Because Mr. Lerner provided the Foundation with transactional advice with respect to the subject matter of the litigation, Sidley & Austin suffers from an incurable conflict of interest as litigation counsel. The firm is "materially limited" under Rule 1.7(b) because it "cannot consider, recommend or carry out" certain courses of action that may be in the best interest of the Foundation. See ABA Model Rule 1.7, cmt. 4. It cannot, for example, challenge the validity of the work provided by its partner Mr. Lerner. This conflict cannot be cured

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under Rule 1.7(b) by the consent of the Foundation since under Rule 1.7(b), it would be unreasonable to think that Sidley's representation would be unimpaired.

Sidley & Austin's Failure to Satisfy the Objective Standard

21. Near the end of the October 20th hearing, a lawyer for Sidley & Austin, argued: "Why is it that I am not representing the Foundation ethically? I would still like to know that, because I believe in my heart of hearts as I stand here, that I am representing this Foundation ethically." Transcript, p. 109. This argument is unfounded because it relies upon a subjective standard. The rules of ethics do not contain such a subjective standard. Rule 1.7(b) employs an objective standard. The standard is what a "disinterested lawyer would conclude." See ABA Model Rule 1.7, cmt. 5. The rule provides that if a lawyer is materially limited in his or her representation of a client because of the lawyer's responsibilities "to another client or to a third person, or by the lawyer's own interest", then the lawyer cannot continue with the representation. See IRPC 1.7(b). The lawyers at Sidley & Austin have a responsibility to preserve the reputation of Mr. Lerner and the law firm as a whole. They cannot repudiate the advice rendered by Mr. Lerner or undermine their own prior work on the case. Moreover, the lawyers at Sidley & Austin have acted in a way that evidences a loyalty to Dr. Tucker and a disregard for the best interests of the Terra Foundation. Under the objective standard set forth in Rule 1.7(b), they are materially limited in their representation of the Foundation. Therefore, as an ethical matter, Sidley & Austin may not represent the Foundation further.

Conclusion

For all the reasons stated above, I conclude that the Rules of Professional Conduct prohibit Sidley & Austin from representing the Foundation in this case, and that the Independent Litigation Committee's decision to appoint Sidley & Austin does not supercede these ethical rules.

FURTHER AFFIANT SAYETH NOT.

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2000 WL 35728515 (Ill.Cir.) (Expert Report and Affidavit)
Circuit Court of Illinois.
Cook County

BUNTROCK, et al.,
v.
TERRA, et al.

No. 00 CH 13859.
December 10, 2000.

(Report or Affidavit of Lawrence C. Marshall)

Name of Expert: Lawrence C. Marshall
Area of Expertise: Legal >> Other Legal
Case Type: N/A >> N/A
Case Type: Fiduciary Duty >> Business Organizations
Jurisdiction: Cook County, Illinois

Representing: Defendant

Hon. Jacques Andreani

Dr. Theodore Stebbins, Jr.

Independent Litigation Committee

Terra Foundation for the Arts

664 North Michigan Avenue

Chicago, Illinois 60611

Dear Ambassador Andreani and Dr. Stebbins,

As you requested, I am writing to formalize my opinion, conveyed to you earlier through Stephen Carlson, that the Independent Litigation Committee ("ILC") of the Terra Foundation for the Arts ("the Foundation") is not barred by any legal or ethical principles from choosing to retain Sidley & Austin to represent the Foundation in the above-captioned litigation. It is my understanding that you were informed of my opinion during a meeting held earlier this month, and that you requested that I reduce these views to writing as soon as possible. I had intended to do this upon my return to Chicago on December 14, but in view of the motion to disqualify Sidley & Austin that Messrs. Buntrock and Gidwitz filed on December 6, I am writing this from Florida where I am vacationing with my family.

Before I set forth the reasoning that supports my opinion, I offer the following synopsis of my position: One of the positions that Professor Breen expressed in his initial affidavit was that it was improper for Dr. Tucker-one of the named individual-defendants in this action-to be the person controlling the litigation on behalf of the Foundation. I do not disagree with that proposition, and I believe that Judge Kinnaird acted properly in ordering the independent directors

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of the Foundation to name an ILC. Professor Breen and the plaintiffs go further, however, and also argue that the ILC is precluded from choosing Sidley & Austin to represent the Foundation. I disagree strongly with this claim. Nothing that Sidley & Austin has done in this case limits its ability to zealously represent the Foundation and to pursue the goals that will be set by the ILC.

When I initially expressed my opinion on this matter, I had the benefit of reviewing the pleadings in the case that had been filed as of late November, particularly the initial affidavit of John M. Breen. Several days ago, I received Professor Breen's Supplemental Affidavit, as well as some recently-filed pleadings, and I have now reviewed them carefully. Nothing in that Supplemental Affidavit or in the new pleadings has caused me to modify my opinion that there is no bar, legal or ethical, to Sidley & Austin continuing to represent the Foundation under the direction of the new ILC.

As I read the plaintiffs' pleadings and the affidavits of Professor Breen, the question of whether Sidley & Austin is disqualified here boils down to three questions. First, does the fact that Sidley & Austin represented the Foundation in this litigation during the period in which Dr. Tucker was directing the litigation on behalf of the Foundation preclude Sidley & Austin from representing the Foundation now that the ILC is directing the litigation? Second, does the fact that Sidley & Austin took certain legal positions on behalf of the Foundation at earlier phases of this litigation preclude Sidley & Austin from continuing to represent the Foundation which might, at the direction of the ILC, choose to pursue different goals in the litigation? Third, does the fact that Ralph Lerner, a partner in Sidley & Austin's New York office, advised the Foundation about how to effectuate certain possible courses of conduct preclude Sidley & Austin from representing the Foundation which might now, at the direction of the ILC, take the position that these previously-contemplated courses of conduct are inappropriate? For the reasons that I will now explain, it is my view that the answer to each of these questions is no.

L The Effect of Sidley & Austin Having Represented the Foundation During the Period in which Dr. Tucker was Directing the Litigation.

The plaintiffs argue that because Sidley & Austin represented the Foundation during the period in which Dr. Tucker had been responsible for directing the litigation, Sidley & Austin is now precluded from representing the Foundation under the direction of the ILC. I do not believe that the governing law or ethical provisions supports this claim in any way. The relevant inquiry at this moment is whether Sidley & Austin's *current* ability to advise and represent the Foundation is impaired by virtue of any duties that Sidley & Austin owes to other clients, any duties that Sidley & Austin owes to third parties, or by Sidley & Austin's own interests. There are no such duties or interests implicated here.

The critical fact here is that Sidley & Austin has never represented anyone in this litigation other than the Foundation. Sidley & Austin owes no duties to anyone else-its only responsibility here is to represent the Foundation as directed by the Foundation's duly authorized corporate representative. At one time-by virtue of the vote of the Foundation's Board of Directors-that duly authorized corporate representative was Dr. Tucker. That has now changed. What has not changed, however, is the fact that Sidley & Austin's duty then and now was to represent the Foundation. The change in the makeup of those who are responsible within the Foundation to direct the litigation creates no conflict on the part of Sidley & Austin (much less a conflict that is so severe that it cannot be remedied by consent of the ILC). Notwithstanding plaintiffs' accusations, Sidley & Austin did nothing wrong and displayed no lack of independence when it took direction from the person that the Bard (advised by senarate corporate counsel) had designated.

The following analogy drives the point home. Assume that a corporation's board of directors retains outside counsel on behalf of the corporation and instructs counsel to work under the direction of the corporation's in-house counsel. Assume further that the board later loses trust in the in-house counsel (even to the point of suspecting that person of wrongdoing) and replaces him with new in- house counsel. Obviously, there is no prohibition on the board choosing to proceed with the same outside counsel that has been representing the corporation. In this example, outside counsel's obligations have always been to the corporation-not to the in-house counsel who was directing the representation on

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behalf of the corporation. The same is true in this case: Sidley & Austin's duties were and are to the Foundation-it has never owed any duties to Dr. Tucker. There is no evidence whatsoever that Sidley & Austin ever compromised this loyalty. There are no conflicting duties at this time, and there is no reason that Sidley & Austin's having taken direction form Dr. Tucker now precludes it from continuing to represent the Foundation.

IL The Effect of Sidley & Austin Having Taken Certain Legal Positions on Behalf of the Foundation at Earlier Phases of this Litigation.

The plaintiffs and Professor Breen point to two specific legal positions that Sidley & Austin maintained earlier in this litigation as support for their claim that Sidley & Austin is now precluded from representing the Foundation. First, they point to the fact that Sidley & Austin defended Dr. Tucker's authority to direct the litigation on behalf of the Foundation, and thus opposed the creation of an independent litigation committee. Second, they point to the fact that Sidley & Austin filed a motion to dismiss the complaint without having undertaken an intense factual investigation into all of the facts asserted therein. According to Professor Breen, these facts demonstrate that Sidley & Austin is "incapable" of fulfilling its duty to "exercise independent professional judgment and render candid advice" on behalf of the Foundation. Breen Supplemental Affidavit at 3. Moreover, Professor Breen asserts that "Sidley & Austin has already committed itself to a certain view of this litigation" and that it cannot represent the Foundation because it is precluded from repudiating its own prior positions in the litigation. In other words, Professor Breen asserts that these prior positions show (a) that Sidley & Austin's loyalty to Dr. Tucker impairs its ability to represent the Foundation at the direction of the ILC, and (b) that Sidley & Austin's self-interest limits its ability to effectively represent the Foundation at the direction of the ILC. These claims miss the mark by a wide margin.

It is one thing to disagree with some of the legal positions that Sidley & Austin has taken in this litigation. It is quite another to use such disagreements to support a claim that Sidley & Austin was disloyal or was acting unethically. Lawyers often take positions on behalf of clients that do not prevail. At times, judges even declare that the position that the lawyer took was plainly wrong. But so long as those positions were taken in furtherance of the client's interests – then expressed by the person or persons authorized to speak on behalf of the client-there is no basis for suggesting that the lawyer was disloyal to the client, or otherwise violated his duties to the client, by taking these positions.

In this case, the Foundation's Board of Directors had voted to have Dr. Tucker direct the litigation, and the Foundation had decided to try to have the lawsuit against the Foundation (dealing with the claim that the Foundation was not allowed to close the Chicago museum) dismissed as soon as possible. There is nothing inappropriate about Sidley & Austin, in its capacity as litigation counsel, having agreed to advance this position in the courts, and Sidley & Austin's willingness to do so does not suggest that it was impaired in any way. The Foundation was a defendant in this action, and most defendants try mightily to have cases against them dismissed. This was not obviously a derivative action-the Foundation was simply a named defendant, and the majority of the Board plainly found no merit in the allegations that it would be *ultra vires* for the Foundation to close the Chicago museum. Indeed, the Board made its decisions, including the decision to appoint Dr. Tucker to direct the litigation on behalf of the Foundation upon the advice of its corporate counsel (a firm other than Sidley & Austin). Sidley & Austin's role was to act as litigation counsel it hired to fulfill its client's clearly-stated goals vis-a-vis the litigation. Consistent with its duty to represent the Foundation in the litigation, Sidley & Austin took positions designed to expedite dismissal of the suit. There was nothing the least bit unethical about that. Indeed, I am very disturbed that any one would use that conduct as a basis for alleging that Sidley & Austin was disloyal to the Foundation.

Now, circumstances have changed and the ILC has asked Sidley & Austin to investigate the factual allegations-particularly as they relate to waste and mismanagement--so that the ILC can decide what positions to take henceforth. In other words, the Foundation is now considering whether it ought to take a new position in the litigation, including on the issues of waste and mismanagement This possible change of position does not demand disqualification of prior counsel. Clients often change their minds in the middle of litigation, and lawyers are often in a position of having to take

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positions different from the ones they took earlier in the litigation. There is no rule of law or ethics that tells a lawyer not to represent the client any longer simply because the clients views about the objectives of the litigation have changed, or because a court has rejected some of the claims that the lawyer advanced earlier in the case. [a]

In sum, nothing about the prior positions that Sidley & Austin took in this litigation suggest (a) that Sidley & Austin was disloyal to the Foundation at any time; (b) that Sidley & Austin is incapable of providing representation to the Foundation that is free of any divided loyalty between the Foundation and any other clients or third parties; or (c) that Sidley & Austin is limited in its ability to represent the Foundation because of the positions it took at earlier stages of the litigation.

III. The Effect of Ralph Lerner Having Advised the Foundation About how to Effectuate Certain Possible Courses of Conduct.

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This challenge has no merit on the current record. Contrary to the plaintiffs' assertions, the litigation at issue here does not turn on the validity of the advice that Mr. Lerner gave the Board on August 24, 2000. Based upon the minutes of that meeting as well as Mr. Lerner's affidavit, it is cear that Mr. Lerner never gave any advice on whether it was permissible, as a matter of Illinois law or general principles, for the Board to close the Chicago museum or to enage in any of the other acts about which plaintiff have complained. from ever indication. Mr. Lemer simply advised the Board on how it would go about accomplishing certain goal* should it choose to adopt those goals It is simply inaccurate, then, to conclude that Sidley & Austin will be in a position of having to challenge the advice that Mr.Lcmer gave No one has ever suggested that any of the advice that Mr. Lemer gave-or the subject of that advice-subject to attack.

In any event, Mr. Lerner's role as counsel to the Board at a time in which he was asked to advise on certain courses of conduct does not bar him or Sidley & Austin from playing different roles at the direction of the ILC. There is no suggestion that Mr. Lerner was anything but loyal to the Foundation, and there is no reason that Sidley & Austin is precluded from representing the Foundation even if it rs out that the ILC concludes that the course of conduct that the Board had earlier contemplated was improper or impermissible.

CONCLUSION

The decision on whether the ILC should retain Sidley & Austin to represent the Foundation in this litigation is, in my view, a decision that is up to the ILC. I see no basis fur any claim that you have no right to proceed with Sidley & Austin should you so cboose. On the other hand, it is obviously your prerogative to choose other counsel, should you wish.

Thank you for giving me this opportunity to advise you. I would be pleased to provide any further assistance that you may deem helpful.

Footnotes

a rofessor Breen cites two cases in his Supplemental Affidavit for the proposition that “it would be unethical for Sidley & Austin to attack its own prior work product in this case.” Supplemental Affidavit at 10. As it turns out, both of these cases involve lawyers who have gone from representing one party to representing another party in the same matter-a classic example of prohibited conduct. Neither of these cases remotely suggests that a law firm must withdraw from representing its client because the vicissitudes of litigation have caused the client or the attorney to rethink some of the positions that the attorney previously advocated on that very client's behalf.

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2000 WL 35728514 (Ill.Cir.Ct.) (Expert Report and Affidavit)
Circuit Court of Illinois.
Chancery Division
Cook County

Dean L. BUNTROCK, a Directo of the Terra Foundation for the Arts, et al., Plaintiffs,
v.
Judith TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.

No. 00CH13859.
December 13, 2000.

Affidavit of Thomas More Donnelly

Case Type: Fiduciary Duty >> Business Organizations
Jurisdiction: Cook County, Illinois
Name of Expert: Thomas More Donnelly
Area of Expertise: Legal >> Law Professor
Area of Expertise: Legal >> Attorney Fees

Representing: Plaintiff

Honorable Dorothy Kirie Kinnaird.

1. I am Thomas More Donnelly, an attorney licensed to practice law in the State of Illinois and a former Judge of the Circuit Court of Cook County. I serve as an adjunct professor at Loyola University of Chicago School of Law. The Illinois Supreme Court appointed me to the position of Reporter to the Supreme Court's Committee on Professional Responsibility in 1994, and I served until the year 2000. I also served as Chairman of the Chicago Bar Association Professional Responsibility Committee from 1999-2000. I am co-author of the Cornell Law School Illinois Legal Ethics Annotation.

2. I have reviewed several documents that have been provided me by the law firm of Quinlan & Crisham, Ltd.:

(a) Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for the Terra Foundation, and/or Receiver;

(b) Opposition by Defendant Terra Foundation for the Arts to Plaintiffs' Motion to Appoint a Special Litigation Committee, Independent Litigation Counsel and/or for a Receiver;

(c) Opposition to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation and/or Receiver;

(d) Plaintiffs' Reply in Further Support of their Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel, and/or Receiver;

(e) Plaintiffs' Motion for Leave to Supplement Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for the Terra Foundation, and/or Receiver Instanter;

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(f) Handwritten and conforming typed order of October 20, 2000; and

(g) Emergency Motion to Appoint Receiver and for a Temporary Restraining Order and Objection to Motion for Stay.

3. In reviewing Terra Foundation's Opposition to Emergency Motion to Appoint Receiver and for Temporary Restraining Order as it Relates to the Retention of Sidley & Austin, payment of legal bills and payment pursuant to the Dilenschneider Contract, I was suiprised on page 11 to read footnote 3 which states:

"Even if the Court at this juncture were to allow plaintiffs to interfere with the attorney-client relationship and find that Sidley & Austin should now be disqualified, Sidley & Austin would *clearly* still be entitled to be compensated for its past work in this case." (emphasis added)

4. Not only may this violate Illinois Rule of Professional Conduct Rule 3.3(a)(3) in that it fails to disclose to this Court legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position that they are asserting, it also may indicate that Sidley & Austin is failing to provide the appropriate legal authority regarding their entitlement to fees to the Foundation.

5. If the plaintiffs' allegations are taken as true, Sidley & Austin has breached a fiduciary duty to its principal. *See In reMarriage of Pogano,* 154 I1*I.*2d at 174, 185-186, 607 N.E.2d 1242, 1249-50 (1993). Where a fee agreement or the basis of representation was illegal, the fee agreement becomes unenforceable and the attorney is not entitled to any fees. *See Leoris v. Dicks,* 150 Ill. App. 3d 350, 353-354, 501 N.E.2d 901 (1st Dist, 2d Div., 1986).

6. Sidley & Austin's entitlement to fees is anything but *clear.* As Judge Learned Hand said 50 years ago:

"it had become a commonplace that an attorney must not represent opposed interests; and the usual consequence has been that he is debarred from receiving any fee from either no matter how successful his labors. Nor will the court hear him urge or let him prove that in fact the conflict of his loyalties has had no influence upon his conduct; the prohibition is absolute and the consequence is a forfeiture of all pay."

Silbiger v. Prudents Bonds Corporation, 180 F.2d 917, 920 (2d Cir. 1950). Indeed, clients are not required to show injury in seeking forfeiture of fees in this circumstance. *See Hendry v. Pelland & Sadur, Pelland & Rubenstein,* P.C., 73 F.3d 397, 401-402 (DC. Cir. 1996).

7. Moreover, because plaintiffs' motion for a temporary restraining order regarding the payment of legal bills raises an issue with regard to fees, Sidley & Austin's attempt to settle or resolve this dispute may raise a presumption of undue influence. *See In re Marriage of Pogano,* 154 Ill.2d at 185. Thus, it becomes incumbent upon Sidley & Austin to rebut this presumption by a showing of clear and convincing evidence. *Id.*

8. The Court looks to several factors in determining whether such a presumption is overcome, including (1) whether "the attorney made a full and frank disclosure of all relevant information, (2) the client's agreement was based on adequate consideration, and (3) the client had independent advice before completing the transaction." *See Id.*

9. In light of footnote 3 on page 11, it is doubtful that Sidley & Austin has made a full and frank disclosure of all relevant information. Among the most relevant considerations for the Foundation would be the fact that Sidley & Austin may not be entitled to any compensation for work done from the date upon which a conflict reasonably should have been determined to exist. *See ISBA Advisory Opinion on Professional Conduct,* Op. No. 90-26 (March 9, 1991).

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10. This is especially true here where the representing lawyer is affiliated with a testifying lawyer (Mr. Lerner) and the lawyer's testimony may be adverse to the client's interest, i.e., an ultra vires act. *See Restatement (Third) of the Law Governing Lawyers,* Section 186, Comments (f) and (i), citing *Cottonwood Estates, Inc. v. Paradise Builders, Inc.,* 624 P.2d 296 (Ariz. 1981) (client consent does not cure adverse testimony conflict).

11. Thus, Sidley & Austin's statement in footnote 3 of page 11 raises two problems. First, it indicates that the attorney in frank disclosure of relevant information and that the client's agreement was not based on adequate consideration. Because Sidley & Austin is ignorant of the law regarding their entitlement to fees for work done before a disqualification order, Sidley is unable to give the client full and frank disclosure of all relevant information and that, based on Sidley's advice, the Foundation is unable to give adequate consideration to its options. Moreover, it is unclear from the record before us whether subsequent to the filing of this motion regarding fees, the client had independent advice before making the decision as to how to proceed with respect to this Emergency Motion in which Sidley & Austin has an undeniable interest.

12. With respect to the Affidavit of Larry Marshall and his attached letter, Mr. Marshall makes two errors. On page 2 of his letter, Mr. Marshall identifies as the critical fact that Sidley & Austin has never represented anyone in this litigation other than the Foundation. Apparently, Mr. Marshall believes that Sidley & Austin's filing an appearance on behalf of the Foundation is dispositive of the question of who they represent within the corporate family. Secondly, he indicates in a conclusory fashion that Sidley & Austin owes no duties to anyone else. As the American Bar Association has made clear many times, the question of who is the client in the corporate family is a complicated factual matter. The ABA Formal Opinion 95-390, Conflicts of Interest in the Corporate Family Context.

13. Mr. Marshall appears to believe that whether Dr. Tucker is a client is determinative of whether he might be owed possible fiduciary responsibilities. However, this is certainly not the case. In many context, a lawyer may owe duties to non-clients. See Restatement (Third) of the Law Governing Lawyers, Sections 36, 27, 213. Hence, these are factual matters that are yet to be resolved. Thus, Mr. Marshall's dismissive and conclusory statements with regard to Sidley & Austin's representation and duties without a thorough investigation of the facts is premature. Similarly, his remark on the footnote on page 4 that the cases cited by Professor Breen are distinguishable because “both of these cases involve lawyers who have gone from representing one party to representing another party in the same matter” begs the question. The question indeed is, “Who does Sidley & Austin represent?” As the Restatement and the ABA recognizes, this presents a complex, factual question.

14. For these reasons, Professor Marshall's Affidavit and letter assume away the central problem in this litigation, and thus is not helpful in addressing the issue presented here.

15. Based on my review of the documents presented to me, I believe the Foundation must receive independent legal advice with respect to its position with regard to the Emergency Motion.

FURTHER AFFIANT SAYETH NOT.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al)
)
Plaintiffs,)
vs.)
) No. 00 CH 13859
JUDITH TERRA, et al)
)
Defendants)
)
THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel. JAMES E. RYAN,)
Attorney General of Illinois,)
)
Plaintiff-Intervenor)
vs.)
)
JUDITH TERRA, et al)
Defendants)

NOTICE OF MOTION

TO: **SEE ATTACHED SERVICE LIST**

On December 27, 2000, at 11:00 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Dorothy Kinnaird or any judge sitting in her stead, in the courtroom usually occupied by her in Rm. 2302 Richard Daley Center Chicago, Illinois, and present the attached **Attorney General's Motion to Enjoin The Terra Foundation's Use of the Current Special Litigation Committee and For Appointment of a Receiver to Conduct Independent Investigations.**

Name: Floyd Perkins Attorney for Plaintiff
Address: 100 West Randolph Street, 3rd Floor City: Chicago, Illinois 60601-3175
Telephone: (312) 814-2595 Attorney No. 99000

PROOF OF SERVICE BY HAND DELIVERY

I, Floyd Perkins
(the attorney, certify)

I served this notice by hand deliverying a copy to each person on the attached service list on December 22, 2000, with proper postage prepaid.

Floyd Perkins

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

No. 00CH 13859

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants,

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel*. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff,

V.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois, Not-For-Profit Corporation,

Defendants,

NOTICE OF FILING

TO: **SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that on December 22, 2000, I caused the attached **Attorney General's Motion To Enjoin The Terra Foundation's Use Of The Current Special Litigation Committee and For Appointment Of A Receiver To Conduct Independent Investigations** to be filed with the Clerk of the Circuit Court of Cook County, Illinois, a copy of which is herewith served upon you.

BY: Therese Harris
Assistant Attorney General

FLOYD D. PERKINS #99000
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

No. 00 CH 13859

FILED
DEC 29 2000
DOROTHY BROWN
CLERK OF CIRCUIT COURT

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

ATTORNEY GENERAL'S MEORANDUM IN SUPPORT OF HIS MOTION TO ENJOIN THE TERRA FOUNDATION'S USE OF THE CURRENT SPECIAL LITIGATION COMMITTEE AND FOR APPOINTMENT OF A RECEIVER TO CONDUCT THE INDEPENDENT INVESTIGATION

NOW COMES the People of the State of Illinois by the Attorney General in Response to certain claims stated by Defendant's counsel in open court on Wednesday December 27, 2000 and states:

16di-000357

1) A verbal statement was made by counsel for the Defendant Foundation while referring to the Attorney General's pending motion stating that "this (the Attorney General's motion) is almost a sanctionable pleading". While such is perhaps a lawyerly attempt to deflect consideration of the allegations found in the attached Neff memos, the Attorney General takes such a charge made before the court about his actions most seriously and is compelled to respond. (Transcript page 75)

2) After asserting the Attorney General's motion is almost sanctionable, counsel for the Foundation further related that Mr. Stebbins was not in a conflict and his ethics had not slipped. (Transcript page 75.)

3) Counsel for the Foundation asserted that the Attorney General should have talked to Mr. Neff and/or Mr. Stebbins. When Assistant Attorney General Perkins explained he had no right to talk to the employees and directors of defendant Foundation, the Foundation's counsel stated " Sure they can. Absolutely, Judge. Judge, that was offered to them in September, it was renewed in October. All you have to do is dial seven numbers. That offer was made to them and they never accepted it. Instead we have this on the public record which has no basis". (Transcript page 76)

4) First, there was never an offer that the Attorney General could conduct interviews of Foundation employees and directors. Sidley & Austin counsel did verbally say sometime in October to Assistant Attorney General Floyd Perkins that he could ask Sidley about anything and they would attempt to get an answer. However, at that time Sidley was telling the Attorney General's office that Sidley needed the Foundation records then still at Bell, Boyd & Lloyd, because Sidley was new to this client and did not have Foundation records. The offer from Sidley was not in writing and was a verbal remark, ask us and we will inquire for you. Also at that time the Attorney General did not have the Neff memos or know of their existence.

5) Second, this informal process now suggested is not how adversarial matters proceed. Indeed, as this court well knows an elaborate system to conduct discovery under sworn oath and court sanction exists so that the truth is compelled from witnesses. The method Sidley & Austin suggests would not place any of the safeguards of discovery upon the answers Sidley obtained from the Foundation

employees and directors. Further the delivery of questions from the Attorney General to Sidley, then delivered by Sidley to its client, followed then by the client's response to Sidley, which would then relate the answer back to the Attorney General is not an acceptable method to gather facts in litigation. When serious charges such as those made by Mr. Neff exist, discovery must be employed.

6) Third, even assuming that Sidley was willing to bring in Mr. Neff and Mr. Stebbins for a sit down discussion (which was never offered until after the filing on December 22, 2000) we would not have the protections of on oath testimony or the ability to assure that all related documents were there and/or available. Further Mr. Neff is an employee of the Foundation working under the direction of certain defendants. Clearly every day experience makes clear he would be an uncomfortable witness in an informal interview session detailing conflicts he observed and memorialized in his memos. In addition, there is often a need to proceed in a certain order of questioning and at times a need to be in a position to make a witness answer a question then, rather than allow the witness to defer an answer until he/she has consulted with others. A deposition allows some control; an interview does not. While more complex a deposition is a more thorough method to resolve facts, and a necessary step in litigation.

7) Fourth, Sidley & Austin's status as counsel for the Foundation has been at issue since October. All discovery has been stayed. If Sidley had not been re-chosen by the special litigation committee or if the committee is enjoined from using Sidley, its verbal offer to allow the Attorney General to interview Foundation employees and directors would be subject to attack by new counsel for the Foundation. New counsel would have every right to point out that the Attorney General was aware of the issues raised as to Sidley's status and should not have proceeded until the Foundation's counsel's status were finally resolved. Indeed, if we had been meeting and interviewing Foundation employees and the special litigation committee had picked a new counsel, the Attorney General's actions would have been called into question.

8) Part of the basis for the Attorney General's motion are the statements made by Curator and director of Art at the Chicago museum, John Neff. Mr. Neff is a highly paid employee, its day to day supervisor of the Chicago museum , and his statements are found and made in his notes to his file.(Attached to the Motion). These statements in part constitute

admissions against interest by the Terra Foundation itself , as they are found in its business records made by a chief executive (a person whose statements are admissions by the Terra). Neff's memos in part provide:

a) "the process (acquisition of art for the Terra) is unacceptable and raises **serious questions of potential conflicts of interest** that do not help our efforts to build a solid reputation for the Terra". ... " these issues fall into three categories : 1) the review process; 2) conservation review; 3) bidding procedures, both at auction and negotiations with dealers." (memo 5/28/99; para. 1 & 2). (Emphasis added).

b) " it is a process that is fundamentally compromised by the fact that Ted (Stebbins) not only is potentially an advisor of his own museum, the MFA, Boston, himself as a private collector, three private collectors he advises, and the Terra, but that the collectors were present during the viewing process (with Derrick and Ted) and at the Chritie's sale May 26th " (memo 5/28/99; para 5).

c) "one never knows where he is on something: are we getting his best judgement? Where does the Terra fit in with the MFA (this was potentially an issue to judge from his comments on the Benson I found at Godel: he said to Derrick (Terra's curator in Giverney) that it was a great little picture and that the MFA didn't have one: when I arrived at Godel after the Christie's sale ... " Ted was already there and looking at a number of pictures not on our list. The Johnson was brought out but I had to ask to have the Benson brought out as well". (Memo 5/28/99 ; para 6).

d) "The consulting conservator who reviews potential acquisitions in New York is Jim Wright" ... " who works with Ted at the MFA, Boston. Because the relationship with Jim is as unclear as is Ted's relationship with the collectors, CAS (Catherine Stevens) and I discussed at length how to pin this down. I sent Ted a memo on May 14 that included a direct request to clarify the relationship , fees and our requirement for timely written reports." ... " Ted brushed this off ".. "he did not respond to my follow up questions about written reports and a direct request to clarify whether Jim was also looking at pictures for 1) MFA 2) Ted personally, or 3) the collectors Ted advises. Under the circumstances I have to wonder if the Terra is in fact paying for Jim Wright to cover a number of Ted's bases." ... "As of this writing I still do not know if Jim Wright was informed of the condition for his services." (

Memo 5/28/99; page 2; para 1 & 2)

e) " Ted is an employee of another museum and should under no circumstances be bidding for the Terra. I'm very surprised the MFA condons it. Nor should he be authorizing dealers to bid on our behalf." ... " The Directors (curators) or their agents should do the bidding." ... " The situation at the Christie's sale on Wednesday May 28th, would have been comical if it hadn't been so indicative of Ted's unwillingness to take direction from the Board. After the Fiance meeting Arthur Hartman, Judith Terra and I called Ted" ... " at the conclusion of the call Arthur and Judith both said that I should be bidding, not a dealer." ... " I conveyed that my instruction were to do the bidding. Ted was not pleased and said that , no, he was going to bid. He then took the paddle and walked away. When I caught up with him he had been joined by one of his collectors"... "As Lot 41 approached, the Ives sculpture, Ted suddenly said " Here, you bid on the Ives and handed me the paddle". ... " Ted addressed me as though I were someone completely unaware of auction rules and protocol" . (Memo 5/28/99; page 3; para 1).

f) "as Director and Curator of collections I should be directing the bidding, either personally or through an appropriate agent. It was extremely uncomfortable to have to contest this obvious issue with a Board member who seemed not to care about my instructions from the Chairman and Executive Director, it is essential that this be clarified at once." (Memo 5/28/99; page 3; para. 3)

g) "Ted's ambiguous role in the market is an ongoing issue and a cause of concern. Yesterday I was told that **a staff member at the Art Institute raised a concern about his ongoing appearance of conflict of interest**"... " Beyond **full disclosure**, he needs to **advise, not bid**." (memo 5/28/99; page 3; paragraph 4) (Emphasis added)

9) These statements by Neff shared with Tucker show his belief that a serious conflict of interest exists in actions taken by Stebbins. A member of the board of directors has no authority to act for the corporation outside a board or committee meeting unless authority is expressly granted by the board. No member of the board of directors had authority to employ agents such as Jim Wright to review potential acquisitions for the Terra, much less be the sole recepient of the advice, when the job of acquisition is a process delegated to art curators. As Neff recognizes Stebbins has no authority to bid or authorize dealers to bid.

As the Neff memo shows, Stebbins represents himself as a potential buyer and as a representative of other buyers. Any frank bidding discussion by Neff and Derrick Cartwright about potential acquisitions by the Terra made with Stebbins when he represents himself as a potential buyer and other potential buyers causes confidential information of the Terra plans to be inappropriately available to others. Stebbins thrusting himself into the evaluating and bidding process as related in the Neff memos is conflict of interest. As example: If Mr. A instructed Broker B to bid at auction up to $300,000 for a specific house and Broker B also represented Mr. C who wanted to bid on the same house, Broker B would have a conflict and could not represent Mr. A and Mr. C. If several houses were for sale and Mr. A asked Broker B to select the best house for re-sale and bid for it on Mr. A's behalf, and Mr. C also asked Broker B to be his broker to bid for Mr. C upon the best house for re-sale, Broker B could not represent Mr. A and Mr. C.

10) The charges by Neff show conflicts of interest by Ted Stebbins and suggest that such was detrimental to the reputation of the Terra museum. These are not allegations manufactured during litigation; they were ordinary business records maintained in due course. Why Stebbins engaged in these conflicts needs to be explored. The relationship between Stebbins and Jim Wright (the consulting conservator mentioned in Neff's May 28, 1999 memo) needs to be determined.

11) Stebbins is clearly in no position to control the investigation into these matters of his conflict. We are advised Neff is resigning his position at the Terra. Recently the Curator at Giverney, Derrick Cartwright, announced his plan to resign. He is a person involved in the movement of Foundation to Mrs. Terra's house in France. While Neff is still an employee and has access to his files, his deposition should be taken. This is not something that can be done by mere interview.

12) Counsel for the Foundation was quite direct in stating that the ethics of Mr. Stebbins had not slipped. If Sidley has already investigated this matter and has already obtained statements from Stebbins, Neff, or Jim Wright directly on this matter, we ask that those materials be made available immediately.

13) The Attorney General filed his motion within three weeks of Mr. Stebbins being placed on the special litigation committee. The need to review and verify facts, the need to review

and analyze other matters filed herein, certain other legal matters assigned to the assistant attorney generals involved and several personal matters prevented the presentation of the subject motion sooner. While we would prefer to have done more discovery, circumstances prevented same. The case law involved requires that the special litigation committee be reviewed for independence. In light of the concern set forth in our motion , the Attorney General felt duty bound to show to the court the lack of independence of Mr. Stebbins.

14) The conflicts alleged arise from the business record memos of the Foundation. Mr. Neff's says " the process is unacceptable and raises serious questions of potential conflicts of interest", Bringing these admissions against interest to the court's attention was not a sanctionable act, but rather a duty.

WHEREFORE, Plaintiff the Attorney General of Illinois prays that the court:

a) enjoin the Foundation's use of the current special litigation committee;

b) order a limited hearing on this matter;

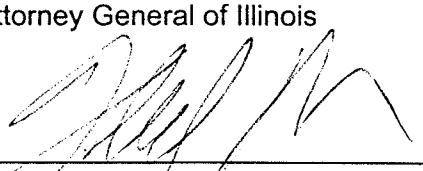
c) allow limited discovery on these matters;

d) appoint a receiver to conduct the independent investigation and litigation on behalf of the Foundation;

e) enter such further relief that the court deems necessary and equitable under the circumstances.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois



BY: Assistant Attorney General

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

Case No. 00 CH 13859

PROCEEDINGS DECEMBER 27, 2000

Mr. -- what's his name -- Mr. Stebbins takes the paddle from him. We get these memos. This almost, your Honor, and I have the greatest respect for Mr. Perkins in the attorney general's office -- this is almost a sanctionable pleading, to suggest based on this memorandum for Mr. Neff without any understanding of the way the process works that Mr. Stebbins is in a conflict of interest or somehow his ethics have slipped. They have not. They absolutely have not.

THE COURT: And that's when you have an opportunity to get a response or an affidavit you would put in a response.

MR. CONLON: Your Honor, we want to do that. Instead of just reading it in the office on the Friday before Christmas and reading about it in the newspapers, when Mr. Stebbins is besmirched, in fairness somebody should have been talked to, at a minimum Mr. Neff. Mr. Stebbins was available, they were.

THE COURT: Well, I thought maybe Mr. Neff wasn't around anymore; that there was no way anybody could talk to him --

MR. PERKINS: Judge, we cannot speak -- in

all fairness, Judge, and that's one of the things I wanted to speak to, we have no right to talk to Mr. Stebbins or Mr. Neff. We can't talk to their client.

MR. CONLON: Sure, they can. Absolutely, Judge. Judge, that was offered to them in September, it was renewed in October. All you have to do is dial seven numbers. That offer was made to them and they never accepted it. Instead we have this on the public record which has no basis.

THE COURT: Okay. Mr. Perkins, I know we're not arguing this. I just wanted to find out the answers to those few questions, when you got the memos, why you didn't sue Mr. Stebbins, and why you didn't tell me about Mr. Stebbins before. Okay. Let me just hear the final thing from Mr. Quinlan.

MR. MICHAELI: Your Honor, can I -- I'm the defendant --

THE COURT: Sir, if you'd like to just step up and just identi- --

MR. MICHAELI: Only two words.

THE COURT: I'm sorry, sir. You need to

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Plaintiffs,

vs.

No. 00CH 13859

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants,

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel*. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff,

V.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois, Not-For-Profit Corporation,

Defendants,

FILED

DEC 29 2000

DOROTHY BROWN
CLERK OF CIRCUIT COURT

NOTICE OF FILING

TO: **SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that on December 29, 2000, I caused the attached **Attorney General's Memorandum In Support Of His Motion To Enjoin The Terra Foundation's Use Of The Current Special Litigation Committee And For Appointment Of A Receiver To Conduct The Independent Investigation** to be filed with the Clerk of the Circuit Court of Cook County, Illinois, a copy of which is herewith served upon you.

BY: Therese Harris
Assistant Attorney General

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I served a copy of the foregoing Notice and the foregoing document upon those listed above by hand delivering a copy of same addressed to the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 29th day of December, 2000 before 5:00 p.m.

BY: Therese Harris
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In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
January 2, 2001

A.M. SESSION

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THE COURT: Counsel, approach the bench, please. Have you all had an opportunity to read all of the materials that have been drafted and dropped off this morning?

MR. KENNEDY: Good morning, your Honor.

THE COURT: By that, I mean we have the letter that came in at 8:22 this morning from Shefsky & Froelich, a letter that came in at 9:02 this morning from Sidley & Austin, a letter that came in at 10:30 this morning from the Attorney General, a letter that came in at 11:03 from the Quinlan firm, and the Attorney General's emergency motion to compel certain discovery that came in at 10:40, and it has an attachment to it.

Has everybody seen all that?

MR. CARLSON: I have not seen the Attorney General's letter.

Stephen Carlson, I'm sorry, for —

THE COURT: Why don't we do this. I thought the court reporter had everyone's name. Let's start at the far right and go across, so she can make a chart.

MR. CARROLL: James Carroll, on behalf of the plaintiffs Buntrock and Gidwitz.

going, when, and how fast.

I need to ask Mr. Carlson, have you had a chance to discuss with Mr. Stebbins whether he is going to be retaining separate counsel to provide you all with the affidavit that we were talking about on Friday?

MR. CARLSON: Mr. Stebbins does have or Dr. Stebbins does have separate counsel, who will assist him in responding to the Attorney General's motion, your Honor.

THE COURT: Okay. Is Sidley & Austin, on behalf of the Special Litigation Committee, as it now exists, prepared to proceed and defend the Attorney General's motion for an appointment of a receiver?

MR. CARLSON: We have started to prepare our response, your Honor. As we said on December 27th, we would have liked some period of time, ten to 14 days. We intend to submit certain affidavits to the Court in response to that motion. And so we are prepared to move ahead.

But again, I would ask for ten to 14 days to get the evidentiary submissions to the Court.

MR. KENNEDY: Good morning, your Honor. John Kennedy, on behalf of the plaintiffs.

MR. PERKINS: Floyd Perkins on behalf of the Attorney General.

MR. CARLSON: Steve Carlson for The Terra Foundation for the Arts.

MR. CROWE: Brian Crowe, on behalf of Alan Simpson and Judith Terra and Professor Tucker.

MR. WILSON: James Wilson on behalf of the same.

THE COURT: Mr. Carlson, what is it that you have not seen?

MR. CARLSON: I believe the Court indicated there was a letter from the Attorney General.

THE COURT: It is a one-line thing.

MR. PERKINS: We Fax'd it over to counsel. But I just handed him a copy. It is pretty short compared to the others.

THE COURT: On the subject matter of the letters, since we are talking about an individual also, and we did not want to have that necessarily aired publicly at this point, I'm going to put that aside for just a moment, because what is, seems to be of a little bit more urgency is where we are

THE COURT: And what is the position that you are taking on the Attorney General's request for the immediate discovery, particularly the deposition of Mr. Neff before he leaves the employ of the Foundation, which is sometime this month?

MR. CARLSON: It may be true; I don't have personal knowledge for sure, your Honor, when he ceases to be an employee of the Foundation.

Frankly, we would have preferred that the Attorney General asked us some questions, asked to talk to Mr. Neff, asked to talk to other relevant people ahead of time. Your Honor has stayed discovery since about the middle of October.

If for purposes of this motion the Court deems it appropriate for discovery to go ahead as relates to that motion, that would be all right, your Honor, as far as the Foundation is concerned.

We don't believe that the motion as it is styled even raises any significant evidentiary questions. But if the Attorney General wants to take discovery on that motion, that's all right with us.

THE COURT: We have two different motions for receiver pending. And we need to know who is

defending those motions. One of the motions questions the appropriateness of the very group that is seeking to defend the motion and, the main motion in the case.

As best as I am able to tell from my discussions in court, and when we did a discussion with the court reporter, but out of the courtroom, the other day, it appears that the Attorney General is seeking an evidentiary hearing on a receiver issue, for the sole purpose of getting a receiver to defend — conduct an investigation and defend the main case.

Is that correct?

MR. PERKINS: That's correct, Judge.

THE COURT: So in other words, you want a receiver appointed to defend the plaintiffs' motion for receiver.

MR. PERKINS: I want a receiver appointed, Judge, to conduct the independent investigation, and determine from that what course of action the Foundation should take.

It is our belief, since we are somewhat joined at the hip with the plaintiff, that a lot of what they have to say is true.

THE COURT: And the focus of your motion at this point is the appropriateness or the inappropriateness of the Special Litigation Committee.

MR. PERKINS: That's correct, Judge.

THE COURT: And the focus is Mr. Stebbins, and the unavailability of Ambassador Andreani, is that correct?

MR. PERKINS: As were laid out in their papers, Judge; we don't believe, if we are using — if we were to go back and read all the papers and all the statements that were made, everybody kept throwing the word "independent" out. And Mr. Stebbins, no matter what he wants to say, cannot be independent about allegations about him.

And in addition, his affidavit isn't going to be sufficient for us.

THE COURT: No matter what it says, it is not going to be sufficient. You want an evidentiary hearing.

MR. PERKINS: We need to at least gather the evidence from Mr. Neff and others as to what did occur and how it occurred, so that we can fully prepare to rebut whatever is presented by the

appointee.

THE COURT: And that evidentiary hearing would only be related to the Mr. Stebbins issue, or Dr. Stebbins issue, and the Ambassador Andreani issue, if there is an issue with regard to him, is that correct?

I'm trying to limit or figure out what the limitations of the discovery that you are seeking is, right? What the limitations are.

MR. CARLSON: May I make another comment?

THE COURT: One second.

I'm trying to find out from Mr. Perkins, you asked in this motion for a whole bunch of discovery. And not all of them relate to Mr. Neff and Mr. Stebbins, or Dr. Stebbins.

So I'm trying to figure out how we can move this case as quickly as we can move this case, and get this issue either behind us or resolved.

MR. PERKINS: Judge, I was looking at that issue myself.

There is a need for us to take Mr. Tucker's deposition on these issues, just to find out how Mr. Neff and Mr. Stebbins resolved some of these things, and what it was that was told to

Tucker.

I understand what your Honor is saying, the limited scope of what we are talking about. But to discover the facts appropriate to that limited scope set of issues might require more than just Mr. Neff and more than just Mr. Stebbins.

THE COURT: Okay. You don't necessarily need employment records, termination records, all of those other things at this point, in order to decide — in order to place in front of the Court your motion for receiver. Your focus is Dr. Stebbins and Ambassador Andreani.

So you would be, you would need a deposition of Dr. Stebbins, a deposition of Dr. Tucker, a deposition of Mr. Wright? Is he involved in that whole issue, Jim Wright?

MR. PERKINS: He was —

THE COURT: He is mentioned in the memo.

MR. PERKINS: He is mentioned in the memos, Judge. I would certainly want to see what he had to say.

THE COURT: And a deposition of John Neff. So I'm counting — and I'm not quite sure. Who is Eric Cartwright?

MR. KENNEDY: He is the director of the museum in Giverny. He is scheduled to leave Giverny at year's end.
THE COURT: Last year?
MR. KENNEDY: This year, I believe. I believe he is departing —
MR. WILSON: Last year.
MR. CARLSON: He is no longer at Giverny.
MR. PERKINS: He was the other curator of the second Terra museum, who has come and gone now.
THE COURT: So you don't need him for the Dr. Stebbins issue, do you?
MR. PERKINS: Judge, I wouldn't want to rule this out, only for this reason: If you look in the memos, he is mentioned. He was curator of the Giverny museum. As a consequence, he is familiar with what Mr. Neff was talking about, because he was present during some of those events.
THE COURT: So there are four, possibly five depositions that you need, plus any and all records that relate, I assume, to authorization of Dr. Stebbins to bid on behalf of the museum; any issues around those questions, is that correct?
MR. PERKINS: Right, Judge, anything to do

we'd answer those questions informally, just if he would ask us those questions.
MR. CARROLL: It is all part of the same thing.
THE COURT: Let me just ask, so essentially, a good portion of No. 9 is what you need, plus four to five depositions, is that correct?
MR. PERKINS: That's correct, Judge.
THE COURT: Now, Mr. Carlson, I know that you and Mr. Conlon have stepped up in court and said, if they'd just ask us, we would answer. Why isn't anyone talking to each other?
MR. CARLSON: I don't know, your Honor. Mr. Perkins has never called me with a single question.
The first day I was in court, September 25, I said most of the Board of the Foundation is in France for the annual meeting, but if the Attorney General wants to ask me any questions this week, as soon as they get back, I will get them answers. Mr. Perkins never called.
I followed up in writing with a letter, again inviting the Attorney General, that if they had any legitimate questions, to put those questions to me, and offered to get answers.

with acquisitions, commissions paid, that kind of thing.
THE COURT: And is there a time period? Is there — which one of these numbers 1 through 12 are there discovery requests that relate to that? Are we talking about 9-A? Are we talking about 9-C? 9-D?
MR. PERKINS: A, your Honor, is the art acquisitions. B, the bank records, that $4 million was used to do an acquisition, and there are some reasons we would like to look at those records.
THE COURT: Are you saying you want all of 9?
MR. PERKINS: All of 9 to the — yes, all of 9. But in honesty, your Honor, some of those things do get into, in G, we get into employment termination.
THE COURT: Yes, a lot of that stuff doesn't have anything to do.
MR. CARLSON: The memo has to do solely with conduct at one particular auction in May of 1999.
If Mr. Perkins had had other questions about the recent acquisition of the Copley by the Terra Foundation or the sale of the art that they sold to get the money to buy the Copley, again,

I have never received any letter from Mr. Perkins asking any questions whatsoever. The first time Mr. Perkins decided to try to make an issue out of Mr. Neff and Mr. Neff's memos was on September — or December 22nd, almost Christmas Eve, when he filed that motion. And I would have been happy to answer questions about Mr. Neff's memo if he had only asked.
MR. PERKINS: All I can say, Judge, it is a good thing perhaps for Mr. Neff that I didn't ask in October, because he got fired.
MR. CARLSON: That is absolutely untrue, absolutely untrue. Mr. Neff was not fired. He is not going to be fired. The memo that he wrote in May of 1999 has nothing to do with his employment situation at the Foundation; never has and never would.
THE COURT: I've read the memo that was written last week on the 27th, or the night of the 27th. I know what it says. It is now going to be part of the court record, unfortunately, in this case. So I don't know that we need to talk about that any more.
What I'm trying to figure out is, there

IN THE CIRCUIT COUNTY OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN BUNTROCK, a director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a director of the Terra Foundation for the Arts,

Plaintiffs,

V.

JUDITH TERRA, a director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Non-For-Profit Corporation,

Defendants

Case No.: 00 CH 13859
Hon. Dorothy Kirie Kinnaird

VERIFIED ANSWER AND AFFIRMATIVE DEFENSES OF NAFTALI MICHAELI TO COMPLAINT OF DEAN L. BUNTROCK AND RONALD GIDWITZ

Defendant Naftali Michaeli ("Michaeli") Pro Se, for his verified answer and affirmative defense to the complaint of Plaintiffs Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), states as follows:

1. *This is an action for declaratory, injunctive and other relief seeking to and enjoin Defendants illegal and wasteful conduct in connection with the management and operation of Terra Foundation for the Arts, a not-for-profit corporation ("Terra Foundation").*

ANSWER: Michaeli admits that Plaintiffs purport to state an action for declaratory, injunctive, and other relief, and admits that Terra Foundation for the Arts (the "Terra Foundation") is an Illinois Not-For-Profit corporation, but denies all remaining allegations contained in this paragraph.

2. *In this action Plaintiffs seek to enjoin Defendants from (1) holding a meeting of the Foundation's board of directors in violation of Terra Foundation's bylaws; (2) taking any action to elect or remove any member off the board of directors or changing any committee assignment; (3) taking any action to close the Terra Museum in Chicago or remove Terra Foundation or any of its assets outside the state of Illinois; and (4) taking any other action contrary to the by-lows of the Terra Foundation or Defendants fiduciary duties as directors of an Illinois not for profits corporation.*

16di-000377

ANSWER: Michaeli admits that Plaintiffs seek to enjoin the Defendants from engaging in the conduct alleged in this paragraph, but denies that such conduct would violate the Terra Foundation's Articles of Incorporation, Bylaws, the Illinois Not For Profit Corporation Act, the laws of the State of Illinois, and any fiduciary duty of the directors of the Terra Foundation. Michaeli denies even potential ability to intervene with such actions.

3. *Plaintiff Buntrock is a resident of DuPage County, Illinois, a prominent businessperson, and a benefactor of the arts. Since 1998, Buntrock has served as a director and officer of Terra Foundation. He presently serves as Terra Foundation's treasurer, is chairman of its finance and investment committee, and is a member of its Executive Committee.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in the first sentence of this paragraph; admits that since 1998 Buntrock has served as a director of the Terra Foundation; admits that Buntrock is a member of the Terra Foundation's Executive Committee; and denies all remaining allegations contained in this paragraph especially the favorite description of Mr. Dean Buntrock as "prominent businessperson". In numerous publications that Michaeli obtained about Buntrock and the company he founded and controlled for 37 years of his life – "Waste Management" – it shows otherwise.

4. *Plaintiff Gidwitz is a resident of Chicago, Cook County, Illinois, a former CEO of Helene Curtis Corporation, and a benefactor of the arts. Since 1982, Gidwitz has served as a director and officer of Terra Foundation. He presently serves as chairman of Terra Foundation's strategic planning committee and is a member of its Executive Committee.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph; denies that since 1982 Gidwitz has served as a director and officer of Terra Foundation.

5. *Defendant Paul Hayes Tucker ("Mr. Tucker") is a resident of Massachusetts. Mr. Tucker is a director, chairman and president of Terra Foundation and is a member of its Executive Committee.*

ANSWER: Michaeli admits the allegations contained in this paragraph.

6. *Defendant Judith Terra is a resident of Washington, D.C. Judith Terra is a director and vice chairman of Terra Foundation, and is a member of its Executive Committee.*

ANSWER: Michaeli admits the allegations contained in this paragraph and adds to it that Judith Terra also serves as vice president of Terra Foundation.

7. *Defendant Senator Alan K. Simpson is a resident of Wyoming and a former United States senator from that state. Sen. Simpson is a director of Terra Foundation and a member of its finance and investment committee.*

ANSWER: Michaeli admits the allegations contained in this paragraph.

8. *Defendant Naftali Michaeli ("Mr. Michaeli") is an Israeli citizen and a resident of Washington, D.C. Mr. Michaeli is a close personal friend of Judith Terra, and has no official position with Terra Foundation.*

ANSWER: Michaeli denies that he is a resident of Washington DC, but admits all other allegations contained in this paragraph.

9. *Defendant Terra Foundation is an Illinois not-for-profit charitable corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit collections of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate museums in Chicago and France.*

ANSWER: Michaeli admits that Terra Foundation is an Illinois Not For Profit corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra"); admits all allegations contained in this paragraph that accurately restate the Terra Foundation's purposes as set out in its Articles of Incorporation and its Bylaws, but denies all allegations inconsistent therewith.

10. *Because of Dan Terra's extraordinarily generous gifts to Terra Foundation in his lifetime, and his bequest to Terra Foundation of most of his estate, Terra Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art.*

ANSWER: Michaeli admits the allegations contained in this paragraph.

11. *Terra Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Ave., Chicago, Illinois.*

ANSWER: Michaeli admits the allegations contained in this paragraph, and, answering further, states that Terra Foundation also operates the Musée dart American, located in Giverny, France, and cooperated with the University of the Arts in Philadelphia.

12. *Terra Foundation currently has eleven directors, the maximum number allowed under the by-laws of Terra Foundation. The Board includes Margaret Daley, a well-known benefactor of education and the arts and the wife of Mayor Richard M. Daley, and Arthur A. Hartman, the former United States Ambassador to France. The Board also includes*

Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Catherine A. Stevens, the wife of United States Senator Ted Stevens, was the Executive Director of Terra Foundation from August of 1996 through April 2000 until terminated by Tucker.

ANSWER: Michaeli admits that Terra Foundation's Board of Directors currently numbers 11 directors, the maximum number allowed under its Bylaws, and which Board includes Margaret Daley, Arthur A. Hartman, Helene Ahrweiler, Jacques Andreani, Stephanie Marshall, and Theodore Stebbins; and lacks knowledge sufficient to form a belief as to the truth of the remaining allegations contained in this paragraph. Michaeli finds the description of the persons that are serving on the board intentionally arrogant and ridiculously bias. With all due respect to the description: "the wife of" – Michaeli does not think it shows something about the women it refers to – they deserve more respect from the Plaintiffs. But, isn't this entire claim about arrogance and being malicious?

13. *Dan Terra established Terra Foundation in December 1978 under the Illinois General Not For Profit Corporation Act. It was Dan Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art. As set forth in the original Articles of Incorporation, the purpose of Terra Foundation was:*
to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and' operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions,
(See Articles of Incorporation, attached hereto as Exhibit 1).

ANSWER: Michaeli admits that Dan Terra established Terra Foundation in December 1978 under the Illinois General Not For Profit Corporation Act; admits all allegations contained in this paragraph that accurately restate the provisions of the Terra Foundation's Articles of Incorporation, and denies all allegations inconsistent therewith; and denies all remaining allegations.

14. *To ensure that the primary mission and purpose of Terra Foundation was carried out, the Terra Museum was opened in 1982 in Evanston, Illinois, In 1987, the Museum relocated to 664 N. Michigan Avenue, Chicago, Illinois, and remains at that location until today.*

ANSWER: Michaeli admits that Terra Foundation opened the Terra Museum in 1982 in Evanston, Illinois; admits that in 1987 the Museum relocated to 664 North Michigan Avenue, Chicago, Illinois, where it remains today; and denies all remaining allegations contained in this paragraph.

15. *Throughout the 1980s and early to mid-1990s, Dan Terra contributed cash, stock and art for the continued growth and viability of the Terra Foundation and the Terra Museum in Chicago. To ensure that his contributions would further the goals and mission of Terra Foundation for the benefit of the public, Dan Terra created two restricted endowments, the "B2 Endowment" restricted to the acquisition of art for Terra Foundation, and the D4 Endowment restricted to education endeavors relating to American art.*

ANSWER: Michaeli denies that throughout the 1980s and early to mid-1990s Dan Terra contributed cash, stock and art solely for the continued growth and viability of the Terra Foundation and the Terra Museum in Chicago; is without sufficient knowledge to admit or denies that Dan Terra created two restrictive endowments, the B2 Endowment, restricted to the acquisition of art for the Terra Foundation, and the D4 Endowment, restricted to education endeavors relating to American Art; and denies all remaining allegations contained in this paragraph.

16. *In the early 1990s, Terra Foundation constructed and developed the Musée dart American Giverny ("Giverny Museum"), an art museum in Giverny, France dedicated to the exhibition of American art and American art education.*

ANSWER: Michaeli denies the allegation "In the early 1990s"; Michaeli admits all other allegations contained in this paragraph.

17. *Primarily because of Dan Terra's gifts and bequests, the value of Terra Foundation has grown substantially since its creation. Currently, Terra Foundation holds net assets worth approximately $450 million. The value of the art alone located at the Terra Museum in Chicago exceeds $100 million, with the overall value of Terra's Foundation's art collection exceeding $173 million.*

ANSWER: Michaeli admits the allegations contained in this paragraph as for the current situation. Michaeli will further adds that Dan Terra's gift to the Foundation worth about $900 million at the time of his death – half of this gift was lost without proper investigation either by the Foundation or by the State Attorney office. The demand of some members of the board to investigate this loss was vigorously refused by the Plaintiffs. The Plaintiffs attempt to help the cover up of that loss is the true reason for this claim and the reason for the State Attorney intervention in favor of the Plaintiffs. Michaeli do not suggest that the Plaintiffs are personally responsible for that loss.

18. *Pursuant to its by-laws, the Board of Directors of Terra Foundation is required to hold an annual meeting during the month of September of each year for the purpose of electing directors and officers and for the transacting of other business. If the election of the directors and officers is not held at such meeting, the Board of Directors may cause the election to be held at a meeting of the Board of Directors as soon thereafter as may be convenient. The Board of Directors may only elect officers and directors by a majority vote.*

ANSWER: Michaeli admits all allegations contained in this paragraph; Michaeli denies any conduct that is inconsistent with the Articles of Incorporation, Bylaws, and the Illinois Not For Profit Corporation Act,

19. *In periods of time between the quarterly Board of Director Meetings, the by-laws provide that as Terra Foundation's Executive Committee has the authority to take action on behalf of Terra Foundation, except on specific issues delegated to the Board of Directors pursuant to the Illinois General Not For Profit Corporation Act. Since October, 1999, Terra Foundation's Executive Committee has consisted of Plaintiffs Buntrock and Gidwitz, Defendants Edith Terra and Mr. Tucker, and director Stephanie Marshall.*

ANSWER: Michaeli admits the allegations contained in the first sentence of this paragraph. Michaeli would like to point out an innocent mistake in the writing of the name of defendant Judith Terra – "Judith" should replace "Edith". Michaeli denies any conduct that is inconsistent with the Articles of Incorporation, Bylaws and the Illinois Not For Profit Corporation Act - or advising others to do so.

20. *Dan Terra was a successful entrepreneur and businessman who resided predominately in the Chicago area. A large portion of his wealth enured through investments in companies located in and around Chicago. As result, Dan Terra made the decision to start the Terra Foundation with the intent to the benefit of the citizens of Illinois and the Chicago area. Terra Foundation became Terra's principal charitable endeavor.*

ANSWER: Michaeli denies that Dan Terra's intent in founding the Terra Foundation was solely to benefit the citizens of Illinois and the Chicago area, affirmatively stating that under its Bylaws, the Terra Foundation is intended to, and does, benefit "a growing art public... in the United States and abroad;" Michaeli adds that Dan Terra established his business mostly outside of Illinois. The companies he founded and gained his fortune from - where International (**"Lawter International"** - a company registered in Delaware, had plants and offices in 26 countries around the world, the company maintained its international headquarters in Belgium) and nationwide (**"Mercury Finance"** - a company registered in Delaware, operated 139 offices in every state in the US). Dan Terra was born (1911) and raised in Philadelphia. Short time after Dan Terra established the "Foundation for the Daniel J. Terra Museum" (12/1978). Dan Terra moved to

Washington DC (1982). While opening the Museum in Chicago (1986) he started to develop his project in France (one day after the grand opening).

21. *Dan Terra described his decision to establish Terra Foundation in Illinois and to open Terra Museum in the Chicago area for the people of Illinois as follows:*
[W]hat's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do.
(See Grace Glueck, American-Art Museum Opening in Chicago, N.Y. Times, April 19, 1987 at B14, attached hereto as Exhibit 2). On many occasions, Dan Terra articulated his intent to benefit the people of Illinois through the creation of Terra Foundation in Illinois and the opening of Terra Museum as "major institution in Chicago." (See, e.g., Dodie Kazanjian, Daniel J. Terra, America's First Ambassador-at-large for Cultural Affairs Pursues the Best in American Painting for His New Museum in Chicago, House & Garden, May 1987, at 52, attached hereto as Exhibit 3).

ANSWER: Michaeli denies that Dan Terra's sole purpose in founding the Terra Foundation was to benefit the citizens of Illinois and the Chicago area, affirmatively staling that under its Bylaws and the Illinois Not For Profit Corporation Act, the Terra Foundation is intended to, and does, benefit "a growing art public... in the United States and abroad;" admits the quoted material to the extent that this paragraph accurately restates material contained in the cited articles; and denies all allegations inconsistent therewith.

22. *Shortly after the creation of Terra Foundation, Dan Terra's first wife, Adeline died. In 1986, Dan Terra married Judith Terra. Judith Terra acknowledged in a prenuptial agreement that she fully understood that the bulk of Dan Terra's estate would go to the Terra Foundation, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the prenuptial agreement. Under the prenuptial agreement, Judith Terra agreed she would receive only a fixed amount of money and assets upon Dan Terra's death. Judith Terra became a member of the Board of Directors of Terra Foundation.*

ANSWER: Michaeli admits that in 1986 Dan Terra and Judith Terra married; admits that Judith Terra became a member of the Board of Directors of Terra Foundation; Michaeli denies all other allegations contained in this paragraph. Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

23. *On information and belief, after Judith Terra became a member of the Board of Directors of Terra Foundation, she suggested to Dan Terra that the Terra Museum be closed and Terra Foundation be moved out of Chicago, This was never done during Dan Terra's lifetime.*

ANSWER: Michaeli admits that during Dan Terra's lifetime the Terra Museum was not closed nor was the Terra Foundation moved out of Chicago; and denies the remaining allegations contained in this paragraph. Michaeli adds that prior to his death, Dan Terra planed to move the Foundation headquarters and the Museum from Chicago to Washington DC. He purchased a building in Jefferson Street and furnishers it for the offices of the headquarters of the Foundation. He also bought land in Culver Street for the Museum new location. He engaged architects to this project and the drawings where already made before he died - unfortunately he died before he was able to fulfill his wishes.

24. *On June 28, 1996, Dan Terra died after suffering a stroke. As the sole residuary beneficiary under his will, Terra Foundation was to receive $125 million.*

ANSWER: Michaeli denies the allegations contained in this paragraph.

25. *As the first step in a plan to seize control of Terra Foundation, Judith Terra immediately attempted to transfer Dan Terra's probate proceedings from the Circuit Court of Cook County to Washington, D.C. After a five-day trial, the Chief Judge of the Probate Division denied the motion to transfer, finding that the motion was without merit in law or fact.*

ANSWER: Michaeli denies the allegation that the attempt to change the venue of the hearing of the Estate matter, meant to close the Museum in Chicago. Dan Terra lived in Washington DC 13 years of the last years of his life and that was the only reason for that attempt. Michaeli denies that there was a trial before the "Chief Judge of the Probate Division," affirmatively stating that there is no "chief judge" of the Circuit Court of Cook County, Probate Division, there being only one chief judge, a constitutional officer, of each of the circuit courts of the State of Illinois.

26. *Judith Terra next embarked on a scheme to seize tens of millions of dollars that Dan Terra intended for Terra Foundation.*

ANSWER: Michaeli denies the existence of any "scheme" as alleged in this paragraph, Michaeli knows from documents and other people that Dan Terra ordered his lawyer at the time (Mr. James Collins), to establish a trust fund for Judith Terra's benefit and for the benefit of his only grandson. Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

27. Under the prenuptial agreement between Dan Terra and Judith Terra, Judith Terra was to receive $4.5 million in cash plus approximately $2.6 million in other assets, for a total of $7.1 million.

ANSWER: Michaeli denies the numbers stated as they appear in the allegations in this paragraph; Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

28. Contrary to her promise in the prenuptial agreement, after Dan's death, Judith Terra immediately filed an action challenging the prenuptial agreement and contesting Dan Terra's will. Judith Terra sought for herself $43 million of the $125 million bequest to Terra Foundation.

ANSWER: Michaeli denies the allegation that the action challenged the prenuptial agreement and "Contrary to her promise". Michaeli denies each and every one of the allegations contained in this paragraph; Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

29. Judith Terra's attempt to seize $43 million of Dan -Terra's bequest to Terra Foundation put her in irreconcilable conflict with the interest of Terra Foundation and, therefore, with the people of the State of Illinois as the beneficiaries of the charitable trust created by Dan Terra. As a result, Judith Terra was forced to take a leave of absence as a director of Terra Foundation.

ANSWER: Michaeli admits that there came a time when Judith Terra took a leave of absence as a director of the Terra Foundation, from her own free will – that was after the agreement between her and the Estate was agreed but not yet performed. The leave of absence was taken because she could not perform any positive duty while being hostage in the hands of the Foundation lawyer. That lawyer controlled the Foundation and almost destroyed it completely. Michaeli denies all remaining allegations. Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

30. The Terra Foundation hired Tyrone Fahner, former Attorney General of Illinois, and Howard McCue III of Mayer, Brown & Platt as special counsel with respect to Judith Terra's attempt to seize the $43 million bequest. Both Terra Foundation's special counsel and the counsel for Dan Terra's estate found that Judith Terra's claims lacked substantial merit. However, to avoid protracted litigation, the estate and Terra Foundation entered into a settlement with Judith Terra whereby she received approximately $1 million more than she was entitled to under the prenuptial agreement. This allowed Terra Foundation to receive virtually all of Dan Terra's $ 125 million bequest as intended under Dan Terra's will.

ANSWER: Michaeli admits that the Terra Foundation engaged Tyron Fahner and Howard McCue III of Mayer, Brown & Platt with regard to the Estate of Dan Terra including the legal claims raised by Judith Terra. Michaeli admits that Terra Foundation and Judith Terra entered into an agreement settling Judith Terra's claims. Michaeli denies all remaining allegations contained in this paragraph. The lawyers mentioned in this paragraph mislead Michaeli on a number of issues. They failed to investigate the loss of about $400 million by the Estate and the Foundation after the death of Dan Terra. Michaeli adds that though "this allowed... $ 125 million" the Foundation never got this money. Michaeli does not understand the purpose of these allegations and denies the relevance of these allegations to this case.

31. *Following the settlement of her claims against the Dan Terra's Estate, Judith Terra sought reinstatement to her position as director of Terra Foundation. Thereafter, changes were made within Terra Foundation and the Museum that were contrary to the best interests of Terra Foundation and therefore contrary to the public interest that was intended to benefit from Terra Foundation.*

ANSWER: Michaeli admits that after Judith Terra and the Terra Foundation entered into an agreement settling her claims, Judith Terra once again attended the board meetings of the Terra Foundation; and admits that the major change that she supported in order to strengthen the status of the Foundation in Chicago proved to be disastrous – entering the Plaintiffs to the board. Michaeli denies all remaining allegations contained in this paragraph.

32. *Beginning in mid-1998, Judith Terra launched a scheme to gain control of Terra Foundation to carry out her own agenda of closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C. Judith Terra owns a home in Washington, D.C. and desires to move the Foundation there to obtain a prominent place in the social circles of Washington, D.C. Judith Terra believes that if she is able to move a foundation as large as Terra Foundation to Washington, D.C., she would be able to establish herself in Washington, D.C. as a large benefactor of the arts, thereby placing herself in the elite social circles of Washington, D.C.*

ANSWER: Michaeli denies the existence of any "scheme" as alleged in this paragraph; Admits that Judith Terra owns a home in Washington, D.C.; on 1998 Judith Terra supported three people that other board members suggested for presidency of the Foundation including one from Chicago. Michaeli likes to add that (knowing from first hand) Mrs. Terra does not need any boost to her social life – she refuses more invitations

then she accepts. This allegation is malicious and false. Mrs. Terra did more to the Chicago Museum and initiated and sponsored more artistic events in Chicago, during the last two years, then she did in her hometown. Mrs. Terra did her utmost to improve the situation in the Chicago Museum even after this claim was filed. Michaeli denies all remaining allegations contained in this paragraph.

33. *To accomplish her scheme of seizing control of Terra Foundation, Judith Terra began stacking Terra Foundation's Board with persons loyal to her alone. For example, Judith Terra recommended and sought the election other friend Sen. Simpson to the Board. Sen. Simpson became a director in mid-1999. At his first Board of Directors meeting in October 1999, Sen. Simpson announced to the Board that his purpose for being on Terra Foundation's Board of Directors was "to protect Mrs. Terra's interests."*

ANSWER: Michaeli denies the existence of any "scheme" as alleged in this paragraph; Admits that Judith Terra supported Senator Allan K. Simpson for the position of director of the Terra Foundation Board; admits that Senator Simpson became a member of the Board in mid-1999; and regrets that the board contains along with some of the best persons in this country and the great City of Chicago two of the worst examples of powerful businessmen persons coming from Chicago. Michaeli admits from hearsay that Senator Simpson is quoted in the minutes as stating that his purpose for being on Terra Foundation's Board was to "protect Mrs., Terra's interests;" and denies all remaining allegations contained in this paragraph.

34. *Prior to October 1999, Judith Terra orchestrated a plan to replace Arthur Hartman as Terra Foundation's president and chairman with her loyalist, Mr. Tucker. Although Terra Foundation had been searching for a new president for more than two years from outside the Board of Directors, Judith Terra and her new allies on the Board replaced Arthur Hartman as president and chairman with Mr. Tucker. As was later discovered, the decision to place Mr. Tucker in the position of president and chairman was made to further Judith Terra's attempt to gain control of Terra Foundation and to further her own agenda contrary to the mission and intent of Dan Terra in creating Terra Foundation.*

ANSWER: Michaeli admits that Tucker was elected to the position of President and Chairman of the Terra Foundation Board of Directors in October 1999; and denies all remaining allegations contained in this paragraph.

35. *Mr. Tucker and Judith Terra further entrenched their power through the hiring of Donald Ratner and the unauthorized expansion of his authority within Terra Foundation. Mr. Ratner was originally retained as a consultant to the Foundation on an interim basis. During the January 25, 2000 meeting of the Board of Directors a motion was made to give Mr. Ratner the title of vice president of finance and administration. The Board members*

present at the meeting voted in favor of the motion. However, because not all Board members were present, the motion was made subject to the ratification by each of the absent Board members. In a subsequent poll of Board members, the motion failed to receive unanimous approval as required by the vote at the January 25, 2000 meeting. Nonetheless, pursuant to Mr. Tucker's dictate, Mr. Ratner has continued to serve as a purported officer of Terra Foundation, and has taken direction from Board members loyal to Judith Terra.

ANSWER: Michaeli admits that the Terra Foundation hired Donald Ratner as a consultant to the Terra Foundation; and denies all remaining allegations contained in this paragraph. Michaeli also remembers Buntrock saying to him in the Museum premises in Chicago during an opening of a new exhibition, that he was the one who brought Mr. Ratner to the Foundation and as treasurer advised the board to establish Mr. Ratner's post as well as bringing him to the job.

36. *Judith Terra also furthered her scheme to gain control of Terra Foundation by causing the removal of the attorneys that had counseled and represented Terra Foundation since its inception, hi 1982, Dan Terra asked James Collins, an attorney at the law firm of Bell, Boyd & Lloyd, to act as both general counsel and an officer of Terra Foundation. Collins served in the capacity of general counsel and secretary of Terra Foundation from 1978 until his removal in October 1999. He also served as treasurer from August 1996 through October 1999. During this time, Collins had represented the interests of Terra Foundation through many difficult issues, including Judith Terra's attempt to confiscate $43 million of Dan Terra's bequest to Terra Foundation.*

ANSWER: Michaeli denies the existence of any "scheme" as alleged in this paragraph; Lack of sufficient knowledge to form a belief as to the truth of the allegation that from 1978 to October 1999 James Collins of the law firm of Bell, Boyd & Lloyd acted as general counsel and, in one capacity or another, acted as an officer of the Terra Foundation between 1978 and October 1999; Adds that it seems impossible that in 1982 Dan Terra asked... to act fron 1978...; Michaeli admits that from 1996 until his removal Collins carried an unbelievable combination of duties, namely:

- General counsel to the Foundation.
- Treasurer of the Foundation.
- Secretary of the Foundation.
- Lawyer of the Estate of Dan Terra.
- Special counsel the board of Lawter Int.
- Attended Mercury Finance board meeting as representative of Dan Terra Estate with director authority and acting special counsel to the board.
- Lawyer of Dan Terra and Judith Terra for 10 years – buying property on her name and advising her on numerous issues and yet counselor for the Estate and the Foundation against her.
- Initiating this lawsuit against Judith Terra and cooperating with the Plaintiffs to harm and create enormous damage to her and the Foundation.

- Using privileged information he obtained as a lawyer to her and her husband and the Foundation and reviling it to the Plaintiffs and their Attorneys. While doing it he lied constantly about facts and events.

Carrying these duties caused Mr. Collins a constant situation of conflict of interests but more important, an unheard-of loss of money to the Estate and the Foundation – Just on the face of it, here are some facts:

a) The Estate reported to the Tax Return Office (signed by Mr. James Terra, the executor on 9/24/97) that the total gross value of the Estate, at the day of the death of Dan Terra is $476,611,796.72;

b) The Estate managed to liquidate all its assets for $223 million. (Executor final report 4/20/2000);

c) Out of that amount the Estate managed to transfer $40 million to the Foundation (6/29/99) and will transfer another $5.5 million. If the amount that paid to Judith Terra (see paragraph 27 above) $7.1 million is true - it means that the whole amount that was paid by the Estate to the two only beneficiaries is $52.6 million.

d) $424 million of the original Estate value was lost or paid as fees, expenses and debts.

e) The executor of the Estate, reported in his final report that $150 million paid as debts and $22 million spent as fees and other expenses – this means that the total amount that the Estate of Dan lost was $254 million;

f) Mr. Collins and Mr. Fahner reported that the Foundation lost $82 million during the first seven months after the death of Dan Terra.

g) Under the 7 hats that Mr. Collins had on his head, the Foundation by its own and through the Estate lost about half of its value – at least **$336 million**.

h) The number of $125 million stated above in paragraphs 24 and 28 is an invention that came out from wild imagination or pure lie.

Michaeli denies any connection to any of the board actions but would wonder if the board would not put an end to this individual activity and that the loss of so much money would not be investigated.

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Michaeli admits that Collins represented the Terra Foundation with regard to Judith Terra's claims relating to Dan Terra's Estate; and denies all remaining allegations contained in this paragraph.

37. *Defendants next forced the resignation of Terra ' Foundation's special counsel, Ty Fahner and Howard McCue III of Mayer, Brown & Platt. Terra Foundation hired Mayer, Brown & Platt as special counsel when Judith Terra sued Dan Terra's estate for the $43 million residual bequest to Terra Foundation. Mayer, Brown & Platt also represented Terra Foundation in connection with its interests in the now defunct Mercury Finance Company.*

ANSWER: Michaeli admits that Terra Foundation hired Mayer, Brown & Platt as special counsel to the Foundation with regard to Judith Terra's claims relating to Dan Terra's Estate; admits that Mayer, Brown & Platt also represented Terra Foundation in connection with its interests in the now-defunct Mercury Finance Company; and denies all remaining allegations contained in this paragraph.

38. *Specifically, on or about August 11, 2000, Mr. Ratner, acting in his ultra vires capacity at the direction of Defendants, told Mayor, Brown &. Platt that Terra Foundation would not pay its fees for any time incurred in dealing with or responding to any issues not specifically requested by either Mr. Tucker or Mr. Ratner. Mayer, Brown & Platt rejected this arrangement recognizing that it would be contrary to its duties and obligations as special counsel to Terra Foundation and its directors. In resigning its position as special counsel to Terra Foundation, Mayer, Brown & Platt stated in a letter to Mr. Tucker:*
In our original engagement letter of December 11, 1996, sent by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all of its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.
(Emphasis added) (See August 18,2000 Letter, attached hereto as Exhibit 4).

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph.

39. *In furtherance of her plan to seize control of Terra Foundation, Judith Terra, Mr. Tucker and Sen. Simpson have ignored the requirements of Terra Foundation's by-laws regarding management of Terra Foundation. Article III, Section 11 of the by-laws provides that the executive committee is to operate Terra Foundation between the quarterly Board of Director meetings. (See By-laws of Terra Foundation, attached hereto as Exhibit 5, at Article IV, Section 9). With few exceptions relating to bringing in new counsel for Terra Foundation, issues were not brought before the executive committee. By not having meetings of the executive committee, Judith Terra, Mr. Tucker, Sen. Simpson were able to control the operations of Terra Foundation for their own benefit, contrary to the provisions of the by-laws.*

ANSWER: Michaeli denies the allegations contained in this paragraph.

40. Judith Terra, Mr. Tucker, Sen. Simpson have also consulted with and taken advice from Mr. Michaeli. Mr. Michaeli has been making decisions for Terra Foundation even though he is not an officer or director of Terra Foundation, or even an employee. Mr. Michaeli's only connection to Terra Museum is his relationship with Judith Terra.

ANSWER: Michaeli denies the allegations contained in this paragraph.

41. Judith Terra also began treating the art collection of Terra Foundation as if it were her own personal property. Judith Terra ordered that art from the collection held by Terra Foundation be transported form the Giverny Museum to her personal residence. The curator of the Giverny Museum objected to any piece of the collection leaving the Giverny Museum. However, at Judith Terra's direction, Mr. Tucker ordered the curator of the Giverny Museum to transport the art to Judith Terra's residence for her personal use.

ANSWER: Michaeli denies the allegations contained in this paragraph; Michaeli was present in the one time event when three painting where brought to Judith Terra's residence in France, by guards of the Giverny Museum accompanied by the director of the Museum for a three-hour time period, so that art could be included in a videotape for a television program to promote the Giverny Museum and the Terra Foundation, which art was safely returned to the Giverny Museum after the videotaping. That videotape speaks for itself and could show the malicious nature of this allegation.

42. Under the control of Judith Terra, Mr. Tucker, Sen. Simpson and Mr. Michaeli, substantial waste and mismanagement has occurred which jeopardizes the continued viability of Terra Museum. This waste and mismanagement includes, but is not limited to, the following:

a. Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

b. Causing the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, and jeopardizing the security of the $100 million of art displayed and collected at Terra Museum;

c. Permitting a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

d. Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

e. Attempting to invade the D4 Endowment restricted to educational purposes for the unauthorized purpose of acquiring art;

f. Bypassing the lawfully elected Executive Committee operating Terra Foundation and Terra Museum;

g. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel;

h. Misusing the art collection of Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

I. *Allowing Mr. Michaeli to participate the management, control and operation of Terra Foundation and Terra Museum.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

43. *Members of the Board of Directors have repeatedly questioned the manner in which Mr. Tucker, Judith Terra and Sen. Simpson have been operating Terra Foundation in the past year. For example, on March 2, 2000, Margaret Daley wrote to John Neff, Director of Terra Museum, regarding the significant problem occurring at Terra Museum as a result of the high turnover of key employees. Specifically, Mrs. Daley stated:*
Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler. John, Ginny worked tirelessly on the School Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their Herculean efforts, it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation. Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner. In my working with her on education issues, I believe she has always gone "above and beyond" her duties.... I couldn't leave without letting you and the Board know my feelings and deep concerns.
(See March 2, 2000 Letter, attached hereto as Exhibit 6)

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

44. *Other members of the Board of Directors, including Buntrock, as well employees of both Terra Foundation and Terra Museum have repeatedly and vigorously challenged the manner and lack of direction in which Terra Foundation has been operated and managed under the direction of Mr. Tucker. (See Arthur A. Hartman letter dated November 7,1999, attached hereto as Exhibit 7).*

ANSWER: Michaeli admits that Exhibit 7 to Plaintiffs' Complaint is a letter from Arthur Hartman; and denies all remaining allegations contained in this paragraph.

45. *On information and belief, the pattern of mismanagement and waste occurring at Terra Museum is conscious effort on the part of Judith Terra, Mr. Tucker and Sen. Simpson to cause the failure of Terra Museum in Chicago to justify closing Terra Museum in Chicago and moving Terra Foundation from Chicago to Washington, D.C. for their own ' purposes and in utter disregard for the people of Illinois intended to benefit from Dan Terra's museum and foundation.*

ANSWER: Michaeli denies all allegations contained in this paragraph.

46. *Despite the fact that Terra during his life had rejected any suggestion of moving Terra Museum from Chicago and therefore depriving the people of the State of Illinois of the charitable trust that he had created, Judith Terra has never abandoned her personal scheme to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. In the last year, after Mr. Tucker obtained the position of president and chairman, Judith Terra, Mr. Tucker and Mr. Michaeli have been actively seeking to close Terra Museum in Chicago.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

47. *To this end, and in breach of their fiduciary duties to Terra Foundation and the people of Illinois, Judith Terra and Mr. Tucker have engaged in negotiations relating to a merger or affiliation between Terra Foundation and The Corcoran Gallery of Art in Washington, D.C. ("the Corcoran"). As part of the proposed merger of affiliation, certain positions on the Board of The Corcoran would be filled by individuals on the Board of Directors of Terra Foundation. Also, the proposal provides that the president and chairman of Terra Foundation, Mr. Tucker, would assume the position of vice-chairman of The Corcoran.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

4 8. *The overall plan and method whereby Judith Terra and Mr. Tucker would secure their mission of obtaining prominent positions in Washington, D.C., in breach of their fiduciary duties to the people of Illinois, was clearly evidenced at the recent Board of Directors meeting held on August 24,2000. There, Mr. Tucker made clear that it was his intention to close Terra Museum in Chicago. Mr. Tucker stated that under his thinking, there were potential problems with the continued operation of the museum in Chicago. Mr. Tucker went to state clearly and unambiguously, the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.*
(Emphasis added) (See Minutes of August 24, 2000 Board of Directors Meeting, attached hereto as Exhibit 8, p. 2). In fact, many of the "problems" with the Chicago museum were of the Defendants' own making.

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

49. *Buntrock objected to Mr. Tucker's improper interpretation of the mission of Terra Foundation and stated that the closing of Terra Museum in Chicago had never been discussed or considered by the full Board of Directors. Mr. Tucker agreed that this critical issue had never been discussed by the full Board of Directors, but stated that a decision had already been reached to close the Terra Museum in Chicago. According to Mr. Tucker, the Strategic Planning Committee was prepared to make a recommendation on this issue to the Board of Directors. Mr. Tucker stated that the Board of Directors "definitely" must make a decision on the closing of the Chicago museum during the annual Board of Directors meeting in September 2000.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

50. *In conjunction with their overall plan, Judith Terra and Mr. Tucker have attempted to create the impression that Terra Museum in Chicago needs to be abandoned as a mission of Terra Foundation.*

ANSWER: Michaeli denies all allegations contained in this paragraph.

51. *Notice was mailed to the directors informing them that the annual Board of Directors meeting of Terra Foundation was scheduled for Tuesday, September 26, 2000 in France. Although various events and committee meetings were scheduled to occur between September 23/2000 and September 26, 2000, the annual meeting of the Board of Directors was scheduled for September 26, 2000.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

52. *As set forth in the agenda for the annual Board meeting that was distributed to each Board member, the election of officers and directors for the upcoming year was to be held during the September 26, 2000 meeting. (See Agenda for September 26, 2000 Board of Directors Meeting, attached hereto as Exhibit 9). As set forth in the agenda, the elections were to occur and then the chairman of each committee would make a presentation to the Board. (Id.) As indicated in the agenda, Mr. Buntrock was scheduled to give a presentation to the Board as the chairman of the finance and investment committee immediately subsequent to the election of the directors and officers.*

ANSWER: Michaeli admits that Exhibit 9 to Plaintiffs' Complaint is the Agenda for the September 26,2000, Meeting of the Board of Directors of Terra Foundation; admits all allegations contained in this paragraph consistent therewith; and denies all allegations contained in this paragraph inconsistent therewith.

53. *The Defendants have now contrived a plan to ensure that the directors are elected with the exception of Buntrock. Defendants intend to see that Buntrock is not retained as a director in order to allow them to more easily accomplish their unlawful personal objective of closing the museum in Chicago and moving Terra Foundation to Washington, D.C. Buntrock has recognized Defendants' efforts and has continued to question the Board's authority to move the charitable assets of the people of the State of Illinois to Washington, D.C. in contravention of the Board's fiduciary duties to the people of Illinois.*

ANSWER: Michaeli denies all allegations contained in this paragraph regarding purported unlawful conduct or conduct in breach of fiduciary duties owed to Terra Foundation; denies participating in the contrivance of any plan regarding the composition of Terra Foundation's Board; and denies all remaining allegations contained in this paragraph.

54. *Plaintiffs have just recently learned of the Defendants' improper plan to remove Mr. Buntrock from the Board of Directors. Subsequent to the dissemination of the agenda for the September 26, 2000 meeting of the Board of Directors, and only days prior to the directors leaving for France, Mr. Ratner was directed to send a letter to all directors, without any consultation, informing them that a 30-minute Board of Directors meeting was scheduled for September 24, 2000, two days prior to the properly noticed and scheduled meeting of the Board of Directors. (See September 15, 2000 Letter, attached hereto as Exhibit 10). This improperly noticed meeting has been scheduled because Defendants will not have a sufficient number of directors available on September 26, 2000 to remove Mr. Buntrock from the Board of Terra Foundation.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to what Plaintiffs "have just recently learned"; admits that Exhibit 10 to Plaintiffs' Complaint is a September 15, 2000 memo from Ratner to the Board of Directors; admits all allegations contained in this paragraph consistent with the terms of Exhibit 10; denies all allegations inconsistent therewith; and denies all remaining allegations contained in this paragraph.

55. *Defendants' attempt to hold the elections for directors and/or officers at a Special Meeting of the Board of Directors on September 24, 2000, is violative of the by-laws of Terra Foundation for at least two reasons. First, Ratner does not have the authority to provide notice of a meeting of the Board of Directors as he is not the secretary of Terra Foundation, nor is he even a duly elected officer or director. Pursuant to the by-laws of Terra Foundation, only the secretary of Terra Foundation is empowered to provide notices required under the by-laws. (Exhibit 5, Article IV, Section 9). Any attempt by Ratner to send notice of a meeting of the Board of Directors constitutes an ultra vires act.*

ANSWER: Michaeli lacks knowledge sufficient to form a belief as to the truth of the allegations contained in this paragraph;

56. *Second, under the by-laws an election of the officers and directors may occur only at one of two occasions. First, the election may take place at the annual meeting of the Board of Directors. Second, if the election is not held at the scheduled annual meeting, a special meeting may be held subsequent to the annual meeting. (Id. at Article III, Section 3). The by-laws provide no authority for the holding of elections of officers or directors prior to the scheduled annual meeting. For this additional reason, Defendants' attempt to hold the elections of directors and officers at the improperly noticed meeting on September 24, 2000 constitutes an ultra vires act, as well as a clear breach of their fiduciary duty to Terra Foundation and the people of the State of Illinois.*

ANSWER: Michaeli admits all allegations contained in this paragraph consistent with the terms of the Terra Foundation's Bylaws; denies all allegations inconsistent therewith; denies participation in any attempt to hold the election of the directors and officers of the Terra Foundation outside of the terms of the Terra Foundation's Bylaws; and denies all remaining allegations contained in this paragraph.

57. *Without relief from this Court, Defendants will carry out their improper plan to ensure that Buntrock does not remain as a director and officer, to close the Terra Museum in Chicago and to undermine the effort of the other directors to ensure that fiduciary duties to the Terra Foundation, and its beneficiaries - the people of the State of Illinois - are followed. The Defendants' plan is motivated by their own self-interests and desires, and inconsistent with their fiduciary obligations as directors of a charitable trust intended to benefit the people of Illinois.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

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58. *Moreover, if Defendants are permitted to carry out their plan to remove Buntrock, there is a real and serious danger that other members of the Board of Directors will resign their positions thereby leaving the Terra Foundation in great jeopardy, and leaving the people of Illinois without protection on the Board. Once Buntrock and other similar "obstructionist" directors are removed or resign, Defendants will have no opposition to carrying out their plan of depriving the people of Illinois of the public trust created over twenty years ago by Dan Terra for their benefit.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph. Michaeli do agree that the people of Illinois needs protection but not from the Defendants....

COUNT I
(Declaratory Relief)

59. *Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 58 of this Complaint as though fully set forth in this Paragraph 59.*

ANSWER: Michaeli repeats and realleges his answers contained in Paragraphs 1 through 58 above as and though fully set forth in this Paragraph 59.

60. *By and through the creation Terra Foundation as a not-for-profit Illinois corporation, Dan Terra intended that a museum of American art be operated in the Chicago area to be held in trust for the benefit of the people of the State of Illinois.*

ANSWER: Michaeli denies the allegation contained in this paragraph.

61. *At various times after the creation of Terra Foundation, Terra reaffirmed his mission of operating a museum in the Chicago area for the benefit of the people of Illinois through the collection of American art and education generally of the public on the issue of American art.*

ANSWER: Michaeli denies the allegation contained in this paragraph.

62. *The Board of Directors of Terra Foundation are the trustees of the charitable trust created by Dan Terra responsible to the people of Illinois as the beneficiaries of the public trust.*

ANSWER: To the extent this paragraph states a legal conclusion, Michaeli denies those allegations; and denies all remaining allegations contained in this paragraph.

63. *As directors of Terra Foundation, Plaintiffs Buntrock and Gidwitz, as well as many others, have donated their time, efforts and resources to accomplish the goals and mission started over twenty years ago by Terra.*

ANSWER: Michaeli denies the allegations contained in this paragraph.

64. *Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to protect Terra Foundation from waste and mismanagement caused by Defendants.*

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ANSWER: To the extent this paragraph states a legal conclusion, Michaeli denies those allegations; admits that he believes that the Plaintiffs owe fiduciary duties to the Foundation, which duties include protection from waste and mismanagement; and denies all remaining allegations contained in this paragraph.

65. *Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to see that Terra Foundation continues to carry out the mission for which it was started for the benefit of the people of Illinois.*

ANSWER: To the extent this paragraph states a legal conclusion, Michaeli denies those allegations; admits that he believes that all directors of the Terra Foundation owe fiduciary duties to the Foundation, which duties include to ensure that Terra Foundation's mission is carried out; and denies all remaining allegations contained in this paragraph.

66. *By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the Terra Foundation and the people of Illinois to protect the charitable assets of Terra Foundation and to act in their interests by furthering the charitable purpose and mission started by Terra more than twenty years ago.*

ANSWER: Michaeli admits that all the directors and officers of Terra Foundation owe a fiduciary duty to the Foundation to protect its assets and to act in the best interests of the Foundation; and denies all remaining allegations contained in this paragraph though they are not directed to him.

67. *Notwithstanding their fiduciary duties to the people of Illinois to further the charitable purpose and mission started by Dan Terra more than twenty years ago, Judith Terra, Sen. Simpson and Mr. Tucker used their positions as directors and/or officers of Terra Foundation to intentionally mismanage Terra Museum in Chicago to further their own self interests in closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

68. *The foregoing improper conduct of Judith Terra, Sen. Simpson and Mr. Tucker has caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois as the beneficiaries of the public trust established for Terra Museum in Chicago as a unique center for American art.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

69. *Plaintiffs have no adequate remedy at law.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

70. *An actual controversy exists between the parties hereto concerning Terra Foundation's obligation and purpose to maintain a museum in the Chicago area for the benefit of the people of Illinois-as originally intended by Dan Terra at the time of the creation of Terra Foundation.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

COUNT II
(Statutory Ultra Vires Acts)

71. *Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 70 of this Complaint as though fully set forth in this Paragraph 71.*

ANSWER: Michaeli repeats and realleges his answers contained in Paragraphs 1 through 70 above as and though fully set forth in this Paragraph 71.

72. *The above acts and conduct of Defendants have been taken without lawful authority, capacity, or power and will continue unless enjoined.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

73. *Section 103.15 of the General Not for Profit Corporation Act of 1986 allows this Court to enjoin Defendants' unlawful acts.*

ANSWER: To the extent the allegations of this paragraph accurately state the provisions of the Illinois General Not For Profit Corporation Act, Michaeli admits all allegations consistent therewith, denies all allegations inconsistent therewith; and answering further, denies having engaged in any unlawful acts towards Terra Foundation.

COUNT III
(Breach of Fiduciary Duty)

74. *Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 73 of this Complaint as though fully set forth in this Paragraph 74.*

ANSWER: Michaeli repeats and realleges his answers contained in Paragraphs 1 through 73 above as and though fully set forth in this Paragraph 74.

75. *By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the people of Illinois to act in their interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago.*

ANSWER: To the extent this paragraph states a legal conclusion, Michaeli denies those allegations; denies the inferential allegation contained in this paragraph that the charitable purpose and mission of Terra Foundation is solely to benefit the people of the State of

16di-000398

Illinois and, accordingly, denies that officers and directors of Terra Foundation owe any fiduciary duty to the people of Illinois, affirmatively stating that Terra Foundation's Bylaws, its Articles of Incorporation, the Illinois Not For Profit Corporation Act specifically state its purpose is to, among other things, benefit "a growing art public ... in the United States and abroad."

76. Defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust. Defendants improper conduct included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable Defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law;

d. Contrary to the by-laws of Terra Foundation, attempting to improperly reschedule the vote for the election of directors to ensure that Defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation.

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

77. The foregoing breaches of fiduciary duty of Judith Terra, Sen. Simpson and Mr. Tucker have caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois, as the beneficiaries of the public trust by endangering the future of Terra Foundation and the continued viability of Terra Museum in Chicago as a unique center for American art.

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

78. Plaintiffs have no adequate remedy at law.

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

COUNT IV
(Inducing A Breach of Fiduciary Duty)

79. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 78 of this Complaint as though fully set forth in this Paragraph 79.

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

80. *As set forth more fully above, Defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust established by Dan Terra. Defendants improper conduct included, but is not limited to, the following acts:*

a. *Intentionally mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;*

b. *Seeking to close Terra Museum in Chicago and transfer or re-establish the museum to Washington, D.C. or some other location outside of Illinois to further their own personal goals;*

c. *Attempting to defeat Buntrock' s re-election as director to enable Defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois;*

d. *Attempting to improperly reschedule the vote for the election of directors to ensure that Defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

81. *Defendant Mr. Michaeli colluded with Judith Terra, Sen. Simpson and Mr. Tucker in committing breaches of fiduciary duty, or otherwise induced or participated in their breaches of duty to Terra Foundation and the people of Illinois as the various ways, including, but not limited to the following:*

a. *Knowingly providing advice to Judith. Terra, Mr. Tucker and Sen.- Simpson that was contrary to the fiduciary duties owed by them as directors of Terra Foundation;*

b. *Acting with Judith Terra, Mr. Tucker and Sen. Simpson to make decisions for Terra Foundation in contravention of the by-laws of Terra Foundation;*

c. *Advising Judith Terra, Mr. Tucker and Sen. Simpson to take action relating to Terra Foundation that constituted waste and mismanagement in an attempt to justify the closure of Terra Museum in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;*

d. *Colluding with or advising Judith Terra, Mr. Tucker and Sen. Simpson in the decision to replace Jim Collins and the law firm of Bell, Boyd & Lloyd in order to gain control over the operations of Terra Foundation for their own improper purpose in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;*

e. *Colluding with, advising or participating in the plan to remove Mr. Buntrock from the Board of Directors in order to remove opposition to their plan to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;*

ANSWER: Michaeli denies each and every allegation contained in this paragraph. Michaeli never attended any Foundation board meeting or its comities. Never asked to give advice or volunteered any advice to any board member. Further more:

a) In view of the current events and the enormous damage that the Plaintiffs are doing to the city of Chicago, the people of Illinois, the Foundation, the Defendants and other board members, and mostly to the great legal system of this great country and state

just by using the enormous power of their wealth (compared to the total inability of all other board members in this respect) Michaeli regrets today that he did not have the courage and or the power to advise, nor did he give advise, to any of the board members, to remove Mr. Collins, his client Buntrock and their big supporter Gidwitz - long time ago.

b) Michaeli found out about the past of Mr. Buntrock and Waste Management and the fact that Buntrock is a client of Bell, Boyd & Lloyd only after the filing of this complaint.

c) Michaeli never thought that Mr. Collins should be removed from the board before a full investigation of his activity was preformed. Instead, the board did let him step aside – He came back to the scene through this complaint and this may do the justice that was not done when he left the Foundation.

d) If the Honorable court will learn about those board members that do not cooperate with the Plaintiffs, their values, integrity, determination and personal weight – The Court will know the absurdness of these allegations.

e) Even the Plaintiffs don't claim that decisions where not made by majority – this means that Michaeli has a kind of magical power that works over people like **Dr. Tucker** - (world authority on Art and Impressionist painters), **Senator Alan Simpson** - (Old Cowboy from Wyoming), **Mrs. Helene Ahrweiler** - the former head of the Sorbonne and the Pompidou Center (Old Greek & French resistance worrier), **Dr. Theodore Stebbins** world authority on Art and American Painters (long time teacher), **Mr. Jack Andreani** – former Ambassador of France to the US (long time leader and great statesman in his country), **Mrs. Stephanie Marshal** – head of one of the most important education centers of Illinois, and **Judith Terra** – Whose strong character described largely in this complaint (the cofounder of the French Museum the person who did not waste a second working for this Foundation and mostly the Chicago Museum). Nobody on this board did more to carry on the legacy of Dan Terra than her. Especially the effort that Dan himself gave-up before his death – saving the Chicago Museum up to the point that the whole Foundation is in jeopardy because of this false absurd complaint.

f) Where is the long planned "scheme"?

- After the death of Dan Terra, the death of Mr. Archibald, and the resignation of Mr. James Terra not one board member was from Chicago. It was Mrs. Terra that supported the joining of four members from Illinois (the Plaintiffs, Mrs. Daley & Mrs. Marshal).
- After two long years of a presidential search, Ambassador Hartman admitted that he failed (Michaeli knows these facts from learning and not from first hand) It was Judith Terra that warmly supported Ambassador Hartman idea to appoint Mrs. Marshal as president. Mrs. Marshal was brought to the board by Mr. Buntrock... and is an Illinois citizen – guess who rejected this idea – Mr. Ronald Gidwitz.
- Mrs. Terra did not bring or initiate the joining of any other board member except Senator Simpson (the last on board – about one year ago).
- It was Senator Simpson himself that was aware of the impossible situation of the board with such counsel that controlled everything in the Foundation. Knowing how important to Mrs. Terra the Foundation, its original goals and the legacy of her husband he felt that she needs his help to guard her goals that are identical to those of the Foundation – against an evil power that threatens to destroy it completely.
- It was Mr. Collins himself and his holding so many duties that caused his resignation. He chose to leave his counseling job when he was removed from the positions of treasurer and secretary. He left a board meeting in the middle and did not give the Foundation any other choice but to change the counseling firm.
- No "scheme" but objective events lead to the removal of the law firm.

g) Michaeli lacks information about the idea to close the Chicago Museum and cannot contribute to this issue. From a professional point of view it seems that this case is not about an attempt to remove the Museum and the Foundation from its current location. It is about preventing a legal board from discussing it.

82. *The conduct of Mr. Michaeli has caused, and will continue to cause, damage to Terra Foundation and the people of Illinois. If the conduct of Mr. Michaeli is not stopped, the public trust created by Dan Terra may be destroyed to the detriment of the people of Illinois.*

ANSWER: Michaeli denies each and every allegation contained in this paragraph.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Gidwitz' complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Gidwitz lack standing to assert claims belonging to the Terra Foundation, which claims may be brought only as a derivative action.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Gidwitz lack standing to assert claims belonging to the people of the State of Illinois, which claims may be brought only by the Illinois Attorney General.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Godwit's complaint fails to state a claim under the Illinois Not For Profit Corporation Act for failure to allege willful and wanton conduct.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Gidwitz' complaint fails to state a claim in as much as it fails to allege with particularity any purported ultra vires acts.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs Buntrock and Gidwitz' complaint fails to state a claim in as much as the conduct alleged is protected by the business judgment rule.

WHEREFORE, Defendant Naftali Michaeli respectfully requests this Court to enter judgment in his favor and against Plaintiffs Dean L. Buntrock and Ronald Gidwitz, and grant such other and further relief, as the Court deems appropriate.

DATED: January 8, 2001

Respectfully submitted, NAFTALI MICHAELI,

16di-000403

3263 N STREET, NW, WASHINGTON, D.C. 20007
TEL. 202-337-1911, Fax. 202-342-3162

16di-000404

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

2001 JAN -8 PM 2:36
CIRCUIT COURT
COOK COUNTY, ILLINOIS
CHANCERY DIVISION
DOROTHY BROWN, CLERK

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

DEFENDANTS JUDITH TERRA'S, PAUL HAYES TUCKER'S AND ALAN K. SIMPSON'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson (collectively "Defendants"), by their attorneys, Shefsky & Froelich Ltd., pursuant to Illinois Supreme Court

Rules 213 and 214 and pursuant to Circuit Court Order of January 2, 2001, hereby direct Plaintiffs Dean L. Buntrock, Ronald Gidwitz and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois to produce the following documents and materials within 7 days of service at the office of Shefsky & Froelich Ltd., 444 North Michigan Avenue, Suite 2500, Chicago, Illinois 60611.

DEFINITIONS AND INSTRUCTIONS

A. "Terra Foundation" means Terra Foundation for the Arts, an Illinois not-for-profit corporation and any of its directors, officers, agents, trustees, representatives and employees.

B. "Stebbins" means Dr. Theodore Stebbins, any of his agents, representatives and/or employees.

C. "Neff" means John Hallmark Neff, any of his agents, representatives and/or employees.

D. "Art Work" means any painting, sculpture, drawing, lithograph, or other object, tangible or otherwise.

E. "Terra Museum" means the Terra Museum for American Art located at 664 North Michigan Avenue, Chicago, Illinois 60611, as well as its affiliate museum located in Evanston, Illinois.

F. "Plaintiffs" means Dean L. Buntrock and/or Ronald Gidwitz and any of their agents, representatives and/or employees.

G. "Attorney General" means the People of the State of Illinois, *ex rel.* James E. Ryan, Attorney General of Illinois and any of his agents, representatives and/or employees.

H. "Person" means any natural person, company, corporation, professional corporation, partnership, association, joint venture, proprietorship, firm, or any other business enterprise or legal entity.

I. "Relating to," "referring to," "in connection with," "pertaining to," "with respect to," "regarding," "concerning," any and other derivative of these terms means consisting of, reflecting, involving, or having a legal, logical or factual connection with the subject matter designated in any question, paragraph, or description. In addition, when used with respect to "documents," these terms mean any document that mentions, concerns, reflects, discusses, describes, analyzes, records, studies, reports, contravenes, or refutes a particular subject tor some aspect of the subject, or transmits, accompanies, forwards, or is attached to documents relating to a particular subject, or which describes a particular subject regardless of whether the proper name, designation, or title of the subject is specifically mentioned.

J. "Or," and "and" mean both "or" and "and" in the conjunctive and the disjunctive.

K. The use of any singular term shall include the plural, the use of the masculine shall include the feminine, and vice versa, as appropriate in the context.

L. "Anything of value" means goods, services, cash, bonds, securities, certificates of deposits, trusts of interests therein, annuities, notes, insurance policies or interests therein, real property, and/or any other tangible or intangible item that is reasonably considered to have value.

M. "Identify" and "the identify of," when used with respect to an individual, mean to state the individual's name; business affiliation and title; last-known address(es) and telephone number(s); and whether the individual is currently an officer, director, employee or otherwise subject to the control of Plaintiffs or the Attorney General.

N. "Identify" and "the identity of," when used with respect to a document, means to state the type of document (*e.g.*, letter, memorandum, handwritten notes); its date; its author and addressee; its last-known custodian or location; and a brief description of its subject matter and size.

O. "Identify" and "the identity of," when used with respect to a company, foundation, not-for-profit corporation or other legal entity, means to state the company/entity's legal name and name under which it does business or operates; address of its principal place of business or operation; and the identity of its chief executive officer.

P. "Identify" and "the identity of," when used with respect to an oral conversation, means to state the parties to the conversation; the date, time and place of the conversation; the substance of the conversation; and the identity of any written record of the conversation.

Q. "Document" means any and all writings of any kind, including the originals and copies, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation, correspondence, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, inter-office and intra-office communications, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, printed matter, computer printouts, teletypes, telefax, invoices, worksheets, all drafts, alterations, modifications, changes and amendments of any of the foregoing, graphic or oral records or representations of any kind (including, without limitations, photographs, charts, graphs, microfiche, microfilm, videotapes, recordings, and motions pictures), and any electronic, mechanical, or electric records or representations of any kind (including without limitation, tapes, cassettes, disks, recordings, e-mails and computer memories).

R. "Meeting" means any coincidence of presence, whether by chance or prearranged, formal or informal, or in connection with any other activity in person, by telephone, or otherwise with at least two persons.

S. "Memorandum" or "Memoranda" means any note, writing or documentation of any subject referenced in the request.

T. "Motions to Enjoin" means either the Attorney General's Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver to Conduct and Independent Investigation or Plaintiffs' Emergency Motion to Appoint Receiver for a Temporary Restraining Order.

DOCUMENTS REQUESTED

1. All documents that refer to, relate to, or concern any information regarding the subject matter of Neff's memoranda dated May 28 and December 3, 1999.

2. All documents that refer to, relate to or concern any communication by and between Plaintiffs or Attorney General and Neff that refer to, relate to or concern Neff's Memoranda dated May 28 or December 3, 1999.

3. All documents that refer to, relate to, or contain any information concerning Stebbins' relationship with (1) the Terra Foundation, (2) the Fogg Museum, (3) the Boston Museum of Fine Arts, (4) any and all private clients of Stebbins, (5) any and all art dealers and auction houses such as Sotheby, (6) Jim Wright, and (7) Paul Tucker.

4. All documents that refer to, relate to or contain any information concerning the subject matter of whether Stebbins has ever earned a commission in relation to selling any art work on behalf of the Terra Foundation.

5. All documents that refer to, relate to or concerning the subject matter of whether Stebbins has ever earned a commission for buying any art work on behalf of the Terra Museum or Terra Foundation.

6. All documents that refer to, relate to or contain any information concerning the subject matter of whether Stebbins has earned a commission for buying or selling art work for any entity or individual from January 1, 1998 to the present.

7. All documents that refer to, relate to or contain any information concerning the subject matter of whether Stebbins has received any compensation in connection with giving advice with respect to art work from any entity or individual from January 1, 1998 to the present.

8. All documents that refer to, relate to or concern information regarding Stebbins' resignation or termination or departure from the Boston Museum of Fine Arts in or about November 1999.

9. All documents relating to or concerning Plaintiffs' retention, engagement, selection and/or payment of a public relations firm or similar Person in connection with this litigation, the Terra Museum or Terra Foundation.

10. All documents that refer to, relate to or concern any discussion or communication by and between Plaintiffs or Attorney General and any director of the Terra Foundation concerning or relating to the matters raised in the Motion to Enjoin.

11. All documents other than those previously requested relating to, referring to or concerning the subject matter of the Motion to Enjoin.

12. All documents relating to or concerning any statements made by any person relating to the subject matter of the Motions to Enjoin.

13. Identify any statements, information and/or documents known to you and requested by any of the foregoing Requests which you claim to be work product or subject to any common law or statutory privilege, and, with respect to each Request, specify the legal basis for the claim, as required by Illinois Supreme Court Rule 201(n).

14. An affidavit stating that your production of documents in response to Defendants' First Request for Production of Documents is complete in accordance with these requests.

15. Any and all documents received from the law firm of Bell Boyd & Lloyd or James Collins prior to January 4, 2001.

Dated: January 8, 2001

Respectfully submitted,

JUDITH TERRA, PAUL HAYES TUCKER and **ALAN K. SIMPSON**

By: _____
One of their Attorneys

Brian L. Crowe
James D. Wilson
SHEFSKY & FROELICH LTD.
444 North Michigan Avenue
Suite 2500
Chicago, Illinois 60611
(312) 527-4000
Firm I.D.# 29143
686014.2

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

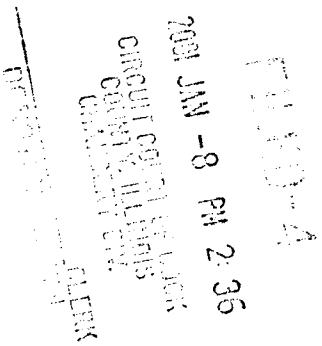
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.



No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

NOTICE OF FILING

PLEASE TAKE NOTICE THAT on Monday, January 8, 2001, we filed with the Clerk of the Circuit Court of Cook County, Illinois, County Department, Chancery Division, **DEFENDANTS**

JUDITH TERRA'S, PAUL HAYES TUCKER'S AND ALAN K. SIMPSON'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, a copy of which is served upon you.

Dated: January 8, 2001

Respectfully submitted,

JUDITH TERRA, PAUL HAYES TUCKER and **ALAN K. SIMPSON**

By: _____
One of their Attorneys

Brian L. Crowe
James D. Wilson
SHEFSKY & FROELICH LTD.
444 North Michigan Avenue
Suite 2500
Chicago, Illinois 60611
(312) 527-4000
Firm I.D.# 29143
686014.2

CERTIFICATE OF SERVICE

The undersigned, pursuant to the provisions of § 1-109 of the Code of Civil Procedure, certifies and states that a true and accurate copy of this **NOTICE OF FILING** and **DEFENDANTS JUDITH TERRA'S, PAUL HAYES TUCKER'S AND ALAN K. SIMPSON'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS** were served on:

William R. Quinlan
James R. Carroll
John F. Kennedy
William J. Quinlan
Quinlan & Crisham, Ltd.
30 North LaSalle Street
29th Floor
Chicago, Illinois 60602

Via Messenger Delivery

Floyd D. Perkins
Assistant Attorney General &
Bureau Chief of Charitable Trusts
100 West Randolph Street
3rd Floor
Chicago, Illinois 60601

Via Messenger Delivery

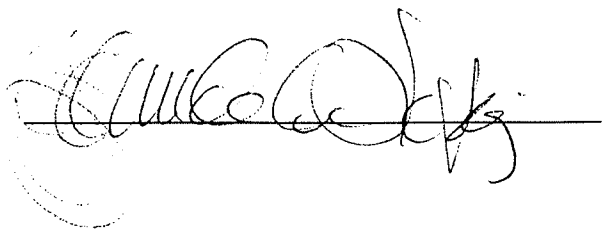
William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
Sidley & Austin
Ten South Dearborn
Chicago, Illinois 60603

Via Messenger Delivery

Naftali Michaeli
3263 North Street, N.W.
Washington, D.C. 20007

Via Federal Express

before 5:00 p.m. this 8th day of January, 2001.



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	Hon. Dorothy Kirie Kinnaird
Defendants.	)	

DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS I AND II OF PLAINTIFFS BUNTROCK AND GIDWITZ'S COMPLAINT

Defendant Terra Foundation for the Arts (the "Foundation"), by and through its attorneys, hereby moves this Court for judgment on the pleadings on Counts I and II of plaintiffs Buntrock and Gidwitz's complaint pursuant to 735 ILCS 5/2-615(e) upon the grounds that the complaint itself establishes that the Foundation is entitled to judgment on Counts I and II as a matter of law. In support of its motion, the Foundation states as follows:

1. The Foundation is a private Illinois not-for-profit corporation organized under the General Illinois Not For Profit Corporation Act, 805 ILCS 105 et seq. The Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 North Michigan Avenue in Chicago, Illinois, as well as the Musee d'Art Americain Giverny (the "Giverny Museum") in Giverny, France. (Buntrock Complaint at ¶¶ 11, 16).

2. Plaintiffs Buntrock and Gidwitz are two members of the Foundation's 11 member board of directors (the "board") who have brought a four count complaint for declaratory, injunctive, and other relief against the Foundation, three members of the board, Judith Terra, Dr. Paul Hayes Tucker and Senator Alan Simpson, as well as another unrelated third party, Naftali Michaeli.

3. In their complaint, plaintiffs allege that the individual defendant directors and the Foundation have undertaken a purported "scheme" to close the Terra Museum located on Michigan Avenue in Chicago and move the Foundation and its assets to Washington D.C. (Buntrock Complaint at ¶¶ 32-39, 45-50, 53), an act which plaintiffs claim is outside the powers and purpose of the Foundation and thus would be an *ultra vires* act.

4. Count I ("Declaratory Relief") seeks the issuance of a declaration that the Foundation is precluded from closing the Terra Museum and moving the Foundation outside the Chicago area on the grounds that any such action would be in violation of the law and an injunction in support of that declaration. (Buntrock Complaint at ¶¶ 59-70). Count II ("Statutory *Ultra Vires* Acts") asks this Court to enjoin the Foundation from taking any action to close the Terra Museum or move the Foundation out of the State of Illinois on the grounds that such action would be *ultra vires*.

5. As a matter of law, however, the actions alleged by plaintiffs are not outside the purpose and powers of the Foundation and are therefore not *ultra vires* acts. The Foundation is thus entitled to judgment on the pleadings on Counts I and II of the Buntrock and Gidwitz complaint.

6. Because the Foundation is a corporation, its purpose and powers are controlled by its Articles of Incorporation and By-Laws. See Stroh v. Blackhawk Holding Corp.,

48 Ill. 2d 471, 475, 272 N.E.2d 1, 2 (1971); Scott v. Harding Museum, 58 Ill. App. 3d 408, 410, 374 N.E.2d 756, 758 (1st Dist. 1978) (relied upon by the plaintiffs, see Plaintiffs' Emergency Mot. for TRO, filed 9/22/00 at pp. 15-17) ("The purposes of the [museum] are set forth in its articles of incorporation."). The Foundation's Articles of Incorporation are a contract and must be construed the same as any contract – in accordance with the document's clear language. See Stroh, 48 Ill. 2d at 474-75.

7. Moreover, the General Assembly has conferred upon the Foundation as an Illinois not-for-profit corporation all of the rights and powers conferred upon Illinois not-for-profit corporations by the General Illinois Not For Profit Corporation Act, 805 ILCS 105 et seq., along with all the powers that have been granted to the Foundation by its Articles of Incorporation and By-Laws.

8. The purpose of the Foundation is clearly and unambiguously laid out in its founding documents which state: "the purposes of the corporation are to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through . . . related educational programs" (Buntrock Complaint, Ex.1 Articles of Incorporation) and "operate museums and schools, both in the United States and abroad" (Buntrock Complaint, Ex. 2 By-Laws) (emphasis added). Nothing in either the Foundation's Articles of Incorporation or By-Laws requires the Foundation to maintain a museum or conduct its activities on Michigan Avenue in Chicago or anywhere else in the State of Illinois for that matter. In fact, neither the City of Chicago nor the State of Illinois are even mentioned in these documents as a location in which the Foundation's activities might take place. The Foundation exists for the express purpose of "expand[ing] the artistic horizons of a growing art public" – not the art public of Chicago or the State of Illinois. (See Buntrock Complaint, Ex. 1, Ex. 2, Art. I).

9. Indeed, the General Assembly has specifically granted the Foundation, as it has all Illinois not-for-profit corporations, the power to "conduct its affairs, carry on its operations, and have offices within and without [Illinois] and to exercise in any other state . . . of the United States, or in any foreign country, the powers granted by [the General Illinois Not For Profit Corporation] Act." 805 ILCS 105/103.10 (j) (emphasis added). Nothing in the General Illinois Not For Profit Corporation Act prohibits the Foundation from choosing to close the Michigan Avenue facility or from conducting its activities elsewhere, and in fact the statute specifically authorizes the Foundation to conduct its affairs and exercise its powers anywhere. Id.

10. The Foundation is a not-for-profit corporation, not a legal trust, and should not be construed as such. Even if the Foundation might be a "trustee" for purposes of the reporting requirements of the Charitable Trust Act, as defined in that Act, the purpose of the Foundation is governed solely by its Articles of Incorporation and By-Laws. See Scott, 58 Ill. App. 3d at 415-16, 374 N.E.2d at 758 (relied upon by plaintiffs) (holding that the Harding Museum, a not-for-profit corporation, was subject to the Charitable Trust Act; however, a determination of the purpose and intent of the corporation was determined solely by looking to the articles of incorporation).

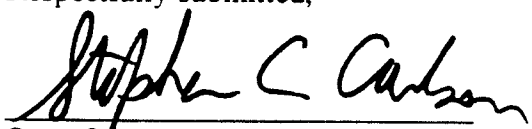
11. In any event, the purpose of the Foundation as expressly defined in its Articles of Incorporation and By-Laws, which are attached as exhibits to plaintiffs' complaint, negate any contrary allegations contained in the complaint. See Chicago Style Products, Inc. v. Chicago Sun Times, Inc., 313 Ill. App. 3d 45, 50, 728 N.E.2d 1204, 1208 (1st Dist. 2000). Plaintiffs' allegations that the purpose of the Foundation is "to provide a Museum in the Chicago area" (Buntrock Complaint at ¶ 13) are directly contradicted by the Articles of Incorporation and

By-Laws which contain no such limitation and specifically provide for a much more broad use of the Foundation's assets. The exhibits control. Id. As a matter of law, plaintiffs have not established any genuine issue of material fact as to whether any alleged actions by the Foundation to close or move the Terra Museum are *ultra vires* acts outside the purpose and powers of the Foundation.

12. In further support of its motion, the Foundation submits herewith a memorandum of law.

WHEREFORE, defendant Terra Foundation for the Arts respectfully moves this Court to grant it judgment on the pleadings on Counts I and II of plaintiffs Buntrock's and Gidwitz's complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Stephen C. Carlson one of the attorneys for defendant the Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS I AND II OF PLAINTIFFS BUNTROCK AND GIDWITZ'S COMPLAINT to be served upon the following counsel by messenger deliver:

William R. Quinlan
James R. Carroll
John F. Kennedy
30 N. La Salle Street
Suite 2900
Chicago, IL 60602

Floyd Perkins
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601

Brian L. Crowe
James Wilson
Shefsky & Froelich, Ltd.
444 N. Michigan Avenue
Chicago, Illinois 60611

and by mail to:

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007

on this 10th day of January, 2001.

Stephen C. Carlson

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	Hon. Dorothy Kirie Kinnaird
Defendants.	)	

DEFENDANT TERRA FOUNDATION FOR THE ARTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS I AND II OF PLAINTIFFS BUNTROCK AND GIDWITZ'S COMPLAINT

Defendant the Terra Foundation for the Arts, an Illinois Not For Profit Corporation, by its attorneys, moves this Court pursuant to 735 ILCS 5/2-615(e) for judgment on the pleadings on Counts I and II of the complaint filed by plaintiffs Dean L. Buntrock and Ronald Gidwitz on the grounds that the complaint itself establishes that the Foundation is entitled to judgment on Counts I and II as a matter of law.

FACTUAL BACKGROUND

The Terra Foundation for the Arts (the "Foundation") is an Illinois not-for-profit corporation established by Ambassador Daniel J. Terra in 1978. (Buntrock Complaint at ¶ 9). The Foundation was established for the stated purposes of, among other things, preserving and

exhibiting "collections of American art" to "expand the artistic horizons of a growing art public through . . . educational programs" (Buntrock Complaint, Ex. 1, Articles of Incorporation) and to "operate museums and schools, both in the United States and abroad." (Buntrock Complaint, Ex. 5, By-Laws, Art. I). In 1982, the Foundation opened the Terra Museum in Evanston, Illinois. (Buntrock Complaint at ¶ 14). In 1987, the Museum was relocated to 664 North Michigan Avenue in Chicago, Illinois. (Id.)

In the early 1990s, in furtherance of the Foundation's purpose of propagating American art, expanding artistic horizons and operating museums abroad, the Foundation opened a museum of American art in Giverny, France. (Id. at ¶ 16). The Buntrock Complaint alleges that the Foundation's art collection is currently worth over $173 million. (Id. at ¶ 17). Roughly half of those assets are located in the Giverny Museum. (See Id.)

The Foundation is currently comprised of an eleven member board of directors. (Id. at ¶ 12). On September 22, 2000, plaintiffs Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), two members of the board, chose to file this lawsuit against three other members of the board, Judith Terra, Dr. Paul Hayes Tucker and Senator Alan K. Simpson as well as the Foundation and another unrelated third party, Naftali Michaeli.

Plaintiffs' complaint is two-fold. In Counts I ("Declaratory Relief") and II ("Statutory *Ultra Vires* Acts"), plaintiffs ask this Court for declaratory, injunctive and other relief designed to prevent the Foundation from taking any action to close or move the Foundation's Michigan Avenue museum from the State of Illinois. In Counts III ("Breach of Fiduciary Duty") and IV ("Inducing A Breach of Fiduciary Duty"), plaintiffs claim that the individual directors breached and/or were induced to breach alleged fiduciary duties allegedly owed to the people of the State of Illinois.

Plaintiffs allege that the individual defendant directors have engaged in a purported "scheme" in the hopes of closing the Terra Museum in Chicago and moving the Foundation to Washington D.C. (Buntrock Complaint at ¶¶ 32-39, 45-50, 53). Despite the fact that the Foundation's Articles of Incorporation and By-Laws,[1] as well as the Illinois General Not For Profit Corporation Act, state otherwise, plaintiffs claim that to move the Terra Museum out of Illinois would be inconsistent with the purpose of the Foundation and would thus be an *ultra vires* act. (Id. at ¶ 72).

It is not alleged, nor could it be alleged, that the Foundation's substantial and longstanding activities in Giverny, France are *ultra vires*. (See Buntrock Complaint at ¶ 16). Nor is it alleged how a minority of three members of the board of directors could even conceivably cause the Foundation to close its Michigan Avenue facility or otherwise control the deliberations or actions of an 11-person board, eight of whom plaintiffs have no complaint against.

The Articles of Incorporation and By-Laws of the Foundation unambiguously speak for themselves and state: "the purposes of the corporation are to form, preserve, and exhibit collections of paintings . . . representing American art; expand the artistic horizons of a growing art public through . . . related educational programs" (Buntrock Complaint, Ex. 1) and "operate museums and schools, both in the United States and abroad." (Buntrock Complaint, Ex. 5, Art. I). Nothing in either the Articles of Incorporation or the By-Laws says that the Foundation must operate a museum in Chicago. Nowhere do the Articles of Incorporation or the By-Laws say that the Foundation is prohibited from conducting its activities or operating museums in locales outside of Chicago. The By-Laws specifically empower the Foundation to

[1] Plaintiffs attached as exhibits and incorporated by reference the Foundation's Articles of Incorporation and By-Laws to their complaint. (See Buntrock Complaint, Exs. 1, 5).

operate museums anywhere inside or outside the United States. (Id.) Additionally, the By-Laws explicitly allow the Foundation to maintain offices outside the State of Illinois; to elect directors who are not residents of Illinois; and to hold meetings outside of Illinois. (Buntrock Complaint, Ex. 5, Art. II, III). Moreover, the Illinois General Assembly has specifically granted the Foundation, as it has all Illinois not-for-profit corporations, the power to "conduct its affairs, carry on its operations, and have offices within and without [Illinois] and to exercise in any other state . . . of the United States, or in any foreign country, the powers granted by [the Illinois General Not For Profit Corporation] Act." 805 ILCS 105/103.10 (j).

ARGUMENT

Count I ("Declaratory Relief") of Plaintiffs' complaint asks this Court to issue a declaration that the Foundation is precluded from closing the Terra Museum and moving the Foundation outside of the Chicago area alleging that any such action would be in violation of the law and for injunctive relief in support of that declaration. (Buntrock Complaint at ¶¶ 59-70). In Count II ("Statutory *Ultra Vires* Acts") of their complaint, Plaintiffs' seek to enjoin the Foundation from taking any action to close the Terra Museum or move the Foundation out of the State of Illinois claiming that such action would be *ultra vires*. (Buntrock Complaint at ¶¶ 71-73). On the face of the Buntrock and Gidwitz complaint, there is no genuine issue of material fact as to whether the Foundation is entitled to decide to close or move the Terra Museum out of Illinois. As evidenced by the Foundation's Articles of Incorporation and By-Laws, any such action is as a matter of law not *ultra vires*. See Stroh v. Blackhawk Holding Corp., 48 Ill. 2d 471, 475 , 272 N.E.2d 1, 2 (1971) (holding that the powers and limitations of a corporation are found in its articles of incorporation and by-laws); Scott v. Harding Museum, 58 Ill. App. 3d 408, 410, 374 N.E.2d 756, 758 (1st Dist. 1978) (a not-for-profit corporation's charter, articles of

incorporation and by-laws control whether a corporate action is *ultra vires*). Judgment on the pleadings is proper if there are no factual questions and the only dispute concerns a question of law. Bd. of Trustees of the Univ. of Ill. v. City of Chicago, 2000 WL 1736958 *1 (1st Dist. Nov. 20, 2000); Pekin Ins. Co. v. Richard Marker Assoc., Inc., 289 Ill. App. 3d 819, 821, 682 N.E.2d 362, 364 (2nd Dist. 1997). The only matters to be considered in ruling on a motion for judgment on the pleadings are the allegations of the pleadings along with the instruments attached as exhibits to the pleadings. M.A.K. v. Rush-Presbyterian St. Luke's Med. Ctr., 249 Ill. Dec. 287, 289, 736 N.E.2d 129, 131 (3rd Dist. 2000). The exhibits attached to the complaint control over any conflicting allegations contained in the complaint. Chicago Style Products v. Chicago Sun Times, Inc., 313 Ill. App. 3d 45, 50, 728 N.E.2d 1204, 1208 (1st Dist. 2000). The Foundation is accordingly entitled to judgment on the pleadings with respect to Counts I and II of plaintiffs' complaint pursuant to 735 ILCS 5/2-615(e).[2]

Plaintiffs allege that the Foundation has undertaken a plan to close the Terra Museum on Michigan Avenue in Chicago and move it to Washington D.C. (Buntrock Complaint at ¶¶ 32-39, 45-50, 53). Without alleging any facts supporting their claim that closing the museum or moving it to Washington, D.C. could conceivably be outside the express powers of the corporation, plaintiffs simply conclude that such purported actions would be *ultra vires* and ask this Court to enter a declaratory judgment and enjoin the Terra Foundation from making any such decision or taking any such action. Whether the Foundation has the authority to close its Michigan Avenue museum or move its assets and operations which may now be in Illinois out of

[2] It is well established under Illinois law that a trial court may grant judgment on the pleadings in favor of a defendant who has not answered the complaint when the complaint itself establishes that the defendant is entitled to judgment in his favor. Mitchell v. Norman James Construction Co., 291 Ill. App. 3d 927, 931, 684 N.E.2d 872, 877 (1st Dist. 1997); Pollack v. Marathon Oil Co., 34 Ill. App. 3d 861, 867, 341 N.E.2d 101, 107 (5th Dist. 1976).

the State of Illinois is a question of law which can be decided on the face of the complaint and in light of the rights and powers conferred upon the Foundation by its Articles of Incorporation, By-Laws, and by the Illinois General Assembly in the Illinois General Not For Profit Corporation Act, 805 ILCS 105 et seq.

I. Because the Actions Alleged by Plaintiffs Are Not Expressly Prohibited by the Foundation's Articles of Incorporation and By-Laws, as a Matter of Law, Such Acts Are Not *Ultra Vires*.

An *ultra vires* act is one that is expressly prohibited and beyond the powers of the corporation. Sherrard State Bank v. Vernon, 243 Ill. App. 122, 1926 WL 3986 *2 (2nd Dist. 1926). The powers and limitations of a corporation are found in its articles of incorporation, its by-laws and in applicable constitutional and statutory provisions. Stroh, 48 Ill. 2d at 475, 272 N.E.2d at 2; Bowman v. Armour & Co., 17 Ill. 2d 43, 47, 160 N.E.2d 753, 755 (1959). A not-for-profit corporation is no different in this regard – its charter, articles of incorporation and by-laws control whether a corporate action is *ultra vires*. See Scott, 58 Ill. App. 3d at 410, 374 N.E.2d at 758 (the principal case relied upon by plaintiffs Buntrock and Gidwitz (see Mem. in Support of Emergency Motion for TRO, pp. 15-17)) ("The purposes of the [museum] are set forth in its articles of incorporation."); Southern Illinois Univ. Foundation v. Booker, 98 Ill. App. 3d 1062, 1064, 425 N.E.2d 465, 467 (5th Dist. 1981) (court determined the purpose of a not-for-profit corporation by looking to its by-laws); Bertram v. Berger, 1 Ill. App. 3d 743, 746, 274 N.E.2d 667, 668 (1st Dist. 1971) (court looked only to the charter of a not-for-profit corporation to determine whether action was *ultra vires*); Harrison v. Barker Annuity Fund, 90 F.2d 286, 289 (7th Cir. 1937) (holding the character and purpose of charitable corporation must be ascertained by reference to the terms of its charter).

Plaintiffs attached to their complaint the Foundation's Articles of Incorporation and By-Laws as exhibits. "Exhibits that conflict with allegations in a pleading negate those allegations." Chicago Style Products, Inc. v. Chicago Sun Times, Inc., 313 Ill. App. 3d 45, 50, 728 N.E.2d 1204, 1208 (1st Dist. 2000); McGuire v. Ameritech Cellular Corp., 314 Ill. App. 3d 83, 86, 731 N.E.2d 343, 345 (1st Dist. 2000); Sangamon County Fair v. Standard, 9 Ill. 2d 267, 276, 137 N.E.2d 487, 493 (1956) (holding that an exhibit attached to a complaint controls over any allegations in conflict with the facts contained in the exhibit). To the extent that plaintiffs' complaint alleges that the purpose of the Foundation was "to provide a Museum in the Chicago area" (Buntrock Complaint at ¶ 13), those allegations are of no effect in light of the attached exhibits to the contrary. Id.

The articles of incorporation are a contract and must be construed the same as any contract – in accordance with the document's clear language. Stroh, 48 Ill. 2d at 474-75, 272 N.E.2d at 3; Clarendon Group, Ltd. v. Smith Laboratories, 741 F. Supp. 1449, 1452 (S.D. Cal. 1990) (applying Illinois law). Construction of the articles of incorporation is a question of law for the court, and it is the plain meaning of the words used in the contract that govern its interpretation. Clarendon, 741 F. Supp. at 1452. As the Illinois Supreme Court has repeatedly held, both the meaning of the contract and the "intent of the parties is to be gathered from the face of the document without assistance from any extrinsic evidence." Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462, 706 N.E.2d 882, 884 (1999) quoting Rakowski v. Lucente, 104 Ill. 2d 317, 323, 472 N.E.2d 791, 794 (1984).

Courts must look solely to the plain and ordinary meaning of the language of the contract to determine the intent of the parties, unless the contract is ambiguous. Air Safety, 185 Ill. 2d at 462, 706 N.E.2d at 884. In re Estate of Powless, 248 Ill. Dec. 403, 734 N.E.2d 111,

115 (Ill. App. Ct. 5th Dist. 2000). However, where no ambiguity exists, construction of the instrument is a matter of law without the use of outside evidence. Air Safety, 185 Ill. 3d at 462, 706 N.E.2d at 884; Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 89, 707 N.E.2d 609, 613 (1st Dist. 1999); Gavery v. McMahon & Elliott, 283 Ill. App. 3d 484, 487, 670 N.E.2d 822, 824 (1st Dist. 1996). A court will not find an ambiguity in the language of an instrument where none exists. Powless, 734 N.E.2d at 116.

There is nothing ambiguous about the purpose of the Foundation as stated specifically and clearly in both the Foundation's Articles of Incorporation and By-Laws. If Ambassador Daniel Terra had intended the Foundation to forever operate a museum in Chicago and only in Chicago, he certainly and simply could have included such limiting language in the Foundation's incorporating documents. To the contrary, however, Ambassador Terra initially located the Terra Museum in Evanston – not Chicago – (Buntrock Complaint at ¶ 14) and expressly stated in the Foundation's Articles of Incorporation that the purpose of the Foundation was far broader than the narrow and parochial interpretation plaintiffs are seeking to impose. As the Articles of Incorporation make clear, the purpose of the Foundation is to reach a broadly-based public without regard to city, state or national borders:

> [T]he purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and . . . build, erect, maintain, equip, manage, lease, and operate a museum and . . . engage in any and all other activities . . . permitted by law.

(Buntrock Complaint, Ex. 1) (emphasis added). The Foundation's By-Laws echo this language and even more specifically state that the "purposes of the corporation are to . . . operate

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museums and schools, both in the United States and abroad." (Buntrock Complaint, Ex. 5, Art. I).

Neither the City of Chicago nor the State of Illinois are mentioned anywhere in any of the Foundation's creating documents. Rather, the By-Laws unequivocally give the Foundation the power to establish a museum anywhere inside or outside the United States. The Articles of Incorporation refer to the "growing art public" – not the art public of Chicago or Illinois. The By-Laws also specifically provide that the Foundation may maintain offices outside of the State of Illinois, hold its annual meetings outside of Illinois, and may elect directors who do not reside in Illinois. (Buntrock Complaint, Ex. 5, Art. II, III). There is nothing in the Articles of Incorporation or By-Laws geographically restricting the Foundation or requiring that it conduct its activities in Chicago or in Illinois

It would be absurd to construe the governing documents to mean that the Foundation must operate exclusively in Chicago, when the Foundation itself and its first museum were originally based outside of Chicago. It would be similarly absurd to construe the documents in such a way as to deem operating a museum outside of Chicago *ultra vires*, when plaintiffs admit themselves in their complaint and do not object to the fact that the Foundation has for years owned and operated another museum in Giverny, France – outside not only Chicago and the State of Illinois but the United States. (Buntrock Complaint at ¶ 16). Language of corporate charters should not be construed to reach an absurd result. City of St. Louis v. Institute of Med. Edu. and Research, 786 S.W.2d 885, 888 (Mo. Ct. App. 1990).

A construction of the Articles of Incorporations and By-Laws that they somehow contain language preventing the Foundation from sharing its collection of art with anyone who does not choose to come within the boundaries of the City of Chicago is not only absurd, but

cannot possibly be reconciled with a plain reading of the documents. Moreover, the Illinois General Not For Profit Corporation Act specifically authorizes the Foundation to conduct activities and operations, maintain offices and exercise any of its powers outside of not only the State of Illinois but the United States, and does not require that there be any museum here at all. See 805 ILCS 105/103.10(j).[3]

II. The Foundation is Not a Legal Trust and Thus Should Not Be Construed as Such.

The Terra Foundation is not a legal trust, and thus should not be construed as such in determining whether a corporate action is *ultra vires*. The Foundation is a private Illinois not-for-profit corporation with all the rights and powers of such a corporation which have been conferred upon the Foundation by the General Assembly of the State of Illinois through the General Not For Profit Corporation Act, along with all the powers that have been granted to the Foundation by its Articles of Incorporation and By-Laws. In their complaint, plaintiffs themselves recognize the Foundation as a corporation and not a trust. (Buntrock Complaint at ¶ 9). The crux of their complaint is that the Foundation should be enjoined from taking any alleged *ultra vires* acts. *Ultra vires* is a corporate doctrine – not a trust doctrine. At the same time plaintiffs are suing the Foundation under a corporate theory of recovery, they illogically and inconsistently allege that the Foundation is somehow a "public trust."[4] (Buntrock Complaint at ¶¶ 46, 57, 58, 62). The fact that the Foundation is a not-for-profit rather than a for-profit corporation makes no

[3] Tellingly, on the very first day that the parties were before this Court, Mr. Perkins, Assistant Attorney General, was specifically asked by the Court whether there existed any case law where a "charitable organization[] in Illinois wish[ed] to move outside the state and [was] stopped by force from doing so." Tr. of Proceedings 09/22/00 at p. 17. Mr. Perkins could not offer the Court any such authority because no such authority exists. See Tr. of Proceedings 9/22/00 at pp. 17-19.

[4] The Federal government also recognizes the Foundation as a private foundation. Under section 509(a) of the Internal Revenue Code, the Foundation is defined as a private foundation and not a public charity (I.R.C. § 509(a)) and it has been specifically found by the IRS to be a private foundation rather than a public charity. (See Cumulative List of Organizations, Exhibit A,

difference. The statutory provision governing *ultra vires* acts of an Illinois not-for-profit corporation is essentially identical to the provision governing *ultra vires* acts of any other Illinois corporation. See 805 ILCS 5/3.15; 805 ILCS 105/103.15; 19 C.J.S. § 576 (Corporations) n. 19 (The defense of *ultra vires* for a nonprofit corporation is the same as that of a corporation for profit).

Plaintiffs have not and cannot allege the necessary elements to prove that Ambassador Terra intended to create a trust when he explicitly created the Foundation as an Illinois not-for-profit corporation. The elements of an express trust are: (1) intent of the parties to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specification of trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee. In re Estate of Zuckerman, 218 Ill. App. 3d 325, 329, 578 N.E.2d 248 (1st Dist. 1991). Plaintiffs have not (and cannot) allege specific facts establishing these requirements because they themselves admit that Ambassador Terra created a not for profit corporation. (Buntrock Complaint at ¶ 9). He prepared Articles of Incorporations and By-Laws, not a trust document. Plaintiffs themselves chose to file their complaint supposedly based upon those Articles of Incorporation and By-Laws, which they attached as exhibits to their complaint. Plaintiffs did not file suit upon and did not attach to their complaint any declaration of trust or other trust document.

While the Foundation may be defined as a "trustee" for purposes of the reporting requirements of the Charitable Trust Act, this does not transform the Foundation into a trust. See 760 ILCS 55/3. The 1963 amendment to section three of the Act, which redefined "trustee" to include not-for-profit corporations, was intended to bring such entities holding property for

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attached hereto).

"charitable" purposes within the scope of the Act and thus the Attorney General's authority. Scott, 58 Ill App. 3d at 413, 374 N.E.2d at 760. However, this Act neither turns all "charitable" not-for-profit corporations into trusts, nor allows this Court to disregard the Foundation's Articles of Incorporation issued by the State of Illinois and "pretend" the Foundation is actually a trust.[5] Nor does the Charitable Trust Act allow the Court to disregard the Foundation's own By-Laws or the rights and powers conferred upon it by the General Assembly through the Illinois General Not for Profit Corporation Act.

The fact that the Foundation may be subject to the Charitable Trust Act for purposes such as complying with the Act's statutory reporting requirements is wholly irrelevant in defining the extent of the Foundation's purposes and powers. In fact, the Illinois Appellate Court has previously addressed this very issue in the case relied upon by plaintiff, Scott v. Harding Museum, 58 Ill. App. 3d 408, 374 N.E.2d 756 (1978) (see Buntrock Mem. in Support of Emergency Motion for TRO at pp. 15-17). In that case, the court found that because the purpose of the George F. Harding Museum, an Illinois not-for-profit corporation, as stated in the museum's articles of incorporation, constituted a "charitable" purpose, the museum was subject to the Charitable Trust Act. Id. at 415-16. However, in determining the purpose of the museum, the court looked solely to the museum's articles of incorporation. Id. The court quoted the language of the articles of incorporation in holding that in "the establishment of this museum, the express intent of the donor was the 'collection, preservation and exhibition of . . . art'." Id. Moreover, the court specifically rejected the "sophistical reading of the purpose clause of the

[5] A not-for-profit corporation and a legal trust are clearly not one and the same. The restrictions that apply to trustees are not applicable to directors of not-for-profit corporations which may happen to be subject to the Charitable Trust Act. For example, the "statutory investment restrictions applicable to trustees of charitable trusts are not applicable to the investment of these funds by [a] charitable corporation." RESTATEMENT (THIRD) OF TRUSTS § 389, cmt. b (1999).

articles of incorporation suggested by the defendants" and instead based its holding on a plain and ordinary reading of the articles of incorporation. Id. at 416.

Just as in Scott v. Harding Museum, this Court should also find that notwithstanding the fact that the Foundation may fall within the scope of the Charitable Trust Act for reporting purposes, the Foundation's purpose and powers must be determined by its Articles of Incorporation and By-Laws alone. See Scott, 58 Ill. App. 3d at 415-416, 374 N.E.2d at 761. Plaintiffs' "interpretation" of the Foundation's powers through their revisionist allegations of Daniel Terra's intent should be rejected. The intent of Ambassador Terra must be determine by looking solely to the Foundation's founding documents, just as the Illinois Appellate Court did in Scott. Id.

Even if this Court chooses to ignore the fact that the operative documents governing the Terra Foundation created a not-for-profit corporation and not a "trust" and decides to somehow treat the Foundation as a "trust," the Foundation is still entitled to judgment on the pleadings. The documents creating the purported "trust" and attached as exhibits to the complaint would still control and require a holding that it was not the intent of Ambassador Terra to limit the scope of the Foundation to operating exclusively within the geographical limits of Chicago, and exclusively for the benefit of the residents of Chicago, and that it was not his intent to require the Foundation and its operations to stay within Chicago or the State of Illinois at all.

Even the otherwise inapplicable case law cited by plaintiffs for the proposition that the Court may look to "surrounding circumstances" to determine the intent of a trust settlor holds that in determining the intent of a trust settlor, "the court must consider the plain and ordinary meaning of the words used." First Nat'l Bank of Chicago v. Canton Council of Campfire Girls, Inc., 85 Ill. 2d 507, 514 426 N.E.2d 1198, 1201 (1981) (emphasis added); see also Northern Ill.

Med. Ctr. v. Home State Bank of Crystal Lake, 136 Ill. App. 3d 129, 145, 482 N.E.2d 1085, 1097 (2nd Dist. 1985); Stuart v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 68 Ill. 2d 502, 528, 369 N.E.2d 1262, 1273 (1977); (Buntrock Mem. in Support of Plaintiffs' Motion for TRO, pg. 14). If the settlor's intent may be gathered from the language of the "trust" documents themselves, that is where the inquiry stops.

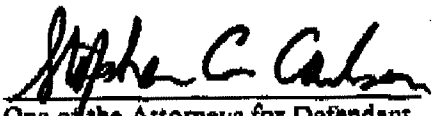
In the absence of ambiguity, which does not exist here, extrinsic evidence is impermissible. Nat'l Bank of Chicago, 85 Ill. 2d at 514, 426 N.E.2d at 1201 see also In re Estate of Mendelson, 298 Ill. App. 3d 1, 3, 697 N.E.2d 1210, 1212 (1st Dist. 1998) (holding that courts should attempt to determine the settlor's intent solely by reference to the plain language of the trust agreement); Mitchell v. Snyder, 402 Ill. 279, 284, 83 N.E.2d 680; 682 (1949) (finding that the intent of the testator is to be drawn from the language of the document itself, and surrounding circumstances will not be permitted to import a different meaning from that expressed, unless there exists such an ambiguity as to require a construction by the court).[6] Even assuming *arguendo* that the Articles of Incorporation and By-Laws created some sort of "trust" – which they did not – there is no ambiguity in those documents. Nowhere in those controlling documents is it stated that the Foundation was created for the specific and exclusive benefit of residents of Chicago or, indeed, for their benefit at all as opposed to the benefit of residents of wherever the Foundation might choose to conduct its activities.

[6] Moreover, it is an objective standard – a "trust provision is not ambiguous merely because the parties disagree on its meaning." Espevik v. Kaye, 277 Ill. App. 3d 689, 694; 660 N.E.2d 1309, 1313 (2nd Dist. 1996).

CONCLUSION

Because a plain and ordinary reading of the Foundation's Articles of Incorporation and By-Laws, which are attached to the complaint as exhibits and are controlling, establishes that the Foundation is not required to operate a museum in the City of Chicago or even Illinois, and because the Illinois General Not For Profit Corporation Act specifically authorizes the Foundation to conduct its affairs anywhere, plaintiffs have, as a matter of law, failed to raise any genuine issue of material fact as to whether any decision or plan to close the Terra Museum or move the Foundation out of the State of Illinois would be an *ultra vires* act. Accordingly, the Foundation respectfully requests that this Court grant its motion for judgment on the pleadings on Counts I and II of plaintiffs Buntrock and Gidwitz's complaint, enter judgment in its favor on those counts, and grant such other relief that this Court deems appropriate.

Respectfully submitted,



One of the Attorneys for Defendant
Terra Foundation for the Arts

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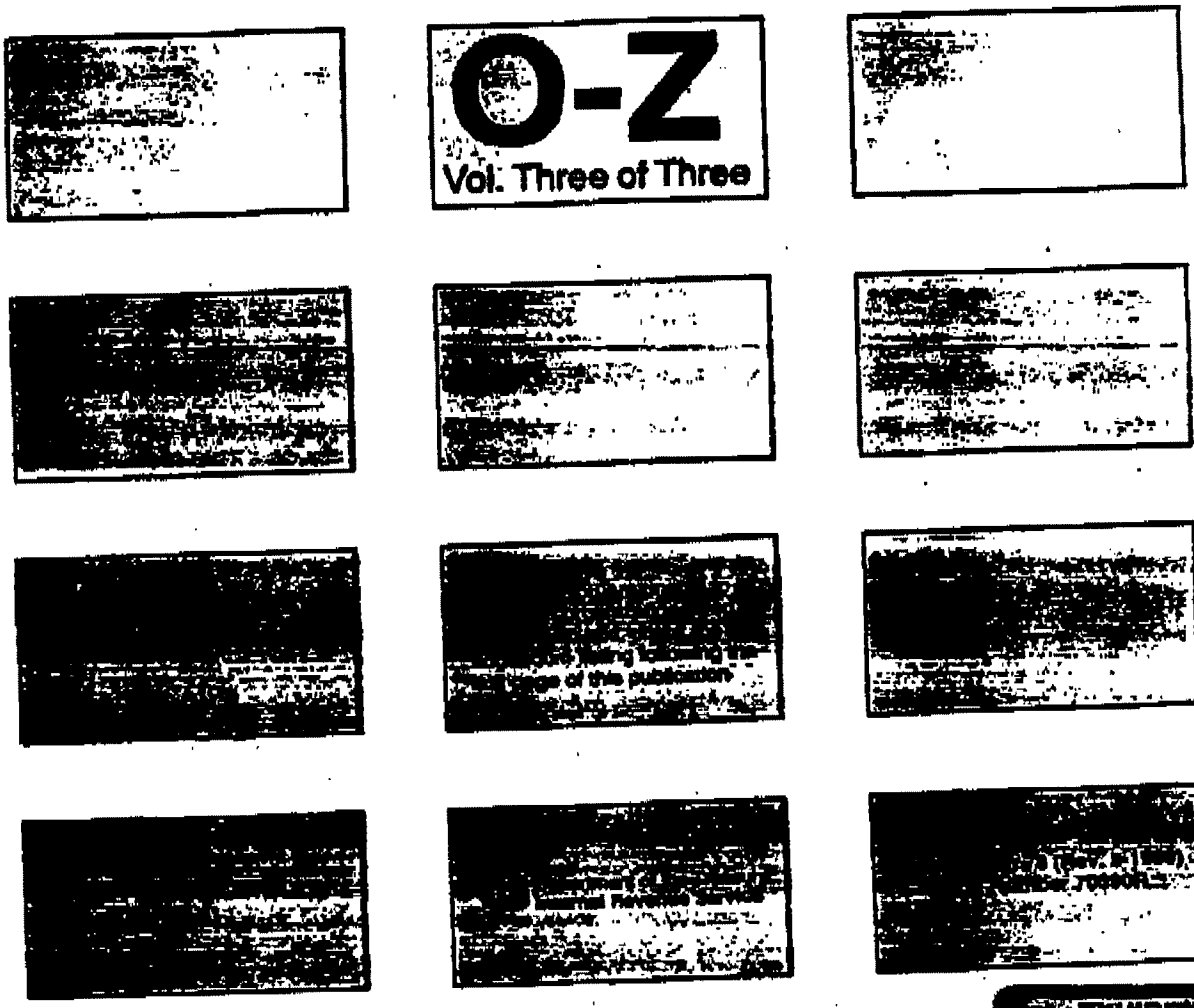
Cumulative List of Organizations

described in Section 170(c) of the Internal Revenue Code of 1986

Revised to September 30, 1999



Cumulative List of Organizations

described in Section 170(c) of the Internal Revenue Code of 1986

Preface

Part I of this preface contains a description of codes used in the individual listings. Part II contains a general explanation of the rules covering deductions for contributions for Federal income tax purposes.

Part I

This publication contains a list of organizations to which contributions are deductible. The list is not all-inclusive. If an organization is not listed but has a ruling or determination letter holding contributions to be deductible, generally the letter will serve as evidence to contributors of the deductibility of their contributions. Contributions to an organization described in section 170(c)(1) for exclusively public purposes will be allowed regardless of whether the organization has received a letter confirming its status. The organizations described in section 170(c)(1) are a state, a possession of the United States, or any political subdivision of the foregoing, or the United States or the District of Columbia.

This publication employs a coding system to identify each organization listed by type and limitation on deductibility. The codes, which appear to the right of the organization's name, are explained below. The significance and effect of the limitations on deductibility are explained in Part II.

Code *Meaning*

None—A public charity with a 50% deductibility limitation.

1 Generally, a central organization holding a group exemption letter, whose subordinate units covered by the group exemption are also included as having contributions deductible, even though they are not separately listed.

2 A fraternal organization contributions to which are deductible by an individual but only if they are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

3 A private operating foundation with a 50% deductibility limitation.

4 A private foundation, generally with a 30% deductibility limitation.

5 A charitable organization whose status as a public charity (rather than a private foundation) has not been determined. Most of these organizations have not sought formal recognition as public charities, even though many of them, such as churches or P.T.A.'s, may qualify as public charities. This code also includes some organizations that have formally claimed public charity status but that status has not yet been determined to be correct by the Internal Revenue Service.

6 An organization described in section 170(c) of the Code other than a charity.

7 An organization to which contributions are deductible if made for the use of a governmental unit. These have a 30% deductibility limitation.

8 A foreign-addressed organization.

OTHER CODING—A four-digit number appearing after the name of an organization and following the legend "Until" indicates the Advance Ruling Expiration Date. The entry represents organizations receiving a "public charity" advance ruling under section 501 (c)(3) of the Internal Revenue Code. The first two-digit number represents the year and the last two-digit number represents the month in which the "public charity" advance ruling is scheduled to terminate (e.g. 9906 indicates a June 30, 1999 expiration date). Additionally, for advance ruling dates expiring in the year 2000, this date will be indicated by a four-digit number representing the year, and the last two digits representing the month (e.g., 200012 indicates a December 31, 2000 expiration date).

The following examples, using fictitious names, illustrate the use of this coding system:

Doe Foundation, The John (4)
Columbia, Md.

Explanation:

Code (4) denotes that this is a private foundation with a 30% deductibility limitation.

Royal order of Falcons (1) (2) (6)
South Orange, N.J.

Explanation:

Code (1) denotes that contributions to subordinate units included under the group exemption are deductible; code (2) limits deductibility to contributions used exclusively for religious, charitable, and other designated purposes; and code (6) denotes a 30% deductibility limitation.

Metatarsal Society of America, Inc.
Washington, D.C.

Explanation:

No code means a public charity with a 50% deductibility limitation.

Tree Public Society, Until 9909,
Yuma, AZ

Explanation:

Until 9909 denotes a 50% deductibility limitation until September 1999. Deductibility after this date will depend on a final determination or ruling on foundation status.

Publication No. 78 is updated and reissued annually. Additions are published in cumulative quarterly supplements. However, when the Internal Revenue Service withdraws recognition of status or when it recognizes a change in an organization's status, the cumulative quarterly supplements do not reflect such changes. Status changes are published by announcements in the Internal Revenue Bulletin. Bulletin announcements also provide the public with current information on the status of protested contributions, where an organization has timely filed suit for declaratory judgment under section 7428 of the Code challenging its revocation of exemption.

Organizations which are required to file annual information returns on either Form 990 (Return for Organization Exempt from Income Tax) or Form 990-PF (Return for Private Foundation Exempt from Income Tax) as required by section 6033 of the Code, but which have not done so for two years (extensions of time to file considered) prior to the extension date of this edition, may not be included in this listing. However the exclusion of an organization from the Cumulative List because of this does not constitute the termination of the Internal Revenue Service's recognition of its exempt status.

The extent to which contributors may rely on the listing of organizations in this

Terhuly Foundation, St. Paul, Mn. (4)
Albert Payson Terhune Foundation, Montclair, N. J. (4)
Teri & Shari Malone Foundation, Leesburg, Va.
Teri Financial Services Inc., Boston, Ma.
T. E. R. I. Inc., Oceanside, Ca.
Terish House Inc., Valparaiso, In.
Terie and Gary Roukos Foundation, Edwards, Ca. (4)
Terjo Properties Inc., Chesterfield, Va.
Terlingua Area Volunteer Fire Dept, Terlingua, Tx.
Terlingua Medics Inc., Terlingua, Tx.
Term Limits Leadership Foundation, Until December 2002, West Redding, Ct.
Termeer Family Charitable Foundation, Boston, Ma. (4)
Terminal Illness Emergency Search, Until December 2001, Seattle, Wa.
Terminal Illness Support Ltd., Until December 2002, Las Vegas, Nv.
Terminal Park PTA, Auburn, Wa
Terminal Radio Inc., Valdez, Ak
Tern Inc., Forsyth, Ga.
Tern Ministries, Federal Way, Wa
Ternes Foundation Inc., Oakhurst, N. J. (4)
Ternion Academy, Santa Clara, Ca.
Terpsi Clubs, Morro Rio, Ca.
T. E. R. Program, Until December 2002, Hutchinson, Co.
Terpsichore Inc., Callao, Va.
Terpsichore Band Inc., Frenchtown, N. J.
Terpsichore, Palos Verdes Estates, Ca.
Terpsichore Theatre Ltd., Atlanta, Ga.
Terpsichore Theatre Ltd., Atlanta, Ga.
Marianna J. Terpstra Trust UW, Birmingham, Mi.
Terra Bella Community Enhancement Corporation, Terra Bella, Ca.
Terra Christa Communications Inc., Oro Valley, Az. (1)
Terra Christa Learning Center, Volney, Va.
Terra Cor Institution, Pittsburgh, Pa.
Terra Cotta Golf Charities Inc., Until September 2000, Naples, Fl.
Terra El Educators Foundation, Jordan, Mn. (4)
Terra Foundation, San Luis Obispo, Ca.
Terra Foundation for the Arts, Chicago, Il. (4)
Terra Foundation Inc., Sanibel, Fl. (4)
Terra Institute Ltd., Mt. Horeb, Wi.
Terra Linda Home & School Association Inc., San Rafael, Ca.
Terra Linda Homeowners Association, San Rafael, Ca.
Terra Linda Parent Teacher Club, Portland, Or.
Terra Linda Scholarship Foundation, San Rafael, Ca.
Terra Lingua, Until December 2001, Kirkwood, Mo.
Terra Manor, Until December 2001, Riverside, Ca.
Terra Marine Research & Education Inc., Santa Barbara, Ca.
Terra Nova Films Inc., Chicago, Il.
Terra Nova Foundation, New York, N. Y. (4)
Terra Nova High School Booster Club, Pacifica, Ca.
Terra Nova Home School Club, Pacifica, Ca.
Terra Nova Institute, Bodega Bay, Ca.
Terra Nova Trust, Jaffrey, N. H. (3)
Terra Org, Until December 1999, Lyons, Ca.
Terra Residential Center Inc., San Jose, Ca.
Terra Rosa Charter School, Sedona, Az.
Terra Technical College Foundation, Fremont, Oh.
Terra Trust, Oak Park, Il.
Terrace at St. Francis Inc., Milwaukee, Wi.
Terrace Chapel, Houston, Tx.
Terrace Gardens Inc., Milpitas, Ca.
Terrace Gardens Retirement Center Inc., Perryville, Md.
Terrace Heights Memorial Park Association, Yakima, Wa. (4)
Terrace Heights Memorial Park Endowment Care Fund, Yakima, Wa. (4)
Terrace Heights Preschool Inc., Yakima, Wa.
Terrace Hill Foundation Inc., Des Moines, Ia.
Terrace Homes Inc., Jonesboro, Ar.
Terrace Mill Foundation Inc., Glenwood, Md.
Terrace Overview Housing Corp, Erie, Pa.
Terrace Park Elementary School Pto, Terrace Park, Oh.
Terrace Park Volunteer Firefighters Incorporated, Terrace Park, Oh.
Terrace Pay Tenant Council Inc., Until December 2002, Baltimore, Md.
Terraceview Community Foundation Inc., Shell Lake, Wi.
Terra-Cotta Inc., San Antonio, Tx. (1)
Terral Cemetery Association, Terral, Ok. (6)
Terral Senior Citizens Center, Terral, Ok.
Terralingua, Until December 2000, Hancock, Mi.
Terramar Research, Bainbridge Island, Wa.
Terrance and Judith Paul Foundation Inc., Wisconsin Rapids, Wi. (4)
Terranova Inc., Until December 2002, Water Mill, N. Y.
Terrapins Swim Team, Concord, Ca.
Terrazas, Edmonds, Wa.
Terre Des Hommes Tdh USA, Greenville, S. C.
Terre Haute Area Meals on Wheels Inc., Terre Haute, In.
Terre Haute Boys Club, Terre Haute, In.
Terre Haute Catholic Charities Foodbank Inc., Terre Haute, In.
Terre Haute Childrens Choir Inc., Until July 2000, Terre Haute, In.
Terre Haute Choral Society, Terre Haute, In.
Terre Haute Christian Center Incorporated, Terre Haute, In.
Terre Haute Concert Band Inc., Terre Haute, In.
Terre Haute Day Nursery Assn, Terre Haute, In.
Terre Haute Educations Inc., Terre Haute, In.
Terre Haute Electrical Joint Apprenticeship and Training Trust, Terre Haute, In.
Terre Haute Housing Authority Development Corp, Terre Haute, In.
Terre Haute Humane Society, Terre Haute, In.
Terre Haute Junior Tennis Association Inc., Terre Haute, In.
Terre Haute Landmarks Inc., Terre Haute, In.
Terre Haute Masonic Temple Association, Terre Haute, In. (2)(6)
Terre Haute Medical Education Foundation Inc., Terre Haute, In.
Terre Haute Miss Softball America Inc., Terre Haute, In.
Terre Haute Montessori School Inc., Terre Haute, In.
Terre Haute North Patriot Booster Club, Terre Haute, In.
Terre Haute Regional Hospital Guild, Terre Haute, In.
Terre Haute Rotary Foundation Inc., Terre Haute, In.
Terre Haute South Babe Ruth Baseball, Terre Haute, In.
The Terre Haute South Vigo High School Athletic Booster Club, Terre Haute, In.
Terre Haute Symphony Association, Terre Haute, In.
Terre Haute Terpsichore Inc., Until December 2003, Terre Haute, In.
Terre Haute Urban Enterprise Association Inc., Terre Haute, In.
Terre Haute Womens Club Inc., Terre Haute, In.
Terre Haute Youth Intervention Center Inc., Terre Haute, In.
Terre Hill Mennonite High School, Terre Hill, Pa.
Terre Town Elementary School Parent Teacher Organization, Terre Haute, In.
Terrebonne Association for Retarded Citizens, Houma, La.
Terrebonne Childrens Advocacy Center, Until December 2002, Houma, La.
Terrebonne Churches United Foodbank Inc., Houma, La.
Terrebonne Council on Aging, Houma, La.
Terrebonne Economic Development Foundation, Houma, La.
Terrebonne Fine Arts Guild, Houma, La.
Terrebonne Foundation for Academic Excellence in Public Education, Houma, La.
Terrebonne Genealogical Society, Houma, La.
Terrebonne Historical Cultural Society Inc., Houma, La.
Terrebonne Literacy Council Inc., Houma, La.
Terrebonne 2000, Until November 1999, Houma, La.
Terrebonne-Lafourche Right to Life Educational Foundation Inc., Houma, La.
Terrel Bell and Associates, Salt Lake City, Ut.
Terrel H. Bell School Reform Network Inc., Until December 1999, McLean, Va.
Terrell Academy Inc., Dawson, Ga.
Terrell and Paula Hill Family Foundation Inc., Atlanta, Ga. (4)
Terrell Athletic and Recreation Association Inc., Terrell, Tx.
Terrell B. Rees Charitable Foundation, Elkhart, In. (4)
Terrell Bible Church, Terrell, Tx.
Terrell Brandon City Kids Fan Club Inc., Until December 1998, Portland, Or.
Terrell Chamber of Commerce Improvement Foundation Inc., Terrell, Tx.
Terrell Christian Academy of Terrell Texas, Terrell, Tx.
Terrell Clark Family Foundation Inc., Clearwater, Fl. (4)
Terrell Community Hospital Auxiliary Inc., Terrell, Tx.
Terrell County Family Connection Inc., Dawson, Ga.
Terrell County Historic Preservation Society Inc., Dawson, Ga.
Terrell Davis Salutes the Kids Inc., Until December 2002, Aurora, Co.
Terrell Foundation, Stephenville, Tx. (4)
Terrell Foundation, Vancouver, Wa. (4)
Terrell Heritage Society Inc., Terrell, Tx.
Terrell Hills Playground Association Inc., San Antonio, Tx.
Terrell Industries Inc., Hartselle, Al.
Terrell Lindsey Trives & Associates Inc., Santa Monica, Ca.
Terrell Little House Inc., Terrell, Tx.
Terrell Police Action League, Terrell, Tx.
Effie Lee Terrell Scholarship Fund Inc., Blytheville, Ar.
Terrell Smith Memorial Education Fund Inc., Griffin, Ga. (1)
The Terrell Street Foundation Inc., Spartanburg, S. C. (4)
The Terrene Institute Inc., Alexandria, Va.
Terri Lynn Ministries, Gordonsville, Tn.
Terri Lynne Lokoff Foundation, King Of Prussia, Pa.
Terri Nicolosi Maurer Foundation Inc., Montvale, N. J.
Terri Nurse Kinmonth Memorial Fund, Cincinnati, Oh. (4)
Terri Town Memorial Fund Inc., Santa Barbara, Ca.
Terrie Sapp Ministries, Until December 2003, Kernersville, N. C.
Terrier Band Boosters Inc., Redlands, Ca.
Terrific Inc., Washington, D. C.
Terrie Tots Inc., Until December 2001, Chicago, Il.
Territorial Book Foundation, Tulsa, Ok.
Territorial Sports Program Inc., Veneta, Or.
Territorial Sportsmen Scholarship Foundation, Until December 1999, Juneau, Ak.
Territory Tellers, Jones, Ok.
Terrois Center for the Arts, Chester, N. Y.
Terros Inc., Phoenix, Az.
Terry & Gae Pearce Family Foundation, Alpine, Ut.
The Terry and Hazeldean Carpenter Intergenerational Center, Until December 1999, Gering, Ne.
Terry B. Batton Evangelistic Association Inc., Georgetown, Ga.
Terry Band Booster Club, Rosenberg, Tx.
Terry Barr Memorial Scholarship Fund Inc., Lewis Center, Oh.
Terry Clark Ministries, San Clemente, Ca.
Terry County Cemetery Association, Brownfield, Tx. (4)
Terry County Citizens for Community Enrichment, Brownfield, Tx.
Terry County Emergency Services Inc., Brownfield, Tx.
Terry County Heritage Museum, Brownfield, Tx.
Terry County Senior Citizens Xyz Club, Brownfield, Tx.
Terry County United Fund, Brownfield, Tx.
Terry Crabtree Memorial Scholarship Fund, Until December 2002, Athens, Oh.
Terry Crowe Chief Superintendent of Holy Tabernacle Outreach Mission, North Las Vegas, Nv.
The Terry D. and Rosanne B. Douglass Foundation 6-29-93, Knoxville, Tn. (4)
Terry D. Barnes Foundation, Kansas City, Mo. (4)
Blanche G. Terry Educational Trust, Dallas, Tx. (4)
Terry F. Allen Tr Fuh Charitable, Farmsburg, Vt. (4)
Terry Family Foundation Inc., Madison, Wi.
Terry Foundation, Houston, Tx. (4)
Louis & Kate Terry Foundation Inc., Highland Park, Il. (4)
Terry French Community Fund, Port Huron, Mi.
Terry Galvin Memorial Scholarship, Brattleboro, Vt.
Terry Hartman Memorial Trust Fund, Kettering, Oh. (4)
Terry Hazen Outreach Ministries Inc., Until December 2000, Tulsa, Ok.
Terry Henshaw Ministries Inc., Tulsa, Ok.
Terry Homes, Auburn, Wa.
Terry K. Watanabe Charitable Trust, Omaha, Ne. (4)
Terry L. Gilliam Memorial Scholarship Fund, Huntsville, Ar.
Terry Law Ministries Inc., Tulsa, Ok.
Terry Lyndon Memorial Foundation, Franktown, Co.
Terry McCurdy Ministries Inc., Joplin, Mo.

CERTIFICATE OF SERVICE

I, Stephen C. Carlson one of the attorneys for defendant the Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached DEFENDANT TERRA FOUNDATION FOR THE ARTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS I AND II OF PLAINTIFFS BUNTROCK AND GIDWITZ'S COMPLAINT to be served upon the following counsel by messenger deliver:

William R. Quinlan
James R. Carroll
John F. Kennedy
30 N. La Salle Street
Suite 2900
Chicago, IL 60602

Brian L. Crowe
James Wilson
Shefsky & Froelich, Ltd.
444 N. Michigan Avenue
Chicago, Illinois 60611

Floyd Perkins
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601

and by mail to:

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007

on this 10th day of January, 2001.

Stephen C. Carlson

1 Confidential Attorney Client Work Product In Anticipation of Litigation

MEETING MINUTES:

LG: Len Garment
LL: Larry Levinson
DR: Donald Ratner
P: Paul Hayes Tucker (Via Phone)
J: Judith Terra
N: Naftali Micheali

L.G.:

- This is the dissenting minority from the agreement
- Tentative plan to fight for self-rule of Foundation on Constitutional Grounds seeking injuntive relief and damages in Federal Court
- The first question is about fees, how are they affected?

L.L.:

- Why isn't this within the scope of the indemnification provision? It's germane to the future of the foundation... will preserve it?

L.G.:

- Plaintiff will have to find at some point
- Fees can be allowed
- Court can say? May allow fees as to the future? There is the possibility that it may deny fees

D.R.

- Everyone is being paid except us by the Foundation
- Quinlan, the plaintiff's attorney is not beingpaid by the foundation

CL

- Our attorney is clearly under the indemnification clause. Plaintiff not according to the court, they have been blocked

D.R.

- Possible to be paid curently

L.G.:

- Desire is to proceed grounded in constitutional law, it's credible
- Present lawyers working are: Allen, Freeman, Larry, Myself
- To sume up: at the June 29th meeting, judicial intervention notwithstanding, the trustees vote will affirm judgement and change the foundation structure. In effect the foundation will sail away from Terra moorings to be controlled by Chicago

-- Left Room Briefly –

CL:

- Originally Simpson will resign immediately
- Other agreements also
- She (Stephanie Marshall) will unwillingly vote for the agreement

L.G.

- When did notice regarding the Attorney General inviting her come to her attorney?

N:

- 2 weeks ago
- 1st letter then a 2nd letter

J:

- Attorney General made "threats" to Marshall
- Heavy impact on her

L.L:

- These meetings were not transcribed?

J:

- No

N:

- Conversation between Terra and Marshall afterwards

LL

- Where is the documentation if any?

J:

- There is none

L.G.:

- To summarize: there is a temporary agreement. Stephanie Marshall, we've temporarily agreed that Marshall was opposed to the agreement a few weeks ago sometime after her position of opposition evidenced by a letter. She was called to the Attorney General's and advised of a conflict of interest regarding her connection to Terra and a connection elsewhere. Subsequent to that advice, at a mediation meeting, she took the position that she would agree to mediation proposal due to her concern about litigation predicated by per his… sticking only to her insistance that Allen Singleton not be singled out for termination. This is evidenced in a letter.
- Final stage/vote she agreed to everything
- She prevailed in her opposition and the whole board was removed

J:

- This is a draft of the letter that was actually sent (See Attached letter marked DRAFT dated 6/4/01)

DR

- I have signed copies

LG

- Documentation is needed to show Stephanie Marshall's coercion into submission

LL

- Series of meetings prior to all this
- Every board has a right to self examination
- Discussions framed regarding their future strategic direction about: the future, Terra's desires, by-laws, … a give and take, no decisions
- Did it occur to Gidwitz and Buntrock that there was a plan afoot to move the foundation to Chicago or Washington?

N:

- There was a proposal

DR

- Art institute approached the foundation for an affiliation

LG:

- There were generic discussions?

DR:

- There were a number of meetings 3-5 items of concern: attendance down, not enough funds to support two locations, not enough art to support two locations, the commitments in Paris
- Maggie Daley and Ron (Gidwitz) were there
- John Bryant of the Art Institute of Chicago, a major Chicago player, approached Gidwitz
- Art world has a culture… it calls from lots of museums
- Brought to the committee, was to discuss at the September board meeting. Had not yet been discussed

LG:

- What was the next major event that occurred?

DR:

- In July or August, Gidwitz suggested a meeting: what would be the best avenue for the museum, he asked for white paper on the subject from everyone. No one but Tucker sent one

N:

- Dean Buntrock also sent a letter

DR:

- Tucker's proposal was to go to D.C.

LG:

- Nothing was said regarding an intent to go to court?

DR:

- No...
- The board did not agree...

J:

- Finance committee earlier
- Allen Simpson uncovered this and had questions about it
- There is documentation of this

N:

- At the last moment after discussion, and the Tucker and Buntrock letter, it was put to the board not to elect Buntrock to next year
- The September election

DR

- There was no idea of a suit

-- Paul Hayes Tucker Via Phone Joins Meeting --

P:

- I've gone through the material

LG:

- What are the feasible options?

P:

- Taking of property is the only defense
- It is legitimate
- Coercion issue is critical
- Her stepping down: not necessarily affect thesuit
- If Stephanie Marshall removed herself from the board, the next meeting would be a tie vote

LG

- This is strategic to tactival

- Focus on certaintly issues for the complaint, on strategic level to stop what's taking palce
- We are in general agreement that the strongest suit is regarding Taking
- And the 2nd cause of action is without compensation under color of law
- Our goal is to secure damages, both compensatory and exemplary
- And to stop it
- Where is the core of the state action located?
- Detail on the way it started, the TRO…
- Cateorized by Carson, with no facts, and no justification,
- The judge does not want this issue
- It has been held in abeyance
- There has been a strategy of peeling away the support and inertia
- All of this can go into the complaint, taking of the ability to govern itself and its future
- The moment of truth was when Stephanie Marshall got called into the Attorney General
- What is your spin?

P:

- I agree with the characterization and stratgic initial assessment
- Motion to dismiss was the best document out of Sidley
- Pressure on Marshall long standing: her initial reaction to being pressed prior to the action took place
- A measure of Gidwitz desire for control

??

- Action here is to demonstrate a time line of actions for control
- Including the Marshall, AG contact
- Concerns are: court ordered mediation

P

- Cause of that was the Sunday phone call with Stu(??), Ted, Stephanie, Paul and one more person.
- A strategy session to get out from the barrage of motions they were filing
- Ask the court for mediation
- We agreed via phone
- That could come back at us.
- Mediation could help develop an exit strategy for the foundation

??:

- Complicit agreement for mediation that colors the a paragraph in the document

LG

- Can be treated as peripheral
- Understandable that people make temporary concessions

- What justification was there for the foundation to not self govern for the AG to enter the case

P:

- Don't know if the documents were ever recovered

DR

- AG attacks complaint to Quinlan

LG

- What is Stephania Marshall's background?

P:

- She is compassionate, moral
- Was at the academy of science
- Put on the baord by Dean Buntrock
- She is impressive, organizational
- She founded the Academy of Science, and built it, chaired for 20 years
- It was totally funded by state finds
- Ron controls all the funds.

LG

- Her role and relationship with Ron is key, especially early on

DR

- Ron agreed to mediation
- Ted Stebbins issue
- Ted conflicted because Quinlan, the plaintiff's attorney, said Ted had done something illegal
- Alleged that Ted had done something improper
- Quinlan said he would investigate Ted
- Ted sought a no court option
- He pushed for mediation
- Did not want to go to court

P:

- He (Ted) reiterated that he could not go on the stand
- Threatened to resign a week prior to nomination committee meeting
- Did not want reputation or standing in the art community to be affected

LG

- Did he say that?

P:

- Yes

- Previously a director had raised questions
- The director and Ted had had personal squirmishes going on
- Ted blamed it on personal distaste
- It was legitimate, there was no conflict
- The former director was upset so he wrote a memo
- Problem was the suggestion was that Ted was on the take had circulated in the art world already
- Evidence did not develop, but Ted was scared

DR

- Mediation of a motion to dismiss
- Ted didn't want to go to court
- Ted said go for mediation
- Paul had no vote and Stephanie had not vote

LG:

- What was the scandal he was haunted by?

DR

- Jim Collins and Kathrine Stevens asked John Neff to write a memo against Ted
- Neff was the fired director

P:

- Katherine Stevens encouraged Neff to write the memo

DR

- Quinlan turns up with the memo in court

LG

- And Ted becomes alarmed…

P

- Ted purchased a painting from or had sold a painting to the same dealer that the Foundation had purchased a painting from
- Whether he got a deal is hard to know, but it caused him issues.
- He had stayed in the dealer's condo at the time

LG

- Second point: Ted Stebbins was another important, gradual defection form the original seven
- He was caused to shift his position on pressure of potential public scandal because of documents that were leaked

P

- Neff said he did not send it to anyone

- Jim Collins or Katherine Stevens...
- Probably Collins to Quinlan

LG

- Attorney General used it in the motion
- Stebbins refused to have matters used in court proceeding because of a fear of scandal

J

- Ted was intent on getting rid of Buntock

N

- They put Ted on strategic planning committee for the future

LG

- This helps the argument
- Stebbins, despite a record of alleged conflict of interests is put forward as head of the Strategic Planning Committee and mediated Settlement committee and the Nomination committee

N

- (Regarding Hartman) He became close with Collins and part of the Gidwitz and Buntrock group
- reasoning was an exoneration letter Hartman wanted to be part of. Gidwitz and Buntrock helped Hartman get the letter

LG

- This cuts both ways

P

- Maggie Daley

LL

- Four directors hostile to exploration of outside alternatives...

DR

- Buntrock was always against it
- Gidwitz and Daley and others were for it initially...

LG

- Who/Why was the animating figure behind the efforts to tie everything down leading to the attorney General situation...

DR

- He and Maggie grew up together, he told her not to go for it
- Gidwitz was enlisted to "carry the water"

- Jim Collins, former General Counsel, gets to Maggie who gets to Gidwitz and Buntrock to carry the ball
- Jim Collins said he was going to get Judith

J

- Jim Collins controlled everything. He nominated Maggie Daley, Dean Buntrock, and ultimately Gidwitz

N

- Bell was Buntrock's personal attorney in the claims on waste management, they are his lawyers

LG:

- The spine: the state action, individuals pursuing private motions to get control of an independent voluntary Foundation and using the attorney general's office to implement the paln
- Systematic defection to show a step by step effect
- We are looking for color of law: intimidation, access to important people, evidentiary support, to show them we will take depositions, etc, to ultimately prevail

N

- In the complaint, the Foundation was enjoined form tossing out Buntrock
- More important than staying in Chicago

P

- I suggested, because Buntrock was constantly against decisions
- He was the "kelp on the keel"
- I spoke with people prior to the September meeting, I did not eel we had the votes to remove him
- I thought I should call him and tell him not to come to the meeting, that it would be embarrassing
- He said he was coming and they could settle things personally
- Maggie and others: by getting rid of Buntrock, would help.

LG

- We have covered the generalities
- The elements we need
- Regarding Damges:
- The right is a property right: the ability to self govern
- Legitimate areas of parochial law. Sometimes one can't separate the community from the institution
- This is the Kind of public action that should concern a federal court
- Greenbay Journal: "A government that Robs Peter to pay Paul can always count on the support of Paul." Sums up the color of law issue
- Ways and Means:

- First locate Chicago counsel, we must prepare under full draft prepare a temporary injunction
- We need to "enter the lists" with this change of course
- Paul leaves Tuesday for Florence, we can arrange to get his testimony and have him sign it

DR

- Will fax a 2 page list of talking issues

P

- Claim was that there were 6 votes that were pro mediation

DR

- They all counted Arthur's vote, claim was that he was on the phone for the last ten minutes

N/J

- He was not there

DR

- Should we reincorporate outside Illinois…

LG:

- Is it a technical or tactical issue
- Issue turns on a question of power
- The right to come in and use the attorney general's power to prevent the ability to leave Illinois
- That's the issue the 4th Circuit in Illinois will have
- These are property rights
- Free foundation to move

P

- H looks at it as a parochial foundation

N

- The Terra Name would disappear

-- Did not attend Lunch discussion --

DR:

- Precedent with another not for profit moving out of Illinois perhaps would be helpful (see 526 US 687)

N

- Also cases where Not for Profit's tried to and failed are not helpful

LG
- Also with the Attorney General Involved?

N
- Yes, but on the state level, not the federal level

LG
- Not the Federal Level

LL
- Federal Constitutional Claim using the 4th, 14th, and the 6th …
- But must have Chicago counsel to take this on
- Hopefully force a compromise
- Attorney General would be subject to heavy ramifications if they lose.

DR
- The Attorney General is running for governor and doesn't want exposure
- A threat of court may shake things up because of bad publicity

N
- There are also issues on the buyback of shares by the estate

DR
- An issue, but we must have documentation

N
- Foundation persuaded to sell to Lawter International and then sold to Eastman at a higher price
- A conflict
- He got money by giving options at a low price
- $8.50 sold for $13.75

DR
- May not be put in, but will add a sentence to the paperwork

N
- With the Hartman issue

DR
- We should name Hartman in the suit
- He thinks we sold Mercury shares in proper sequence, if he had known, he could not have acted on it because of his conflict.
- He had a strong belief that Collins sold his own shares based on insider information

- Had he sold others' shares on the information, the whole foundation could have been wiped out

N/J

- Board decided to sell the shares, they didn't have the inside information

N

- Indiana Commerce Committee approached Collins to buy half the foundation shares for $2 million (+-)
- Heavy buying and selling of the same in the market each day

J

- Foundation was owner of the shares, not Collins
- In the mediation process (unrecorded) when the Attorney General threatened, he threatened about the Mercury issue

LL

- Must have a Chicago Lawyer so as not to be paralyzed by the inability to put this (Taking) issue before the Chicago court
- The violation, illegitimacy of public purpose, as a constitutional issue

-- END --

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al Plaintiffs, vs. JUDITH TERRA, et al Defendants	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor vs. JUDITH TERRA, et al Defendants	)	

NOTICE OF MOTION

TO: **SEE ATTACHED SERVICE LIST**

On January 22, 2001, at 11:00 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Dorothy Kinnaird or any judge sitting in her stead, in the courtroom usually occupied by her in Rm. 2302, Richard Daley Center, Chicago, Illinois, and present the attached **Attorney General's Motion To Allow Bifurcated Depositions and Depositions in Excess of Three Hours Under Rule 206.**

Name:	Floyd Perkins	Attorney for	Plaintiff
Address:	100 West Randolph Street, 3rd Floor City:	Chicago, Illinois	60601-3175
Telephone:	(312) 814-2595	Attorney No.	99000

PROOF OF SERVICE BY FACSIMILE AND U.S. MAIL

I, Floyd Perkins
(the attorney, certify)

I served a copy of this notice and the attached motion on each of the parties on the attached Service List by facsimile and by U.S. mail, postage pre-paid before 5 p.m. on January 12, 2001.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

SERVICE LIST

William Conlon
Stephen C. Carlson
Susan A. Stone
Sidley & Austin
One First National Plaza
Chicago, Illinois 60603

Brian L. Crowe
James Wilson
Shefsky & Froelich, Ltd.
444 N. Michigan
Chicago, Illinois 60611

William R. Quinlan
James R. Carroll
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, Illinois 60602

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	)	

ATTORNEY GENERAL'S MOTION TO ALLOW BIFURCATED DEPOSITIONS AND DEPOSITIONS IN EXCESS OF THREE HOURS UNDER RULE 206

NOW COMES the People of the State of Illinois by the Attorney General and moves pursuant to Illinois Supreme Court Rule 206 for an order concerning discovery and certain depositions as follows:

16di-000457

1) The ATTORNEY GENERAL has filed his Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver to Conduct the Independent Investigation and that motion concerns a limited part of the matters herein, and such limited matters are the subject of expedited limited discovery. These matters were discussed before the court and the parties have agreed to an expedited discovery schedule and the matter is set by order of court to proceed on a limited expedited manner.

2) Pursuant to Supreme Court Rule 201 (k) the parties have met and discussed the methods and timing of discovery on this limited matter, and a comprehensive plan has been agreed to.

3) In the course of discussing the discovery schedule, Plaintiffs requested that the Defendants agree that any depositions being taken for the limited purpose of the Attorney General's aforesaid pending motion would not limit or prevent the Plaintiffs from conducting only a limited depositions on the matters related to the Attorney General's motion and reserving the right to depose such persons again at a later date, as a continued deposition.

4) Counsel for the defendants Tucker, Simpson and Terra refused to agree and contends that plaintiffs shall be entitled to one deposition. The parties counsel discussed such but could not agree.

5) Plaintiffs seek to reserve the right to bifurcate the depositions and to limit the expedited deposition examinations to the issues in the subject motion, and to have said depositions adjourned after a limited examination on the matters in the motion , with a right in Plaintiffs to continue the deposition to another date to deal with the other matters in this case.

6) The depositions of certain of the defendant board members , specifically defendant Tucker and Defendant Terra will involve many issues involving complex activities and their depositions as to the matters of the total case will require more than the three hours allowed without order by Rule 206, and with the extra issues presented by this additional limited subject motion, three hours as provided by rule 206 (d) will not be sufficient to complete a

proper and complete deposition.

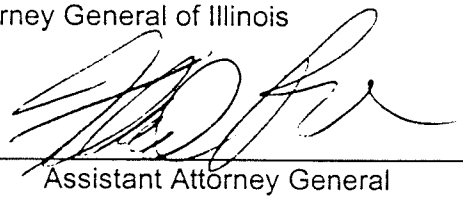
Wherefore the Attorney General pursuant to Supreme Court Rule 206 seeks an order that:

1) The depositions taken pursuant to the expedited discovery schedule on the limited issue before the court on the matters raised in the subject Attorney General's motion shall be taken in a bifurcated manner to allow examination on the matters related to the motion, with a right in the Plaintiffs to adjourn the depositions after examination , and with a right in the Plaintiffs to reschedule and reconvene said depositions at a later date and time.

2) The three hour rule under Supreme Court Rule 206 shall not apply to the depositions herein of the party defendants , their agents, servants or employees, and that the parties be allowed to conduct said depositions without a restriction on the time.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois



BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock

v.

Terra

NO. 00 CH 13859

1 of 2

AGREED **ORDER**

This matter coming on to be heard for status and on various motions due notice having been given, and the Court being fully advised IT IS HEREBY ORDERED THAT:

(1) David C. Hilliard of Pattishall McAuliffe, Newbury, Hilliard & Geraldson is hereby appointed as a mediator to mediate between the parties the issues raised by Counts I, II and III of the Buntrock and Gidwitz Complaint and the Attorney General's Complaint.

(2) No statements made by participants in the mediation will be admissible in evidence or otherwise usable in any way in any further proceedings in connection with this case.

(3) The mediation shall be a private proceeding and no party to this action, no member, Employee and/or Agent of the Board of the

Atty No. 90761

Name Steve Carson

Attorney for Terra Fund

Address Bank One Plaza Suite 4700

City / Zip Chicago 60605

Telephone 853-7717

ENTER:

Judge **Judge's No.**

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-5/12/00(03480663)

CCG-N002

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

2

Buntrock

v.

Terra

NO. 00CH 13859

2 of 2

ORDER

Terra Foundation, or attorney for any of the parties herein shall discuss the mediation or anything said or done in the course of the mediation with members of the press or public or anyone outside of those involved in the mediation process;

④ The manner and method of the mediation will be determined by the mediator;

⑤ All motions and matters herein are hereby stayed pending further Order of the Court with the exception of the Director Defendants' Motion for Advancement of Fees AND ANY EMERGENCY MOTIONS FOR A TEMPORARY RESTRAINING ORDER.

Atty No. 90761

Name Steve Carlson

Attorney for Terra Foundation

Address [illegible]

City / Zip [illegible]

Telephone [illegible]

ENTER: ENTERED CLERK OF CIRCUIT COURT DOROTHY BROWN FEB 05 2001 JUDGE DOROTHY KINNAIRD-278 DEPUTY CLERK

Judge Judge's No.

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-5/12/00(03480663)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
	)	Honorable Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al., Defendants.	)	

JOINT EMERGENCY MOTION AND MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER TO ENJOIN BOARD MEETING SCHEDULED FOR JUNE 8 - 9, 2001

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of the Terra Foundation for the Arts ("Terra Foundation" or "Foundation"), by their attorneys, Quinlan & Crisham, Ltd., and Plaintiff-Intervenor, the People of the State of Illinois by James E. Ryan, Attorney General ("Attorney General")(collectively "Plaintiffs"), respectfully submit this motion and memorandum of law in support of a temporary restraining order to enjoin the Board of Directors meeting of the Terra Foundation that is scheduled for June 8 - 9, 2001.

INTRODUCTION

On May 21, 2001, the parties informed this Court of the status of the mediation process and, based on that information, the Court advised the parties to continue the mediation process. The Court set this matter for further status on June 18. 2001. Three days later, Judith Terra attempted to unilaterally terminate the mediation process. At virtually the same time, Ratner (who takes

direction from Tucker) began the process to schedule a "mid-year meeting" of the board. The meeting is now scheduled for June 8-9. Although Judith Terra and certain other board members did not make themselves available for conclusion of the mediation process, they have made themselves available for the meeting and other Foundation functions. The Defendants persist in holding the meeting even though Mr. Gidwitz, Mrs. Daley and possibly Ambassador Hartman are unable to attend the meeting--given such short notice and prior commitments that could not be changed. Moreover, the Foundation's delivery of the board materials was untimely and Mr. Gidwitz' request for the materials last week was rejected out of hand.

The meeting should be enjoined. The meeting alters the status quo and violates the stay order of February 5, 2001. The meeting is an attempt to subvert the mediation process, interfere with the mediated agreement reached on May 11, 2001, and usurps the Court's jurisdiction to hear the Attorney General's expedited request for a receiver.

I. STATEMENT OF FACTS

The Plaintiffs and the Attorney General have each filed verified complaints alleging, among other things, that the Defendants have breached their fiduciary duties as members of the Board of Directors for the Terra Foundation.[1] The verified pleadings allege that the Defendants have grossly mismanaged the affairs of the Foundation, and have unilaterally attempted to divest the People of the State of Illinois of their exclusive beneficial interest in the Foundation by closing the Terra Museum in Chicago and relocating the Foundation outside of Illinois. The Plaintiffs and the Attorney General have also alleged that the Defendants have breached their fiduciary duties and

[1] The facts are undisputed and based largely on the documents authorized by the Defendants. Plaintiff, Ronald Gidwitz', affidavit is also attached hereto as Exhibit A.

16di-000464

engaged in numerous conflicts of interest with respect to the Foundation's acquisition of art. The Attorney General and Plaintiffs have requested that this Court appoint a receiver for the Foundation and remove the Defendant Directors from the Board of Directors.

On February 5, 2001, this Court stayed the litigation, including discovery and the Attorney General's expedited hearing on a receiver, and entered an order appointing David C. Hilliard to mediate this dispute between the parties. *See* Exhibit A, attached. On Friday, May 11, 2001, the Board of Directors reached an agreement on all material terms, thus resolving this matter.

On May 21, 2001, this Court conducted a status hearing regarding the mediated settlement agreement. Plaintiffs and the Attorney General advised the Court that agreement had been reached on the material terms necessary to resolve this matter and that further clarification and explanation was indicated. At the conclusion of the status hearing, the Court advised the parties to continue to cooperate to bring the mediation to a conclusion. The Court also set the matter for further status on June 18, 2001 to accommodate the mediation process.

The Plaintiffs and the Attorney General have made themselves available to conclude the mediation process with the Defendant Directors and the board members, to no avail.

Three days after the status hearing before the Court, on May 24, 2001, Judith Terra delivered a letter to the mediator and Foundation board members in which she declared the mediation process to be "against justice, moral values, basic integrity....stupid [and] insulting," among other things. Judith Terra further declared:

> I hereby instruct my lawyers to do the necessary steps to put an end to the mediation process and set a date to properly hear evidence and finalize this lawsuit based on real facts and legal rights."

A copy of Judith Terra's letter is attached as Exhibit B1 hereto.

16di-000465

While Judith Terra was indicting the mediation process, Donald Ratner, a Foundation staff member who takes direction from Defendant Tucker, informed the board members on May 23, 2001 that a "mid-year board meeting" was to be scheduled. Ratner proposed that the meeting take place on June 8 and 9 or June 11 and 12, 2001. Ratner provided no agenda for the meeting at that time. A copy of Ratner's scheduling memo is attached Exhibit B2.

On May 31, 2001, Ratner scheduled the "mid-year meeting" for June 8 and 9, 2001, again without an agenda. Mr. Gidwitz, Mrs. Daley and possibly Ambassador Hartman are unavailable to participate in the meeting because of prior obligations which could not be altered on such short notice. Further, only two or three of the board members will even be in Chicago of the meeting.

Mr. Gidwitz had requested a copy of the board materials last week and his request was denied. On June 5, 2001, three days before the meeting is to occur, Ratner finally issued the agenda for the meeting. The agenda includes the following:

- Board "approval/acceptance" of meeting minutes of no less than 37 Board, Executive, Finance, Collections, Education and Strategic Planning meeting minutes ranging in dates from March 13, 2000 through May 15, 2001.
- Approval of the Terra Foundation budget for 2002.
- A nondescript reference to "old business/new business."
- Informational items such as a director's report and the report of committees.

A copy of the agenda for the June 8-9, 2001 "mid-year meeting" is attached hereto as Exhibit B4. Ratner failed to deliver the "board packet" to the board members for the meeting until June 5, 2001.

It is improper for this board to approve the voluminous minutes, while the mediation is pending and before hearing on the Attorney General's motion to appoint a receiver, among other motions. The agenda also does not allow the directors reasonable time to review the minutes.

Moreover, "approval/acceptance" of the minutes are at issue in this litigation and alter the status quo. Defendants are attempting to obtain approval of the minutes to ratify their improper conduct and justify their litigation position. Further, many minutes are sanitized, failing to accurately reflect the subject meetings.

In addition, an agenda item includes "Approval of Budget." The Defendants' intention is to approve this budget before the mediation is concluded. This is improper for several reasons, including the following:

- The budget is the product of a tainted board. The Illinois Attorney General and Plaintiffs have alleged that several Defendant Directors are unfit to continue to serve on the board. The Defendant Directors therefore are unfit to deliberate on the budget.
- The Attorney General and Plaintiffs have requested that the Court appoint a receiver to protect the Foundation. Discovery and a hearing on the appointment of a receiver has been stayed pending mediation. The subject meeting and proposed budget should be stayed until the issues involved in the mediation and/or receivership are concluded.
- The budget documents project that the Foundation will spend $2.4 million in "litigation expenses" through 2001; yet the proposed actual budget provides for only $60,000 in "litigation expenses." This gross disparity in the use of charitable funds requires further investigation by, among others, the Attorney General.
- No budget should be approved by this board until the mediation is concluded because any budget approved now will irreparably prejudice the Board's implementation of the May 11 agreement.

On June 4, 2001, Mrs. Daley also requested that the meeting dates be deferred, to no avail. On June 4, 2001, Mrs. Daley wrote to her fellow board members and requested that the meeting be deferred. Mrs. Daley had informed the board that she was unavailable to attend the meeting scheduled for June 8 and 9 based on prior commitments which could not be altered. In Mrs. Daley's letter, she suggests to the board that the meeting be deferred to the week of June 25. This would not

only allow Mrs. Daley and Mr. Gidwitz to participate in the meeting, but it would also coincide with the visit by the Terra Fellows to Chicago. Mrs. Daley writes, as follows:

> And I suspect that many of the board members will agree with me that it will be an opportunity lost if we do not reconsider holding our meeting at that time. If we had known about the week's activities of our Terra Fellows when we originally asked for dates, many of us, I'm sure, would have considered changing schedules.

Mrs. Daley also explained that she was unfairly prejudiced by the failure to provide the agenda for the subject meeting on a timely basis, as follows:

> Since it is June 4th and we still do not have an agenda for the 9th of June...why not re-think this? It shouldn't hamper travel arrangements, since I was told only two directors were to be present at the Foundation Office for this Saturday.
>
> Let's try to work this out. All of us will benefit and enjoy the possibilities of gathering with our scholars.

Mrs. Daley's request to defer the meeting was rejected. A copy of Mrs. Daley's letter is attached as Exhibit B6.

ARGUMENT

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF TO ENJOIN THE BOARD MEETING AND STRIKE ITS AGENDA.

The issuance of a temporary restraining order is appropriate where the facts demonstrate a "fair question" that: (1) the party seeking relief has a protected right; (2) the party will suffer irreparable injury if injunctive relief is not granted; (3) the party has an inadequate remedy at law; and (4) there is a likelihood that the party seeking injunctive relief will succeed on the merits. *Tierney v. Village of Schaumburg*, 182 Ill. App. 3d 1055, 538 N.E.2d 904, 907 (1st Dist. 1989). Moreover, a temporary restraining order is properly issued where it is necessary to maintain the status quo. *People's Gas Light & Coke v. City of Chicago*, 117 Ill. App. 3d 353,

355, 453 N.E.2d 740, 741 (1st Dist. 1983). Plaintiffs clearly meet each of the elements required for the issuance of the injunctive relief sought here.

A temporary restraining order is issued upon a showing of the necessity to maintain the status quo until a hearing can be held on an application for a preliminary injunction. *People's Gas, Light & Coke v. City of Chicago*, 117 Ill. App. 3d 353, 355, 453 N.E.2d 740, 742 (1st Dist. 1983). Illinois law is clear that consideration of entry of a temporary restraining order is a summary proceeding and must be granted based on the strength of the movants' papers alone. *See Passon v. TCR, Inc.*, 242 Ill. App. 3d 259, 263, 608 N.E. 2d 1346, 1349 (2d Dist. 1993)(even if Defendant files an answer, the court is to proceed in summary fashion and hear argument only on the motion for TRO); *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 524, 532 N.E. 2d 464, 467 (1st Dist. 1988)(order entered by trial court was TRO and required only a summary showing by Plaintiff that the order was necessary to prevent immediate and irreparable harm). *See also* Hon. Thomas J. O'Brien and Richard A. Jurczyk, *TRO Petitions: Is an Evidentiary Hearing Required?* 81 Ill. B.J. 572, 575 (Nov. 1993).

A. The People of Illinois Are the Beneficiaries of the Foundation and Require the Court's Protection.

Plaintiffs Gidwitz and Buntrock, as directors of the Terra Foundation, possess a protectible right in that they are expressly authorized by section 103.15 of the Not for Profit Corporation Act, 805 ILCS 105/103.15, to "enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation."

The Attorney General is vested with a protectible interest by virtue of the common law and the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.*), that authorizes the Attorney General to protect the interests of the People of the State of Illinois as the ultimate beneficiaries

of the Foundation, a charitable trust within the State of Illinois. The Foundation is a not-for-profit corporation holding property for charitable purposes and is an Illinois trustee under common law and pursuant to section 3 of the Charitable Trust Act, 760 ILCS 55/3. The Foundation has in the past acknowledged that it is an Illinois charitable trust and has registered and reported to the Attorney General pursuant to the Charitable Trust Act.

The People are the sole and exclusive vested beneficiaries of the charitable assets held by the Foundation and thus, have a protectible interest that warrants injunctive relief. Charitable trust law is the foundation of all modern trust law with respect to fiduciary duty and the obligation to adhere to specific purposes of a trust. The common law rule of decision related to charitable trusts establishes and provides that the People are the fully vested beneficiaries as equitable owners of a fee simple interest of the charitable estate, as a matter of law. The Foundation was created, exists and operates as a charitable trustee of a charitable trust. Under Illinois law, it serves as merely a trustee for all of the charitable assets which it holds such in trust exclusively for the benefit of the People. *Id.* Consequently, by operation of law, the People are the sole and exclusive vested beneficiaries of the charitable assets held by the Foundation.

B. The Board Meeting Must be Enjoined Because it was Scheduled for an Improper Purpose.

The Board meeting scheduled for June 8 - 9, 2001 and its purported agenda is intended solely to undermine the mediation efforts and to advance Defendants' legal positions in this litigation. Thus, the meeting does not further the Foundation's charitable purpose, is *ultra vires*, and Defendants efforts to use the Board meeting to advance this litigation amounts to a breach of fiduciary duty that should be enjoined. Defendants must not be permitted to use the

Foundation's Board meetings and its agenda as a means to further their personal agenda and mismanagement of the Foundation. This Court may enjoin the Board meeting if it is based on an improper purpose. Illinois law explicitly recognizes that the exercise of corporate rights and governance must comply with good faith and a proper purpose. *See, e.g., Briskin v. Ogden-Kildare Building Corporation*, 132 Ill. App. 2d 679, 270 N.E.2d 520 (1st Dist. 1971) (court must consider evidence of good faith and motive of shareholder when determining whether corporation properly refused to comply with stockholder's statutory request for inspection of books and records); *see also* 805 ILCS 105/107.75 (providing for right to inspect records of not-for-profit corporation for proper purpose).

In addition, under the Charitable Trust Act, the court should "exercise its discretion as the equities require" when the Attorney General has alleged that the trustees of a charitable organization have breached their fiduciary duties and has sought injunctive relief. 760 ILCS 55/16(b).

Further, in actions alleging the grounds for dissolution but where dissolution is not sought, the Illinois Business Corporation Act specifically provides that a court may order "the submission of the dispute to mediation or other forms of non-binding alternative dispute resolution." 805 ILCS 5/12.56(b)(8). The General Not for Profit Corporation Act provides generally that under similar circumstances, a circuit court may take such action "as is necessary to preserve the corporate assets and carry on the affairs of the corporation until a full hearing can be had." 805 ILCS 105/112.60. Moreover, this Court has the inherent, equitable power to order the parties to submit to mediation. In *American Re-Insurance Company v. MGIG Investment Corporation*, 73 Ill. App. 3d 316, 391 N.E.2d 532 (1st Dist. 1979); *County of Cook v. Barrett*, 36

Ill. App. 3d 623, 344 N.E.2d 540 (1st Dist. 1975); *First National Bank of Chicago v. Bryn Mawr Beach Bldg. Corp.*, 365 Ill. 409, 6 N.E.2d 654 (1937).

Any attempt to engage in or fund activities outside the specific purpose of a non-profit corporation is *ultra vires,* void, and subject to restraint. *Harrison v. Barker Annuity Fund*, 90 F.2d 286 (7th Cir. 1927); *see also*, 805 ILCS 105/103.15 (allowing a director of a not-for-profit corporation to bring an action to enjoin an *ultra vires* action be the corporation). Furthermore, any action by the not-for-profit corporation that fails to directly serve the beneficiaries is also *ultra vires* and void. *See People ex rel. Scott v. George F. Harding Museum*, 58 Ill.App.3d 408, 374 N.E.2d 756 (1st Dist. 1978).

The People, as beneficiaries of the Foundation, and Plaintiffs Gidwitz and Buntrock, as Foundation directors, seek to protect the Foundation and its assets from further mismanagement and abuse by Defendants. Thus, Plaintiffs seek to restrain the Terra Foundation from: 1) conducting the meeting scheduled for June 8 and 9, 2001; and (2) striking Item IV of the purported agenda. Plaintiffs also seek an order compelling Defendants to proceed with mediation efforts with Mr. Hilliard on June 8 -9, 2001, or as soon as practicable. The Defendants' attempt to mask their personal agenda as proper business for the Foundation is contrary to the Foundation's charitable purpose and thus, amounts to an *ultra vires* act and a violation of the individual Defendants' own fiduciary duties.

C. The Defendants' Actions are Contrary to the Charitable Purpose of the Terra Foundation and Must be Enjoined.

Certain Defendants' attempt to schedule a Board meeting undermines the mediation efforts. That the Board meeting is premised on the self-interest of Defendants is evident when

one considers the purported agenda for that meeting. One of the action items of the agenda involves the approval of the budget. Prior to the mediation discussions, the People requested the appointment of a receiver, in light of the serious allegations of misconduct alleged against the individual director Defendants. The motion was intended to ensure that the Foundation and its assets were protected. Clearly the approval of a budget, including the allocation of litigation expenses and other Foundation assets, is precisely the type of action that should be reserved to a receiver. Defendants are attempting to take advantage of the stay imposed by this Court on the People's motion, by passing a budget before this Court rules on the motion. The "rush" approval of a budget by the current Board ensures the Defendants' continued control of the Foundation's assets. The Defendants' actions to schedule the approval of a budget undermines the settlement negotiations in furtherance their own self-interest and to the detriment of the Foundation.

It is well established that a not-for-profit corporation is created by law for a definite purpose, and that the assets held by the corporation in trust can be used only to carry out the purpose for which the corporation was created. *See, e.g., Riverton Area Fire Protection Dist. v. Riverton Volunteer Fire Dep't*, 208 Ill. App. 3d 944, 950, 566 N.E.2d 1015, 1019 (4th Dist. 1991) (assets held in trust by volunteer fire department, a charitable trust, could be used only to provide fire protection services for citizens from whom it solicited funds). The Defendants' plan to approve a budget at this time cannot be said to further the Foundation's purpose. Instead, the approval of the budget is simply an attempt to ensure that this current Board can continue their management of the Foundation without conclusion of mediation or implementation of the May 11 agreement or this Court's hearing of the motion for a receiver. Indeed, the allegations of

mismanagement against the Defendants clearly raise a fair question that this Board should not determine the distribution of the Foundation's assets at this time.

Equally troubling is the scheduled approval and acceptance of minutes as another action item at the June 8 - 9 meeting. Defendants have scheduled the approval of *thirty-seven* Board and committee meetings that occurred over the course of the past year. The Board has not approved the minutes prior to this time and the Defendants' attempt to do so now is consistent with Judith Terra's direction to her attorneys to proceed with litigation. Defendants are attempting to ensure that the minutes that reflect their litigation position are approved to advance their litigation strategy. The proper approval of minutes is to establish an accurate record of Board actions and *not* an "after the fact" attempt to posture for litigation. This Court must enjoin the meeting and strike its agenda to prevent Defendants from using the corporate procedures and formality as a means to improve their legal positions in this action.

D. The Board Meeting Should Be Enjoined And Item IV Of Its Agenda Stricken Because Defendants Are Attempting To Further Their Own Self-Interest In Violation Of Their Fiduciary Duty To The Foundation.

The Defendants should also be enjoined because their actions violate their fiduciary duties. Illinois recognizes that the directors and officers of a not-for-profit corporation owe a fiduciary duty to the corporation and its beneficiaries to preserve the assets of the corporation for use exclusively in the stated mission of the corporation. *Mile-O-Mo Fishing Club, Inc. v. Noble*, 62 Ill. App. 2d 50, 210 N.E.2d 12 (5th Dist. 1965). As stated in *Noble*, "the officers and directors of a not-for-profit corporation should therefore, be charged the same degree of fidelity to the interests of the corporation as are the officers and directors of a business corporation." *Noble*, 62 Ill. App. 2d at 57, 210 N.E.2d at 15.

Here, the Terra Foundation's assets must be preserved for the operation and maintenance of the Terra Museum, as well as for the education of Illinois citizens in the arts. Any act by the Defendants to deplete the assets of the Foundation as well as transfer those assets away from the citizens of Illinois would constitute a flagrant breach of the Defendants' fiduciary obligations. The Defendants cannot lawfully take action or force action by the Foundation which is contrary to the mission of the Foundation. Accordingly, any attempt to pass a budget for the Foundation directly involves the use of Foundation assets and must be consistent with the Foundation's purpose and not to further Defendants' self-interest and litigation goals.

Plaintiffs, themselves fiduciaries of the Terra Foundation, seek a temporary restraining order prohibiting the Defendants from taking any action on behalf of the Foundation to benefit their self-interest and litigation strategy. By attempting to pass a budget at this time, Defendants are clearly attempting to preserve their control and further facilitate their continued mismanagement of the Foundation.

Defendants, as directors of the Foundation, owe a fiduciary duty to act in the Foundation's best interest. Defendants' attempt to use the Board meeting as a vehicle to advance their own agenda and litigation strategy is clearly improper and inconsistent with the fiduciary duties that Defendants are bound by. Such a budget, approved at this time, will irreparably harm the implementation of the May 11 agreement. Accordingly, this Court must enjoin the Board meeting scheduled for June 8 and 9, 2001 and strike the agenda for that meeting.

III. IN THE ALTERNATIVE, THIS COURT SHOULD DELAY THE BOARD MEETING AND PRESERVE THE STATUS QUO UNTIL SUCH TIME AS THE MEDIATION HAS CONCLUDED.

Alternatively, if this Court does not enjoin the Board meeting, Plaintiffs respectfully request that this Court preserve the status quo and allow the meeting to occur for informational purposes only: that is; agenda items V.A (Director's Report) and V.B (Report of Finance, Collections and Education Committees). The agenda of the board meeting allows consideration of old and new business, and in that regard the issue of making Foundation loans to the Defendant directors to allow them to use Foundation funds to pay their personal legal fees has been on past agendas, and presumably could be revisited at this recently called meeting. Thus, no "old business/new business" should be addressed given the procedural posture of the mediation and the litigation.

Defendants have seemingly decided to abandon the mediation and to resume the litigation of this matter. Although Defendants may certainly decide to pursue such action, Defendants should be required to inform the Court of their intent so that this Court may disband the mediation process and reschedule all pending motions and issues related to this litigation on its calendar.

To date, Plaintiffs have been exercising good faith efforts to resolve this matter while Defendants have been engaged in a scheme to improve their litigation positions and strategy by using a Board meeting to alter the status quo. The parties are scheduled to appear before this Court on June 18, 2001 to advise the Court as to the status of the mediation. If this Court does not enjoin the meeting altogether, Plaintiffs request that this Court delay any Board meetings

until after the June 18, 2001 date. Such a delay would be minimal and thus, there would be no real harm incurred by the Foundation or Defendants.

At the time that this Court entered a temporary restraining order enjoining Defendants' efforts to transfer the Foundation from Chicago, Illinois, this Court indicated that the normal day to day operations of the Foundation would continue. The agenda for the June 8 - 9 meeting does not involve the day to day operations of the Foundation. Rather, the meeting is an improper effort to alter the status quo of this matter. Defendants must not be permitted to use the Foundation as a means of posturing in this litigation. Accordingly, Plaintiffs request that this Court delay the meeting scheduled for June 8 - 9, 2001 until such time as this Court determines that the mediation has been concluded.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order restraining the Terra Foundation from: (1) conducting a meeting of the Foundation's Board of Directors scheduled for June 8 - 9, 2001; and (2) striking the agenda for the June 8 - 9, 2001 meeting. Plaintiffs respectfully request that this Court order Defendants to meet with Mr. Hilliard on June 8 -9, 2001, or as soon as practicable, to discuss settlement of this matter. In the alternative, Plaintiffs request that this Court delay the meeting scheduled for June 8 -9, 2001 until after the mediation has been concluded.

Respectfully submitted,

DEAN BUNTROCK and
RONALD GIDWITZ

By: _____
Assistant Attorney General

By: _____
One of Their Attorneys

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Respectfully submitted,

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

MOTION FOR LEAVE TO FILE UNDER SEAL EMERGENCY MOTION AND MEMORANDUM OF LAW IN SUPPORT OF TEMPORARY RESTRAINING ORDER TO ENJOIN BOARD MEETING SCHEDULED FOR JUNE 8-9, 2001

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of the Terra Foundation for the Arts ("Terra Foundation" or "Foundation") by their attorneys Quinlan & Crisham, Ltd., and Plaintiff-Intervenor, the people of the State of Illinois by James E. Ryan, Attorney General (collectively "Plaintiffs"), respectfully move this Court to allow plaintiffs to file their Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order to Enjoin Board Meeting Scheduled for June 8-9, 2001 under Seal. In support of their motion, plaintiffs state:

1. Plaintiffs require emergency injunctive relief to enjoin the individual defendants and the Terra Foundation from proceeding with the Board meeting scheduled for June 8-9, 2001 because the meeting and its purported agenda does not further the charitable purpose of the Foundation, threatens to harm the public good, and will undermine the parties' lengthy settlement negotiations.

2. Plaintiffs have therefore prepared their emergency motion to enjoin the Board meeting scheduled for June 8-9, 2001. Plaintiffs wish to be heard on that motion on Thursday, June 7, 2001 at 9:15 a.m.

3. Plaintiffs' motion may contain information relating to the parties' mediation process. On May 21, 2001, this Court stated that its February 5, 2001 order "provided that this mediation process is a private proceeding and no party to the action, no member of the Board, no employee or agent of the Board, or any attorneys for them or any parties therein, are to discuss this mediation process, given out any materials, or do anything at all that would jeopardize the success of what has been a very, very long and difficult process and which I believe may be close to an end here." (5/21/2001 Transcript of Proceedings at p. 5).

4. Plaintiffs therefore file this precautionary motion requesting that their emergency motion to enjoin the Board meeting scheduled for June 8-9, 2001 be filed under seal so as to be in full compliance with this Court's statements from the bench on May 21, 2001.

WHEREFORE plaintiffs respectfully request that this Court enter an Order granting plaintiffs leave to file their Emergency Motion and Memorandum of law in support of temporary restraining order to enjoin the Board Meeting Scheduled for June 8-9, 2001 under seal and

QUINLAN & CRISHAM, LTD.
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June 6, 2001

VIA MESSENGER
The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Buntrock and Gidwitz v. Terra, Tucker, Simpson, Michaeli, and the Terra Foundation for the Arts*, No. 00 CH 13859**
Emergency Motion Noticed for June 7, 2001 at 9:15 a.m.

Dear Judge Kinnaird:

Enclosed please find a courtesy copy of the Plaintiffs' Joint Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order to Enjoin Board Meeting Scheduled for June 8 -9, 2001. This motion has been served upon the parties, but not filed with the clerk of the court. Consistent with this Court's direction, we propose to file this motion under seal on June 7, 2001. We will be presenting this motion and the motion for leave to file under seal at your emergency motion call at 9:15a.m. on Thursday, June 7, 2001.

Very truly yours,

William R. Quinlan

cc: Service List Attached

Doc:176302

SERVICE LIST

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16di-000483

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	CURRENT MOTION

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on **June 7, 2001 at 9:15 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Dorothy K. Kinnaird, or any judge sitting in her stead, in the courtroom usually occupied by her in Room 2302 of the Richard J. Daley Center, and shall then and there present the attached **Plaintiffs' Joint Emergency Motion and Memorandum of Law In Support of Temporary Restraining Order to Enjoin the Board Meeting Scheduled for June 8-9, 2001,** and **Motion for Leave to File Under Seal,** copies of which are attached and hereby served upon you.

William R. Quinlan
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Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ,
Directors of Terra Foundation of the Arts

By: _____
One of Their Attorneys

Doc:176283

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and Correct Copies of the Attached **Notice of Motion** and **Plaintiffs' Joint Emergency Motion and Memorandum of Law In Support of Temporary Restraining Order to Enjoin the Board Meeting Scheduled for June 8-9, 2001** and **Motion for Leave to File Under Seal** to be served on June 6, 2001, the method service as indicated on the attached service list.

Jenelle A. Gilreath

SUBSCRIBED AND SWORN to before me this 6th day of June, 2001.

Mary Butler
NOTARY PUBLIC

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Doc:176283

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June 6, 2001

VIA MESSENGER
***See* Service List**

Re: ***Buntrock and Gidwitz v. Terra, Tucker, Simpson, Michaeli, and the Terra Foundation for the Arts*, No. 00 CH 13859**

Dear Counsel:

Enclosed you will find a copy of **Plaintiffs' Joint Emergency Motion and Memorandum of Law In Support of Temporary Restraining Order to Enjoin the Board Meeting Scheduled for June 8-9, 2001**. This pleading has not yet been filed with the clerk's office as we will be seeking leave to file it under seal, consistent with Judge Kinnaird's directions. The emergency motion will be presented at **9:15 a.m.** on **June 7, 2001**.

Very truly yours,

William R. Quinlan

Doc:176359

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(Via Messenger)

2001 WL 36415356 (Ill.Cir.Ct.) (Expert Report and Affidavit)
Circuit Court of Illinois.
County Department, Chancery Division
Cook County

Dean L. BUNTROCK, a Director of the Terra Foundation for the Arts, and
Ronald Gidwitz a Director of the Terra Foundation for the Arts, Plaintiffs,
v.
Judith TERRA, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan Simpson, a Director of the Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts, an Illinois Not-For-Profit Corporation, Defendants.

No. 00CH13859.
July 1, 2001.

Affidavit of John Walsh

Case Type: Fiduciary Duty >> Business Organizations
Jurisdiction: Cook County, Illinois
Name of Expert: John Walsh
Area of Expertise: Art, Entertainment & Media >> Other Art, Entertainment & Media

Representing: Defendant

Hon. Dorothy Kiric Kinnaird.

The underiersigned upon oath, hereby deposes and states as follows:

1. I am John Walsh. I recently retired from the J. Paul Getty Museum in Los Angeles, California, where I had served as Director since 1983. Prior to that, my career included curatorial positions at the Frick Collection in New York, the Metropolitan Museum of Art in New York, and the Museum of Fine Arts in Boston. I have taught at Columbia University, Barnard College and Harvard University. I have been a member of the Governing Board of the Yale Art Gallery since 1975 and of the Smithsonian Council since 1990. The professional organizations to which I belong include the American Association of Museums and the Association of Art Museum Directors, of which I served as a trustee from 1986 to 1992 and of which I was president from 1989 to 1990.

2. I have known Dr. Theodore Stebbins for over 40 years. He is a distinguished scholar and expert in the field of American art. He is, and has a reputation as, a man of impeccable honesty and ethies.

3. From my own experience and my knowledge of art museums, I know that curators and directors commonly serve on boards of museums other than those that employ them.

4. It is perfectly proper for the chairman of a museum's collections committee, or a trustee or member of the board of directors of a museum, to bid at an auction for the museum. It is not improper for a representative of a museum to bid at an auction or behalf of, or offer advice to a number of different interests, provided that the customary precautions against conflict of interest are taken.

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5. I have never known Dr. Stebbins to find bimself in a situation involving conflict of interest.

6. Under penalties provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedures, I certify that the statements set forth in this affidavit are true and correct

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	**No. 00 CH 13859**
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	**Hon. Dorothy Kirie Kinnaird**

DEFENDANTS' MOTION FOR LEAVE TO FILE WRITTEN OBJECTIONS AND FOR AN EVIDENTIARY HEARING ON THE PROPOSED SETTLEMENT

Defendants, through their undersigned counsel, in support of their subject Motion, state as follows:

OVERVIEW

On Friday, June 29, 2001, the Board of Directors of the Terra Foundation (the "Foundation") approved a purported settlement fashioned in conjunction with the Illinois Attorney General's Office. The settlement was approved by a bare majority of Directors (the "Director Majority") required by the Foundation's bylaws. In anticipation that this Court would approve their act, the Director Majority voted to change the structure of the Foundation in ways that would, if accepted by the Court, defeat the stated purpose of the Foundation. Of equal importance, Friday's activities serve

to ratify and advance a series of improper actions that make the change of structure a nullity. Those actions could not have been contemplated by this Court when it: permitted the intervention by the Attorney General; selected mediation as a way to resolve many of the issues; or, appointed distinguished counsel as Mediator.[1]

Defendants Paul Hayes Tucker, Alan K. Simpson, and Judith Terra object to the proposed settlement on their own behalf, and as fiduciaries for the Foundation. The within request for a briefing schedule and evidentiary hearing on Defendants' objections is intended to assist the Court in reviewing the fairness and adequacy of the proposed settlement. (Point A, *infra*)

Defendants intend to demonstrate that the proposed settlement is substantively and procedurally unsound. Substantively, the settlement is inconsistent with the Foundation's charter, the Founder's clear intentions, the Foundation's best interests, the best interests of the art public worldwide that the Foundation was established to serve, and sound Illinois public policy. (Point B, *infra*)

Procedurally, the settlement process was tainted by conflicts of interests that destroyed the efficacy of its results. Having once insinuated itself into these proceedings, ostensibly to protect the People of Illinois, the Attorney General's Office thereafter perverted the mediation process to keep the Foundation from fulfilling its charter and bylaws. Perhaps of greater import to the present

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[1]The undersigned are too new to this matter to presume to disagree with this Court for its apparent reliance upon the mediation process to resolve the breadth of issues that the cause eventually presented. We are equally loathe to criticize its Mediator for not excusing himself from the proceedings the instant that the words "art" and "institute" were co-joined. Having thus reaffirmed our respect and regard for this Court and its agent, we believe that the proposed settlement presents an horrific result that unquestionably would have been avoided had the Court redirected the stated objectives of the Attorney General during the hearing on September 25, 2000 (Transcript of Proceedings, p. 84) (Exhibit 1, attached hereto).

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outcome, the Attorney General's office decided that it had the legal authority to have the Foundation, through Illinois directors, serve the People of Illinois, almost to the exclusion of others, for 50 years, regardless of the Foundation's charter and bylaws, and regardless of the extra legal means employed; to wit: two Board members, Drs. Stebbins and Marshall, were palpably conflicted as a result of intimidation by the Attorney General's Office. Lastly, the ordinary business practices necessary to optimize the assets of the Foundation were truncated because of the insistence that the place where the Founder earned his fortune, and none other, house his collection into perpetuity.

A. A Fairness Hearing Is Required

Under settled law, a court may not approve a pending settlement agreement without first finding that it is "suitable for the corporation, its purpose, and . . . in the best interest of its members." See, the trial court's ruling as recited in Palencia v. Navarro, 243 Ill. App. 3d 290, 611 N.E.2d 1191 (App. Ct. 1st Dist. 1993). See also Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N.E. 116 (1929) (in trust disputes, question for the court is whether settlement "under all the circumstances is fair and equitable and result[s] in substantial . . . advantage").

Under similar circumstances, courts have required evidentiary hearings and permitted adequate time to allow interested parties to file written objections. Palencia, 243 Ill. App.3d at 295 (permitting written objections and hearing after receipt of proposed bylaw changes); Northern Trust Co., 336 Ill. at 138, 168 N.E. at 117 (evidentiary hearing held on settlement).

The same procedures should be followed here. Specifically, Defendants seek sufficient time to file written objections and to have an evidentiary hearing. Such process is required because:

- The Court has not been sufficiently involved directly in the "decisional" process and, thus lacks full information necessary to assess the fairness of its result;

- Defendants have not had time to consult among themselves or prepare a full set of objections;

- Many important witnesses are scattered around the world. Whether they testify live or by declaration, there must be sufficient time to contact them and obtain their testimony;

- No attempt was made to explore alternative arrangements for the Foundation's collection out of State;

- The proposed settlement would place onerous and long-lasting restrictions on the future operations of a $500 million foundation; and,

- The proposed settlement was approved with the bare minimum of votes required by the Foundation's bylaws and only over substantial objection.

Before the Court approves a settlement that will substantially alter the future of such a substantial charity, it should ensure that all objectors seeking to discharge their fiduciary obligations to the Foundation and its beneficiaries have a full and fair opportunity to be heard.

B. The Proposed Settlement is "Not Suitable for the Corporation, its Purposes, and in [its] Best Interests"

The proposed settlement expressly requires, among other things, that the Foundation: (1) maintain its collection "in the Chicago metropolitan area" for at least 50 years; (2) amend its bylaws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois; and, (3) pursue a "partnership" with another local Chicago museum (likely the Art Institute of Chicago) that will result in the transfer of the Foundation's property and autonomy to another institution.

Given a full opportunity to be heard, Defendants intend to establish that such provisions are not "suitable for the [Foundation], its purposes, and in [its] best interests." Palencia, 243 Ill. App. 3d at 295. Defendants will show that the proposed settlement is antithetical to the Foundation's

charter, the Founder's controlling intentions, the best interests of the Foundation and its intended beneficiaries, and sound Illinois public policy. For example:

1. Nothing in the Foundation's charter suggests that the Foundation's art collection should be isolated in any one state or location, or that its Board members should come only from Illinois. In fact, such restrictions are directly contrary to the Foundation's stated purpose in its Articles of Incorporation. The Foundation was formed to "expand the artistic horizons of a growing art public" without geographic limitation. See, Articles of Incorporation. (Exhibit 2, attached hereto). A 1994 Amendment to the Articles of Incorporation further clarified that the Foundation's purpose is to

> [b]uild, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added) (Exhibit 3, attached hereto).

Plainly, the Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry.

2. It is fundamental learning that a founder's charitable intentions should be honored in any action to reform a charity unless to do so would require the charity to fail. See, e.g., First Nat'l Bank of Chicago v. King Edward's Hosp. Fund for London, et al., 1 Ill. App. 2d 338, 117 N.E.2d 656 (1954) (courts will "carry out the donor's charitable intent" wherever possible); Kemmerer v. Kemmerer, 233 Ill. 327, 84 N.E. 256 (1908) (same).

The evidence is legion that approving the settlement would directly undermine the Founder's intentions. Defendants will prove that by the time of his death in 1996, Mr. Terra "felt that the Chicago museum was simply underappreciated" and was actively taking efforts to "relocat[e] his art

collection." Decl. Of Alan Simpson ¶ 2 (Exh. 4).[2]

Between 1990 and 1995, Mr. Terra spoke with the President of the Corcoran Museum in Washington, the President of the University of the Arts in Philadelphia, the Pennsylvania Academy of Fine Arts, and the Whitney Museum in New York about moving the Foundation's collection to their facilities. See, Decl. of Paul Tucker (Exh. 1), Decl. of David Levy (Exh. 5), Decl. of Peter Solmssen (Exh. 8). In the end, Mr. Terra rejected these offers because each would require the Foundation to forfeit control over its collection.

In 1996, the last year of his life, Mr. Terra decided to establish an independent museum in Washington, D.C., where he then resided, and move his collection there. Exh. 8 ¶ 7. He spoke with the President of the University of the Arts in Philadelphia "at length about his desire to move the Foundation to Washington, D.C." Id. In early 1996, Mr. Terra bought a building on Thomas Jefferson Street in Georgetown for the purpose, as testimony will establish, of serving as the new interim corporate headquarters of the Foundation. Decl. of Joseph Zorc (Exh. 6) ¶¶ 2-4. At the same time, Mr. Terra commissioned an architect to draw plans for a new museum facility and headquarters on his existing property on Connecticut Avenue; the plans were completed in May 1996. Decl. of Belinda Reeder (Exh. 9) ¶¶ 2-4 & attachments thereto (appending plans). Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson Street location, sometimes with handwritten annotations. Exh. 10 (address notification). However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996. Exh. 1 ¶ 7; Exh. 6 ¶ 4.

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[2]All exhibit references from this point forward are to the documents filed with the Court by Defendants on June 29, 2001.

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Plainly, the Founder had no intention of locking the Foundation into Chicago at all, let alone for 50 years. Plainly, too, as exhibited by his rejection of the offer by the Pennsylvania Academy of Fine Arts and others, he did not wish his collection to become subsumed in another museum's collection (as will happen in any arrangement with the Art Institute).

3. The proposed settlement dangerously compromises the Foundation's flexibility to fulfill its charter. Evidence shows that the Foundation's collection does not stimulate much interest in Chicago. In 1990, for example, Mr. Terra noted that a mere 60,000 visitors went through the museum, meaning the Foundation spent "in excess of $5,000 per visitor." See Exh. 3 at 6-7. Defendants will present evidence from art experts nationwide that if the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract more interest.

Likewise, the Foundation has benefitted tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a major Parisian art museum. Under the proposed settlement, the benefit of such experts would be diluted by a board controlled by individuals whose selection depends on their being residents of Illinois. Again, Defendants intend to present evidence that this limitation is not in the Foundation's best interests.

4. The Illinois public has a strong incentive to avoid precedents that discourage charities from settling in this State. The proposed settlement will have just that effect. The proposed settlement will suggest to other charities that individual board members and the Illinois Attorney General's Office can and will use litigation and its threat as a weapon against charities that settle here. Defendants intend to present proof from experts in the study of charitable institutions and

leaders of significant art charities nationwide that this settlement, if approved, will deter foundations, present and future, from considering Illinois as its domicile.

5. The intended beneficiaries of the Foundation are the members of the art public nationwide and worldwide. See, Articles of Incorporation (purpose is to "expand the artistic horizons of a growing art public" both "in the United States and abroad"). Defendants will present evidence that it is contrary to the interests of this public to force the Foundation into remaining in Chicago; the collection is demonstrably underappreciated here and would be more appreciated elsewhere. Defendants will also show that it is also contrary to the best interests of the Foundation's intended beneficiaries that it should have a board dominated other than by the most qualified members from a worldwide selection process.

C. The Settlement Process Was Fatally Tainted

Defendants intend to establish that the settlement process was tainted in multiple ways that undermine the enforceability of its result. By way of example:

1. There is evidence that the Attorney General's office suffered from a fundamental conflict of interest between enforcing the laws of Illinois and serving some xenophobic concerns. Indeed, the unnecessary insertion of the Attorney General's bias against a not-for-profit's freedom of choice to conduct its affairs outside of the State does a greater disservice to Illinois than losing an art collection, no matter its importance.

Mr. Perkins intervened purportedly to ensure the enforcement of Illinois law. Illinois law, however, guarantees corporate self-governance, promises respect for a foundation's corporate charter and for its founder's intentions. Defendants will show that Mr. Perkins pursued none of these legitimate interests in the mediation process, but instead sought solely to keep the Foundation in

Illinois, without regard to the propriety of the methods he employed.

2. The Mediator has long-standing ties to the Art Institute of Chicago. Yet that institution is a likely beneficiary of the proposed settlement's provision that requires the Foundation to "partner" with another local museum. Defendants are prepared to present testimony that the Art Institute is the obvious, if not expressly stated, beneficiary of this settlement provision.

3. Defendants will establish that members of the Board voting on the proposed settlement also suffered from an unfortunate, irreconcilable conflict of interest created by Mr. Perkins.

Throughout the mediation process, Mr. Perkins demanded that any settlement rewrite the Foundation's bylaws so as to deprive the Foundation of self-governance, force it to remain an Illinois corporation located in Illinois for 50 years, exhibit its collection in the Chicago area for 50 years, insure that a majority of the board be Illinois residents without time limit, and form a partnership with another Chicago art institution with the goal of terminating its ability to operate a free-standing museum altogether. Mr. Perkins's proposals initially had the support of only four of the six Board members required to effect any change in the Foundation's bylaws. See Bylaws Article XII (requiring 6 of 11 votes to change bylaws). Defendants intend to demonstrate that, after learning this fact, Mr. Perkins took menacing steps against two hold-outs, Dr. Stebbins and Dr. Marshall. Mr. Perkins began with the highly improper step of circulating an internal "draft" amended complaint that named Dr. Stebbins as an individual defendant in this action and charged Dr. Stebbins with breaching a duty of loyalty to the Foundation by representing multiple parties at art auctions -- a common and entirely proper practice in the art world. Exh. 21 pp. 28-29 ("Draft Complaint"). Nothing was done to investigate the activities of either named Plaintiffs or Defendants for

mismanagement, waste and other breaches of fiduciary duty.

Defendants further intend to show that, as recently as June 5, 2001, Dr. Marshall wrote to the Mediator expressing her refusal to support the Attorney General's proposals. Exh. 19 ("We have not agreed to any settlement"). At approximately the same time, however, the Attorney General launched an investigation into the Illinois Mathematics and Science Academy, of which Dr. Marshall is president and which depends on public funds.

Mr. Perkins took these actions against Dr. Stebbins and Dr. Marshall *at the very time* he was purporting to negotiate a settlement with these two individuals. Within weeks, both changed their votes. See Exh. 20 (Crain's report that Dr. Marshall "flipped."). While Dr. Stebbins and Dr. Marshall understandably deny that these investigations influenced their decision to change their votes, both expressed their "abhorrence" of the Attorney General's threats. And, both were undeniably and palpably conflicted between their fiduciary duty to the Foundation and their personal interests.[3]

CONCLUSION

For the foregoing reasons, the Court should hold an evidentiary hearing on the fairness of the

---

[3]In this regard, whether threat of personal loss entered into their respective votes is not the important issue; what is important is that they cannot resolve the conflict. Moreover, any activity of the Board since at least June 1, 22991 is a nullity. Defendants intend to file counterclaims against Messrs. Buntrock, Gidwitz, and Perkins for violation of 28 U.S.C. § 1983, breach of fiduciary duty, conversion, and related causes of action. At a minimum, the Court should afford sufficient time for Defendants to present their counterclaims before entering judgment. See Illinois Code, at 735 Ill. Comp. Stat. 5/2-616 ("[a]t any time before final judgment amendments may be allowed on just and reasonable terms"); Mem. Op. and Order, Terra v. Perkins, at 4 (N.D. Ill. June 28, 2001) (denying TRO in part because "there was--and as far as I know still is--ample opportunity to raise" such claims "in the state court proceedings"). Defendants could not have raised their counterclaims earlier because the actions that form the basis of those claims took place only recently, only gradually came to Defendants' attention, and resulted in concrete injury only with the vote on June 29, 2001.

settlement and order any other and further relief that the Court may deem appropriate. Absent such procedures, the Court should reject the proposed settlement as substantively unfair and procedurally tainted and follow a process similar to that followed in Palencia, 243 Ill. App. 3d at 294, without interference by the Attorney General's Office.

Respectfully submitted,

ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER

By: _____
One of their Attorneys

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Attorneys for Defendants

16di-000515

CERTIFICATE OF SERVICE

By:Facsimile
William R. Quinlan
James R. Carroll
John F. Kennedy
Quinlan & Crisham, Ltd.
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602

By :Facsimile
Therese Harris
Floyd D. Perkins
Bureau of Charitable Trusts & Solicitations
100 West Randolph Street
3rd Floor
Chicago, Illinois 60601

By Facsimile:
Brian L. Crowe
James Wilson
Shefsky & Froelich, Ltd.
444 North Michigan Avenue
Chicago, Illinois 60611

By Facsimile:
William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
Sidley & Austin
10 South Dearborn Street
Chicago, Illinois 60603

By Facsimile:
David Hilliard,
Pattishall, McAuliffe, Newbury,
Hilliard & Geraldson
311 South Wacker Drive
Suite 5000
Chicago, Illinois 60606

By Facsimile:
Naftali Michaeli
3263 N Street, NW
Washington, DC 20007

I, Evelyn Benders, a non-attorney, do hereby certify that I have caused a copy of the foregoing Motion for Leave to File Written Objections And For An Evidentiary Hearing on the Proposed Settlement to be served upon each of the above addressees by facsimile, this 2nd day of July 2001.

Evelyn Benders

SUBSCRIBED AND SWORN TO
before me this 2nd day of July, 2001

Elizabeth A Steinhauser
NOTARY PUBLIC

OFFICIAL SEAL
ELIZABETH A STEINHAUSER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/27/02

Page 1

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION
DEAN L. BUNTROCK, a Director)
of the Terra Foundation for)
the Arts, and RONALD GIDWITZ,)
a Director of the Terra)
Foundation for the Arts,)
Plaintiffs,) Case No.
vs.) 00 CH 13859
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
NAFTALI MICHAELI, and the TERRA)
FOUNDATION FOR THE ARTS, an)
Illinois Not-For-Profit)
Corporation,)
Defendants.)
PROCEEDINGS SEPTEMBER 25, 2000

Page 2

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel., JAMES E. RYAN,)
Attorney General of Illinois,)
Plaintiff-Intervenor,)
vs.)
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
and the TERRA FOUNDATION FOR THE)
ARTS, an Illinois Not-For-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 25th of September, A.D. 2000, at 2:37 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

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PRESENT:

QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL,
MR. MICHAEL I. ROTHSTEIN and
MR. MARTIN J. O'HARA,
appeared on behalf of the Plaintiffs;

SIDLEY & AUSTIN,
(One First National Plaza,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON,
-and-
WINSTON & STRAWN,
(35 West Wacker Drive,
Chicago, Illinois 60601), by:
MR. TERRY M. GRIMM,
appeared on behalf of Defendant
the Terra Foundation for the Arts;

Page 4

PRESENT: (Continued)
HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, and
MR. BARRY GOLDBERG, Assistant Attorney
General,
appeared on behalf of the
Plaintiff-Intervenor;
McBRIDE BAKER & COLES,
(500 West Madison Street, 40th Floor,
Chicago, Illinois 60661-2511), by:
MR. DONALD G. MULACK,
appeared on behalf of James Terra,
Plaintiff-Intervenor.

REPORTED BY: JACQUELINE M. TIMMONS,
C.S.R., R.M.R., R.D.R.
Certificate No. 84-2949.

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talking about how much could be closed, how much of the collection could be moved? What is your position going to be at that point?
MR. PERKINS: Well, Your Honor, I think we all recognize that this is a situation where a museum can have other locations and they exchange collections not only among those locations, but with other institutions. We are expecting there to be this substantial museum that we see in Chicago in perpetuity, and that that is the intent Dan Terra when he founded it, when he went out and personally selected all of this art. This is the situation. He probably picked 90 percent of the pieces of art that are in this museum, and we will be able to prove that. We have the son, who is — who has been with him through the entire process, and this is the situation where I don't think the facts, really, are going to be that much in dispute. It may become a question for a chancellor or a trier of fact, so to speak, to decide what that is and apply the law, but I think it is very clear what Dan Terra had in mind. He named it after himself. He put it in he city that he

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grew up in and did business in and became successful in and I think he wanted to give back.
THE COURT: Except for the Harding case, has there been any other museum case in Illinois where private or a not-for-profit— you don't want me to use the word "private," a not-for-profit corporation is precluded from closing if it chose to do so?
MR. PERKINS: Judge, I think it is a question of when we say closing, a great example are not-for-profit hospitals that find themselves in situations where they must close down.
THE COURT: Because they can't make it financially, and this is not that situation.
MR. PERKINS: But in the question — the reason I point that out, Judge, there is money left over, substantial moneys often. In fact, they sell often to a for-profit or they sell to another not-for-profit to gather back a whole bunch of money for a foundation. And the question is, always, what will that money go for. And I can tell you this, it is always very

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parochial. I mean, it can be such that a Southern Illinois community isn't interested in seeing that money migrate up into the Chicagoland area to be given for other purposes.
And so I think these concepts are very rooted in community and very rooted in the common law, which is the state, the sovereign state, and the community that creates the charitable trust should remain the beneficiary of that charitable trust. That is the heart of what the common law provided. And, true, as we move forward in society and we have United States with different states and different locations, it becomes a little harder always to apply that in each circumstance. But I think when the founder has so clearly indicated his intent, and I think when the situation is so clear that it belongs in the State and in the City of Chicago, I think it is a situation where that trust must stay under the protection of the people of the State of Illinois, under its representatives, under the protection of this court.

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THE COURT: So it is going to be your position, ultimately, let's assume it is not this particular case, but let's assume there is a museum in town that is simply not making it. There is not attendance, it is not doing well. It just is not supporting its efforts, it is not growing and, for whatever reason, it has to close. It is your position that even if that were the case, the assets would have to ultimately remain in the State of Illinois or the collection would be sold for the benefit of the people of the State of Illinois.
MR. PERKINS: Yes, Judge, absolutely.
THE COURT: And that is really what it comes down to. They can't ever move these assets elsewhere.
MR. PERKINS: Your Honor, I have been on many cases and that is our position in every case.
THE COURT: Okay. Is there anything else? Mr. Quinlan, you have been very patient.
MR. QUINLAN: No, not at all. I obviously concur with what the Attorney General says and his perspective, obviously, is a little

Certificate 38135

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, *Articles of Incorporation duly signed and verified of*

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 13th *day of* December *A. D. 1978, as provided by the* "GENERAL NOT FOR PROFIT CORPORATION ACT" *of Illinois, approved July 17, 1943, in force January 1, A. D. 1944.*

Now Therefore, I, ALAN J. DIXON, *Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this Certificate of Incorporation, and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.*

In Testimony Whereof, *I hereto set my hand, and cause to be affixed the Great Seal of the State of Illinois.*

Done at the City of Springfield this 13th *day of* December *A.D. 19* 78 *and of the Independence of the United States the two hundred and* 3rd

(SEAL)

Alan J. Dixon

SECRETARY OF STATE

16di-000521

Filing Fee $25.00

FORM NP-29

ARTICLES OF INCORPORATION
UNDER THE
GENERAL NOT FOR PROFIT CORPORATION ACT

(These Articles Must Be Filed in Duplicate)

(Do Not Write in This Space)
Date Paid 12/13/78
Filing Fee $ 25.00
Clerk [signature]
12-13-78

ecretary of State, Springfield, Illinois.

We, the undersigned,

(Not less than three)

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park, Evanston, Illinois 60201			
James D. Terra	2600 Central Park, Evanston, Illinois 60201			
Robert J. Sugrue	One IBM Plaza, Suite 2650, Chicago, Ill. 60611			

eing natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of orming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the owing Articles of Incorporation:

. The name of the corporation is: FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

. The period of duration of the corporation is: perpetual
(Please state "perpetual" or a definite number of years)

. The address of its initial **Registered Office** in the State of Illinois is: 2600 Central Park Street in the City of Evanston (60201) County of Cook and
(Zip Code)

the name of its initial **Registered Agent** *at said Address* is: Daniel J. Terra

. The first Board of Directors shall be three in number, their names and addresses being as follows:
(Not less than three)

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park, Evanston, Illinois 60201			
James D. Terra	2600 Central Park, Evanston, Illinois 60201			
Robert J. Sugrue	One IBM Plaza, Suite 2650, Chicago, Ill. 60611			

(1-47)

16di-000522

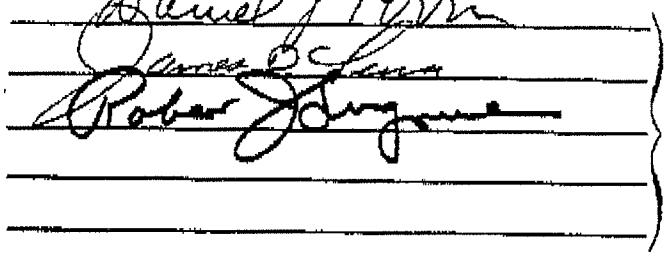
The purpose or purposes for which the corporation is organized are: This corporation is organized exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the ternal Revenue Code of 1954, or the corresponding provisions of any osequent Federal tax laws ("Code"). Within the foregoing, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all oter activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

. No part of the net earnings of the corporation shall inure to the enefit of or be distributable to, its members, directors, trustees, fficers, or other private persons, except that the corporation shall be uthorized and empowered to pay reasonable compensation for services endered and to make payments and distributions in furtherance of the urposes set forth in Article 5 hereof. No substantial part of the ctivities of the corporation shall be the carrying on of propaganda, or therwise attempting, to influence legislation, and the corporation hall not participate in, or intervene in (including the publishing or istributions of statements) any political campaign on behalf of any andidate for public office. Notwithstanding any other provision of hese articles, the corporation shall not carry on any other activities ot permitted to be carried on by a corporation exempt from Federal ncome tax under Section 501(c)(3) of the Code.

. Upon dissolution of the corporation, the Board of Directors shall, fter paying or making provision for the payment of all of the liabilities f the corporation, dispose of all of the assets of the corporation xclusively for the purposes of the corporation in such manner, or to ich organization or organizations organized and operated exclusively or charitable, educational, literary, religious or scientific purposes s shall at the time qualify as an exempt organization or organizations ider Section 501(c)(3) of the Code, as the Board of Directors shall etermine.

TE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)



Incorporators

I, Margaret Solyomi, a Notary Public do hereby certify that on the 11th day of December, 19 78, Daniel J. Terra, James D. Terra, and Robert J. Sugrue (Names of Incorporators)

lly appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing ument in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE
NOTARIAL SEAL)
HERE

Margaret Solyomi
Notary Public

PAID
DEC 19 1978
ALAN J. DIXON
Secretary of State

FILED
DEC 19 [illegible]
[illegible] Secretary of State

ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT
CORPORATION ACT
of

SECRETARY OF STATE
CORPORATION DEPARTMENT
TELEPHONE: (217) 782-7880

(These Articles Must Be Executed and Filed in Duplicate)

Filing Fee $25.00

16di-000525

Certificate 8557 A

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, *Articles of Amendment to the Articles of Incorporation duly signed and verified of*

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 27th *day of* December *A. D. 19* 78 *as provided by the* "GENERAL NOT FOR PROFIT CORPORATION ACT" *of Illinois, approved July 17, 1943, in force January 1, A. D. 1944.*

Now Therefore, I, ALAN J. DIXON, *Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this Certificate of Amendment and attach thereto a copy of the Articles of Amendment to the Articles of Incorporation of the aforesaid corporation.*

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois.*

Done at the City of Springfield, this 27th *day of* December *A.D. 19* 78 *and of the Independence of the United States the two hundred and* 3rd

(SEAL)

Alan J. Dixon

SECRETARY OF STATE

16di-000526

To Be Filed
In Duplicate
Filing Fee $10.00

FORM NP-A

Date 12-22-78

Filing Fee $ 10.00

Clerk

ARTICLES OF AMENDMENT
to the
ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT CORPORATION ACT

ALAN J. DIXON
To ~~PAUL POWELL~~, Secretary of State, Springfield, Illinois.

The undersigned corporation, for the purpose of amending its Articles of Incorporation and pursuant to the provisions of Section 35 of the "General Not For Profit Corporation Act" of the State of Illinois, hereby executes the following Articles of Amendment:

1. The name of the corporation is: Foundation for the Daniel J. Terra Museum

2. There are no members, having voting rights with respect to amendments;
(Insert "no" or "some")

(Strike paragraphs (a), (b), or (c) not applicable)

3. ~~(a) At a meeting of members, at which a quorum was present, held on ..... 19..... same receiving at least two-thirds (2/3) of the votes entitled to be cast by the members of the corporation present or represented by proxy at such meeting.~~

~~(b) By a consent in writing signed by all members of the corporation entitled to vote with respect thereto.~~

(c) At a **meeting of directors** (members having no voting rights with respect to amendments) held on December 19, 19 78, same receiving the votes of a majority of the directors then in office,

the following amendment or amendments were adopted in the manner prescribed by the "General Not For Profit Corporation Act" of the State of Illinois:

Article I shall be amended in its entirety to read as follows:

1. The name of the corporation is: THE DANIEL J. TERRA MUSEUM OF AMERICAN ART

(Over)

16di-000527

IN WITNESS WHEREOF, the undersigned corporation has caused these Articles of Amendment to be executed in its name by its President, and its Secretary, this 19th day of December, 19 78

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM
(Exact Corporate Title)

By Daniel J. Terra
Its President

Its Assistant Secretary

Place (CORPORATE SEAL) Here

STATE OF Illinois }
COUNTY OF Cook } ss.

I, [illegible], a Notary Public, do hereby certify that on the 19th day of December, 19 78

(Acknowledgment by either officer is sufficient)

personally appeared before me and, being first duly sworn by me, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

Place (NOTARIAL SEAL) Here

[illegible]
Notary Public.

PAID
DEC 28 1978

FILED
DEC 27 1978
Secretary of State

FORM NP-A

Box 5162 File 63254

ARTICLES OF AMENDMENT
to the
ARTICLES OF INCORPORATION
of

Filing Fee $10.00

(3070—10M—12-64)

16di-000528

File Number 5162-635-4

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

Whereas. ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF

TERRA FOUNDATION FOR THE ARTS

INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE GENERAL NOT FOR PROFIT CORPORATION ACT OF ILLINOIS, IN FORCE JANUARY 1, A.D. 1987.

Now Therefore, I, George H. Ryan, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the Application of the aforesaid corporation.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, at the City of Springfield, this* 26TH *day of* AUGUST *A.D. 19* 94 *and of the Independence of the United States the two hundred and* 19TH.

George H Ryan

SECRETARY OF STATE

16di-000530

NFP-110.30
(Rev. Jan. 1987)

Submit in Duplicate

Remit payment in Check or Money Order, payable to "Secretary of State."

DO NOT SEND CASH!

GEORGE H. RYAN
Secretary of State
State of Illinois

PAID
AUG 29 1994

File # 5162-635-4

This Space For Use By Secretary of State
Date 8-26-94
Filing Fee 25
Approved

ARTICLES OF AMENDMENT
under the
GENERAL NOT FOR PROFIT CORPORATION ACT

Pursuant to the provisions of "The General Not For Profit Corporation Act of 1986," the undersigned corporation hereby adopts these Articles of Amendment to its Articles of Incorporation.

ARTICLE ONE The name of the corporation is Terra Foundation For The Arts

(Note 1)

ARTICLE TWO The following amendment to the Articles of Incorporation was adopted on July 18, 19 94 in the manner indicated below *("X" one box only.)*

[X] By the affirmative vote of a majority of the directors in office, at a meeting of the board of directors, in accordance with Section 110.15. *(Note 2)*

[ ] By written consent, signed by all the directors in office, in compliance with Sections 110.15 and 108.45 of this Act. *(Note 3)*

[ ] By the members at a meeting of members entitled to vote by the affirmative vote of the members having not less than the minimum number of votes necessary to adopt such amendment, as provided by this Act, the articles of incorporation or the bylaws, in accordance with Section 110.20. (Note 4)

[ ] By written consent signed by members entitled to vote having not less than the minimum number of votes necessary to adopt such amendment, as provided by this Act, the articles of incorporation, or the bylaws, in compliance with Sections 107.10 and 110.20 of this Act. *(Note 4)*

(INSERT RESOLUTION)

See attachment.

Attachment
Articles of Amendment
Terra Foundation For The Arts

RESOLVED, that the first paragraph of Article V of the articles of incorporation of the corporation be amended to read as follows:

> The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

RESOLVED, that the officers of the corporation are authorized to execute such documents and take such actions they deem necessary or advisable to effect the foregoing resolutions.

(If space is insufficient, attach additional pages size 8 1/2 x 11)

The undersigned corporation has caused these articles to be signed by its duly authorized officers, each of whom affirm, under penalties of perjury, that the facts stated herein are true.

Dated July 18, 19 94

Terra Foundation For The Arts
(Exact Name of Corporation)

attested by _____
(Signature of Secretary or Assistant Secretary)

James Collins, Secretary
(Type or Print Name and Title)

by _____
(Signature of President or Vice President)

Daniel J. Terra, Chairman
(Type or Print Name and Title)

NOTES AND INSTUCTIONS

NOTE 1: State the true exact corporate name as it appears on the records of the Office of the Secretary of State, **BEFORE** any amendments herein reported.

NOTE 2: Directors may adopt amendments without member approval only when the corporation has no members, or no members entitled to vote.

NOTE 3: Director approval may be (1) by vote at a director's meeting *(either annual or special)* or (2) consent, in writing, without a meeting.

NOTE 4: All amendments not adopted under Sec. 110.15 require (1) that the board of directors adopt a resolution setting forth the proposed amendment and (2) that the members approve the amendment.

Member approval may be (1) by vote at a members meeting *(either annual or special)* or (2) by consent, in writing, without a meeting.

To be adopted, the amendment must receive the affirmative vote or consent of the holders of at least 2/3 of the outstanding members entitled to vote on the amendment, *(but if class voting applies, then also at least a 2/3 vote within each class is required).*

The articles of incorporation may supersede the 2/3 vote requirement by specifying any smaller or larger vote requirement not less than a majority of the outstanding votes of such members entitled to vote and not less than a majority within each when class voting applies. *(Sec. 110.20)*

NOTE 5: When a member approval is by written consent, all members must be given notice of the proposed amendment at least 5 days before the consent is signed. If the amendment is adopted, members who have not signed the consent must be promptly notified of the passage of the amendment. *(Sec. 107.10 & 110.20)*

FORM NFP-110.30

File No. _____

ARTICLES OF AMENDMENT
under the
GENERAL NOT FOR PROFIT CORPORATION ACT

Filing Fee $25

Filing Fee for Re-Stated Articles $100

FILED
AUG 26 1994
GEORGE H. RYAN
SECRETARY OF STATE

RETURN TO:

Department of Business Services
Secretary of State
Springfield, Illinois 62756
Telephone (217) 782-1832

16di-000533

File # N 5162-635-4

Form **BCA-5.10**
NFP-105.10
(Rev. April 1995)

George H. Ryan
Secretary of State
Department of Business Services
Springfield, IL 62756
Telephone (217) 782-3647
http://www.sos.state.il.us

STATEMENT OF CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

FILED
JAN 24 2001
JESSE WHITE
SECRETARY OF STATE

SUBMIT IN DUPLICATE

This space for use by Secretary of State
Date 1-24-01

Filing Fee $ 5

Approved: fee ✓

Remit payment in check or money order, payable to "Secretary of State."

Type or print in black ink only.
See reverse side for signature(s).

PAID
JAN 25 2001
Expedited Services

CORPORATE NAME: Terra Foundation For The Arts

STATE OR COUNTRY OF INCORPORATION: Illinois

Name and address of the registered agent and registered office as they appear on the records of the office of the Secretary of State *(before change)*:

Registered Agent: James (First Name) W. (Middle Name) Collins (Last Name)

Registered Office: 664 (Number) N. Michigan Ave (Street) 10th FL (Suite No. (A P.O. Box alone is not acceptable))
Chicago (City) 60611 (ZIP Code) Cook (County)

Name and address of the registered agent and registered office shall be *(after all changes herein reported)*:

Registered Agent: Donald (First Name) H. (Middle Name) Ratner (Last Name)

Registered Office: 664 N. Michigan Avenue, 10th Floor (Number Street Suite No. (A P.O. Box alone is not acceptable))
Chicago (City) 60611-0000 (ZIP Code) Cook (County)

16di-000534

The address of the registered office and the address of the business office of the registered agent, as changed, will be identical.

The above change was authorized by: *("X" one box only)*

a. ☒ By resolution duly adopted by the board of directors. *(Note 5)*

b. ☐ By action of the registered agent. *(Note 6)*

OTE: When the registered agent changes, the signatures of both president and secretary are required.

(If authorized by the board of directors, sign here. See Note 5)

The undersigned corporation has caused this statement to be signed by its duly authorized officers, each of hom affirms, under penalties of perjury, that the facts stated herein are true.

ated 1/19/01 19XX Terra Foundation For The Arts

(Exact Name of Corporation)

ested by _____ by _____

(Signature of Secretary or Assistant Secretary) *(Signature of President or Vice President)*

Stephanie Pace Marshall, Secretary Paul Hayes Tucker, President

(Type or Print Name and Title) *(Type or Print Name and Title)*

change of registered office by registered agent, sign here. See Note 6)

The undersigned, under penalties of perjury, affirms that the facts stated herein are true.

ated _____ 19,____ _____

(Signature of Registered Agent of Record)

NOTES

The registered office may, but need not be the same as the principal office of the corporation. However, the registered office and the office address of the registered agent must be the same.

The registered office must include a street or road address; a post office box number alone is not acceptable.

A corporation cannot act as its own registered agent.

If the registered office is changed from one county to another, then the corporation must file with the recorder of deeds of the new county a certified copy of the articles of incorporation and a certified copy of the statement of change of registered office. Such certified copies may be obtained ONLY from the Secretary of State.

Any change of *registered agent* must be by resolution adopted by the board of directors. This statement must then be signed by the president *(or vice-president)* and by the secretary *(or an assistant secretary)*.

The registered agent may report a change of the *registered office* of the corporation for which he or she is registered agent. When the agent reports such a change, this statement must be signed by the registered agent.

5.12

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,	)	
	)	
Plaintiffs	)	**No. 00 CH 13859**
	)	
vs.	)	**Hon. Dorothy Kirie Kinnaird**
	)	
JUDITH TERRA, et al.	)	
	)	
Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

YOU ARE HEREBY NOTIFIED that on Monday, July 2, 2001, at 2:00 p.m., we shall appear before the Honorable Dorothy Kirie Kinnaird in the Circuit Court of Cook County, Chancery Division, Richard J. Daley Center, Room 2302, Chicago, Illinois, and then and there present the attached Motion For Leave To File Written Objections And For An Evidentiary Hearing on the Proposed Settlement, at which time and place you may appear if you see fit.

Dated at Chicago, Illinois this 2nd day of July, 2001.

Joel J. Bellows
One of the Attorneys for Certain Defendants

Joel J. Bellows
BELLOWS AND BELLOWS
79 West Monroe Street, Suite 800
Chicago, Illinois 60603
(312) 332-3340
Attorney #01000

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

Case No. 00 CH 13859

ORIGINAL

PROCEEDINGS JULY 2, 2001

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel., JAMES E. RYAN,)
Attorney General of Illinois,)
Plaintiff-Intervenor,)
vs.)
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
and the TERRA FOUNDATION FOR THE)
ARTS, an Illinois Not-for-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:

QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;

BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

VERNER, LIIPFERT, BERNHARD, McPHERSON &
HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named
Defendants;

APPEARANCES: (Continued)

KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
appeared on behalf of the named
Defendants;

SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant
Terra Foundation for the Arts;

APPEARANCES: (Continued)

HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, Charitable Trusts Bureau, and
MS. THERESE M. HARRIS, Assistant Attorney
General, Charitable Trusts Bureau,
appeared on behalf of the
Plaintiff-Intervenor;

ALSO PRESENT:

MR. HILLIARD.

REPORTED BY: KAY A. LEVINE, M.A., C.S.R., R.P.R.
Certificate No. 84-3654.

THE COURT: After everybody gets in position, I'm going to ask if we could start on the far right and go across for the benefit of the court reporter. And if we have two rows, that's fine. I just want to do the front row first and the second row second. It makes it easier for the court reporter if that's possible.

MR. CARROLL: Good afternoon, your Honor. James Carroll on behalf of the plaintiffs, Gidwitz and Buntrock.

MR. KENNEDY: Good afternoon, Judge. John Kennedy on behalf of the plaintiffs.

MR. QUINLAN: William R. Quinlan on behalf of plaintiffs.

MR. PERKINS: Floyd Perkins and Therese Harris on behalf of the Attorney General.

MR. CARLSON: Steve Carlson, your Honor, on behalf of the Terra Foundation for the Arts.

MS. STONE: Susan Stone on behalf of the Terra Foundation.

MR. BELLOWS: I'm Joel Bellows. I'm here for the named defendants.

MS. BELLOWS: Laurel Bellows, the same, for the named defendants.

MR. GARMENT: Leonard Garment, the same, for the named defendants.

MR. TODD: Chris Todd, for the same.

MR. WILSON: James Wilson for Judith Terra, Alan Simpson, and Paul Tucker.

MR. CROWE: Brian Crowe here on the last-mentioned defendants.

MR. BELLOWS: Your Honor, is there some significance to the fact that Mr. Crowe has one foot out of the courtroom?

THE COURT: None whatsoever.

Counsel, since you were here on Friday, I've received three filings, and I don't really know yet what has been filed and what hasn't been. There was quite a bit of confusion after Friday's court proceeding, so I want to clarify some of that confusion, first of all.

What I've received since Friday is Mr. Crowe and Mr. Wilson's emergency motion to withdraw on behalf of the individual defendants, and I assume that everybody has received that.

I also received at 1:15 today, right before I went and did my 1:30 case, from Bellows & Bellows a motion for leave to file written

objections and for an evidentiary hearing on a proposed settlement. And there are some attachments to that, and in this short period of time I haven't gotten through all the attachments on that one.

And then while I was hearing my 1:30 case, I received from the mediator a letter dated July 2nd. And I assume that all of you have received that letter?

SEVERAL ATTORNEYS: We have not, your Honor.

THE COURT: Okay. And then I also received what is the first notification officially that I have of a proposed consent judgment and order. I realize that on the papers that were tendered as courtesy copies on Friday, there are included in there some proposed drafts of things that had been circulating in the mediation process. I didn't deem it appropriate to read those on Friday or to read anything until I received something firsthand from the mediator.

What I've received from the mediator is a one-page letter and a proposed consent judgment and order which I have just started to get through and which I haven't gotten through in the short

period of time that I've been off the bench.

Now, is there anybody here from the mediator's office? Are there extra copies of this document -- oh, Mr. Hilliard is in the courtroom. Do you have extra copies for everyone, sir?

MR. HILLIARD: I have some extra copies, yes.

THE COURT: It's a one-page letter and then a proposed consent judgment. I don't have anything official as to what took place, if anything, on Friday, so I don't know if there was a vote on bylaw changes and I don't know what the vote was. And I don't know if there's anything else I'm supposed to be reading.

And then the last thing I just wanted to bring up is I'm not quite certain from the Bellows & Bellows firm what was filed on Friday. I asked my staff to call on Friday. There were a number of telephone calls back and forth.

I received Friday morning a notice of a motion for a temporary restraining order, and my staff asked two or three times the attorney who dropped it off, Is this the courtesy copy or is this the original? And we were told this is the courtesy copy, so I proceeded to start to mark it

up.

Later in the afternoon I checked with the court clerk and was told she had no original. So this is signed by Joel Bellows and -- originally, it looks like -- and it appears to be the original. So if this is to be filed with the clerk of the court, I have to give it to the clerk.

MS. BELLOWS: May I speak to this, your Honor, to straighten up some of the housekeeping matters that are before you? We are prepared to substitute a copy for you to work on as a courtesy copy. Because you've begun to mark it up, we can arrange as to how you want to handle that.

THE COURT: Why don't you put these two pages on the end of that, the original signed, and give me the other.

MS. BELLOWS: Right. Because we would like --

THE COURT: To file it under seal.

MS. BELLOWS: We would like to file it under seal. Thank you, your Honor. So if we could have an order that gives us authority to file those papers under seal, we will do so.

THE COURT: And those papers would be the document entitled Notice of Motion for Temporary Restraining Order. Let me give you the other, if you don't mind, a copy of the other signed one for Mr. Bellows. Those are the originals.

MR. BELLOWS: Thank you.

THE COURT: Just give me the body, you know, something to complete that.

MS. BELLOWS: I have that here.

THE COURT: Then this document, Additional Appearance, was that ever filed?

MS. BELLOWS: I thought that we have an appearance that is filed.

THE COURT: So this is -- even though this is an original, this is meant to be my courtesy copy.

MS. BELLOWS: It's meant to be your courtesy copy and --

THE COURT: And you're going to file under seal the document I handed you back, reshuffled, with the signature pages and your plaintiffs' memorandum and your exhibits that were filed in the federal court case; is that right?

MS. BELLOWS: Precisely. Attached as exhibits to the motion that I filed under seal.

THE COURT: Okay. We need a separate court order that has nothing else in it but that these documents are to be filed under seal and kept separate under seal by the clerk of the court. And then that gets put on the front of the envelope. So they'll be put in an envelope sealed with that on top and give them to the clerk.

MS. BELLOWS: We have come prepared to do that today, your Honor.

THE COURT: Okay. So that was the first issue from Friday.

The second issue from Friday, when I left, I had a copy of the motion. The original, the clerk tells me from her phone call, was filed on the pro hac vice. And I did not get an order on Friday and the clerk said that an order has just been brought in on that. Anybody have a problem if I sign that order now?

MS. BELLOWS: It has been faxed to everybody for advanced notice, your Honor.

THE COURT: Okay. So the counsel from Washington are in, and I just want to make sure that before we deal with Mr. Crowe's motion, everybody's in who's supposed to be in.

Now, Mr. Crowe, you want to leave us?

MR. CROWE: I do.

THE COURT: And, Mr. Wilson, you want to go along with him?

MR. WILSON: That's correct, your Honor. We are taking this as if it were a motion for substitution, since there is other counsel in at this point. The strictures of the Supreme Court rule regarding withdrawal we didn't feel applied here at the time because of the fact there's more than competent counsel from three law firms in two cities representing these clients.

THE COURT: And I assume that no one wants to say anything about that?

MR. CROWE: Plus, Judge, we'll assert no attorneys' lien on the file.

THE COURT: Thank you.

MS. BELLOWS: Your Honor, we have authority from our clients to enter an additional appearance.

As your Honor may recall, we began in federal court with authority to file that action by our client. Our clients, two of them, one is in Florence, the other is somewhere in Russia.

That would be Senator Alan Simpson in Russia.

And as I indicated to your Honor at the close of court at the hearing on this matter on Friday, we do not have the ability to get authority for a substitute, only ability at least for the near future to serve as additional counsel in this matter.

THE COURT: Okay. And you've got your additional appearance on file as to the counsel from Washington. Everybody is from Washington, right? And you have leave to withdraw.

The only issue I want to deal with is or talk about is, you have a pending motion for fees, which if the settlement is approved, will be mooted. And if the settlement is not approved, it will be the first matter I deal with.

MR. CROWE: We have a petition for you today, Judge, to be filed.

THE COURT: What is that?

MR. CROWE: A petition for our fees, whether the settlement is approved or not.

THE COURT: Okay. Should that be filed with the clerk of the court?

MR. CROWE: I assume it should, Judge. We'd

give a copy to you, of course.

THE COURT: Anybody have a problem with that petition being filed at this juncture with the clerk of the court?

MR. QUINLAN: No, your Honor.

THE COURT: Okay. You can go ahead and then drop off a copy.

(WHEREUPON, Messrs. Wilson and Crowe left the proceedings.)

THE COURT: There is a motion now for an evidentiary hearing on the settlement issue. Let me hear, first of all, from counsel for the Foundation as to what happened on Friday.

And is there anything else I'm supposed to read, and does the Foundation concur that there is the need for a fairness hearing?

MS. STONE: Your Honor, on Friday there was a properly noticed, properly called board meeting. Due notice had been given. There was a meeting held, convened at approximately 12:45.

The board met, discussed the proposed settlement. There was lively debate about certain aspects of the proposed consent judgment and language of resolution that would be needed to

amend the bylaws in order to allow the board to enter into the proposed consent judgment. After some vigorous debate, the board voted and by a vote of 6 to 2 voted to enter into the proposed consent order.

THE COURT: And that was with three individuals not present.

MS. STONE: That's correct. Those individuals were Senator Simpson, Ambassador Jacques Andreani and Madame Helene Ahrweiler. All three had been given proper notice. The Foundation administrative staff talked to all three before and after the meeting and confirmed that they had indeed been given notice of the meeting.

I do not believe -- we only received the motion that the Bellows & Bellows firm is filing a few moments before court began, but I do not believe from my quick perusal of that document that they are raising any particular concerns about the way in which the notice was given. I believe notice was appropriate, and the meeting was appropriately called in strict conformity with the bylaws.

THE COURT: Was a vote taken to change the bylaws?

MS. STONE: Yes, it was, your Honor.

THE COURT: And was a vote taken to elect new directors?

MS. STONE: Yes, it was, your Honor.

THE COURT: So as far as the Foundation is concerned right now, there are how many directors?

MR. CARLSON: It doesn't change, your Honor.

THE COURT: It doesn't change anything until I sign this, right?

MR. CARLSON: That's correct, your Honor.

THE COURT: And right now the Foundation is continuing to operate as it has.

MR. CARLSON: Exactly right, your Honor.

THE COURT: Does anybody feel that we should have an oral report from the mediator? Do you want to take a brief recess and read his letter and then decide how you want to proceed? I know you all just received the Bellows & Bellows documents.

MR. CARROLL: We haven't even received the exhibits, your Honor. We just received a fax of --

THE COURT: Do you have a complete copy to give counsel?

MS. BELLOWS: We do.

THE COURT: I have moved my 3:00 o'clock to 3:30 with the hopes that we would be done a little bit before -- I mean relatively soon because I'm not certain this is going to be concluded today.

I want to find out what you believe is the best way that we should proceed on this, but you're not all informed because you don't all have the document. Do you want to take a few moments and look at the document and see whether an oral report is called for from the mediator today?

MR. QUINLAN: I think some sort of report from the mediator would be appropriate.

THE COURT: That was my intent. I intended to hear from him.

MR. QUINLAN: Maybe if we heard from him now, it might help us when we see the documents and where we are.

THE COURT: Okay. Mr. Hilliard, are you prepared to give us an oral report today?

MR. HILLIARD: The mediator's report is necessarily abbreviated because of the proceedings

in mediation that are confidential. But I can report that a vote was taken on the 19th of June on which a majority approved of a settlement agreement. That agreement was -- modifications were made to it and -- in order that it could be a subject of resolutions.

And it was brought before the board of the Foundation on Friday for ratification and for the election of additional members of the board, five additional members, and it has just been reported to you that took place on Friday.

The mediators were informed of this at about 2:00 o'clock in the afternoon. This morning we sent around the document to attempt to get signatures. We weren't able to get all the signatures, but that is the document which we tendered to the Court this afternoon.

THE COURT: The mediation process started on February 6th?

MR. HILLIARD: Correct.

THE COURT: And it's now the beginning of July and during this almost -- what is it? -- four months' period, you have had, I understand, extensive meetings with all of the parties

involved and individual meetings with them, meetings with their counsel as well as group meetings of this board.

MR. HILLIARD: We've had individual meetings with all of the members of the board, all the directors of the board, and we have had group meetings in March, again in May, and again in June when we would get everyone together.

THE COURT: And when one refers to a mediated settlement, the settlement is based on a vote on the board; is that correct? I mean, there's no issue that eleven people are not 100 percent happy about this. There are dissenters?

MR. HILLIARD: That's correct.

THE COURT: But this was a proceeding in which everybody had, as far as you're concerned, a full opportunity to participate.

MR. HILLIARD: Oh, yes.

THE COURT: Do you have any concerns about the integrity off this mediation process or presenting the settlement to the court?

MR. HILLIARD: I do not.

THE COURT: Does anybody want to just take a brief recess and get the one-page letter from the

mediator, and then we will resume after you have exchanged some documents?

MR. GARMENT: May I say something first, your Honor?

THE COURT: Yes, sir.

MR. GARMENT: And what I say is, I hope your Honor will take it in the spirit in which it is intended, which is to make a contribution to this proceeding and with respect. But I understand -- I understood and still understand why your Honor would have started the mediating proceeding, mediation process, with an order that the proceedings be sealed in the hope and perhaps a reasonable expectation that this would facilitate the discussions of the parties and permit free and open discussion without the intervention of outsiders and outside pressures of one sort or another of publicity and debate.

And what happened thereafter is a very strong argument -- I say respectfully -- for the centrality of press access of proceedings of this nature. And I think that at this time the sealing provision should end. I can understand why the press and press comment was, in effect, prevented

in order to --

THE COURT: I don't mean to interrupt you, sir, but I don't think anybody is anticipating anything to be sealed from now on, is there?

MS. BELLOWS: Your Honor, we aren't anticipating, but we have been cautious about our filing today. The mediation process -- it's our understanding the mediation process is terminated --

MR. GARMENT: Well, I can conclude very quickly then.

THE COURT: And I didn't mean any disrespect in cutting you off, sir, but the order said the board couldn't meet until -- or the board couldn't meet or do anything until the mediator reported back. And that during the course of the mediation process, the parties were supposed to be dealing with the mediator and working this case out.

MR. GARMENT: And, of course, your Honor, precisely what we have alleged in the district court proceeding under the Section 1983 claims relating to the interventions and not only improper and unlawful interventions by the Attorney General's office is precisely the reason

why open, free access to the processes of law, whether in court or in a mediation proceeding are best aired publicly. And that is the nature of the First Amendment, sometimes abused but always exercised in the interest of public information.

THE COURT: Were these documents that were filed in federal court filed under seal?

MR. GARMENT: We filed them under seal.

MS. BELLOWS: We filed them under --

THE COURT: Because mine aren't marked that, so I have --

MR. GARMENT: In deference to your Honor's --

THE COURT: I assumed that since everyone was talking about things that have come out in the newspaper that there had been plenty of access to these documents. Because how else would anybody know about this stuff?

MS. BELLOWS: Your Honor, we filed them under seal. Judge Bucklo did not accept them under seal; that's as far as the federal court proceeding.

As far as the filings that we have, I have submitted a courtesy copy to your Honor this afternoon. We have pursuant to your clerk's

suggestion --

THE COURT: Just brought it here to court.

MS. BELLOWS: -- brought it to court, and assume that it will not be filed under seal. But if we have no motion to do so, we would intend to have your Honor -- we would intend to file it in the normal course.

But in deference to your Honor and our new place here among you, with an abundance of caution we have provided your Honor with a courtesy copy, counsel with copies by fax, and no one else.

THE COURT: I am one of the strongest advocates in this building on the public's right to know, and anybody who routinely practices here knows that I virtually never seal anything in this courtroom. And the only time I do it is if I feel that there is a really important reason to have it done.

And in this case the only thing that was sealed is while this case was in mediation. I wanted to give it a chance. And I didn't want the parties or anyone or the attorneys talking to anyone except the mediator about what was going

on.

Now, lots of people, as I understand it, have violated that order, and that's another issue that we're going to have to deal with about that. That's a whole separate issue.

But now the mediator has reported. That's one of the reasons I wanted to make sure you all have what the appropriate papers are here. The plaintiffs are saying they don't know what you want to file today, Ms. Bellows, because they don't have the exhibits. So I want to take a few moments and make sure that everybody sees this document, which is being sought to be filed with the clerk of the court not under seal and see if there's any objection and whether it's -- whether there is a desire on behalf of anyone to file anything under seal from now on.

The proposed consent decree, that's not supposed to be sealed, is it?

MR. CARLSON: No, it is not.

THE COURT: Am I missing something here?

MR. CARLSON: No, it is not.

THE COURT: When we talked about that one, you all came to me and you wanted to have a

certain portion of the mediated settlement not public. And I said you can go ahead and try it, but I'm not signing anything that's not going to be public. And so you went back to the drawing board and talked some more.

MS. STONE: There was one aspect of the consent, proposed consent judgment, that we should draw to your Honor's attention. That the parties who are entering into this proposed consent judgment, assuming your Honor approves it --

THE COURT: This is all they're going to say.

MR. CARLSON: That's correct.

MS. STONE: -- have agreed that there is a mutually agreeable statement that will be released to the press. And that is all that people will say. And that will be binding on those who -- the parties who are parties to this particular agreement.

THE COURT: That's the Attorney General, Mr. Buntrock, Mr. Gidwitz, and the Foundation.

MR. CARLSON: That's correct.

THE COURT: And that's all you're going to say. And this is not binding on the three individual defendants because they haven't bought

into it.

MS. STONE: Or Mr. Michaeli.

THE COURT: Oh, Mr. Michaeli. Okay. What I would like to do if we could is, Mr. Hilliard, if you could make available to them whatever copies of the letter that you had, I would assume that I would file this letter with the clerk of the court unless someone has a problem with doing that. But I want you all to see it.

And the proposed consent judgment and order is something I'm going to have to take a little bit of time to at least read more than the 15 minutes that I was allotted today after you spent four months putting it together.

And there is a motion which is seeking an evidentiary hearing and a fairness hearing about this, and you all get to be heard as to -- unless you feel that you're barred by the consent decree judgment. You're not, are you?

Okay. I want to hear what you all have to say about their proposed motion and we can go from there. But first let's just see the motion and all the attachments. And as soon as you're ready, please let me know.

(WHEREUPON, a recess was had.)

THE COURT: Anybody have any problem if we file the letter from the mediator?

SEVERAL ATTORNEYS: No, your Honor.

MR. BELLOWS: It is what it is. We have a problem with the content, but the letter itself is what it is.

THE COURT: Okay. Well, I will file that with the clerk of the court.

Has everybody had a chance to see the exhibits that are attached to the individual defendants' motion for leave to file written objections and for an evidentiary hearing?

ATTORNEYS: (Nodding.)

THE COURT: That apparently was what the concern was, that you didn't have the exhibits.

MS. BELLOWS: Your Honor, may I speak for one moment to the exhibits. The exhibits themselves were simply the original articles of incorporation, the amended articles of incorporation, and a page of the transcript.

But counsel, Mr. Quinlan, has reminded me that also referred to in our motion are portions of the exhibits that were filed with this

court that were going to be filed under seal.

Now, frankly, your Honor, there are three exhibits that were attached to the federal court proceeding and are now filed under seal in connection with our Friday's motion, three exhibits which do have something to do with the mediation process, Exhibits 17, 18, and 19 of those documents attached to our motion for TRO. Those are letters which involve the mediation process.

Other than those, we do not believe that there is anything else in the exhibit book that your Honor has that should be filed under seal. We would like to then have permission to remove those documents and attach the exhibits as an additional exhibit to our motion today for an objections and evidentiary hearing.

THE COURT: You're talking removing only Exhibits 17, 18 and 19?

MS. BELLOWS: Yes.

THE COURT: And that would be the things you would be filing today. So what you would file today is this motion for leave to file written objections. Would you also be including that

memorandum from Friday or just the exhibits?

MS. BELLOWS: No, your Honor. Just the exhibits.

THE COURT: Just the exhibits with the exception of 17, 18 and 19. Is everybody on board as to what Ms. Bellows is talking about?

MR. BELLOWS: Her husband's not. If I could be heard on this. I thought I understood the Court to say that it did not want to in any way impede the mediation process. As you know, the things that we have been filing with the court have made repeated references to the mediation process.

THE COURT: Well, as of yet, nothing's filed. You haven't filed anything except an appearance on Friday.

MR. BELLOWS: That doesn't have anything to do with it.

THE COURT: Nothing made it to the clerk's office yet. So nothing -- whatever was filed in federal court was filed in federal court. The mediation process, as I'm seeing it, is concluded as of the report of the mediator today, is it not?

MR. CARLSON: I think it is, your Honor.

MR. BELLOWS: And then at that point is everything released from seal? Can we feel free to refer to it in arguments before the Court?

THE COURT: That's what I want. I want to have an opportunity to have everyone be heard on that also. Is there any desire to keep any of these documents confidential for purposes of now?

MR. QUINLAN: Which -- I'm sorry.

THE COURT: Any documents. The only reason that I wanted the things filed under seal Friday was we were still in the mediation process. And they should have been filed Friday, and if they were filed Friday, they should have been filed under seal.

MR. QUINLAN: I guess the only question I have, your Honor, is if the mediation process has been terminated merely by filing the report of the mediator -- are we at that point or -- before you consider whether you enact the agreement of the parties pursuant to the mediation. You have not addressed the issue of the resolution that has been adopted by the board.

THE COURT: Well, first of all, I haven't seen the resolution that's been adopted by the

board.

MR. QUINLAN: Well, you've seen the consent judgment, which is the --

THE COURT: I've seen the consent decree.

MR. QUINLAN: -- which is the result of the resolution.

THE COURT: As I indicated on Friday, I'm going to consider anybody's argument that they may want to present as to whether or not I should sign this consent decree or not. Now, I didn't anticipate an evidentiary hearing. I could possibly see this all being done with affidavits.

It suggests that there's the need for an evidentiary hearing, and that's what I want to talk about today with all of you. Is anybody going to publicly air the entire mediation process, contemplating with your evidentiary hearing calling the mediator as a witness? What are we doing here?

MR. GARMENT: Indeed we do.

MR. BELLOWS: I don't see any way to avoid that, particularly since the mediator has recognized that the mediation could not have succeeded without inter alia the Attorney General.

And I think that that's really the point of it.

My own feeling on this is that we don't necessarily have to take the Court's time in having a hearing as long as we are able to develop -- I mean, the affidavits that we get, we can get from third parties and things of that nature by virtue of the people who would not otherwise be able to get them.

I would not be reluctant or opposed to, if the Court gave us an expedited discovery schedule, to taking their depositions and avoid having to drag this thing out in court.

THE COURT: Mr. Bellows, you say that you need to take depositions of people from all over the world on this motion. And are you talking about --

MR. BELLOWS: I don't think so.

THE COURT: Well, that's what you said in this document. You said of the people that would need to be in an evidentiary hearing, witnesses are spread throughout the world. Are you talking about board members or are you talking about people that -- similar to these declarations where you're talking about Dan Terra's intent? What are

we talking about as a hearing?

MR. BELLOWS: It breaks into two parts, so the answer is yes. It breaks into two parts. The affidavits of declaration from people all over the world, obviously we don't have to depose them.

With regard to the people who were intimately involved in the mediation process itself -- and I would think certainly Mr. Hilliard would be one of those persons -- we could either call him as a witness if the Court wanted to be involved in the give-and-take of it, or we could take his deposition and several others and just argue from those. The people all over the world, as I say, are people from whom we would get affidavits.

THE COURT: About?

MR. BELLOWS: The various points raised in the -- the various points raised in our motion as to the effect of this order on entities wishing to do business in the future in Illinois, not-for-profits most particularly, foundations.

We would also bring in people who would -- the Court will recall that part of the -- you see, if you don't get me right then and there,

it's gone.

The Court will recall that one of the things that was not done in this very slow rush to judgment was to find out --

THE COURT: What very slow rush to judgment? The mediation process?

MR. BELLOWS: Yes. -- was to get alternatives to the arrangement that is proposed in this consent decree. And I think that, for example, and this has been a very large concern of mine, although it's not exclusively.

You've got a major asset here. You've got people on the board, particularly the named plaintiffs, who are used to disposing of assets of substantial size. I have to believe that neither of them, for that matter no one else, would really undertake to make the kind of a decision that had been presented here in the consent decree without considering alternatives.

Now, part of the problem, of course, is that if you start out with the Attorney General of the State of Illinois saying that this entity will remain here, that this will be its focus, that this is where the art will be displayed, that this

is where we're going to enter into an arrangement with another entity here in Chicago, I don't know that the board members would even appreciate the fact that it would be in the Foundation's best interest to consider alternatives from places outside of the state. And I think that that is something that the Court's entitled to consider when it determines the fairness of the result of this process.

THE COURT: Now, Mr. Bellows, I don't know how much of an opportunity you all had to discuss the history of the case with your predecessor counsel.

I know from their motion today that their client has stopped communicating with them, and I know that they did not know that you all were going into court on the motion today on Thursday until they read about it in the newspaper.

But we had in this case I would say at least half a dozen sessions with the Court and with counsel from each side to talk about whether or not this case was mediatable, and we had some pretty long sessions about that.

And one of the fiercest proponents for the mediation process, one of the most vociferous, "Let's go to mediation," was from your clients' counsel who wanted this case mediated.

Well, right from the very beginning the Attorney General made the statement that they were not going to be participating in any mediated agreement if it meant that this collection would be lost to the state of Illinois. That was up front from day one.

And there were many discussions about that. And that was the ground rule from their perspective pretty much when we -- not the ground rule, because I don't mean to say that it was a rule that they were setting, but that was their concern from the very beginning. And there was a full airing of that with the Court about whether or not there should be a mediation to begin with because there are unresolved legal issues here.

And the Attorney General may be right or may be wrong in its view of the law, and the plaintiffs may right or wrong. But there was a substantial concern about the cost of dragging

this litigation on for years, and there was a substantial concern about the stakes of not trying to settle this.

But everybody went into the process, as I understand it, with the understanding that the Attorney General was going to have to sign on at the end to this agreement, and in order to sign on to this agreement, there was going to have to be some kind of concession made about Illinois.

That was how it started. So when you say that things were not aired, we all had a number of discussions about where the Foundation was before this lawsuit started and about negotiations with a number of other institutions throughout the country and whether or not this was the right thing or the wrong thing to do to try and settle this case.

And a decision was made by all counsel on behalf of all parties that, yes, let's give this a chance. And this was pretty much the starting point. So I know you're shaking your head yes, but I don't understand. You're suggesting that this was something that got hammered in at the last minute. Well, this was

from the very beginning.

MR. BELLOWS: Pardon me for a moment, your Honor. The reason I was nodding is I thought that was the purpose of mediation. People start out with a certain position. The Attorney General started out with a position that some concession had to be made. I don't fault our predecessors in any way for agreeing to the mediation process. That's the first point of it, and the recognition that it is the process itself that is supposed to get people to change their positions. That's the first thing.

The second thing about it is I don't think that anyone really contemplated at the beginning of the process that it could be perverted to the -- and that was the word I used in our motion -- to the extent that it was. So I think that on two grounds -- yes, I appreciate the fact that our predecessors agreed to it. We probably would have for the same reasons that they did.

But to wind up in a position where you're saying, Well, gee, the Attorney General made its views clear at the beginning of the

process. Yes, that's why you have this kind of a process, to get them to change their position.

And during that process all kinds of things happen that were not really part of a normal mediation process. You don't have people going outside of this process to attempt to intimidate people. And it is by virtue of the conflicts that arose that there's some very, very severe problems with the validity of any agreement that would be reached.

But when I say, for example, that -- and only as an example -- that we would want to present the Court with evidence of alternatives of places from without the state, the Court may very well decide, after having heard that evidence or alternatively reading it by way of written submissions, that anyplace that -- if it turns out to be, for example, the Art Institute, that that might be a superior way of dealing with this.

A whole bunch of things, Judge, got started with bare allegations, with allegations that we believe have no basis in fact. That Dan Terra, for example, wanted his collection here when the evidence is just the opposite.

And so I think these are things that the Court should understand and appreciate. And if you say, well, gee, there are all these people that have signed on to the result of the mediation, I would say to you, Judge, you know, when you've got the Attorney General of the State of Illinois saying, This is what the law is, this is what the rules are, this is what's going to happen here, you get these participants -- I'm beginning to think, well, gee, you know, if that's where this is going to wind up, I mean if it's only going to -- if it's going to wind up where the Attorney General is going to be able to keep us here in Illinois so that we can't do other things, then that's what's going to -- that's the result. That's what's going to happen as a result of the mediation.

And if, in fact, that had been dispelled at the beginning, if the people who participated in the process understood that they did not have to capitulate on those points, if in fact those people did not have inherent conflicts that precluded them from taking a role in the decisional process, then, your Honor, the

non-majority directors would still have the numerical majority at this point.

THE COURT: Let me hear briefly from each side. Everyone is being very silent here.

MS. STONE: May I speak on behalf of the Foundation, your Honor?

THE COURT: Yes.

MS. STONE: The Foundation's position is today what it has always been in this case, which is that the board of directors should be able to run the affairs of the Foundation without undue influence from this Court, or quite frankly, from unhappy directors who happen to be in the minority. And that's as true today as it was at the start of the case.

It doesn't matter who the individuals are who may be in the minority. The fact is that a board of directors determines the face of an organization through the majority will.

And here you have a situation where there was a duly constituted, duly called board meeting. A quorum was present. There was vigorous discussion and a vote was held. And 6 to 2, the directors voted, exercising their free

will that this -- and in accordance with their fiduciary duties that this was in the best interests of the Foundation as they understood it.

Now, Mr. Bellows may disagree that it's in the best interests, Mrs. Terra may disagree, you may disagree, or I may disagree, your Honor. None of that is relevant. The question is whether or not the majority's will of this board will be respected.

And, your Honor, no one ducked the issue of whether or not there was coercion. That was an issue which had been discussed in federal court on Thursday and Friday morning in front of your Honor. And that matter was specifically addressed at the board meeting.

And I would like to read your Honor a portion, a very short portion, from the transcript of the board meeting. Now, this is a rough draft and we haven't had time to refine it, but this is our best understanding of what was said at the board meeting that was taped.

Corporate counsel for the Foundation, Mr. Heatwole, Mark Heatwole of Winston & Strawn, specifically advised all of the directors of their

need to vote their fiduciary duty.

And he stated: In light of the allegations that have been brought forward in federal court yesterday, to a certain extent I was not there, but I understand that that sort of the same substantive comments were made in the Cook County courts this morning, about the coercion that some of the members of this board may feel or may not feel from the action of the Attorney General.

I think it's important for each of you to, I think, indicate before you take this vote, that you are voting freely and that you are voting your fiduciary obligations to this board and this institution and without that pressure. And if anyone feels they can't do that, I don't think we should vote. But if you are voting freely and if you do not feel that compulsion, then I think you are free to vote.

And this is specifically what Stephanie Pace Marshall and Dr. Ted Stebbins said in response to that.

Dr. Marshall: Just in response to what you've just said, Mark, I have felt in the past

that despite the desire of some board members over the last year or so to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked my own path and I have always spoken with my own voice to represent the integrity of my own convictions. And I have done it throughout this arduous process, and I do so now with full knowledge of my fiduciary responsibilities.

It is true that the Attorney General's office has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation. This has not played a part in my decision-making with respect to my fiduciary responsibilities as a board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation.

And then Dr. Stebbins spoke. And it's interesting, your Honor, that in his comments he does criticize the tactics, as I believe he calls them, of the Attorney General. He specifically criticizes the Attorney General, but he says that

that is not what is influencing his vote. And he talks about his history throughout this process, about how he has been more of a centrist or someone who is exploring different options. He talks about his history on the board.

I came to the board. I knew Dan Terra. I came to the board at the request of Jim Collins and Judith Terra. I've served as chair of the collections committee and I think I served effectively. And I brought some wonderful new paintings, helped to bring some wonderful new paintings to the Foundation collection.

I've done this without any iota of a conflict of interest. I've always felt free to form my own judgments. And either last August or early September when Paul Tucker first told me about his enthusiasm for the building in Washington and wanting to move there, I disagreed. I long argued to explore a variety of stand-alone options in Chicago. I was willing to consider as part of the strategic planning going elsewhere, but I've always been a defender of Chicago.

And then he goes on: I abhor the threatening tactics of the Attorney General, but I

am voting my own conscience and for what I believe is the best interest of the Foundation for its future as an independent, viable force in Chicago and in France for the promulgation of American art.

So, your Honor, these particular directors clearly and unequivocally stated that they believed they were voting in the best interests of the Foundation and in accordance with their fiduciary duties as they understood it.

I think the board has spoken. It was a 6 to 2 vote, and I think the board process should be respected.

THE COURT: I have one question. I'm going to go on and let the plaintiffs speak in just a moment.

The consent decree which I just received, I have read again during the breaks here. This, as I read it -- and tell me if I'm wrong -- has a new board, once it's elected, essentially negotiating to partner with another institution in Chicago. It doesn't require it, does it?

MS. STONE: That's correct, your Honor.

THE COURT: So if something can't be worked out, the Terra would be its own separate museum.

MS. STONE: That's absolutely an option for the board.

THE COURT: And there's absolutely nothing in here that restricts the Foundation's ability to continue to run its programs, activities, and operations in Giverny, France?

MS. STONE: That's particularly reserved for the board. The board's ability and freedom to conduct its activities, operations, and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

THE COURT: It can also lend its collection, as it always had, to other museums throughout the United States and continue its educational efforts in other places of the United States.

MS. STONE: That's correct, your Honor.

THE COURT: The only thing that this really is making a difference, as I understand it, is the Foundation can't close up shop and move outside of Illinois permanently. I mean --

MS. STONE: Right. I think --

THE COURT: -- there's a number of other changes, new board members --

MS. STONE: -- paragraph 5 of the consent judgment and order probably identifies what limitations may exist now with respect to the Foundation's activities for a 50-year period.

THE COURT: For a 50-year period.

MS. BELLOWS: And self-governing, your Honor. Which is one of the things that we would speak to when everyone else has a chance to be heard.

THE COURT: Okay. And this document is the board of the Terra Foundation amending its own bylaws to put some restrictions on its activities that Dan Terra didn't put in there when he set it up.

MS. STONE: That's correct, your Honor.

THE COURT: And any board can do that if it chooses to do that, can it not?

MS. STONE: That's correct, your Honor.

THE COURT: Okay. Let me hear from the plaintiffs and the need for -- I really want you also to address whether you have a problem with anything being filed with the clerk of the court at this juncture. I can tell you that what I'm

going to need to do is to read this very carefully. I want the transcript of the board meeting and --

MR. CARLSON: We'll be happy to give you the resolution that was passed.

THE COURT: Right. -- and the resolution, the amended bylaws, whatever else that you have from Thursday. But let me hear from Plaintiff. Is it Mr. Quinlan I'm looking at?

MR. QUINLAN: Yes, your Honor. Well, first of all, the issue here is their motion for leave to file objections to this agreement or consent decree.

And the problem is that what you really have here is an agreement. I don't think there's any question -- and I don't even think that the defendant directors raise the issue whether there's agreement or the terms of the agreement.

What they tell you is that they don't like the agreement and they don't like the terms of the agreement. But we have a 6 to 2 vote, which is here by the attorneys representing the Foundation who attest to the validity of that. We have the terms which are in front of your Honor;

there's no objection to that.

And the problem is that what they present is really a question that they would like to try in front of this Court, which they had the opportunity to try; namely, what was the intent of Mr. Terra and what was the law on these issues, et cetera.

And that's the reason we went into mediation is the parties agreed to set those things aside, put them off the table, and get together to see if we couldn't resolve this dispute in a way that didn't necessarily require addressing what were some concerns and issues on both sides.

And what we had here was an agreement to mediate by all the parties, including the defendant directors. Counsel now would like to come in and say, Let's take a look at what took place. Let's go out and take depositions. Let's depose the people that were there, including the mediator.

As your Honor knows, that would, in fact, destroy and undercut the ability to have any mediation in any case again, which they agreed to.

This was a mediated process, and they were agreeing in that mediation that nothing in the mediation would be used against anybody involved in this, including anything that was ever said in there.

So the mediation statements and the reason for your order barring disclosure of this was that these couldn't be used in court or in any other proceeding against anybody. Again, a commonplace type of procedure in mediation because no one is going to get into the mediation process if, in fact, this is going to be something to be used against them. The same thing as a settlement. This is a settlement process.

Your Honor herself in a settlement process in any case would say, Ladies and gentlemen, you know that nothing said here is going to be anything that can be used one way or the other. People will make statements, compromise their positions, make offers, make proposals that can't be used later on to show that they were willing to at least agree to that or agree to something else, again, because it would never work.

The public policy of the state, the public policy of the United States, the public policy of the United States expressed in the Arbitration Act are that these things are to be encouraged, not discouraged. That's exactly what they would have here. If they want to complain about this agreement, and if they want to complain about this process, they can say it was fraud, they can say it was duress. They can say those things, but they need evidence of proof that's clear and convincing.

There is nothing proffered anywhere here that even offers a scintilla of evidence that nobody agreed to this or it wasn't properly agreed to. In fact, the people that they allege that were somehow coerced are not here. They were not in the federal court. They don't file an affidavit. The very people who supposedly were intimidated or hurt not only do not file an affidavit or appear; in fact, they make a statement that their vote has nothing to do with it. That they were not coerced into making this vote. They make their vote because it's a hard question. And we think on a better analysis here,

it's the right result. And that's what they said. The federal district court judge said, Look, there's nothing unlawful about that.

What we have as a situation is they complain about the lawful activity of the Attorney General and they complain about the lawful activity of two directors that are both lawful. And to somehow say that that is unlawful has in no way been demonstrated. And it has not.

It is indicated here clearly what we have is a party who has agreed because they didn't prevail. Their views didn't win out. But it was one of those compromise decisions, and they were subject to the same requirements as everybody else. They were part of the board, and the board chose to do this.

THE COURT: Are you saying that you're objecting to them filing a motion?

MR. QUINLAN: I see no basis for it, your Honor. There is no proper tactic here. What they're asking in that motion is to come forward with evidence that is totally irrelevant to whether or not there was an agreement or whether or not the terms were agreed to. That's what it's

about.

And if they want to say this was a coerced type of thing, it requires clear and convincing evidence. And that's after they admit there's an agreement; you must have to set it aside. There is no evidence of that at all. At all. All they have is affidavits of third parties, affidavits of an individual, Mr. Tucker, who himself can't testify to what these people feel or don't feel.

He said, I think they were coerced. They just told us they weren't. And in fact the federal court couldn't see any basis to this. Nothing's new. They filed the same things in the federal court. So there's nothing here in front of your Honor to warrant any kind of allowing them to file these matters or to be heard.

These are things that they are just dissatisfied with. Well, they're dissatisfied with a lot of things. Frankly, we're dissatisfied with a lot of things.

THE COURT: Do you believe that it would be different if they came forward with a motion that was seeking to have the Court not approve the

settlement because it was not a settlement, not agreed to, something wrong?

MR. QUINLAN: They showed that it had not been agreed or not settled to, and there was substantial evidence -- that is what the Illinois law requires is substantial evidence. It might require a hearing. But there's no substantial evidence of this. In fact, it's admitted.

THE COURT: What about an argument that perhaps there's something illegal about this settlement? I know there were some statements made about that the other day, but I don't really see that necessarily here in terms of something -- cases that are cited that says that there's some provision of this agreement that is contrary to Illinois law.

MR. QUINLAN: Well, if you notice in their pleading that they have filed -- actually it's a pleading, there's no complaint on file. There's actually nothing in front of your Honor other than a request to file a motion. So that there's no request to file a pleading. There's nothing that brings this case in front of the Court other than their motion.

And, your Honor, if the illegality of this -- I don't see any evidence of anything that's illegal. There's nothing here that radically changes the bylaws and says anything that's dramatic. We can never do "X" or we can never do "Y," or we immediately agree that we changed the law, the body of the law of Illinois, or whatever it might be. They're organized under the laws of the State of Illinois.

As any corporation, the laws of the state in which you are organized under are the laws that apply. They are organized under this state, and they are venued here in Illinois. Can they change it? Well, they have to look to the law of Illinois. That's where they chose to come and where they chose to do it. But they make no allegations in any way that this is wrong, illegal, or we're doing anything improper here in this particular consent decree.

All we're doing is articulating some things. That is the extent of the -- to change the number of directors, to agree to do something for a period of time. That does not in any way bind them to anything else. They have voluntarily

agreed to do certain things. Other parties have voluntarily agreed not to do things which enabled us to go forward. So there is nothing here in terms of the law that is set forward. There's nothing that would contest that. There's nothing illegal. And if they did that, they'd have to do it by some motion as set forth, some basis for an illegal act of the body.

But this was mediation. There is nothing illegal about mediation, there is nothing illegal about the topics, there is nothing illegal about what was being done. As counsel for the Foundation pointed out, this is what's done all the time. This is a typical type of thing a board would consider. It's a typical type of thing going forward that you'd look at. A decree, a mediation, a resolution of this. Boards across the world consider these type of things all the time.

And for counsel to come in here and suggest at the eleventh hour that there is something strange that's going on here and to suggest deposing the mediator, I think is just outlandish, your Honor. There is absolutely no

basis for that. You know, the whole point here, they talk about stuff that's outside the state. We can take all of these depositions of people around the world. I don't know what they can add. I really don't. And I don't see how they can add anything to it, other than to say they have opinions about what might happen, et cetera.

I also would ask that even the documents that have been filed by architects and others and real estate brokers, all they talk about is what somebody might have wanted to do about renting property, of using property, et cetera.

As we all know from anything to dealing with the states, a lot of people met and intended to do a lot of things that they never got around to doing. And it didn't happen. Nobody changed the location of the Foundation from Illinois. Nobody changed the bylaws, nobody moved.

It was a question of what everybody was thinking. Everybody was looking for a better place and a better forum for the Terra Museum. And they had talked about that before, which all the parties admit. Can we find a better place in

Chicago? How can we move this? How can we move around to get this out and get a better exposure?

And these are the things that were mediated, and these were the things that were resolved. So to suggest now that we could come in and just raise it at the eleventh hour -- they say they never knew about the intent of the Attorney General. They never realized this is what he wanted.

They knew from the very beginning, your Honor. They knew throughout this. These were things that if they wanted to raise to you, if they wanted to object, they could have done so. They agreed and they entered into the order to fully participate in this mediation and never withdrew that until they came in at the eleventh hour and attempted to file these pleadings in federal court.

THE COURT: No, they gave directions to their counsel to stop participating in meetings.

MR. QUINLAN: On the 4th of June. So we're talking about something that never took place at this time. And of course we have contrary affidavits that could attest to just the contrary

intent. That was the issue that would need to be tried and need to be resolved. But that wasn't really part of the mediation. The approach of mediation is to remove the issues of which people are in contest about and to seek those things that you are in agreement about. And that's how you resolve it.

THE COURT: Mr. Quinlan, have you ever heard of a situation where there's been a court-ordered mediation, and then everybody comes in and puts the mediator on the stand and has all the mediation completely aired? Have you all been able to find any cases where that's been done?

MR. QUINLAN: No, your Honor.

THE COURT: How about you all? Have you ever been able to --

MR. BELLOWS: I haven't researched it, your Honor, but I would say in that regard that certainly the Court's entitled to go beyond -- behind any settlement to determine whether it was obtained by fraud.

If the Court feels that Mr. Hilliard is, by virtue of his appointment, sacrosanct in these proceedings -- I'm not saying that in the

pejorative -- then I could understand that. I could even sympathize with it. But that does not mean in and of itself that the Court's not entitled to some of the other information that can be obtained from this hearing. I've heard all kinds of things, your Honor. Well, you know, there's really nothing fundamentally changed here. Nothing fundamentally changed here.

THE COURT: Well, there's a lot that's changed. There is no issue that there is a lot that has changed. One of the most significant things and, quite frankly, one of the things that surprised me the most is this board agreed that the entire board was going to resign. When I read that, I was very surprised. But that's what was decided and voted on by the majority. I didn't expect that to come out of this.

MR. BELLOWS: Well, I'd like to speak to whether it was voted on by the majority. First of all, as the Court has heard from Mr. Hilliard, at the very beginning of this session today, Mr. Hilliard said the vote was taken on June 19. It was ratified on June 29th. That's what Mr. Hilliard said.

THE COURT: Well, perhaps it wasn't --

MR. BELLOWS: I don't know whether you agree with it or don't agree with it, but what I'm saying is that on June the 19th it was a 6 to 5 vote.

THE COURT: Well, it wasn't a vote of the board because there was no board meeting. It was a mediation session on June 19th. The board did not meet till Friday.

MR. BELLOWS: Your Honor, I think, you know, that Mr. Hilliard was certainly capable of articulating what it was. His position was that it was ratified. I don't really care, your Honor, if it was unanimous.

I still think, your Honor, notwithstanding the statement of counsel, that it doesn't matter what the Court believes. That's insane. This Court is here to determine questions of this nature. Is this corporation acting pursuant to its charter, to its bylaws, and just going out and changing the charter and the bylaws? If that action of changing the charter and the bylaws is inappropriate, if the vote could change the charter and the bylaws it participated in by

people who should not have been voting, should not have been voting. And to sit here and say, I haven't been coerced.

But, you know, the interesting thing about it, Judge, is that these statements were made in the context of all this pressure has been applied to me, but I'm voting my conscience.

That's the very point of this thing. It doesn't make any difference whether people felt that they were being coerced; they had something to lose by not making that vote. And what they had to lose, your Honor, was something that didn't have anything to do with the business of the Foundation. It was personal, their personal exposure. And as a result of that, your Honor, they should not have participated in the vote.

THE COURT: Who should not have participated?

MR. BELLOWS: I'm talking about the two people who made the statement that they weren't being coerced even though -- it's semicolon -- however, I think that what the Attorney General has done as far as attempting to coerce me, I think is terrible. I'm voting this way of my own conscience but I think it's terrible that he

attempted to coerce me.

I think that the point of it, Judge, is they should not have participated in that vote by virtue of the fact that they had an inherent conflict between being threatened personally and participating in the vote on the Foundation.

Counsel has also indicated we're going to be taking depositions around the world. I said just the opposite. That the people from around the world are people whose affidavits we can get fully and freely.

But with regard to the evidence I think that the Court should hear is the same evidence that it would hear in determining whether a settlement agreement had been procured by inappropriate means, by coercion, by fraud, by any of those things.

And I think that the Court has the responsibility, Judge, notwithstanding the fact that there has been this mediation process, to objectively review the result, notwithstanding the vote.

THE COURT: Are you suggesting that I interview those two board members to find out

whether or not they were coerced?

MR. BELLOWS: That's not the issue.

THE COURT: Have you even spoken to either of them to -- I have no affidavits from them. I have absolutely nothing to suggest --

MS. BELLOWS: Your Honor, if I may. We see this -- and I will answer your questions directly. But we see this in two large categories at least. We see the acts that led up to the mediation process. I should say three categories; the acts which led to the mediation process to which all agreed, the decision to mediate.

But those acts involved misrepresentations to this Court which led this Court to grant a motion for intervention on the Attorney General's behalf to begin with. And those misrepresentations, it is our position, involved the intent of Dan Terra to keep the museum in Illinois.

But for that representation and the decision of this Court to give the Attorney General access to the mediation process, not so much to protect the citizens of Illinois from the -- not so much to assure the citizens of

Illinois the enforcement of the laws and the regulations and the proper conduct of foundations, which the citizens of Illinois are entitled to, but more to the point to enforce an intent which was not proven by any evidentiary proceeding before your Honor.

So we have the pre-mediation. We have what happened during the mediation, and counsel -- Mr. Quinlan -- has -- and we strongly agree that evidence and proof are what are needed in this instance.

The acts which took place to which Dr. Stebbins referred, the threatening -- these are not my words, counsel read them -- threatening tactics of the Attorney General, the only attorney seated throughout that mediation process. When somebody states that in the same sentence that they indicate the incredible importance of the preservation of their credibility, and in the next sentence says, And I abhor the threatening tactics, but I agree of my own free will, I believe it is the Court's duty to question what that meant.

Now, you could bring Dr. Stebbins and

Dr. Marshall into this court and question them under oath, but it is the essence of intimidation; the better the intimidation, the less this Court will hear that they voted for anything other than by their own free will. The more successful the intimidator, the less likely the intimidatee to come forward and say, You're right, your Honor, I was intimidated. I felt I would lose 90 percent of my funding which I receive from the State of Illinois -- in Dr. Stebbins' position -- and perhaps be subject to continued inquiry by the Attorney General, which Dr. Marshall said right in the same sentence, probably a semicolon.

Yes, of my own free will, but I would like to acknowledge that the Attorney General has come into my academy and is in the process of making inquiries. The very same office of the Attorney General that is seated at the mediation, your Honor.

Those to me are the beginnings of pretty substantial evidence and proof that there is something wrong with the free discussion that should be taking place in the mediation.

And then I have my third category if

you'll permit me, your Honor. And that third category is, is the agreement that was reached something that the Court should in fact sign, agree to, consent to? And for a number of reasons the answer is no.

Let's start with a simple one, the power of negotiation. One of the provisions that your Honor asked Mr. Quinlan and Ms. Stone about earlier was, is it a fact that as part of this order that I just -- I saw a few minutes ago, so I'm absorbing it as we go.

But is it a fact that one of the provisions of this order is that the Terra Foundation will be asked to negotiate with some -- perhaps somebody could help me with the exact wording -- but some entity as to the future of the collection?

Now, the only entity in this city, the one that we regard very, very highly, but the only entity that I know of, your Honor, that would be a likely candidate to accept this collection, would be the Art Institute of Chicago. Putting aside for the moment that our esteemed mediator is in fact a well-known lover and board member committed

to the Art Institute -- and when this came up, frankly, I have to say might well have considered when the word "art" came slashed with "institute" that perhaps as far as the appearance of a fair and open discussion might have suggested that another mediator come forward.

THE COURT: This was also very fully discussed with all of the parties before the mediator was selected, and everybody agreed, including Mr. Crowe. And no mediator was even considered unless we had agreement. And Mr. Hilliard's association with the Art Institute was disclosed from day one.

MS. BELLOWS: Absolutely, your Honor. I think that Mr. Hilliard's resume is well known to everyone in the city of Chicago and his lack of bias generally accepted. However, combine that with the tactics of the Attorney General to which Mr. Hilliard could never have assumed.

I don't think that Mr. Hilliard would ever have anticipated that right smack dab toward the end of his mediation process would the Attorney General choose that time to file an inquiry directed at one of the participants in the

mediation, specifically Dr. Marshall.

What curious timing that at the end of May, as the mediation is coming to a close, the people who have the control over the timing of that inquiry would choose to file an inquiry as opposed to two or three weeks later.

Putting that aside -- not totally aside -- but moving back to the power of negotiation, how difficult it is, what common sense it is, to understand that no entity has the ability to negotiate if there is only one side negotiating. If there is nothing -- no other entity in the city of Chicago able to accept this collection -- and they are being directed only to negotiate with an art entity for partnership in the city of Chicago, limited to that --

THE COURT: I don't read that the Art Institute is the only entity. There were lots of discussions in this mediation process. You're just assuming the Art Institute.

MS. BELLOWS: No, I am assuming the Art Institute because of the phrasing of the consent judgment, your Honor.

THE COURT: Which paragraph?

MS. BELLOWS: If somebody could help me find it, I would.

MR. CARLSON: It's paragraph 11, your Honor, right at the end. Not to interrupt counsel in her argument, but the words there are "Chicago metropolitan area." I was involved in the drafting of the order, and it was intended to allow the corporation to talk with Northwestern University. I don't know how far the Chicago metropolitan area extends, but it was designed to be much broader than just the city of Chicago.

MS. BELLOWS: To that point, your Honor, the only entity of the caliber that would accept this collection in the metropolitan area of the city of Chicago is undeniably the Art Institute.

If I am incorrect, then again I submit that evidence and proof would be a discussion for what other entities the Terra Foundation's board would have the ability to negotiate freely so that they could determine the simple items, such as what commitment will an institution make to the Terra collection when it arrives. In what way will it be displayed and as a whole or piecemeal? What kind of money will they spend to ensure that

it is properly marketed and that it is properly -- that the public not only in the city of Chicago and state of Illinois, but according to Dan Terra's intent, the global public and certainly the national public would have the opportunity.

The type of institute that if your Honor probably in her discussions relating to would be the Corcoran Museum or the National Gallery or the Philadelphia Art Museum. There are a number of museums of the caliber of the Art Institute, those in Chicago. And I would say none compare. Nonetheless, there was no beauty contest.

And this agreement forecloses the free and powerful negotiation of the kind of agreement that would be undeniably part of any situation where you would put a collection out to bid, so to speak. It is to me so much a matter of common sense that that small sentence should be read very carefully by this Court as it recognizes whether or not this Court should sign this agreement.

Let me speak to self-governance. I cannot say at this moment what the composition of the major boards of significant foundations are in

the Chicago area, much less the United States at this moment. Evidence and proof will show that.

I suspect, your Honor, that it will be hard to show foundations of this character who are precluded from choosing -- or who are precluded from choosing board members who are not -- a majority of whom are not members of the citizens of the state of Illinois.

I would submit, your Honor, though without evidence today, and that's one of the reasons we would like to go forward with this hearing, that the Field Museum, that the Art Institute itself perhaps, that the Museum of Contemporary Art, and the Science and Industry Museum, and the Aquarium do not have in their bylaws a governance position where they are required to have a majority of their members from the State of Illinois.

THE COURT: Is there anything illegal about that?

MS. BELLOWS: Is it illegal? It is certainly overreaching, and it might -- I would hope that counsel for the Foundation wouldn't draft something that they thought was illegal.

But the question is, if the Attorney General of the state of Illinois now comes into a private foundation without proof of wrongdoing in any way and takes over the governance of the foundation to the extent that they're able to negotiate an agreement which names the parties on the board, requires the Attorney General to have approval as to where the Attorney General's office -- not the board, the board has given up its right to self-governance -- to require the Attorney General to say yea or nay as to whether this organization can stay in the state of Illinois in the future.

MS. STONE: Your Honor, may I respond very briefly?

THE COURT: Yes.

MS. STONE: I have four points. First, let me correct a misimpression about my earlier statement. Of course, what the Court thinks about the validity of the settlement --

THE COURT: Oh, I didn't take offense at that at all. But --

MS. STONE: My point is an important --

THE COURT: -- I agree with --

MS. STONE: -- board should run the organization.

THE COURT: Right. As long as they're doing it properly.

MS. STONE: Right. And the point is that your Honor cannot substitute her business judgment; none of us can substitute our business judgment or the business judgment of the directors of the Foundation. That's point one, and that was all I intended, your Honor.

Number two, as your Honor pointed out, a corporation can through the majority of its directors, decide to actually limit its powers by voting amendments to its bylaws. And we do believe, your Honor, that what the board has agreed to is indeed a further restriction of its powers far beyond what existed when this case was first filed.

The Foundation has never agreed with the very crabbed and limited and, quite frankly, far-fetched interpretation that the plaintiffs in the AG had of the bylaws that were in existence at the time this case was filed.

At the time this case was filed, this

Foundation was free to operate outside of Illinois. However, the board of directors, exercising its business judgment, has agreed to this agreement, this settlement, that does contemplate certain restrictions for 50 years.

The third point, your Honor -- and included within that restriction is also the residency requirement. Again, Ms. Bellows points out that this is somewhat unusual. It may be, your Honor, but it is what the board of directors exercising their business judgment has decided to do.

The third point, your Honor, is that the Court should not, and counsel in their zeal should not, impose further restrictions upon the board and the board has agreed. The board has not agreed to partner with the Art Institute. That should be very clear.

All the board has done is to set up a strategic planning committee with certain directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone

museum in Chicago. There is no guarantee it's going to be the Art Institute, there's no guarantee it's going to be with anyone. And that should be abundantly clear to this Court, and that should be understood by everyone. That was the deal that was struck. An attempt to arrange a forced marriage with the Art Institute was not the end result of the mediation process.

And then the final point, your Honor, has to do with the comments of Dr. Marshall and Dr. Stebbins at the board meeting. I believe it was Ms. Bellows, and perhaps Mr. Bellows as well, who made the point that you can't really trust what these directors are saying because they are so intimidated that they're not going to 'fess up to the fact that they're being coerced.

I think that, your Honor, you need to look at the totality of what they said. Dr. Marshall readily admitted to the fact-finding investigation, and Dr. Stebbins took specific pointed issue with the tactics -- his words -- used by the Attorney General.

I think that sort of vigorous attack on the Attorney General shows that, in fact, he was

not cowed, he was not silenced. He felt that he could indeed express his free will and point out that he did not appreciate the way the Attorney General has conducted himself during this litigation and during the mediation, but that nevertheless, for all of the reasons he articulated, for all the reasons he thought it was important to remain in Chicago, he thought this was the best outcome for the Foundation.

Again, it's not what I think, it's not what anyone else thinks. It's what Dr. Stebbins, Dr. Marshall, and the four other people who voted for this think. We had a vote, it was 6 to 2. This is what the board wants to do.

MR. TODD: Your Honor --

THE COURT: One second. Very briefly, I'm just about to wrap this up. But I realize I haven't heard from the Attorney General, but I'm even going to hold off on doing that unless Mr. Perkins strongly objects.

But go ahead.

MR. TODD: Your Honor, may I just reply to the issue of coercion and the fact that Dr. Stebbins and Dr. Marshall have both apparently

said that they were not coerced; this was of their free will.

It is rare, indeed exceedingly rare, that one who has been the victim of coercion, particularly coercion by a state and a state prosecutor then says, after having been victimized in that sense and their free will been taken away from them and they're both corrupted and deluded, then to come in and say, And by the way, effectively I didn't have the moral courage to stand up to the pressures that brought to bear on me by the Attorney General of the State of Illinois.

You, I submit, are not going to hear in either sworn testimony or through affidavits or declarations Dr. Stebbins or Dr. Marshall saying that. That brings us to the fact that that is a fact issue for this Court, as are many issues that we have raised in the pleadings, fact issues for the Court.

For example, the Attorney General injected himself into this case in what I submit was merely a misrepresentation to the Court that, namely, that Dan Terra wanted this Foundation to

remain here in Chicago or in Illinois. The overwhelming evidence is to the contrary.

Let me just show you, hand up to the Court, this is a change of address that Dan Terra --

THE COURT: I've seen that document, yes.

MR. TODD: Well, I submit to you, your Honor, that Mr. Quinlan argues that there's no evidence on these fact issues. There is already substantial evidence on each one of the fact issues on coercion, the fact that this vote that occurred last Friday was, as a matter of law, under Illinois law, a nullity.

It was unlawful, and therefore the purported change in the bylaws is also unlawful. It requires six people on that board to vote in favor of a change in bylaws, i.e. the settlement.

That didn't happen if Dr. Marshall and Dr. Stebbins were coerced. And that's the evidence that we merely want an opportunity to present to the Court.

THE COURT: And how are you going to develop that further than what you have? You have the two individuals who have said, We are not coerced.

MR. BELLOWS: It doesn't matter, Judge.

THE COURT: Well, what else are you going to do? What are you planning to do?

MR. BELLOWS: I think it's important for the Court to understand what kind of power was brought to bear against them, okay? And then the Court will determine whether there was a conflict. Whether the person acknowledges it, understands it, appreciates what happened, there is a purpose that is contrary --

THE COURT: But how are you going to present --

MR. BELLOWS: -- to the purpose of the Foundation. A fiduciary cannot serve the Foundation if he or she has a personal interest that is 180 degrees opposed to their responsibility as a fiduciary. Counsel --

THE COURT: I understand that. I'm trying to figure out. You've got two people saying, We were not coerced. Most of the affidavits, declarations, things you've given me, have nothing to do with that issue; they have to do with Dan Terra's intent.

I'm talking about the coercion issue.

Certainly deposing a mediator isn't going to get you anything on the coercion issue. So what are you talking about as far as proceeding on coercion?

MR. TODD: For one thing, we have heard from Dr. Marshall and Dr. Stebbins -- apparently, we only have it secondhand -- of what their position was at the board meeting. We haven't gotten sworn testimony and/or a declaration from them that, Yes, indeed, that is my position. That's what happened.

We also haven't examined the circumstances surrounding how they purportedly came from a position of opposing such a settlement which had such a draconian difference in the intent of Dan Terra to one of, Okay, lock it up in Illinois, we're switching gears.

Okay. Take all the board members that are here now and change them completely and make sure that the Attorney General -- make sure that only people -- that a majority are from the state of Illinois. That I submit to you, the force of the common sense of the difference between the original position and their position last Friday

despite the fact that they say, Well, the Attorney General's threats to me, which I abhor, didn't have anything to do with it, is a fact issue for this Court. And the circumstances around the change have to be aired and have to be aired publicly in this proceeding.

Secondly, we have proof or we develop proof about what the Attorney General did and when he did it and why he did it. And the proof before the Court right now is, that yes, mediation originally was agreed to, but it became clear to the Attorney General during that mediation that he may not or did not have the votes to force through a lockup in Illinois. And then, and only then, do we see the intimidation that was brought to bear against Dr. Stebbins and Dr. Marshall.

And then, again, as I say, a change in, I would submit, heart and mind, at least objectively -- but I submit it was only a change in what these people did, not in their hearts, and it was not a change in their mind; that was of their own free will. And that's what makes this vote unlawful.

MS. BELLOWS: On what basis, for instance,

did the Attorney General commence its inquiry against the Academy?

THE COURT: Has anybody spoken to the Attorney General? Have you all even talked to Mr. Perkins about any of this?

MS. BELLOWS: Mr. Perkins, remember, was in Canada last week.

THE COURT: Well, he's back now, and you've been making an awful lot of very serious allegations. And I don't know whether you've even -- as far as I know, and I know nothing about this -- they have been contemplating some action of what -- against this Academy or thinking about looking into whatever they were looking into -- and I don't know even know what they've done -- for quite sometime.

You know, you've come into court and you've filed a number of things, and they sound very, very dramatic. But I don't see anything here supported by affidavit. I don't see anything here supportive of any substance. You've got lots of affidavits about Dan Terra's intent. That's how this whole lawsuit started out.

And I rejected James Terra from coming

into this case and said he couldn't because we were going to go to mediation. And I was going to let him come in in the event mediation didn't work out, and we were going to talk about Dan Terra's intent. Maybe.

And there were some other issues in this case, much, much -- equally as significant as Mr. Terra's intent. And that was the plaintiff and the Attorney General's verified pleadings about waste and mismanagement here. Those issues were very much the subject of the mediation also. So there were -- everything ended up going in and being talked about in this mediation --

MR. BELLOWS: But not business judgment, your Honor. Ms. Stone is sitting there saying the board was exercising its business judgment. Your Honor, of all of the numbered paragraphs, fourteen numbered paragraphs, with the exception of the jurisdictional statement, what business judgment, what did the Terra Foundation get for the agreement for a 50-year lockup? What did it get for agreeing that the Foundation conduct its affairs in accordance with the wishes of the Attorney General? What did it get for at least

50 years that the Foundation shall maintain and exhibit the Terra collection of American art either by itself or through partnerships with institutions in the Chicago area?

THE COURT: Mr. Bellows, I don't want to speak right now to the Foundation's -- the board members who voted, but it seems obvious to me that what this foundation may get from an approval of this mediation is the ability to move on and the ability to keep an important collection together to avoid what is starting out very slowly, but would go years before this litigation would be done.

There are issues right now of this board not even being able to meet, not even being able to have an executive committee meeting, not even being able to go on with its business. There's a lot that it would have gotten.

But this is what I need to do based on the pleadings that I have right now. And I realize that I haven't even asked the Attorney General to speak.

So I don't think anybody's spoken to you, and I don't think it's fair for you to have

to defend yourself without them even having spoken to you about this first.

I need a motion to approve the consent decree because I don't have that. I have a one-page letter from the mediator, and I have a proposed consent decree. And attached to that motion I need the copies of whatever the bylaw changes were and the transcript.

And I'm going to allow any party to this case to file a written objection supported by affidavits as to why the consent decree should not be approved. However, the issues are coercion and illegality and those issues only.

I do not want to hear anything more about intent of the original founder or anything about any of these affidavits from people all over the world and change of address and all of that. That is not before the Court on this motion to approve the consent decree, so the defendants do not have leave to file these objections.

So this motion for leave to file these objections is going to be denied. Let's get the proposed consent decree. Let's get the attachments to it, whatever is to be read. When

you get those, by all means, Mr. Perkins isn't under any kind of a gag order.

Are you willing to speak to counsel for the defendants about this?

MR. PERKINS: I'll be glad to, Judge.

MS. BELLOWS: About the investigation that's taking place against himself?

MR. PERKINS: To the extent I can, Judge, I'll be glad to share some information. However, that's a private person who has a right to be protected.

THE COURT: I understand.

MR. PERKINS: And these people perhaps have no basis or they obviously have no knowledge about what's going on. So we'll get to that. But I'll be glad to answer some questions.

THE COURT: Okay. And then the other thing that I just want to make sure. I want to make it absolutely clear, we are not at any time in this proceeding deposing the mediator in this case.

And as of right now, the documents that were granted leave to be filed under seal on Friday, they're going to stay that way for now. You don't have leave to file these documents today

because let's get their motion. I think it would be very, very helpful before you file a motion objecting to what went on Friday, you really knew what went on Friday. So why don't you get the transcript because I assume that hasn't been made available to any one of --

MS. STONE: No, it's not. We only have a very rough draft, your Honor.

MR. GARMENT: We have heard the tape recording of it. I mean, it was recorded.

Your Honor, may I just say this. The Attorney General said he does not want to get into the matter of something involving a private person. I think your Honor is right, that issues such as Dan Terra's intent are secondary to what is the central issue in this case. And that is whether or not crucial votes were obtained by the improper intervention by the Attorney General.

We are entitled to examine the Attorney General representative and the persons who were involved in the initiation under these more than coincidental circumstances in the switch of the crucial votes that turned this Foundation from one level of management to another. With all of its

implications to fasten the property here in the state of Illinois, make no suggestion that it would not be properly administered in the state of Illinois. But it is a taking of property of a very serious order involving acts, undeniable acts on the part of the Attorney General's Office at the time that the question of the exercise of discretion was being considered by the crucial parties --

THE COURT: I'm sorry, counsel, you're saying "undeniable act." We haven't even let him talk.

MR. GARMENT: Your Honor, may I just finish? We are entitled as a matter of law to take testimony to have people testify about the circumstances in which this dramatic shift, which spells the extinction of a long-standing foundation, which destroys its ability to operate freely, which sends a message to the world that if you bring a foundation to Illinois, you are subject to the intervention of the Attorney General to fasten those assets in the state of Illinois on pretext. And so far it's all pretext.

There has not been an evidentiary hearing with respect to the central issues since

the beginning of this case nor has the public through the press been empowered to make its own judgments about what is going on in this case.

THE COURT: This entire record with the exception of the mediation has been fully open to the press and --

MR. GARMENT: But the mediation is the heart of the problem. The mediation has been infected by the actions of the Attorney General. That is our allegation, and we are entitled to have a day in court to prove it.

THE COURT: And I'm not saying that you may or you may not have a day in court. I'm saying you need to have a verified pleading directed to these issues before the Court. And once I see a verified pleading directed to the issues of intimidation from the Attorney General, it will determine whether or not there needs to be some additional discovery regarding those allegations.

But that's not this document. I don't have any affidavits in this document. I don't have anything from anybody that suggests that the Attorney General has exercised pressure. I have a hearsay affidavit that was attached or a

declaration that was attached in a federal court paper from the defendant Tucker. And I think that's essentially it.

MR. GARMENT: We may ask the Attorney General who is here whether or not these proceedings were started and that draft complaint circulated under the circumstances --

MR. QUINLAN: Your Honor --

MR. GARMENT: -- contained in our pleading.

MR. QUINLAN: Your Honor, we object. This maligning of the Attorney General --

THE COURT: Okay. Rather than ask him --

MR. QUINLAN: -- without any basis whatsoever is really outlandish. And, first of --

THE COURT: Slow down.

MR. QUINLAN: -- all, those documents --

THE COURT: I said slow down. She didn't get that and you want this in the transcript. Slow down.

MR. QUINLAN: The documents that he's talking about and the contentions he's talking about were found to be lawful acts by the federal court and also were the changing of the vote found to be lawful acts.

MR. GARMENT: Not right.

MR. QUINLAN: I don't know what the burden of proof is elsewhere, your Honor, but the burden of proof here is on Mr. Garment, not on the Attorney General to disavow something. We're talking about a McCarthy type of proceeding here. We come and make an accusation and the Attorney General is supposed to now come up and disavow himself of doing anything wrong in his life.

THE COURT: The Attorney -- just one second --

MR. GARMENT: It is not an accusation. Your Honor, it is --

THE COURT: Counsel. The Attorney General --

MR. GARMENT: -- not an accusation. It is an admission on the part of the Attorney General --

THE COURT: You can stop the transcript if you want. She's not taking any of that down.

There have been some very serious allegations lodged against the Attorney General in this case. These documents were filed in federal court presumably on Thursday when Mr. Perkins wasn't even in the country. He has not had an opportunity because you all have not even talked

to him about any of this. And he does not have to defend himself in any way today in front of this Court based on the status of what I have in front of me. Because right now there's nothing in front of me verified to defend.

You will have an opportunity to file something. Once they file -- and that means the Foundation -- a petition to approve the consent decree, the only thing I need to talk to you about is the scheduling of this. I'm only here for a couple of weeks. How long will it take the Foundation to make the motion for me to approve the consent decree?

MS. STONE: Your Honor, in order to -- the mechanics, in order to file that motion, we need the original signatures from Messrs. Buntrock and Gidwitz and the Attorney General before anyone from the Foundation is authorized to sign. That is what the resolution states.

So I see that the mediator, I think, tried to kind of cut to the chase in terms of what he submitted to you, and he has something that purports to be Stephanie Pace Marshall's signature on it. That's not actually accurate as a matter

of corporate law. She's not actually empowered to sign it yet until we have the signatures from all three of the other signing parties.

THE COURT: Is that going to be a big deal? Can we just get their signatures?

MS. STONE: We have a clean form here. We could get -- well, I think we need Mr. Buntrock's and Mr. Gidwitz's signatures.

MR. CARLSON: Would it be faxed around to counsel for all of the parties this morning, your Honor? Or -- yes, a copy of the consent judgment, the decree. And if we get signatures, we can have it on file Friday, Monday, whenever it's --

THE COURT: So by Friday perhaps can you get on file a petition to approve the consent decree with the transcript and everything ready?

MS. STONE: Yes, your Honor.

THE COURT: Okay. And then I assume --

MS. STONE: Assuming we get the signatures.

THE COURT: And I assume that the only parties that want to file any objections to this are the defendants. And when -- I don't know who to look to because there have been so many of you. When do you wish to file objections to the

proposed consent degree?

MR. BELLOWS: 21 days.

THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while -- perhaps while I was gone.

This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.

MR. BELLOWS: Are you ordering the Attorney General to submit himself -- or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.

THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

will cooperate with you as fully as he can and answer any concerns you have.

MR. BELLOWS: You have that on the record. Not your statements, his statement.

THE COURT: Well, I have no doubt that Mr. Perkins is going to cooperate and answer whatever questions you have without compromising ongoing investigations.

MR. PERKINS: That's correct, Judge.

THE COURT: Now, can you within a week of -- I mean, this isn't any big surprise here. You know what they're going to file. Within a week can you file some type of a verified document to see whether or not we even need to have --

MR. TODD: Your Honor, may we have two weeks for this reason? I'm scheduled to leave on Thursday for a long, planned trip, a business trip, where I'm going to be meeting with over 200 of my clients in the Mideast, and it would be extremely difficult for me to change that. I will be back here July 12th, so if your Honor could compromise and give us two weeks from Friday and we will get it done.

MR. CARLSON: Your Honor, as far as we're

concerned, all our petition is going to be is a petition for the Court to approve the consent judgment, the decree, and I will attach probably the resolution that was passed by the board. To get all the formalities done, I would probably like until Friday to do it, but counsel can assume -- he already knows what we're going to be filing, and if two weeks from today is some time in which he can be done with whatever he wants, maybe we could speed it up a little bit.

MR. QUINLAN: Your Honor, there are things under the consent decree that are expected to be done speedily so that the board can continue to operate and operate appropriately.

We also note there's three different sets of counsel here. I would imagine that somebody could pick up for counsel who's not available.

MR. GARMENT: Your Honor, may I just make a brief statement?

THE COURT: Yes.

MR. GARMENT: I know I've spoken with a certain amount of vehemence today, but this case started with some demonstrably false and very

serious allegations against the defendants. They have not been proved. There has not been a hearing to present a bit of evidence in support of those allegations.

THE COURT: And they remain unproven.

MR. GARMENT: And it is our intention, and we ask leave to file an amended answer which will raise those issues in terms of -- our present contemplation is to assert counterclaims, which we are entitled to do under an amended pleading.

These issues have never come into focus, and what has happened is through the intervention of the Attorney General, in cooperation with Messrs. Gidwitz and Buntrock, who were the dissenting directors who did not want consideration given to any kind of change in the venue of the museum activities, this process was brought to a halt.

Your Honor understandably tried to find a solution through a mediation process. That mediation process stopped everything except the actions that were necessary in the view of the Attorney General to bring the process to the conclusion he wanted.

And we have standing out inexplicably, but clearly demonstrated, the fact of two crucial votes being switched in the last few weeks on the basis or in absolute concurrence with interventions on the part of the Attorney General that were threatening to these two directors.

That I submit is enough for us to ask leave to present evidence, to ask for witnesses to come forward and testify about the circumstances of their intervention, Messrs. Gidwitz and Buntrock, the Attorney General, and the votes that were switched. That will not take much time. That does not involve affidavits from all over the world. That involves a discrete hearing process under oath where people have to explain why they did it, when they did it, so that your Honor can determine whether or not this is a free voluntary action of a majority of the board of a huge and extremely important national art collection that happens to be temporarily lodged in Chicago.

MR. QUINLAN: Your Honor, first of all --

THE COURT: I'm sorry, what you really were saying was two different things. If you're at this point asking leave to file additional

pleadings in this case, as far as a counterclaim, that leave is not granted. You would have to come in the way we normally do it here on a motion for leave to file with a document proposed. I need to know who it is against and what the cause of action is, and whether or not it's affected one way or the other by this mediated settlement. That's a totally separate issue.

What you've said about the opportunity to take discovery, I have not foreclosed that. I'm saying based on what you filed, there's nothing to take discovery on right now. I have nothing verified from these defendants to suggest that this Court should not approve this settlement, and I am willing to let you file something.

But the date that I have available to hear this is -- the date I have is July 24th in the afternoon, and that's moving a case that I already have. And I want to be able to seriously consider anything that you're going to file. And I don't want, like I had today, ten minutes before I have to come out here and be given a document. I would like to be able to take it home and review

it.

So you can file the motion to approve the consent decree by July 6th, and if you can all get a response filed on time by the 19th of July -- can you do July 19th?

MS. BELLOWS: May I remind the Court that one of our clients, Dr. Tucker, is in Italy and the second of our clients is available; Judith Terra is in Washington, D.C. But the third of our clients is presently somewhere in Russia. So I do not want to make the setting of the date a cause celebre. On the other hand, I do believe that we should be able to be in touch with those clients prior to filing.

THE COURT: Well, today is the 2nd, and your response would not be due until the 19th. And if you can't get in touch with your clients by the 19th, then there's a big problem.

MS. BELLOWS: Oh, I'm sorry, your Honor. I thought that you were looking to us to file a pleading on July 6th.

THE COURT: No. Just the --

MS. BELLOWS: I apologize, your Honor.

THE COURT: -- and your response would be the

19th, and if the plaintiffs or the parties seeking to enforce this settlement want to file any kind of reply, because I would expect whatever the response is, it's going to have case law. It's going to have an affidavit. There's going to be some type of a firsthand affidavit that says the Attorney General's done something wrong here.

And there's going to be case law that there might be something illegal about this settlement. Because I haven't even seen a trace of that yet. And any case law that you give or that you cite, you've got to give me a copy of the cases because I'm going to have to take them home.

And everybody else, if you want to respond to their cases or whatever, I'm going to give you until noon of the 23rd. I'm sorry it's going to wreck a weekend in July, but it's the best I can do for you. And I would see you July 24th at 2:00 o'clock. And I need somebody to draw an order.

In the meantime, those documents that were filed in Court on Friday, or were supposed to be filed, can just still be filed as they were supposed to have been on file, under seal.

I do not want to have any of the papers that relate to the mediation process made public at this time. I don't see any reason why we need to have that. I will entertain any kind of a motion to open them. Is there anything that -- I mean, if you all want it opened, then that's another thing.

MR. GARMENT: It should be opened.

THE COURT: Mr. Carlson, you wanted to say something?

MR. CARLSON: I was going to say now maybe this motion is moot in light of the fact that the individual defendants apparently have changed counsel. But previous counsel -- you know, they had a motion they noticed up for today for an order referring the matter to the State's Attorney of Cook County for investigation relating to breaches of the confidentiality provision, your Honor's order of February 5th.

THE COURT: I haven't seen that. I never got that motion.

MR. CARLSON: Oh, you didn't?

THE COURT: No. Nobody ever gave it to me.

MR. CARLSON: Well, we may very well file a

motion on behalf of the Foundation, your Honor, relating to what are apparent breaches of your Honor's February 5th confidentiality order. There are articles that appeared in Crain, Chicago Business, and elsewhere suggesting that certain members of the board perhaps have been violating the confidentiality provisions that are currently in place. And that is of concern to the Foundation, getting the confidentiality provisions that are included in the consent judgment, which we hope to have that. I just want to alert the Court to the fact that we'll take a look at it and prepare an appropriate motion.

THE COURT: Okay. Please file that other document like you were supposed to have filed it on Friday. And the document you seek to file today, I'm not going to grant leave to file it. There's nothing objectionable or unconfidential in it; it's just that let's get their motion, and most of what this is all about is Dan Terra's intent. That's not what I'm going to look at when I either approve or not approve the settlement.

MR. QUINLAN: Your Honor, one other thing. You had mentioned about filing a counterclaim.

We'd object to that from a procedure point --

THE COURT: Well, he's not going to file it without a motion for leave, and you'd have a chance to see it and then come and tell me what --

MR. QUINLAN: Plus it would be procedurally out of place at this time because the mediation process obviously substituted here, and any motion for a counterclaim frankly is not timely. They never answered to this, so that any answer they'd have to seek --

MR. GARMENT: The injunction took the place of an answer.

MR. QUINLAN: No, the injunction didn't take the place --

THE COURT: There are individual defendants I don't believe ever filed an answer.

MR. QUINLAN: Never filed an answer.

MR. CARLSON: Dr. Tucker did.

MR. QUINLAN: Only Tucker did. But there was no counterclaim filed at that time. But no counterclaim would be appropriate at this time because the mediation process stopped all that.

So to get to that point, you'd have to set aside all the mediation process, the consent

decree, the mediation, et cetera, and then if you wanted to file a counterclaim, we'd be back to square one to file this.

My only reason for raising this is that we're going to have enough to respond to in this short period of time, and I'd prefer we don't get into these collateral issues before they're appropriately in front of the Court.

MS. STONE: Your Honor, I do want to again -- we would have to object whenever anyone tries to seek to impose additional limitations on the proposed consent decree. The proposed consent decree does not release -- I'm sorry, does not in any way force the individual defendants to release any claims or rights they might have. I just need to point that out to the Court.

MR. QUINLAN: That has nothing to do with the counterclaim.

MS. BELLOWS: Well, your Honor, clearly you're correct. I mean, in such time as we file a motion for a counterclaim and attach a counterclaim if that's what we decide to do.

THE COURT: That's my 9:15 call. You give them notice. You bring it in and -- they'll have

a chance to file a written response and objection to that.

Before we adjourn today, I want to express my sincere appreciation to Mr. Hilliard.

Mr. Hilliard, you've done a yeoman's effort since February, and I know it hasn't been easy. And I don't know whether or not you've ever been paid because I don't have access to that. But I assume that you are sending your bills to the Foundation, and in due course someone will have a vote and approve the payment of that if that's necessary.

And I want to make it clear if anybody -- I assume that if any counsel wants to have any discussion with Mr. Hilliard -- Mr. Hilliard, how do you feel about informal discussions with any counsel, or have you just about had it at this point?

MR. HILLIARD: They should meet me in my hotel room in London. I'm leaving tonight.

THE COURT: Good for you. Have a wonderful trip.

MR. KENNEDY: Just one last housekeeping matter. The September 25 is scheduled to expire

today. We recommend until this is resolved to extend it to the 24th of July.

THE COURT: That's fine. Make it 5:00 o'clock. And if you'd draw me up some orders. And I would ask if you could kind of maybe do that in the conference room.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, KAY A. LEVINE, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 3rd day of July 2001.

Kay A. Levine

Certified Shorthand Reporter
Registered Professional Reporter

C.S.R. Certificate No. 84-3654.
CSR Certificate No. 84-3654.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES D. TERRA, as Executor of the Estate of Daniel J. Terra, Deceased and JAMES D. TERRA, Individually,	)	
Plaintiff,	)	
v.	)	No. 01 CH 03218
TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, and James Ryan, Attorney General of Illinois,	)	Hon. Richard J. Billik
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO TERRA FOUNDATION FOR THE ARTS' MOTION TO DISMISS

Plaintiff, James D. Terra, as Independent Executor of the Estate of Daniel J. Terra, deceased, and individually, by his attorneys McBride Baker & Coles, submits this memorandum in opposition to defendant Terra Foundation For The Arts' motion to dismiss plaintiff's Complaint For Reformation.

I. BACKGROUND

The Terra Foundation For The Arts ("Foundation"), a not-for-profit corporation organized under the Illinois General Not-For-Profit Corporation Act, operates the Terra Museum of American Art in Chicago, Illinois and a related museum, Musee d'Art American Giverny, located in Giverny, France. (Complaint, ¶ 2.) Plaintiff is one of the three original incorporators of the Foundation, originally known as the Foundation for the Daniel J. Terra Museum. (*Id.*, ¶ 1.) The other incorporators were plaintiff's father Daniel J. Terra and Robert Sugrue. (*Id.*, ¶ 5.)

The Complaint alleges that prior to the creation of the Terra Museum in December 1978, the incorporators discussed the fact that the American art collection owned by Daniel J. Terra

and plaintiff's mother Adelaine E. Terra was to be a gift to the people of Chicago and, accordingly, that the Terra Museum should always have a presence in the Chicago area to display the gift. (*Id.*, ¶¶ 4, 6.) Contrary to that expressed intent and agreement of the incorporators, however, Article 5 of the Foundation's Articles of Incorporation ("Article 5") did not contain such a limitation. (*Id.*, ¶ 6.)

Despite this mistake in Article 5, the Foundation has acted in accordance with the incorporators' intent by displaying its art in the Chicago area from its inception in 1978 to the present. It was only in September of 2000 that some of the directors of the Foundation planned to close the Terra Museum in Chicago and transfer its assets to Washington, D.C. or elsewhere. (*Id.*, ¶ 7.)

Plaintiff first learned of the mistake in Article 5 at the time a lawsuit was filed in this court by two Foundation directors who seek to enjoin the planned closing of the Terra Museum in Chicago. (Complaint, ¶ 7.) After discovering that Article 5 did not contain the incorporators' original understanding and agreement that the Terra Museum would always have a presence in the Chicago area, plaintiff filed this Complaint for Reformation.

The Foundation has moved to dismiss plaintiff's Complaint under 735 ILCS 5/2-619 upon grounds of mootness and laches, and under 735 ILCS 5/2-615 for failure to state a claim upon which relief may be granted, arguing that in Illinois corporate articles of incorporation are not subject to reformation. For the reasons that follow, the Foundation's motion to dismiss misstates the background facts, misapplies chancery principles, and should therefore be denied.

II. THE 1994 AMENDMENT TO ARTICLE 5 DOES NOT RENDER PLAINTIFF'S CLAIM FOR REFORMATION MOOT BECAUSE THE ARTICLE WAS NOT "RESTATED"

The Foundation correctly points out that the original 1978 Article 5 was amended in 1994 by its board of directors (Foundation's Motion to Dismiss, ¶ 3). The Foundation then argues that plaintiff has improperly filed a claim for reformation of that original Article. According to the Foundation, plaintiff's claim for reformation is moot, because the amended Article 5 supercedes the original 1978 Article 5, which no longer has any continuing legal effect. Foundation's Memorandum In Support of Motion To Dismiss ("Memo."), pp. 5-6. According to the Foundation,

> The Article 5 that Plaintiff seeks to have reformed is no longer in force. Any legal issues between Plaintiff and the Foundation relating to Article 5 have ceased to exist.

(*Id.*, p. 6.). The foundation is plainly incorrect because it bases its argument on the false premise that Article 5 and the entire Articles of Incorporation were "restated" by the Foundation board in 1994 and therefore have been superceded (Memo., p. 5, 8).[1] Section 105/110.35(2)(c) of the Not-For-Profit Corporation Act states:

> (c) **If** the amendment restates the articles of incorporation, such restated articles of incorporation shall, upon such amendment becoming effective, supersede and stand in lieu of the corporation's preexisting articles of incorporation. (Emphasis added).

(805 ILCS 105/110.35(2)(c)). In the present case, contrary to the Foundation's argument the 1978 articles were not restated, nor amended out of existence. Only a few words of Article 5 were changed or added.

[1] Only the by-laws of the Foundation were restated in 1994 (see Exhibit A attached hereto). The amendment to Article 5 that was filed on August 26, 1994 with the Illinois Secretary of State is attached to the Foundation's Motion to Dismiss as Exhibit 1. It does not state that Article 5 is "restated" as required by Section 105/110.35(2)(c) of the Act in order to legally "supercede" the original Articles.

But amendment of Article 5 by changing a few words does not render plaintiff's claim for reformation moot. A substantial and relevant part of Article 5, is still in existence.[2] That fact distinguishes the cases relied on by the Foundation. In both *Amoco Oil Co. v. Johnstone,* 856 F.2d 967 (7th Cir. 1988) and *Leon's Fine Foods, Inc. v. McClearin,* 2000 WL 277135 (Tex. App. 3/15/2000), (Memo, p. 5), the claims for reformation were moot because the agreements had **expired,** not because the agreements sought to be reformed had been amended but were otherwise still on existence. In short, the claims for reformation in the cases cited by plaintiff were moot because there was nothing to reform. That plainly is not the case here.

Although amended, the substance of the original Articles of Incorporation, including Article 5, are still in existence. Moreover, Article 5, as amended, does not state that the museum may be removed from the Chicagoland area. More importantly, it still does not contain the original agreement of the incorporators that the Terra Museum will always have a presence in the Chicago area. Thus, there is a present controversy between the parties regarding Article 5, and the relief sought by plaintiff can be granted by reforming said Article, as amended, and as in existence today.

It should be noted, however, that the Foundation makes no argument that a claim to reform the present amended Article 5 also is moot. Thus, simple amendment of the Complaint to reform amended Article 5 also disposes of the Foundation's mootness argument. See *4300 Marine Drive Condominium Association v. Tenenblatt,* 221 Ill.App.3d 877, 884, 582 N.E.2d 1173, 1178 (1st Dist. 1991) (Claim against successor trustee was not moot because successor was

[2] Only those words that were amended cease to exist. The original Article 5 contained 187 words. The Amendment in 1994 deleted 12 words from the original Article, but added 29 new words. Moreover, none of the added or deleted words addressed whether the museum should or should not remain in the Chicagoland area.

not named as a defendant in original complaint. Instead, plaintiff granted leave to amend complaint to explain the liability of successor trustee.).

For these reasons, plaintiff's claim for reformation is not moot.

III. PLAINTIFF'S CLAIM FOR REFORMATION IS NOT BARRED BY LACHES

The Foundation argues that plaintiff's claim for reformation is barred by laches because plaintiff failed to plead any facts in justification of his failure to pursue his claim for over 22 years. (Memo., pp. 7-9.) The Foundation also argues that the reformation claim is barred by plaintiff's alleged failure to read or learn the contents of the Articles of Incorporation before he signed them. (*Id.*, pp. 7-8.) The Foundation is incorrect in each of these arguments.

A. Laches Is Not Simply A Matter Of Delay Or Passage Of Time

As the Foundation itself acknowledges, laches is not simply a matter of delay or passage of time. That delay also must cause prejudice. (Memo., p. 6.) These requirements for barring a claim under laches are well established. According to the Illinois Supreme Court,

> Laches is not simply a matter of delay, and to bar the action 'it must appear that plaintiff's unreasonable delay in asserting his rights has prejudiced and misled the defendant, or caused him to pursue a course different from what he would otherwise have taken.'

Bruyn v. Elrod, 84 Ill.2d 128, 136, 418 N.E.2d 413, 417 (Ill. 1981). See also, *Blisset v. Blisset,* 123 Ill.2d 161, 170, 526 N.E.2d 125, 129 (Ill. 1988) ("Laches is not available as a defense ... unless the party asserting the doctrine has suffered injury or prejudice as a result of the other party's delay in instituting the action."); *People v. Wells,* 182 Ill.2d 471, 490, 696 N.E.2d 303, 312 (Ill. 1998) ("Application of the laches doctrine requires a showing of lack of due diligence by the party asserting the claim and prejudice to the party asserting the doctrine.")

Despite paying lip service to this well-established law, the Foundation then ignores it, arguing, in effect, that plaintiff's claim for reformation is barred solely by the passage of time

from the signing of the original Articles of Incorporation in 1978. (Memo., pp. 6-9.) The Foundation makes no argument whatsoever that it was prejudiced as a result of that delay.[3] That failure alone requires denial of the Foundation's motion to dismiss based on laches. *Bruyn v. Elrod, supra; Blisset v. Blisset, supra; People v. Wells, supra.* See also, *Patrick Media Group, Inc. v. City Of Chicago,* 255 Ill.App.3d 1, 7, 626 N.E.2d 1066, 1071 (1st Dist. 1993) (Defendant neither properly pleaded nor proved laches where it relied solely on the length of the alleged delay.).

B. Plaintiff's Complaint Does Not Establish Laches

1. Laches Requires Prejudice

Despite this well-established law, the Foundation argues that a complaint may be dismissed on the pleadings if plaintiff fails to plead facts in justification for the delay. (Memo., p. 7-9.) That is partly true. A complaint may be dismissed for laches if plaintiff does not plead justification for the delay, **if the elements of laches are apparent from the face of the complaint.** As discussed above (pp. 5-6), laches requires a showing of both delay and prejudice. Thus, in *In re Adoption of Miller,* 106 Ill.App.3d 1025, 436 N.E.2d 611 (1st Dist. 1982), the court dismissed the complaint on a motion to dismiss where the complaint established both delay and prejudice. 106 Ill.App.3d 1025, 1031, 1033, 436 N.E.2d 611, 615, 617. See also, *Schoenbrod v. Rosenthal,* 36 Ill.App.2d 112, 121-122, 183 N.E.2d 188, 193 (1st Dist. 1962).

However, a motion to dismiss based on laches must be denied where the elements of laches, including prejudice, are not apparent from the complaint. *People v. Claar,* 293

[3] The Foundation likewise claims no prejudice in its Motion to Dismiss. The Motion merely states:

> 7. Plaintiff's complaint must also be dismissed ... as barred by the equitable doctrine of laches. Laches precludes a party from pursuing an action in the face of an unjustified delay in filing suit. *People v. Wells,* 182 Ill.2d 471, 490, 696 N.E.2d 303, 312 (Ill. 1998). Plaintiff has totally failed to plead any specific facts which justify his delay in bringing this claim for over 22 years. (Motion To Dismiss, ¶ 7).

Ill.App.3d 211, 219, 687 N.E.2d 557, 562 (3rd Dist. 1997) (Motion to dismiss based on laches denied where prejudice from the delay not apparent from the face of the complaint.) Even the cases cited by the Foundation agree. *Beckham v. Tate,* 61 Ill.App.3d 765, 767-768, 378 N.E.2d 588, 590 (5th Dist. 1978) (In dismissing complaint based on laches for failure to plead justification for the delay, court expressly found prejudice to opposing party); also see *Shapiro v. Grosby,* 25 Ill.2d 245, 249, 184 N.E.2d 855, 857 (Ill. 1962).

The result is the same under a §2-619 motion to dismiss. See *Summers v. Village Of Durand,* 267 Ill.App.3d 767, 771, 643 N.E.2d 272, 275-276 (2nd Dist. 1994) (Dismissal of complaint based on laches reversed where laches was not apparent from face of the complaint, and defendant did not establish prejudice by affidavit under §2-619.).

2. Plaintiff Has Pleaded Justification For The Delay

In any event, plaintiff has pleaded justification for the delay. According to the Complaint, although Article 5 did not contain the incorporators' understanding and agreement that the Terra Museum should always have a presence in the Chicago area, there was no attempt to operate the Museum in violation of that agreement until the fall of 2000. (Complaint, ¶ 7.) At that time, after plaintiff had received notice of litigation challenging an attempt to close the Museum in Chicago, plaintiff recognized that the Articles of Incorporation did not contain the agreed limitation, and promptly filed this action for reformation. *(Id.)* Those facts justify the delay and are sufficient to defeat a claim for laches.

For example, in *Ballard v. Granby,* 90 Ill.App.3d 13, 412 N.E.2d 1067 (3rd Dist. 1980), dismissal of a complaint for reformation was reversed on appeal. According to the complaint, plaintiffs made a quitclaim deed of certain property to defendants in 1965. The deed was made in furtherance of an alleged agreement between the parties that defendants would build a dormitory

for workers on that property, not on property adjacent to plaintiff's home, and would build no other structure on the conveyed property. However, the deed contained no such limitation. Thirteen years later, in 1978, plaintiff learned that defendants planned to build a house for their personal use on the conveyed property, in violation of the alleged agreed limitation, and filed the complaint for reformation of the deed.

Based on those allegations, plaintiffs' complaint for reformation was not barred by laches. According to the court,

> There is no indication that ... [plaintiffs] had knowledge of the variance between the deed and their alleged understanding with respect to the conveyance, until that time in 1978, when they learned of ... [defendants'] intent to construct a residence on the property. **Until that time, no violation of the parties' understanding had occurred.** The ... suit for reformation was promptly filed thereafter. (Emphasis added)

90 Ill.App.3d at 17, 412 N.E.2d at 1070. Similarly, in the present case, from 1978 until 2000 there was no violation of the incorporators' understanding to keep the Museum in Chicago, and thus there was no unwarranted delay in bringing the present action.

In *People v. Wells, supra,* a case cited by the Foundation (Memo., p. 6) the court reached the same result. There, the State claimed defendant's motion to suppress was barred by laches, because the search at issue occurred in 1967 but defendant did not file the motion until 1992, twenty-five years later. The Illinois Supreme Court rejected that argument. Although the search occurred in 1967, defendant was not indicted until 1992. According to the court, "defendant had absolutely no need to move to suppress items removed from his home unless and until the State lodges a complaint or indictment against him." 182 Ill.2d at 490, 696 N.E.2d at 312.

Finally, in *Millspaugh v. Cassedy,* 181 N.Y.S.276, 282 (App. Div. 1920) a New York court addressed an almost identical issue to the present case. There, a complaint was filed in 1918 to reform corporate articles of incorporation prepared 20 years earlier in 1898 to conform

to the parties' agreement that preferred stockholders had no right to vote in corporate elections. The court held that the claim was not barred by laches because there had been no attempt by preferred shareholders to vote or otherwise challenge the common stock's right to control until the election of 1918.

Thus, in the present case, even if plaintiff is required to plead justification for the delay in filing this action, he has done so. (Complaint, ¶7).

C. Plaintiff's Purported Negligence Does Not Bar The Reformation Claim

The Foundation also argues that plaintiff's negligence in failing to ascertain the mistake in the Articles of Incorporation bars the claim for reformation. (Memo., pp. 7-8.) That argument must also be rejected.

1. Negligence Does Not Bar A Claim For Reformation

Negligence in failing to notice the alleged mistake in the document to be reformed does not bar a claim for reformation. For example, in *Blumenfeld v. Neuman,* 350 N.E.2d 306, 112 N.E.2d 742 (4th Dist. 1953), defendant argued that a claim for reformation was barred by plaintiff's failure to read the lease and discover the alleged mistake. The court rejected that argument, first noting that "this is not an argument that no mistake was made, but rather that relief should be denied because of the negligence." 350 N.E.2d at 312, 112 N.E.2d at 745. According to the court, negligence is not a defense to reformation, "since there would then be no ground for reformation because of mutual mistake, inasmusch as mistakes nearly always presuppose negligence." *(Id.)*[4]

[4] The authority cited by the Foundation, *Magnus v. Lutheran General Health C are System,* 235 Ill.App.3d 173, 601 N.E.2d 907 (1st Dist. 1992) (Memo., pp. 7-8) is not on point. That case concerned a claim for reformation based on unilateral mistake and fraud, **not mutual mistake, as here**. 235 Ill.App.3d at 183-184, 601 N.E.2d at 914-915. In a unilateral mistake and fraud case, the failure to learn the contents of the document rebuts the claim of fraud. *(Id.)* However, that rule simply does not apply to a mutual mistake claim, for the reasons discussed in *Blumenfeld v. Neuman, supra.*

2. Negligence By One Of The Parties In Drafting The Document To Be Reformed Does Not Bar Reformation

In a related argument, with no citation of authority, the Foundation boldly argues "there can be no basis for a claim of 'mutual mistake' because Robert Sugrue, one of the incorporators, drafted the original Articles of Incorporation. (Memo., p. 7, fn. 1.) But the law is clear that negligence by one of the parties in preparing the instrument does not bar reformation. In fact, one of the cases cited by the Foundation is directly on point **against** its argument. In *Marengo Federal Savings & Loan Association v. First National Bank of Woodstock,* 172 Ill.App.3d 859, 527 N.E.2d 121 (2nd Dist. 1988), defendant argued that plaintiff's claim for reformation of loan documents was barred by "plaintiff's negligence in drafting the loan documents." 172 Ill.App.3d at 860, 527 N.E.2d at 122. The court rejected that argument, and granted reformation to the bank that had drafted the mistaken loan documents. See also, *Harden v. Desideri,* 20 Ill.App.3d 590, 315 N.E.2d 235 (1st Dist. 1974) (Negligence of party to contract in preparing contract in manner that did not reflect agreement of the parties did not bar claim for reformation.). The Foundation's unsupported argument must therefore be rejected.

D. The Claim For Reformation Is Not Barred Because Plaintiff Owed Fiduciary Duties To The Foundation

Finally, the Foundation argues that the claim for reformation is barred by plaintiff's failure to discover the mistake when he signed the Articles of Incorporation or while he served as a director of the Foundation, allegedly in violation of his fiduciary duties to the Foundation. (Memo., p. 8, fn. 2.) According to the Foundation, "Under Illinois law, negligence that amounts to a violation of a legal duty bars reformation. *(Id.)*

Once again, the authority cited by the Foundation is not on point. Neither *Marengo Federal Savings & Loan Association v. First National Bank of Woodstock,* 172 Ill.App.3d 859,

527 N.E.2d 121 (2nd Dist. 1988), nor *Korosic v. Pearson,* 377 Ill. 413, 36 N.E.2d 744 (Ill. 1941) (Memo., p. 8, fn. 2) involved a purported breach of fiduciary duty. More importantly, neither case therefore held that the failure of a fiduciary to notice or correct a mistake bars a claim for reformation.

Numerous cases, however, have allowed reformation where a fiduciary allegedly failed to correct the mistake. For example, in *Kolkovich v. Tosolin,* 19 Ill.App.3d 524, 311 N.E.2d 782 (4th Dist. 1974), a claim by decedent's son to reform his father's will was granted, even though the son failed to take action to correct the mistake while he served as executor of his father's estate and, in fact, closed the estate in accordance with the mistaken will. In fact, although acknowledging the same "positive legal duty" test relied on by the Foundation, the court nevertheless held that reformation was proper for the son, who was clearly a fiduciary to his father and his estate. 19 Ill.App.3d at 529, 311 N.E.2d at 786-787.

Likewise, in *Stoerger v. Ivesdale Co-op Grain Co.,* 15 Ill.App.3d 313, 304 N.E.2d 300 (4th Dist. 1973), the court held that reformation of debentures was proper, even though they were signed in blank by officers of the defendant corporation. Again, this clear breach by fiduciaries did not bar their claim for reformation. See also, *Remus v. Schwass,* 406 Ill. 63, 92 Ill.2d 127 (Ill. 1950), where the Illinois Supreme Court upheld the claim of the administratrix of an estate to reform a contract for the purchase of real estate to make her a joint tenant, even though she had listed the property as an asset of her husband's estate following his death.

For all of these reasons, plaintiff's claim for reformation of Article 5 of the Foundation's Articles of Incorporation is not barred by laches.

IV. THE FOUNDATION'S ARTICLES OF INCORPORATION ARE SUBJECT TO REFORMATION

The Foundation also argues that the its Articles of Incorporation are not subject to reformation as a matter of law. (Memo., pp. 9-10.) That argument must also be rejected.

1. Reformation Of The Articles Of Incorporation Is Not Barred By The Illinois Not For Profit Corporation Act

The Foundation erroneously argues that reformation by the court of the articles of incorporation of an Illinois not-for-profit corporation is barred by §105/110.05 of the Act itself, (805 ILCS 105/110.05) merely because it provides that the articles of incorporation may be changed by an amendment passed by the board of directors. (Memo., p. 9.) That argument is fatally flawed, because amendment by the board is not the equivalent of, nor a substitute for, reformation by the court, nor does the Act preclude such remedy. This distinction is apparent in a case such as this, where the majority of a new board, or a board adverse to the incorporators, can frustrate the intent of the incorporators by simply not correcting the mistake in the articles of incorporation by amendment. In fact, plaintiff has pleaded such futility in this case. (Complaint, ¶ 8.)

The equitable remedy of reformation is designed for instances in which one party to a knowingly incorrect agreement refuses to correct the error, even though he knows that the proposed change would reflect the actual agreement of the parties.

> The basis for a reformation action is an understanding between the parties. What is sought to be reformed is not this understanding, but rather an instrument which inaccurately reflects it.

Harden v. Desideri, supra, 20 Ill.App.3d at 596, 315 N.E.2d at 240. Thus, reformation is a narrow remedy limited to correcting mistakes in the expression of the parties'agreement which one of the parties themselves will not agree to correct by amendment. As such, given the broad

powers of a court of equity, reformation by the court is appropriate to correct mistakes in corporate articles of incorporation.

2. A Court Of Equity Has The Inherent Power To Reform Corporate Articles Of Incorporation

Like the Foundation, plaintiff could find no Illinois case that considered reformation of corporate articles of incorporation. But that should not decide the issue. In *Millspaugh v. Cassedy,* 181 N.Y.S. 276 (App. Div.), the court likewise had no precedent for reformation of corporate articles of incorporation. According to the court, however, "the novelty of the exercise of equitable power is no reason for disaffirming it." 181 N.Y.S. at 279. The court then proceeded to reform the articles of incorporation to conform to the parties' original intent that preferred stockholders had no voting rights. 181 N.Y.S. at 230.

Millspaugh does not stand alone. The Delaware Supreme Court, perhaps the most respected and widely cited court in the country regarding issues of corporate law and governance, has also held that corporate articles of incorporation may be reformed by the Court. *Waggoner v. Laster,* 581 A.2d 1127 (Del. 1990). According to the court,

> It is a basic principle of equity that the Court of Chancery has jurisdiction to reform a document to make it conform to the original intent of the parties. [Citations omitted] That includes a certificate of incorporation.

581 A.2d at 1135. See also, *In the Matter of Farm Industries, Inc.,* 41 Del. Ch. 379, 196 A.2d 582 (Del. Ch. 1963) (Court reformed certificate of incorporation to reflect original intent with respect to voting rights.).

3. The Interest Of The Public In Public Documents Is Represented By The Illinois Attorney General

Finally, the Foundation argues that reformation is not authorized because the Foundation's Articles of Incorporation is "not a two party contract, but serve as the official

charter granted by the State of Illinois." (Memo., p. 9.) To the extent this argument is meant to raise the interest of the State or the public in the Foundation's charter, those interests are represented by the Illinois Attorney General (Complaint, ¶ 3), who, it should be noted, has not opposed plaintiff's claim nor challenged this court's authority to reform the Foundation's Articles of Incorporation.

For these reasons, the Foundation's motion to dismiss for failure to state a claim upon which relief can be granted must be dismissed.[5]

V. STANDARD OF LAW

"A motion to dismiss admits all facts well pleaded and the reasonable inferences which may be drawn therefrom are taken as true for the purposes of the motion." *Theodosakis v. Austin Bank of Chicago,* 93 Ill.App.3d 634, 417 N.E.2d 806, 808, 49 Ill.Dec. 116 (1st Dist. 1981). A complaint should only be dismissed if it appears that the pleadings disclose no set of facts, which if proved, would entitle the plaintiff to relief sought. (*Id.*) As demonstrated herein, plaintiff has adequately pleaded facts upon which relief can be granted.

VI. CONCLUSION

It is ironic to say the least that the Foundation would aggressively argue that plaintiff has violated fiduciary duties to the Foundation, while it is the Foundation which defiantly seeks to bar any inquiry into whether its own Articles of Incorporation do not accurately reflect the agreement of its founders and incorporators that the Terra Museum shall always have a presence

[5] The Foundation's other assertions have no merit. Thus, the Foundation's rehash of the argument concerning the delay in filing this action (Memo., p. 10) is disposed of by plaintiff's arguments regarding laches in Section III, (pp. 5-11.) Likewise, the Foundation's assertion that plaintiff's claim is based on his own mistake, not that of Daniel J. Terra or Robert Sugrue, is contradicted by the Complaint, in which plaintiff has alleged that both his father and Mr. Sugrue also signed the Articles of Incorporation in the mistaken belief that they contained the agreed upon limitation regarding the Museum's perpetual presence in the Chicago area. (Complaint, ¶ 8.) Those allegations must be accepted as true for purposes of the Foundation's motion to dismiss.

in the Chicago area. However, for all the reasons discussed in this memorandum, the Foundation's effort must fail, and its motion to dismiss plaintiff's Complaint for Reformation must be denied.

JAMES D. TERRA As Executor of the
Estate of DANIEL J. TERRA, Deceased,
and JAMES D. TERRA, Individually,
Plaintiff,

By:
One of His Attorneys

Dated: July 3, 2001.

Donald G. Mulack
Marc L. Fogelberg
McBride Baker & Coles
500 W. Madison St., 40th Floor
Chicago, IL 60661
(312) 715-5789
F.irm ID #90529

RESTATED BY-LAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1954, or the corresponding provisions of any subsequent Federal tax laws ("Code"). Within the foregoing, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these by-laws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c) (3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess

business holdings, as defined in Section 4943 (c), from making any investments in such manner as to subject the foundation to tax under Section 4944, and from making any taxable expenditures, as defined in Section 4945(d), all Sections being of the Code.

Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c) (3) of the Code, as the Board of Directors shall determine.

The corporation shall have such powers as are authorized by law and in general, subject to such limitations and conditions as are or may be prescribed by law, to exercise such other powers which now are or hereafter may be conferred by law upon a corporation organized for the purposes hereinabove set forth, or necessary or incidental to the powers so conferred, or conducive to the attainment of the purposes of the corporation, subject to the further limitation and condition that only such powers shall be exercised as are in furtherance of the exempt purposes of the organization set forth in Section 501(c) (3) of the Code and its Regulations as they now exist or as they may hereafter be amended.

The corporation also has such powers as are now or may hereafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

ARTICLE II

Offices

The corporation shall have and continuously maintain in this state a registered office and a registered agent whose office is identical with such registered office, and may have other offices within or without the State of Illinois as the Board of Directors may from time to time determine.

ARTICLE III

Board of Directors

Section 1. General Powers. The affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications.

(a) The number of directors elected by the Board of Directors shall be such number as shall be designated from time

to time by resolution of the Board of Directors or by amendment of the By-Laws. Until so fixed by resolution of the Board of Directors, or by amendment to the By-Laws, the number is hereby fixed at three (3). Each elected director shall hold office until the next annual meeting of the Board of Directors and until his successor shall have been elected and qualified.

(b) In addition, the number of honorary directors elected by the Board of Directors shall be such number as shall be designated from time to time by resolution of the Board of Directors or by amendment of the By-Laws. Until so fixed by resolution of the Board of Directors, or by amendment to the By-Laws, the number is hereby fixed at five (5). Each elected honorary director shall hold office for two years or until his successor shall have been elected and qualified. Honorary directors shall not be entitled to vote.

(c) Directors need not be residents o Illinois If

Section 3. Regular Meetings. A regular annual meeting shall be held on the third Tuesday of July of each year, beginning with the year 1981, at the hour of 1:30 o'clock P.M., for the purposes of electing directors and for the transaction of such other business as may come before the meeting. If such day be a legal holiday, the meeting shall be held at the same hour on the next succeeding business day. The Board of Directors shall provide by resolution the time and place, either within or without the State of Illinois, for the holding of the regular annual meeting and additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two directors. The person or persons authorized to call special meetings of the board may fix any reasonable place, either within or without the State of Illinois, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any special meeting of the Board of Directors shall be given at least two days previously thereto by written notice delivered personally or sent by mail or telegram to each director at his address as notice shall be deemed to be delivered when deposited in the shown by the records of the corporation. If mailed, such

United States mail in a sealed envelope so addressed, with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the

meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of waiver of notice of such meeting, unless specifically required by law or by these By-Laws.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the board, except that if less than a majority of the directors are present at such meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these By-Laws.

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors.

Section 9. The Executive Committee. The Executive Committee shall consist of the officers elected by the Board of Directors and two members of the Board of Directors who are not officers appointed by the president. The term of membership of such two members who are not officers shall expire on the date of each annual meeting of the Board of Directors. Such committee shall have and exercise the authority of the Board of Directors in the management of the corporation between meetings of the Board.

Section 10. Other Committees. By a majority of the whole board, the Board of Directors may designate one or more other committees, each committee to consist of two or more of the directors of the corporation selected from time to time by the Executive Committee. Any such committee shall have and may exercise such powers and authority of the Board of Directors as is provided in a resolution of the Board of Directors from time to time. The term of membership of each committee shall be limited to one (1) year ending with the annual meeting of the Board of Directors.

Section 11. Compensation. Directors as such shall not receive any stated salaries for their services, but by resolution of the Board of Directors, a fixed sum may, and expenses of attendance, if any, shall be allowed for attendance at each regular or special meeting of the Board; except that nothing herein contained shall be construed to preclude any

director from serving the corporation in any other capacity and receiving compensation therefor.

ARTICLE IV

Officers

Section 1. Officers. The officers of the corporation shall be a chairman, a president, one or more vice presidents, a secretary and a treasurer. The Board of Directors may appoint such other officers, including one or more assistant secretaries and one more assistant treasurers as it shall deem desirable, such appointed officers to have the authority and perform the duties prescribed from time to time by the Board of Directors. Any two or more offices may be held by the same person, except the offices of president and secretary.

Section 2. Election and Term of Office. The officers of the corporation shall be elected by the Board of Directors at its regular annual meeting. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be.

Vacancies may be filled and new offices created and filled at any meeting of the Board of Directors. Each elected officer shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been duly elected and shall have qualified.

Section 3. Removal. Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed.

Section 4. Chairman. The chairman, in the absence of the president or in the event of his inability or refusal to act, shall perform the duties of the president and when so acting shall have all the powers of the president. He shall, in the absence of the president, preside at all meetings of the Board of Directors. He shall perform such other duties as may be prescribed by the Board of Directors from time to time.

Section 5. President. The president shall be the principal executive officer of the corporation and shall in general supervise and control all the business and affairs of the corporation. He shall preside at all meetings of the Board of Directors. He may sign, with the secretary or any other proper officer of the corporation authorized by the Board of Directors, any deed, mortgages, bonds, contracts, or other instruments which the Board of Directors have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these By-Laws or by

statute to some other officer or agent of the corporation; and in general shall perform all duties incident to the office of president and such other duties as may be prescribed by the Board of Directors from time to time.

Section 6. Vice Presidents. In the absence of the chairman and president or in the event of the inability or refusal to act of both the chairman and the president, the vice presidents in the order designated by the Board of Directors shall perform the duties of the president, and when so acting shall have all the powers of the president. Each vice president shall perform such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 7. Treasurer. If required by the Board of Directors, the treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety or sureties as the Board of Directors shall determine. He shall have charge and custody of and be responsible for all funds and securities of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of the corporation and in such banks, trust companies or other depositories as shall be selected in accordance with the provisions of ARTICLE V of these By-Laws; and in general perform all the duties incident to the office of treasurer and such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 8. Secretary. The secretary shall keep minutes of the meetings of the Board of Directors in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these By-Laws or as required by law; be custodian of the corporate records and of the seal of the corporation and see that the seal of the corporation is affixed to all documents, the execution of which on behalf of the corporation under its seal is duly authorized in accordance with the provisions of these By-Laws; and in general perform all duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 9. Assistant Treasurers and Assistant Secretaries. If required by the Board of Directors, the assistant treasurers shall give bonds for the faithful discharge of their duties in such sums and with such sureties as the Board of Directors shall determine. The assistant treasurers and assistant secretaries, in general, shall perform such duties as shall be assigned to them by the treasurer or the secretary or by the president or the Board of Directors.

ARTICLE V

Contracts, Checks, Deposits and Funds

Section 1. Contracts. The Board of Directors may authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these By-Laws, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directorse. In the absence of such determination by the Board of Directors, such instruments shall be signed by any two elected officers of the corporation.

Section 3. Deposits. All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select.

Section 4. Gifts. The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the' corporation.

ARTICLE VI

Books and Records

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board of Directors.

ARTICLE VII

Fiscal Year

The fiscal year of the corporation shall begin on July 1 of each year and end on June 30 of the succeeding year.

ARTICLE VIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the form of a circle and shall have inscribed thereon the name of the corporation and the words "Corporate Seal, Illinois".

16di-000672

ARTICLE IX

Waiver of Notice

Whenever any notice whatever is required to be given under the provisions of the General Not For Profit Corporation Act of Illinois or under the provisions of the Articles of Incorporation or the By-Laws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE X

Indemnification

(a) The corporation shall indemnify any and all of its directors or officers or former directors or officers or any person who may have served at its request or by its election as a director or officer of another corporation against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties, or a party, by reason of being or having been directors or a director or officer of the corporation, or of such other corporation, except in relation to matters as to which any such director or officer or former director or officer of person shall be adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicted on the existence of such liability.

(b) Except as provided in paragraph (a) above, the termination of any litigation by judgment, settlement, conviction or upon a plea of nolo contendre, or its equivalent, shall not create a presumption that the person seeking indemnification did not meet the applicable indemnification standard as set forth in paragraph (a) above.

(c) Advances may be made by the corporation against costs, expenses and fees arising out of, or in connection with, such litigation at the discretion of, and upon such terms (but always subject to the final determination of a person's right to indemnification) as may be determined by the Board of Directors.

(d) The right of indemnification provided hereunder shall not be deemed exclusive of any other right to which any person may be entitled, or of any other indemnification which may lawfully be granted to any person in addition to the indemnification provided hereunder. Indemnification provided hereunder shall, in the case of the death of the person entitled to indemnification, inure to the benefit of his heirs, executors or other lawful representative.

(e) The corporation may purchase and maintain insurance on behalf of any and all of its directors or officers or former directors or officers or any person who has served at its request or by its election as a director or officer of another corporation against any liability, incurred by them by reason of being or having been directors or a director or officer of the corporation, or of such other corporation, whether or not the corporation would have the power to indemnify them against such liability or settlement under the provisions of this ARTICLE X.

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to By-Laws

These By-Laws may be altered, amended or repealed and new By-Laws may be adopted by a majority of the directors present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new By-Laws at such meeting.

16di-000674

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

16di-000676

MOTION FOR ENTRY OF CONSENT JUDGMENT AND ORDER

COMES NOW the Terra Foundation for the Arts by and through its attorneys, Sidley Austin Brown & Wood, and hereby moves this Court for entry of the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B, and in support of said Motion states as follows:

1. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts met and by a vote of 6 to 2 passed the Resolutions attached hereto as Exhibit A. Among other things, said Resolutions authorized the Foundation to enter into the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B, and to file it with the Court.

2. Pursuant to the action of the Board of Directors of the Terra Foundation for the Arts on June 29, 2001, the Foundation hereby asks this Court to enter the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B.

TERRA FOUNDATION FOR THE ARTS

By: Stephen C. Carlson
One of its Attorneys

William F. Conlon
Stephen C. Carlson
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(312) 853-7000
Firm ID No. 38315

16di-000677

[Resolutions Relating to Special Meeting of Board of Directors
of the Terra Foundation of the Arts to be Held on June 29, 2001]

WHEREAS, the Foundation is a defendant in litigation (the "Litigation") entitled Dean L. Buntrock, a Director of the Terra Foundation for the Arts, and Ronald Gidwitz, a Director of the Terra Foundation for the Arts vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts and the Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation in the Circuit Court of Cook County, Illinois, County Department, Chancery Division (No. 00 CH 18359); and

WHEREAS, there has been presented a proposed settlement to the Litigation and this Board of Directors believes that it is in the best interests of the Foundation to accept the proposed settlement and take certain other action related thereto;

NOW, THEREFORE, BE IT RESOLVED THAT the form of Consent Judgment and Order (the "Consent Judgment") presented to this meeting hereby (a copy of which shall be attached to the minutes of this meeting as Exhibit A) is approved, ratified and confirmed and that the officers of the Foundation are, and each of them hereby is, authorized to execute and deliver, in the name and on behalf of the Foundation, the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois) substantially in the form presented to this meeting but with such changes therein as the officer executing the same shall approve (such approval to be conclusively evidenced by his or her execution thereof); and

FURTHER RESOLVED, that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized in the name and on behalf of the Foundation, to file with the Circuit Court of Cook County the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois); and

FURTHER RESOLVED, that Section 2 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the date the Consent Judgment shall be entered by the Circuit Court of Cook County, Illinois (the "Effective Date"), to read as follows:

Section 2. Number, Tenure, and Qualifications.

(a) Number. The number of directors elected by the Board of Directors shall

be sixteen until the 2002 Annual Meeting of the Board of Directors (the "2002 Annual Meeting") and initially be fifteen thereafter.

(b) Board Classification. The Board of Directors shall be divided into two classes until the 2002 Annual Meeting, consisting of (I) eleven Class I Directors, who shall be elected for a term to expire at the 2002 Annual Meeting and (II) five Class II Directors who shall initially be elected for a term to expire at the 2005 Annual Meeting of Directors. At the 2002 Annual Meeting the Board of Directors shall be divided into four classes, consisting of (i) three Class I Directors, who shall initially be elected for a term to expire at the 2003 Annual Meeting of Directors, (ii) five Class II Directors (i.e., the Class II Directors elected as contemplated in clause (II) of the preceding sentence) whose term shall expire at the 2005 Annual Meeting of Directors, (iii) three Class III Directors, who shall initially be elected for a term to expire at the 2004 Annual Meeting of Directors, and (iv) four Class IV Directors, who shall initially be elected for a term to expire at the 2006 Annual Meeting of Directors. Thereafter each class of directors shall be elected for four-year terms.

(c) Tenure. No person shall serve as a member of the Board of Directors for a total of more than eight years following the date in June or July 2001 on which this Section 2(c) shall have first become effective (the "Effective Date"), and none of the persons elected as Class I Directors prior to the 2002 Annual Meeting as contemplated by clause (b)(I) of this Section 2 shall serve past the 2002 Annual Meeting or be eligible to stand for election to the Board of Directors at any time thereafter. Each elected director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.

(d) Residency. Prior to the 2002 Annual Meeting at least one-half of the elected directors shall be residents of the State of Illinois. Thereafter until at least 25 years after the Effective Date have elapsed, at least a majority of the elected directors shall be residents of the State of Illinois.

FURTHER RESOLVED, that Section 8 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the Effective Date, to read as follows:

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of such director's predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors at which the class of directors to which such new director has been designated pursuant to Section 2 of this Article III shall be standing for election.

FURTHER RESOLVED, that effective as of the Effective Date, the following persons shall be elected as the respective class of director indicated below to serve until their respective successors are elected and qualified or until their earlier resignation or removal:

Class I Directors (Term to Expire at 2002 Annual Meeting)	Class II Directors (Term to Expire at 2005 Annual Meeting)
Helene Ahrweiler	James R. Donnelley
Jacques Andréani	Marshall Field V
Dean L. Buntrock	Dr. Kathleen A. Foster
Margaret Daley	Prof. Robert S. Hamada
Ronald Gidwitz	Frederick A. Krehbiel
Arthur Hartman	
Stephanie Marshall	
Alan Simpson	
Theodore Stebbins, Jr.	
Judith Terra	
Paul Tucker	

FURTHER RESOLVED, that not later than August 1, 2001, this Board of Directors shall meet to (i) elect a new Chairman (who shall be chosen from among the Class II Directors elected pursuant to the preceding resolution), (ii) elect new officers and committee heads, (iii) elect a new Executive Committee composed of the newly elected officers that also are directors, and (iv) elect a new Strategic Planning Committee whose members shall include Mr. Ronald Gidwitz, Dr. Theodore Stebbins, Jr. and one or more Class II Directors; and

FURTHER RESOLVED, that the new Strategic Planning Committee, once elected, shall be authorized and directed to seek to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago, it being understood that the terms of any such partnership shall be subject to the approval of the Board of Directors; and

FURTHER RESOLVED, that the officers of the Corporation are authorized, in the name and on behalf of the Foundation, to execute such additional agreements, certificates or other documents, and to take such further actions (including, without limitation, the payment of expenses or other expenditures of money) as may be necessary or advisable to carry out the preceding resolutions.

16di-000680

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859 Judge D. K. Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation, Defendants.	

EXHIBIT B

16di-000681

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts having moved to dismiss Counts I and II of the Buntrock and Gidwitz Complaint, Paul Tucker having answered the Buntrock and Gidwitz Complaint and having denied its allegations, no other answer having been filed to either complaint and the parties having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. The parties hereto desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts ("the Foundation"), its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the

16di-000682

Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and not stand for re-election.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to

negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A. No other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE:_____

_____
Judge Dorothy Kirie Kinnaird

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/02/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd Perkins
Assistant Attorney General
State of Illinois (Title)

Print Name: FLOYD PERKINS

Date: 7/6/01

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its Treasurer and Secretary

Print Name: Stephanie Marshall

Date: July 6, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

CERTIFICATE OF SERVICE

I, Robert P. O'Keefe, one of the attorneys for defendant The Terra Foundation For The Arts, do hereby certify that I caused a true and correct copy of the attached Motion for Entry of Consent Judgment and Order to be served upon the following counsel by facsimile and messenger delivery to those located in Chicago and by facsimile and Federal Express to those located elsewhere before 5:00 p.m. this 6th day of July, 2001

William R. Quinlan, Esq.
James R. Carroll, Esq.
John F. Kennedy, Esq.
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602
Fax: 312/263-5013

Laurel G. Bellows, Esq.
Bellows and Bellows, P.C.
79 West Monroe Street
Chicago, IL 60603
Fax: 312/332-1190

Leonard Garment, Esq.
Lawrence Levinson, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hard
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Fax: 202/371-6279

Floyd Perkins, Esq.
Barry Goldberg, Esq.
Assistant Attorney Generals
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601
Fax: 312/814-2596

K. Chris Todd, Esq.
Neil M. Gorsuch, Esq.
John H. Longwell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Fax: 202/326-7999

Robert P. O'Keefe

16di-000689

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

16di-000690

NOTICE OF MOTION

TO: William R. Quinlan, Esq.
James R. Carroll, Esq.
John F. Kennedy, Esq.
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602

Laurel G. Bellows, Esq.
Bellows and Bellows, P.C.
79 West Monroe Street
Chicago, IL 60603

Leonard Garment, Esq.
Lawrence Levinson, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hard
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Floyd Perkins, Esq.
Barry Goldberg, Esq.
Assistant Attorney Generals
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601

K. Chris Todd, Esq.
Neil M. Gorsuch, Esq.
John H. Longwell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036

PLEASE TAKE NOTICE that on _____, _____ __, 2001 at _____ _.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Dorothy Kirie Kinnaird in Courtroom 2302 at The Daley Center, Randolph and Dearborn Streets, Chicago, Illinois, and then and there present Terra Foundation's Motion for Entry of a Consent Judgement and Order, a copy of which is hereby served upon you.

Dated: July 6, 2001

Respectfully Submitted,

By:_____
One of the Attorneys for Defendant
The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser

16di-000691

SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
Ten South Dearborn
Chicago, IL 60603
(312) 853-7000
Firm ID No. 38315

CERTIFICATE OF SERVICE

I, Robert P. O'Keefe, one of the attorneys for defendant The Terra Foundation For The Arts, do hereby certify that I caused a true and correct copy of the attached Notice of Motion to be served upon all counsel of record listed above by facsimile and messenger delivery to those located in Chicago and by facsimile and Federal Express to those located elsewhere before 5:00 p.m. this 6th day of July, 2001.

Robert P. O'Keefe

16di-000692

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WRITER'S DIRECT NUMBER
(312) 853-7110

WRITER'S E-MAIL ADDRESS
rokeefe@sidley.com

July 6, 2001

By Messenger

The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
Room 2302
Richard J. Daley Center
Chicago, IL 60602

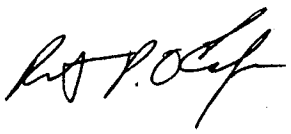
Re: Buntrock, et al. v. Terra, et al.
Case No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed please find a courtesy copy of the Terra Foundation for the Arts' Motion for Entry of Consent Judgement and Order.

Very truly yours,

SIDLEY AUSTIN BROWN & WOOD



Robert P. O'Keefe

Enclosure

cc: All counsel of record

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

CASES CITED IN OBJECTIONS OF DEFENDANTS JUDITH TERRA, PAUL HAYES TUCKER, AND ALAN K. SIMPSON TO THE PROPOSED SETTLEMENT

July 19, 2001

Tab	Description
1.	Auerbach v. Bennet, 393 N.E.2d 994 (N.Y. 1979)
2.	In re Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1996 WL 167347, (N.D. Ill. Apr. 4, 1996)
3.	In re Corrugated Container Antitrust Litg., 643 F.2d 195 (5th Cir. 1981)
4.	Elward v. Peabody Coal Co, 9 Ill.App. 2d 234, 132 N.E.2d 549 (1956)
5.	First Nat'l Bank of Chicago v. King Edward's Hosp. Fund, 1 Ill. App. 2d 338, 117 N.E.2d 656 (1954)
6.	In re General Motors Corp. Engine Interchange Litg., 594 F.2d 1106 (7th Cir. 1979)
7.	In re General Motors Corp. Pickup Truck Fuel Tank Products Liab. Litg, 55F.3d 768 (3d Cir. 1995)
8.	Kerrigan v. Unity Savings Assoc., 58 Ill. 2d 20, 317 N.E.2d 39 (1974)
9.	Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (Sup. Ct. 1999)
10.	Martin v. Heinold Commodities, Inc., 163 Ill. 2d 33, 643 N.E.2d 734 (1994)
11.	Metropolitan Sanitary Dist. of Greater Chicago v. Ingram Corp., 85 Ill. 2d 458, 426 N.E.2d 860 (1981)
12.	New York Hotel & Motel Trades Council v. Hotel Ass'n, 747 F. Supp. 1074 (S.D.N.Y. 1990)
13.	Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N.D. Ill. 1980)
14.	Paramount Communications, Inc. v. QVC Networks, Inc., 637 A.2d 34 (Del. 1994)
15.	Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1975)
16.	Penn Mart Realty Co. v. Becker, 298 A.2d 349 (Del. Ch. 1972)
17.	Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972)
18.	Steinberg v. System Software Assoc., Inc., 713 N.E.2d 709 (Ill. App. Ct. 1999)

19. In re Tomlinson's Estate, 65 Ill.2d 382, 359 N.E.2d 109 (1976)

20. Waters v. City of Chicago, 95 Ill. App. 3d 919, 420 N.E.2d 599 (1981)

21. Weiss Med. Complex v. Kim, 87 Ill. App. 3d 111, 408 N.E.2d 959 (1980)

22. Fletcher Cyclopedia of the Law of Private Corporations § 837.60 (rev. vol. 1994 & Supp. 2000)

23. Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 11.42 (3d ed. 1992)

24. 760 Ill. Comp. Stat. 55/15(a)(4)

25. 760 Ill. Comp. Stat. 55/16(b)

26. 805 Ill. Comp. Stat. 105/108.05(b)

Court of Appeals of New York.

Elias AUERBACH, Plaintiff, and Stanley Wallenstein, as Executor of Ida S. Wallenstein, Deceased, Respondent,
v.
William F. BENNETT et al., Appellants.

July 9, 1979.

Shareholder's derivative action was brought against directors of corporation and its auditor. The Supreme Court, Westchester County, Isaac Rubin, J., granted summary judgment in favor of defendants, and stockholder other than one who instituted action sought to intervene and appeal. The Supreme Court, Appellate Division, 64 A.D.2d 98, 408 N.Y.S.2d 83, held that intervening stockholder was aggrieved party who could appeal and that business judgment doctrine could not properly be invoked to permit summary dismissal of suit, and appeal was taken by permission. The Court of Appeals, Jones, J., held that no basis was shown to warrant judicial inquiry as to disinterested independence of members of special litigation committee, who were appointed by corporation's board of directors after shareholder's derivative action was filed against certain corporate directors, or as to appropriateness and sufficiency of investigative procedures chosen and pursued by committee, and thus business judgment rule shielded from judicial scrutiny decision of committee not to prosecute shareholder's derivative action.

Affirmed as modified.

Cooke, C. J., filed a dissenting opinion.

West Headnotes

[1] Corporations ⚿320(1)
101k320(1)

While substantive aspects of decision to terminate shareholders' derivative action against corporate directors made by a committee of disinterested directors employed by corporation's board of directors are beyond judicial inquiry under business judgment doctrine, court may inquire as to disinterested independence of members of that committee and as to appropriateness and sufficiency of investigative procedures chosen and pursued by committee.

[2] Corporations ⚿202
101k202

[2] Corporations ⚿207
101k207

[2] Corporations ⚿207.1
101k207.1

In a stockholder's derivative suit, judicially regarded as in nature of class action, interest of stockholder and corporation are united and when stockholder undertakes to sue on behalf of corporation, his action concerns other stockholders as well.

[3] Appeal and Error ⚿151(2)
30k151(2)

In view of established rule that dismissal on merits of derivative action generally bars suits by other stockholders of same corporation on same cause of action, one stockholder, who was within class for whose benefit a derivative action had been instituted, was party aggrieved by dismissal of complaint and thus could file notice of appeal after it appeared that stockholder who originally filed action had no intention of appealing. CPLR 5511.

[4] Appeal and Error ⚿329
30k329

Where it was not until stockholder decided not to appeal from dismissal by special term of shareholder's derivative action that inadequacy of his representation of another stockholder became apparent, such other stockholder could not be faulted for not theretofore having sought intervention, and for then serving notice of appeal to the Appellate Division and moving for permission to intervene to secure panoply of rights which attach to named party in an action, and thus Appellate Division, which is vested with all the power of Supreme Court to grant motion for intervention, properly granted such relief.

[5] Appeal and Error ⚿151(6)
30k151(6)

Because stockholder, whose application was one for intervention as coplaintiff and not as successor replacement for stockholder who originally filed shareholder's derivative action, came within ambit

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of "party aggrieved" by dismissal of complaint, no jurisdictional defect existed that prevented Appellate Division from permitting intervention nunc pro tunc, on theory that it lacked jurisdiction by reason of stockholder's lack of standing to serve and file valid, timely notice of appeal after original stockholder failed to appeal. CPLR 5511.

[6] Corporations ⚿310(1)
101k310(1)

Business judgment doctrine bars judicial inquiry into actions of corporate directors taken in good faith, in exercise of honest judgment and in lawful and legitimate furtherance of corporate purposes.

[7] Corporations ⚿310(1)
101k310(1)

By definition, responsibility for business judgment must rest with corporate directors, whose individual capabilities and experience peculiarly qualify them for discharge of that responsibility, and thus, absent evidence of bad faith or fraud, courts must and properly should respect their determinations under business judgment doctrine.

[8] Corporations ⚿320(1)
101k320(1)

As with other questions of corporate policy and management, decision whether and to what extent to explore and prosecute derivative claims against corporate directors, which belongs to corporation itself, lies within judgment and control of board of directors, and court may not intrude to interfere in decision, which must be predicated on weighing and balancing of variety of disparate considerations to protect and advance interests of corporation.

[9] Corporations ⚿310(1)
101k310(1)

Business judgment rule does not foreclose inquiry by courts into disinterested independence of those members of board chosen by it to make corporate decision on its behalf; indeed, the rule shields deliberations and conclusions of chosen representatives of board only if they possess disinterested independence and do not stand in dual relation which prevents an unprejudicial exercise of judgment.

[10] Corporations ⚿202
101k202

Special litigation committee, members of which did not have any prior affiliation with corporation, could be delegated power to terminate shareholder's derivative action by board of directors, some of whom had been sued in derivative action, especially since to disqualify entire board would have been to render corporation powerless to make effective business judgment with respect to prosecution of derivative action.

[11] Corporations ⚿320(1)
101k320(1)

Substantive decision by special litigation committee, members of which were not members of corporation's board of directors at time of transactions in question, not to pursue shareholder's derivative action alleging that present and former members of corporation's board of directors and auditor were liable to corporation for bribe and kickback payments, fell within embrace of business judgment doctrine, involving as it did weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors, and thus court could not inquire as to which factors were considered or relative weights accorded them in reaching decision.

[12] Corporations ⚿320(1)
101k320(1)

Business judgment doctrine did not prevent court from inquiring into adoption of procedures by special litigation committee, which was created by board of directors to determine position to be taken by corporation with respect to shareholder derivative claims against certain directors but, although court could properly inquire as to adequacy and appropriateness of committee's investigative procedures and methodologies, it could not under guise of consideration of such factors trespass in domain of business judgment.

[13] Appeal and Error ⚿329
30k329

Stockholder, as intervenor in shareholder's derivative suit, had to accept record in state in which he found it at time he was granted leave to intervene in the Appellate Division where no application for intervention was made prior thereto and where application when made did not seek any relief other

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than right to appeal from order of special term dismissing complaint.

[14] Corporations ⚿320(1)
101k320(1)

Neither insufficiency nor infirmity existed with respect to procedures and methodologies chosen and pursued by special litigation committee, which was created by corporation's board of directors to investigate shareholder derivative claims against certain directors and officers, which properly engaged eminent special counsel to guide its deliberations, which reviewed prior work of audit committees, which conducted individual interviews with directors and which sought and obtained pertinent legal advice from special counsel before deciding to terminate derivative action.

[15] Judgment ⚿188
228k188

Where there was no application at special term for withholding of summary judgment in shareholder's derivative suit, there was no affidavit from which it appeared that essential facts might exist that could be obtained by disclosure, and intervening stockholder had not identified any particulars as to which he desired discovery relating to disinterestedness of members of special litigation committee or to procedures followed by that committee, stockholder was not entitled to have summary judgment dismissing complaint withheld until there had been opportunity for disclosure. CPLR 3212(f).

***621 ***922 **996** Peter M. Fishbein, Steven J. Glassman, Myron Kirschbaum, Peter H. Morrison, Benjamin Zelermyer, Dean C. Rohrer and Samuel J. Wilson, New York City, for William F. Bennett and others, appellants.

***622** Edward J. Ross, James D. Zirin and George F. Vary, New York City, for Arthur Andersen & Co., appellant.

Martin R. Gold, John M. Schwartz and Elliott J. Weiss, New York City, for respondent.

***623** OPINION OF THE COURT

JONES, Judge.

[1] While the substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial inquiry under the business judgment doctrine, the court may inquire as to the disinterested independence of the ***624** members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee. In this instance, however, no basis is shown to warrant either inquiry by the court. Accordingly we hold that it was error to reverse the lower court's dismissal of the shareholders' derivative action.

In the summer of 1975 the management of General Telephone & Electronics Corporation, in response to reports that numerous other multinational companies had made questionable payments to public officials or political parties in foreign countries, directed that an internal preliminary investigation be made to ascertain whether that corporation had engaged in similar transactions. On the basis of the report of this survey, received in October, 1975, management brought the issue to the attention of the corporation's board of directors. At a meeting held on November 6 of that year the board referred the matter to the board's audit committee. The audit committee retained as its special counsel the Washington, D. C., law firm of Wilmer, Cutler & Pickering which had not previously acted as counsel to the corporation. With the assistance of such special counsel and Arthur Andersen & Co., the corporation's outside auditors, the audit committee engaged in an investigation into the corporation's worldwide operations, focusing on whether, in the period January 1, 1971 to December 31, 1975, corporate funds had been (1) paid directly or indirectly to any political party or person or to any officer, employee, shareholder*****923** or director of any governmental or private customer, or (2) used to reimburse ****997** any officer of the corporation or other person for such payments.

On March 4, 1976 the audit committee released its report which was filed with the Securities and Exchange Commission and disclosed to the corporation's shareholders in a proxy statement prior to the annual meeting of shareholders held in April, 1976. The audit committee reported that it had found evidence that in the period from 1971 to 1975 the corporation or its subsidiaries had made payments abroad and in the United States constituting bribes and kickbacks in amounts perhaps totaling more than 11 million dollars and that some of the individual defendant directors had been personally involved in

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certain of the transactions.[FN1]

FN1. The audit committee made a brief supplemental report under date of November 4, 1976, which also was filed with the Securities and Exchange Commission and was publicized through a press release.

***625** Almost immediately Auerbach, a shareholder in the corporation, instituted the present shareholders' derivative action on behalf of the corporation against the corporation's directors, Arthur Andersen & Co. and the corporation. The complaint alleged that in connection with the transactions reported by the audit committee defendants, present and former members of the corporation's board of directors and Arthur Andersen & Co., are liable to the corporation for breach of their duties to the corporation and should be made to account for payments made in those transactions.[FN2]

FN2. It appears that only 4 of the 13 named individual defendants, all present directors, have been served. By stipulation plaintiff agreed not to serve the other individual defendants and not to make them parties to this action unless and until their involvement in the actions alleged in the complaint appeared.

On April 21, 1976 the board of directors of the corporation adopted a resolution creating a special litigation committee "for the purpose of establishing a point of contract between the Board of Directors and the Corporation's General Counsel concerning the position to be taken by the Corporation in certain litigation involving shareholder derivative claims on behalf of the Corporation against certain of its directors and officers" and authorizing that committee "to take such steps from time to time as it deems necessary to pursue its objectives including the retention of special outside counsel." The special committee comprised three disinterested directors who had joined the board after the challenged transactions had occurred. The board subsequently additionally vested in the committee "all of the authority of the Board of Directors to determine, on behalf of the Board, the position that the Corporation shall take with respect to the derivative claims alleged on its behalf" in the present and similar shareholder derivative actions.

The special litigation committee reported under date of November 22, 1976. It found that defendant Arthur Andersen & Co. had conducted examination of the corporation's affairs in accordance with generally accepted auditing standards and in good faith and concluded that no proper interest of the corporation or its shareholders would be served by the continued assertion of a claim against it. The committee also concluded that none of the individual defendants had violated the New York State statutory standard of care, that none had profited personally or gained in any way, that the claims asserted in the present action are without merit, that if the ***626** action were allowed to proceed the time and talents of the corporation's senior management would be wasted on lengthy pretrial and trial proceedings, that litigation costs would be inordinately high in view of the unlikelihood of success, and that the continuing publicity could be damaging to the corporation's business. The committee determined that it would not be in the best interests of the corporation for the present derivative action to proceed, and, exercising the authority delegated to it, directed the corporation's general counsel to take that position in the *****924** present litigation as well as in pending comparable shareholders' derivative actions.

On December 17, 1976 the corporation and the four individual defendants who had been served moved for an order pursuant to ****998** CPLR 3211 (subd. (a), pars. (3), (7)) dismissing the complaint or in the alternative for an order pursuant to CPLR 3211 (subd. (c)) for summary judgment. On January 7, 1977 Arthur Andersen & Co. made a similar motion. On May 13, 1977 Supreme Court, Special Term, granted the motions of all defendants and dismissed the complaint on the merits.

When it appeared that plaintiff Auerbach had no intention of appealing from the determination of Special Term, on June 13, 1977 Stanley Wallenstein, as executor of the estate of Ida S. Wallenstein, a stockholder of the corporation, filed and served a "Notice of Appeal" from the order and judgment of Special Term. On July 11, 1977 defendants moved in the Appellate Division to dismiss the purported Wallenstein appeal on the ground that he was not an aggrieved party. Thereupon Wallenstein cross-moved for an order pursuant to CPLR 1012 to intervene in the present action, Nunc pro tunc, for the purpose of appealing from the judgment of Special Term pursuant to his notice of appeal da June 13, 1977. Wallenstein predicated his right to intervene and to appeal on the grounds that Ida S. Wallenstein had been a stockholder of the

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corporation continuously from 1959 until her death in 1976 and that her estate, of which Stanley Wallenstein is sole executor, had continuously owned the corporate shares since her death, that in January, 1977 Wallenstein had commenced a shareholders' derivative action against the corporation, and that on May 24, 1977 the defendants in the Wallenstein action had moved for dismissal of that action on the ground that the order and judgment of Special Term in the present action was Res judicata and resulted in collateral estoppel. On August 3, 1977 defendants' motion to dismiss the appeal and Wallenstein's *627 cross motion for intervention were denied with leave to renew on argument of the appeal.

On August 7, 1978 the Appellate Division denied defendants' motion to dismiss the appeal, granted Wallenstein's cross motion for leave to intervene, and reversed the May 13, 1977 order of Special Term and denied defendants' motions for summary judgment. On October 12, 1978 that court granted defendants' motions for leave to appeal to our court. For the reasons stated below we now modify the order of the Appellate Division to the extent of reversing its reversal of the order of Special Term granting defendants summary judgment dismissing the complaint on the merits and reinstate the order of Special Term. We do not disturb those portions of the order at the Appellate Division which denied defendants' motion to dismiss the Wallenstein appeal and granted the cross motion for leave to intervene.

Appellant Arthur Andersen & Co. poses the threshold question whether an error of law was committed by the Appellate Division in permitting intervention by Wallenstein and entertaining the appeal taken by him from Special Term's dismissal of the complaint. Because Andersen's challenge to the Appellate Division's exercise of authority in Wallenstein's favor, if successful, would dispose of the present appeal without reaching the merits of the attack on defendants' conduct with respect to the derivative actions, we turn first to that aspect of the appeal and there find no error of law in the disposition by the court below.

[2][3] As to the status of Wallenstein as an appellant and intervenor we agree with the analysis of Mr. Justice Hopkins and particularly his statements that in a stockholder's derivative action, traditionally regarded as in the nature of a class action, the interest of the stockholder and the corporation are united and that "when a stockholder undertakes to sue on behalf of the corporation, his action concerns the other stockholders as well". (64 A.D.2d 98, 104, 408 N.Y.S.2d 83, 86). The extent of that ***925** concern with respect to the present Auerbach action on stockholder Wallenstein on the strength of Special Term's dismissal of this suit by Auerbach. In view of the established rule that a dismissal on the merits of one derivative **999 action is generally a bar to suits by other stockholders of the same corporation on the same cause of *628 action (*Grant v. Greene Cons. Copper Co.*, 169 App.Div. 206, 215-216, 154 N.Y.S. 596, 603, affd. 223 N.Y. 655, 119 N.E. 1049), we have no difficulty in recognizing one of the stockholders, who is within the class for whose benefit a derivative action has been instituted, as a party aggrieved by whom a notice of appeal may be filed under CPLR 5511.

The applicable rule has been well stated by a leading authority on New York practice: "Although ordinarily one not a party to the proceeding below will not be aggrieved because he will not be found by the determination, in some situations a nonparty may be adversely affected, as in stockholders' suits * * * In most such cases the real question is one of proper representation; if the person's interests are not being adequately represented, or for any other reason he should be heard, the matter should properly be raised below, as by a motion for intervention (CPLR 1012-1013). If he had notice of the proceedings below and did nothing, considerations of orderly procedure will usually dictate that his subsequent attempt to appeal from the resulting judgment be denied, Though intervention may be allowed in the appellate court in a proper case " (7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5511.04 (emphasis supplied)). It cannot be disputed that, absent Wallenstein, his interests would not have been adequately represented in the Appellate Division; Auerbach's decision not to appeal would have meant that such interests would not have been represented at all!

[4] Appellant Andersen argues that, under the principles quoted, Wallenstein's failure to have sought intervention earlier at Special Term is fatal to his appeal and to his application to intervene made to the Appellate Division. However, under the circumstances of this case when it was not until plaintiff Auerbach's decision not to appeal from the dismissal by Special Term that the inadequacy of Auerbach's representation of Wallenstein became apparent, Wallenstein cannot be faulted for not theretofore having sought intervention and for

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serving a notice of appeal to the Appellate Division time for which was limited and if not complied with would have precluded any procurement of appellate review of Special Term's dismissal then moving in the Appellate Division for permission to intervene to secure to himself the full panoply of rights which attach to a named party in an action. The Appellate Division was vested with all the power of Supreme Court to grant the motion for intervention, and in the circumstances ***629** here present this was "a proper case" for the grant of such relief by the appellate court. (For a similar grant in the Court of Appeals see Soto v. Lenscraft Opt. Corp. (Rayex), 7 N.Y.2d 747, 193 N.Y.S.2d 655, 162 N.E.2d 740.)

[5] In reaching the conclusion we do we reject Andersen's contention that the Appellate Division lacked power to permit intervention Nunc pro tunc because that court lacked jurisdiction of the case by reason of Wallenstein's lack of standing to serve and file a valid, timely notice of appeal. Because Wallenstein came within the ambit of a "party aggrieved" as that term is employed in CPLR 5511, no jurisdictional defect existed. The case of Matter of Benson Realty Corp. v. Walsh (40 A.D.2d 592, 335 N.Y.S.2d 444, mot. for lv. to app. den. 31 N.Y.2d 645, 340 N.Y.S.2d 1025, 293 N.E.2d 98), relied on by appellant Andersen, is distinguishable; there no notice of appeal had been filed within the period mandated by statute. Also without relevance is the reference tendered on oral argument to legislative intent reflected in the alteration ***926** made in CPLR 5511 from its predecessor statute (Civ.Prac.Act, s 557), with respect to the right of a substituted party to file notice of appeal. No substitution is involved in the present case; Wallenstein's application was one for intervention as a coplaintiff with Auerbach, not as a successor replacement for him. Insofar as the Appellate Division admitted him to the litigation and entertained the appeal, notice of which was filed by him, there was no error.

[6] As all parties and both courts below recognize, the disposition of this case on the **1000** merits turns on the proper application of the business judgment doctrine, in particular to the decision of a specially appointed committee of disinterested directors acting on behalf of the board to terminate a shareholders' derivative action. That doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. "Questions of policy of management, expediency of contracts or actic adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests, are left solely to their honest and unselfish decision, for their powers therein are without limitation and free from restraint, and the exercise of them for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient." (Pollitz v. Wabash R. R. Co., 207 N.Y. 113, 124, 100 N.E. 721, 724.)

***630** In this instance our inquiry, to the limited extent to which it may be pursued, has a two-tiered aspect. The complaint initially asserted liability on the part of defendants based on the payments made to foreign governmental customers and privately owned customers, some unspecified portions of which were allegedly passed on to officials of the customers, i. e., the focus was on first-tier bribes and kickbacks. Then subsequent to the service of the complaint there came the report of a special litigation committee, particularly appointed by the corporation's board of directors to consider the merits of the present and similar shareholder' derivative actions, and its determination that it wou. not be in the best interests of the corporation to press claims against defendants based on their possible first-tier liability. The motions for summary judgment were predicated principally on the report and determination of the special litigation committee and on the contention that this second-tier corporate action insulated the first-tier transactions from judicial inquiry and was itself subject to the shelter of the business judgment doctrine. The disposition at Special Term was predicated on this analysis; its decision focused on the actions of the special litigation committee, and the motions for summary judgment were granted on the ground that the business judgment doctrine precluded the courts from going back of the decision of the special litigation committee on behalf of the corporation not to pursue the claims alleged in the complaint. Similarly the reversal at the Appellate Division was based on that court's perception of the proper application of the business judgment rule to the actions and determination of the special litigation committee. We proceed on the same analysis, concluding, however, on the record before us, at variance with the Appellate Division, that t' determination of the special litigation committe. forecloses further judicial inquiry in this case.

[7] It appears to us that the business judgment

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doctrine, at least in part, is grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments. The authority and responsibilities vested in corporate directors both by statute and decisional law proceed on the assumption that inescapably there can be no available objective standard by which the correctness of every corporate decision may be measured, by the courts or otherwise. Even if that were not the case, by definition the responsibility for business judgments *631 must rest with the corporate ***927 directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud (of which there is none here) the courts must and properly should respect their determinations.

[8] Derivative claims against corporate directors belong to the corporation itself. As with other questions of corporate policy and management, the decision whether and to what extent to explore and prosecute such claims lies within the judgment and control of the corporation's board of directors. Necessarily such decision must be predicated on the weighing and balancing **1001 of a variety of disparate considerations to reach a considered conclusion as to what course of action or inaction is best calculated to protect and advance the interests of the corporation. This is the essence of the responsibility and role of the board of directors, and courts may not intrude to interfere.

In the present case we confront a special instance of the application of the business judgment rule and inquire whether it applies in its full vigor to shield from judicial scrutiny the decision of a three-person minority committee of the board acting on behalf of the full board not to prosecute a shareholder's derivative action. The record in this case reveals that the board is a 15-member board, and that the derivative suit was brought against four of the directors. Nothing suggests that any of the other directors participated in any of the challenged first-tier transactions. Indeed the report of the audit committee on which the complaint is based specifically found that no other directors had any prior knowledge of or were in any way involved in any of these transactions. Other directors had, however, been members of the board in the period during which the transactions occurred. Each of the three director members of the special litigation committee joined the board thereafter.

[9] The business judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members of the board chosen by it to make the corporate decision on its behalf here the members of the special litigation committee. Indeed the rule shields the deliberations and conclusions of the chosen representatives of the board only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment. (Cf. Koral v. Savory, Inc., 276 N.Y. 215, 11 N.E.2d 883.)

We examine then the proof submitted by defendants. It is *632 not disputed that the members of the special litigation committee were not members of the corporation's board of directors at the time of the first-tier transactions in question. Howard Blauvelt, chairman of the board of Continental Oil Company, had been elected to the corporation's board of directors on October 9, 1975. Dr. John T. Dunlop, Lamont University professor at the Graduate School of Business Administration of Harvard University had been elected to the board on April 21, 1976. James R. Barker, chairman of the board and chief executive officer of Moore McCormack Resources, Inc., was added as the third member of the committee when he was elected to the board on July 19, 1976. None of the three had had any prior affiliation with the corporation. Notwithstanding the vigorous and imaginative hypothesizing and innuendo of counsel there is nothing in this record to raise a triable issue of fact as to the independence and disinterested status of these three directors.

[10] The contention of Wallenstein that any committee authorized by the board of which defendant directors were members must be held to be legally infirm and may not be delegated power to terminate a derivative action must be rejected. In the very nature of the corporate organization it was only the existing board of directors which had authority on behalf of the corporation ***928 to direct the investigation and to assure the cooperation of corporate employees, and it is only that same board by its own action or as here pursuant to authority duly delegated by it which had authority to decide whether to prosecute the claims against defendant directors. The board in this instance, with slight adaptation, followed prudent practice in observing the general policy that when individual members of a board of directors prove to have personal interests which may conflict with the interests of the

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corporation, such interested directors must be excluded while the remaining members of the board proceed to consideration and action. (Cf. Business Corporation Law, s 713, which contemplates such situations and provides that the interested directors may nonetheless be included in the quorum count.) Courts have consistently held that the business judgment rule **1002 applies where some directors are charged with wrongdoing, so long as the remaining directors making the decision are disinterested and independent. (Swanson v. Traer, 249 F.2d 854, 858-859; Gall v. Exxon Corp.,418 F.Supp. 508, supplemented 75 Civ. 3582 (U.S.Dist.Ct., S.D.N.Y., Jan. 17, 1977); Issner v. Aldrich, *633 254 F.Supp. 696, 701-702; Republic Nat. Life Ins. Co. v. Beasley, 73 F.R.D. 658, 668-669; Gilbert v. Curtiss-Wright Corp., 179 Misc. 641, 645, 38 N.Y.S.2d 548, 552.)

To accept the assertions of the intervenor and to disqualify the entire board would be to render the corporation powerless to make an effective business judgment with respect to prosecution of the derivative action. The possible risk of hesitancy on the part of the members of any committee, even if composed of outside, independent, disinterested directors, to investigate the activities of fellow members of the board where personal liability is at stake is an inherent, inescapable, given aspect of the corporation's predicament. To assign responsibility of the dimension here involved to individuals wholly separate and apart from the board of directors would, except in the most extraordinary circumstances, itself be an act of default and breach of the nondelegable fiduciary duty owed by the members of the board to the corporation and to its shareholders, employees and creditors. For the courts to preside over such determinations would similarly work an ouster of the board's fundamental responsibility and authority for corporate management.

[11] We turn then to the action of the special litigation committee itself which comprised two components. First, there was the selection of procedures appropriate to the pursuit of its charge, and second, there was the ultimate substantive decision, predicated on the procedures chosen and the data produced thereby, not to pursue the claims advanced in the shareholders' derivative actions. The latter, substantive decision falls squarely within the embrace of the business judgment doctrine, involving as it did the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to th resolution of many if not most corporate problems. To this extent the conclusion reached by the special litigation committee is outside the scope of our review. Thus, the courts cannot inquire as to which factors were considered by that committee or the relative weight accorded them in reaching that substantive decision "the reasons for the payments, the advantages or disadvantages accruing to the corporation by reason of the transactions, the extent of the participation or profit by the respondent directors and the loss, if any, of public confidence in the corporation which might be incurred" (64 A.D.2d, at p. 107, 408 N.Y.S.2d at pp. 87-88). Inquiry into such matters would go to the very core of the *634 business judgment made by the committee. To permit judicial probing of such issues would be to emasculate the business judgment doctrine as applied to the actions and determinations of the special litigation committee. Its substantive evaluation of the problems posed and its judgment in their resolution are beyond our reach.

***929** [12] As to the other component of the committee's activities, however, the situation is different, and here we agree with the Appella Division. As to the methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability, the courts are well equipped by long and continuing experience and practice to make determinations. In fact they are better qualified in this regard than are corporate directors in general. Nor do the determinations to be made in the adoption of procedures partake of the nuances or special perceptions or comprehensions of business judgment or corporate activities or interests. The question is solely how appropriately to set about to gather the pertinent data.

While the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment. At the same time those responsible for the procedures **1003 by which the business judgment is reached may reasonably be required to show that they have pursued their chosen investigative methods in good faith. What evidentiary proof may be required to this end will, of course, depend on the nature of th particular investigation, and the proper reach disclosure at the instance of the shareholders will in turn relate inversely to the showing made by the corporate representatives themselves. The latter may

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be expected to show that the areas and subjects to be examined are reasonably complete and that there has been a good-faith pursuit of inquiry into such areas and subjects. What has been uncovered and the relative weight accorded in evaluating and balancing the several factors and considerations are beyond the scope of judicial concern. Proof, however, that the investigation has been so restricted in scope, so shallow in execution, or otherwise so Pro forma or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise ***635** questions of good faith or conceivably fraud which would never be shielded by that doctrine.

In addition to the issue of the disinterested independence of the special litigation committee, addressed above, the disposition of the present appeal turns, then, on whether on defendants' motions for summary judgment predicated on the investigation and determination of the special litigation committee, Wallenstein by tender of evidentiary proof in admissible form has shown facts sufficient to require a trial of any material issue of fact as to the adequacy or appropriateness of the Modus operandi of that committee or has demonstrated acceptable excuse for failure to make such tender. (Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298; CPLR 3212, subd. (b).) We conclude that the requisite showing has not been made on this record.

[13] At the outset we observe that Wallenstein, the intervenor, must accept the record in the state in which he finds it at the time he was granted leave to intervene in the Appellate Division. No application for intervention was made prior thereto, nor did the application when made seek any relief other than the right to appeal from the order of Special Term. (Cf. Matter of Martin v. Ronan, 47 N.Y.2d 486, 419 N.Y.S.2d 42, 392 N.E.2d 1226). Thus, because plaintiff Auerbach had submitted none, the record in this case is devoid of any affidavits or documentary evidence in opposition to the motions for summary judgment.

[14] On the submissions made by defendants in support of their motions, we do not find either insufficiency or infirmity as to the procedures and methodologies chosen and pursued by the special litigation committee. That committee promptly engaged eminent special counsel to guide its deliberations and to advise it. The committee reviewed the prior work of the audit committee, testing its completeness, accuracy and thoroughness by interviewing representatives *****930** of Wilmer, Cutler & Pickering, reviewing transcripts of the testimony of 10 corporate officers and employees before the Securities and Exchange Commission, and studying documents collected by and work papers of the Washington law firm. Individual interviews were conducted with the directors found to have participated in any way in the questioned payments, and with representatives of Arthur Andersen & Co. Questionnaires were sent to and answered by each of the corporation's nonmanagement directors. At the conclusion of its investigation the special litigation committee sought and obtained ***636** pertinent legal advice from its special counsel. The selection of appropriate investigative methods must always turn on the nature and characteristics of the particular subject being investigated, but we find nothing in this record that requires a trial of any material issue of fact concerning the sufficiency or appropriateness of the procedures chosen by this special litigation committee. Nor is there anything in this record to raise a triable issue of fact as to the good-faith pursuit of its examination by that committee.

[15] Finally, there should be a word as to the contention advanced by the intervenor that summary judgment should at least be withheld until there has been opportunity ****1004** for disclosure. We note preliminarily as a matter of procedure that there was no application at Special Term for any such relief nor is there in the record any opposing affidavit from which it appears that essential facts may exist which could be obtained by disclosure (CPLR 3212, subd. (f)). It is also significant that neither in his brief nor on oral argument did Wallenstein identify any particulars as to which he desires discovery relating to the disinterestedness of the members of the special litigation committee or to the procedures followed by that committee. To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on the summary judgment motions under the authority of CPLR 3212 (subd. (f)). The disclosure proposed and described by Wallenstein on oral argument would go only to particulars as to the results of the committee's investigation and work, the factors bearing on its substantive decision not to prosecute the derivative actions and the factual aspects of the underlying first-tier activities of defendants all matters falling within the ambit of the business judgment doctrine and thus excluded from judicial

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scrutiny.

For the reasons stated the order of the Appellate Division should be modified, with costs to defendants, by reversing so much thereof as reversed the order of Supreme Court, and, as so modified, affirmed.

COOKE, Chief Judge (dissenting).

There should be an affirmance for the reasons set forth in the excellent analysis of Mr. Justice James D. Hopkins who wrote for a unanimous Appellate Division. In response to the majority opinion, a few remarks are added.

True, the "business judgment rule" is potentially applicable ***637** in these circumstances. But this case differs markedly from the typical situation in which that rule would be invoked. Here, the alleged wrongdoers are directors of the corporation. Of course, it would be most inappropriate to allow these interested directors to vote to preclude a shareholder's suit and thereby insulate themselves from liability (see Koral v. Savory, Inc., 276 N.Y. 215, 217-218, 11 N.E.2d 883, 885; see, also, United Copper Co. v. Amalgamated Copper Co., 244 U.S. 261, 263, 37 S.Ct. 509, 61 L.Ed. 1119). Hence, the lawsuit should be terminated only if a sufficient number of disinterested directors (cf. Business Corporation Law, s 713; Rapoport v. Schneider, 29 N.Y.2d 396, 402, 328 N.Y.S.2d 431, 436, 278 N.E.2d 642, 645), in this case the special litigation committee, rendered a good faith, " 'unprejudiced exercise of judgment' ", determining that maintenance of the action would not be in the best interests of the corporation (see Koral v. Savory, Inc., supra, 276 N.Y. at p. 217, 11 N.E.2d at p. 885).

*****931** Since the continuation of the suit is dependent, in large measure, upon the motives and actions of the defendants and the special litigation committee, and since knowledge of these matters "is peculiarly in the possession of the defendants themselves", summary judgment should not be granted prior to disclosure proceedings (Terranova v. Emil, 20 N.Y.2d 493, 496-497, 285 N.Y.S.2d 51, 54, 231 N.E.2d 753, 755). That the intervenor has not proposed potentially fruitful areas for disclosure should not, contrary to the majority holding, be determinative (see Udoff v. Zipf, 44 N.Y.2d 117, 122, 404 N.Y.S.2d 332, 334, 375 N.E.2d 392, 394). It is precisely because certa defendants and the members of the committee are possessed of exclusive knowledge of the facts that the intervenor is now unable to suggest the possible avenues which might successfully be pursued upon pretrial disclosure. And it is for this reason that we have formulated a rule precluding a grant of summary judgment where the case is likely to turn on "knowledge in the possession of the" moving party (e. g., Udoff v. Zipf, 44 N.Y.2d 117, 122, 404 N.Y.S.2d 332, 334, 375 N.E.2d 392, 394, Supra; Terranova v. Emil, supra, 20 N.Y.2d at p. 497, 285 N.Y.S.2d at p. 53, 231 N.E.2d 753, 755; 4 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 3212.18). No reason can be discerned for denying application of that rule at this early stage in these obvious circumstances. The result of the majority ruling is to place the intervenor in a classic "Catch-22" situation, denying him disclosure because he has not come forward with ****1005** facts facts which by their very nature are discernible only after disclosure.

In sum, to deny the intervenor an opportunity for pretrial disclosure is to mistakenly group this ca with the typical case involving the business ***63** judgment rule. Since the business judgment rule is only conditionally applicable here, and since certain defendants as well as the members of the special litigation committee have the sole knowledge of the facts upon which its applicability turns, summary judgment should be withheld pending disclosure proceedings. The result reached by the majority not only effectively dilutes the substantive rule of law at issue, but may also render corporate directors largely unaccountable to the shareholders whose business they are elected to govern.

JASEN, WACHTLER, FUCHSBERG and MEYER, JJ., concur with JONES, J.

COOKE, C. J., dissents and votes to affirm in a separate opinion.

GABRIELLI, J., taking no part.

Order modified, with costs to defendants, in accordance with the opinion herein and, as so modified, affirmed. Question certified answered in the negative.

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United States District Court, N.D. Illinois.

In re BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION
This Document Relates to: ALL CASES

No. 94 C 897.

April 4, 1996.

MEMORANDUM OPINION

KOCORAS, District Judge:

***1** On February 15, 1996, this court preliminarily approved partial settlements between the Class Plaintiffs and many of the Manufacturer Defendants (collectively, the "settling defendants"). [FN1] Notice to the Class Plaintiffs was thereafter effectuated, and Class Plaintiffs were given the opportunity formally to state their objections in written form and/or via a fairness hearing which convened before the court on March 27, 1996. After careful examination of the proposed partial settlements and the submitted objections, we reject the settlements for the reasons stated below.

DISCUSSION

In evaluating the propriety of a class action settlement, a district court must determine whether the proposed settlement is "lawful, fair, reasonable, and adequate." *See E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986); *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982). When making this "fairness" determination, several factors warrant consideration. These include: a comparison of the strengths of the plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery already undertaken at the time of settlement. *Hiram Walker*, 768 F.2d at 889. Unless the **settlement** is **unfair, unreasonable**, or inadequate, the district court may not deny approval. *Id.*

The present litigation involves a plaintiff class consisting of tens of thousands of retail pharmacies, ranging in size from individual, small pharmacies to large, multi-state chains. These plaintiffs have charged virtually all of the leading manufacturers and wholesalers of brand name prescription drugs with participation in a massive price-fixing conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The magnitude of this multi-district antitrust litigation is enormous, as is its complexity. To date, the litigation has progressed through exhaustive discovery and numerous motions. A tentative trial date on the Sherman Act claims has been set for May 1996.

According to the Class Plaintiffs, 3,371 communications criticizing the Settlements have been received. These communications reportedly represent approximately seven percent of the notices mailed. The settling parties note that most of the objections appear to be "boilerplate" and are in a form solicited by trade associations such as the National Association of Retail Druggists ("NARD") and the Pharmacy Freedom Fund ("PFF"). Given the massive effort undertaken by the opponents of the settlements to solicit objections, the settling parties attest that the number of objections recorded is remarkably low. Nevertheless, several recurrent themes emerge from the submitted objections, the most pervasive of which will be addressed below. While we reject nearly all of the plaintiffs' primary objections, we believe that, under the circumstances here presented and given the spirit of the relief originally sought, the absence of *any* statement as to how the defendants' behavior must be reevaluated renders the proposed settlements unacceptable.

A. The Scope of the Release

***2** Paragraph 15 of the proposed settlements includes a general release, whereby the settling defendants are released from further pursuit of the Class Plaintiffs' existing Sherman Act claims, as well as "without limitation, claims which have been asserted or could have been asserted in any litigation against the Released Parties or any one of them, or which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing or trade practice law, or other law or regulation, or common law, including, without limitation, the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* and the Robinson-Patman Act, 15 U.S.C. § 13(a) *et seq.* .... Each member of the class hereby covenants and agrees that it shall not, hereafter, seek to establish liability against any

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Released Party based, in whole or in part, upon any of the Released Claims." Settlement Agreement at ¶ 15. The scope of this release, which, in addition to extinguishing the Sherman Act claims, relinquishes any further claims which the class may have had under the Robinson-Patman Act or state law, forms the basis for numerous objections by class members. Although we sympathize with the plight of the objectors, we nevertheless cannot agree that the scope of the release is here improper.

For the settling defendants, the essential element of the Settlement Agreement is the release of all claims, asserted and unasserted, which arise out of the pricing practices that have been the subject of this class action. This includes Robinson-Patman claims. It may also include state law claims. Such releases have been found to be "reasonable and customary, and without them settlement of large antitrust actions would not be desirable." *In re Corrugated Container Antitrust Lit.*, 643 F.2d 195, 222 (5th Cir. 1981), *cert. denied,* 456 U.S. 998 (1982). *See McDermott, Inc. v. AmClyde,* 114 S.Ct. 1461, 1467 (U.S. 1994) (noting that defendants have no incentive to settle unless settlement precludes the possibility of further liability).

Objecting class members argue that a class release can be no broader than the scope of issue or claim preclusion that would result from a judgment on the merits. The objectors conclude that because a trial of Sherman Act claims might not be *res judicata* with respect to the Robinson-Patman claims, release of the latter is inappropriate. Such a conclusion, however, runs afoul of Seventh Circuit caselaw. *See Richards Lumber and Supply Co. v. United States Gypsum,* 545 F.2d 18, 20-21 (7th Cir. 1976), *cert. denied,* 430 U.S. 915 (1977) (rejecting contention that class settlement release cannot constitutionally release claims beyond those that would be barred by *res judicata*); *Patterson v. Stovall,* 528 F.2d 108, 110 n.2 (7th Cir. 1976) (affirming approval of class action settlement releasing all claims which could have been alleged by any class member by reason of or in connection with any matter or fact set forth or referred to in the class action complaint); *see also Oswald v. McGarr,* 620 F.2d 1190, 1198 (7th Cir. 1980) ("[I]t is entirely proper for the offer to include a release for claims not yet adjudicated. A settlement offer is a compromise and may include release of claims not before the Court"). Were the objectors here correct, rather than finding repose in settlements, settling defendants would face new and widespread litigation based on the same course of conduct. Under such circumstances, settlement negotiations would simply not ensue.

***3** In any case, the breadth of the settlement's release is not beyond the class' authority. As a matter of law, where absent class members are accorded due process and are adequately represented, they are bound by the resulting class action judgment. *See, e.g., Phillips Petroleum v. Shutts,* 472 U.S. 806, 808, 811-12 (1985). Adequate representation requires that the named plaintiffs must "be part of the class and possess the same interest and suffer the same injury as the class members," *General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 156 (1982), so "that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n.13. Here, it is not contested that each member of the class could have asserted a Robinson-Patman claim. Indeed, the same factual predicate-- differential pricing-- was employed in the conspiracy claims alleged by the class. Because the interests of the objecting class members mirror the interests of the named plaintiffs in this respect, the release of all claims was within the authority of the class representatives and was n therefore inappropriate.

B. The Opportunity to Opt-Out

Related to the scope of the negotiated release is the assertion that objectors should be afforded a second opportunity to opt out of the class, given that the class notice did not inform the Class Plaintiffs that they had Robinson-Patman claims which might be settled if they remained in the class. The objectors attest that due process requires a second opt-out period. We disagree. As the Ninth Circuit observed in *Officers For Justice v. Civil Service Com'n,* 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983):

> [W]e have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out. We think it does not. [Objectors'] rights are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. *Moreover, to hold that due process requires a second opportunity opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law.*

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Officers For Justice v. Civil Service Com'n, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied,* 459 U.S. 1217 (1983); *see also* Wright, Miller, Kane *Federal Practice and Procedure: Civil 2d,* § 1797 at p. 376 ("Since plaintiff was given notice and an opportunity to opt out at an earlier stage due process does not require that a second opportunity be given after the settlement terms are disclosed. At that point the parties' interests are protected by the Rule 23(e) requirements of court approval of the settlement with notice and a fairness hearing at which dissenters can voice their objections").

The Notice of Class Determination approved by this court complied fully with the requirements of Rule 23 of the Federal Rules of Civil Procedure. The class notice described the claim asserted, advised class members of their right to opt-out of the class, informed them that if they remained class members they would be bound by this court's rulings and judgments, informed them that they were entitled to enter an appearance through their own counsel, and told them that the pleadings and other records in the case were available for examination.

***4** At the time the Notice of Class Determination was disseminated there were no settlements or releases, proposed or otherwise, to be disclosed. Neither Rule 23 nor due process requires that the objectors now be afforded a second opportunity to opt out simply because they now oppose settlements which did not exist at the time the original Notice of Class Determination was disseminated.

As we have previously observed, "Class notice is not intended to serve as a complete source of information as to each and every alternative a class member may have in pursuing any potential claim against named defendants." Mem. Op., Nov. 12, 1995, at 3. Further discussion concerning the possible consequences of a decision whether to opt out is appropriately left to "the marketplace of ideas." Tr. of Proceedings, Feb. 2, 1995, at 21. The fact that plaintiffs representing 14,400 stores (including 3,200 independents) opted out of the class and filed suits containing Robinson-Patman claims exemplifies the effectiveness of such an approach. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 813 (1985) (presence of 3,400 opt outs indicates that opt-out procedures were effective). Due process demands only that the class be given notice of the settlement and an opportunity to be heard. Fed. R. Civ. P. 23(d), (e). Where these objectives are satisfied, due process does not warrant a second chance to opt-out of the plaintiff class. [FN2]

C. The Adequacy of the Cash Settlement

The proposed partial settlements involve a cash amount equal to $408 million. This figure represents a total five times the largest settlement in any antitrust class action not preceded by a prior governmental investigation and represents only seventy-five percent of the class purchases for which the class seeks damages. [FN3] Relying on a report filed in the opt out plaintiffs' cases describing alleged damages sustained by opt out Robinson-Patman plaintiffs, the objectors argue that the class' damages are in the range of $23-32 billion, before trebling. Based upon the Class Plaintiffs' experts' reports, class counsel have estimated $6 billion in potential class damages stemming from the settling defendants. Such well-founded or ill-founded estimates alone, however, do not warrant the conclusion that the $408 million proposed by the settlements is inadequate. Whether a jury would return a verdict remotely close to the asserted overcharges is far from certain, as is whether a multi-billion dollar judgment would ultimately be sustained on appeal. *See EEOC v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 890 (7th Cir. 1985), *cert. denied,* 478 U.S. 1004 (1986) ("the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution after trial"). Although the $408 million assessed in the proposed partial settlement is significantly smaller than the plaintiffs' own estimated assessment of damages, the amount remains sufficiently large to warrant attention. That this is true is reflected by the Federal Trade Commission's ("FTC") recent announcement that the FTC is conducting an investigation into drug industry pricing. Twenty-two drug manufacturers have been targeted by the investigation, most of whom are defendants in the present litigation. The $408 million involved in the proposed partial settlements is not inadequate.

D. The Foundation

***5** Paragraph 12 of the proposed partial settlement provides that five percent of the settlement funds shall be set aside for the establishment and operation of a not-for-profit Foundation. The objectors maintain that the creation of such a Foundation, which may not engage in litigation or lobbying activities, is virtually worthless. We do not agree.

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The asserted purpose of the Foundation is to advance the competitive position of retail pharmacies in the brand name prescription drug marketplace. The composition of the board and the Foundation's activities will be subject to court approval and supervision. As set forth by the settling parties, the Foundation advances several goals common to the Class Plaintiffs. For example, one goal of the Foundation might be to assist retail pharmacies in developing market share and cognitive services programs with a view toward generating lower pricing and improving the competitive position of retail pharmacies in the market place. The Foundation might also monitor industry pricing of brand name prescription drugs for purposes of developing materials that could be used in future litigation or for obtaining favorable legislation.

For purposes designed to assist the class, a court may set aside a portion of the settlement proceeds in order to maximize the beneficial impact of a settlement fund on the needs of a class. An allocation for such purposes as the Foundation here proposed is not improper.

E. Confidentiality Restrictions on Discovery Materials

The objectors maintain that the settlements impose extraordinary confidentiality restrictions on discovery materials which could hinder future drug pricing litigation. Although the settlements do provide for the return or destruction of sensitive materials, these proclamations merely comport with an earlier protective order entered by this court. On May 26, 1994, in order to facilitate discovery, this court entered a protective order extending confidential treatment for commercially sensitive documents and information produced by the defendants. *See Pretrial Order No. 4* and *Revised Pretrial Order No. 4.* The proposed settlements operate in accordance with earlier court directives, and provide assurances to the defendants that privileged information will not be made public following resolution. Any objection as to the disposition of documents must be rejected.

F. Allocation of the Settlement

The settlements do not set forth any plan or formula for allocation of settlement proceeds. Although the objectors maintain that such an allocation plan is necessary to evaluate the fairness of the partial settlements, we disagree. As was noted in *In re Washington Public Power Supply System Securiti Litigation,* 1988 WL 158947, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,326 at 92,143 (W.D. Wash. 1988):

> Deferral of allocation decisions is routinely followed in partial settlements where the appropriate allocation among class members can best be determined when further settlements have been achieved or the litigation is completely resolved.

***6** *In re Washington Public Power Supply System Securities Litigation,* [[1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,326 at 92,143 (W.D. Wash. 1988). We agree with the Washington court's assessment. The overall fairness of the partial settlements does not hinge upon a preliminary analysis of the precise manner in which the proceeds of a settlement are to be distributed or the amount which counsel will ultimately collect in fees. Such matters may be more readily examined after further resolution.

G. The Necessity of Injunctive Relief

The most substantial objection to the settlements, and that which ultimately determines their fate, involves the absence of an injunction or other provision eliminating the two-tiered system of pricing pharmaceutical drugs. Many Class Plaintiffs object to the continued maintenance of discounts to managed care entities and argue that such practices unfairly prevent Plaintiffs from competing with those entities. The plaintiffs seek what they describe as a level playing field. They maintain that without some change in the two-tiered pricing system, especially when compared to the modest per store recovery which the cash settlements provide, the settlements fail to accomplish the essential goal of the lawsuit. The druggists who appeared at the March 27, 1996 hearing proffered this view without exception-- and often with great passion.

Because consideration of whether final approval should be given to the settlements comes at a time when discovery has been completed and after substantial briefing and oral arguments on motions for summary judgment, the Court has the benefit of a complete evidentiary record to guide its decision. The defendants assert that the discounts afforded managed care entities are based on their ability to affect market share, an ability which the retail pharmacies purportedly do not possess. The plaintiffs maintain that such discounts are violative

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of the Sherman Act and likewise assert that the plaintiffs' ability to affect market share has been foreclosed by the actions of the defendants. Not surprisingly, evidence exists in support of each side's position.

There is substantial evidence that managed care providers possess considerable influence over the prescribing decision, and a manufacturer's failure to discount may result in the elimination of its products from the managed care formularies designed to influence that prescribing decision. Accordingly, the manufacturer's discounting decision in these cases is often a response to competitive pressures and reflects the epitome of a competitive system. As a matter of law, there is nothing improper about discounting the costs of pharmaceutical drugs to a purchaser for the purpose of receiving or maintaining that customer's business. And nothing in the law requires the manufacturer to provide a similar discount to a customer without a similar ability to affect market share.

On the other hand, there is evidence in this record that the refusal to discount is sometimes based on the *status* of the purchaser and irrespective of that purchaser's ability to affect market share. In these circumstances, the retail pharmacy is denied the opportunity to demonstrate an ability to show its affect on the market and, accordingly, denied the opportunity to compete effectively in the market place with managed care providers. The denial of the discount in these circumstances is not only manifestly unfair, but it is also illegal.

***7** What many plaintiffs really seek-- a one price policy for themselves and managed care-- is not legally attainable in this or any other court. Any injunction or requirement along these lines would discourage competition, not enhance it. What the plaintiffs *are* entitled to, however, is the opportunity to earn the same or similar discounts upon a showing that the plaintiffs possess the same or similar abilities to affect market share as purchasers receiving discounts for those reasons.

As indicated above, we believe the settlement amount committed to by the defendants will surely counsel deterrence. The recent announcement of an FTC investigation into drug industry pricing evidences this fact, as do recent, limited instances where discounts have been afforded to retailers. Conspicuously, however, no commitment exists on the part of the settling defendants to bring about the fairness in opportunity which we believe the law requires and, as asserted by the objectors, forms the ultimate purpose for the plaintiffs' lawsuit. In unadorned form, we believe the following commitments on the part of the settling defendants to be entirely appropriate:

1. That a manufacturer shall not refuse to discount its goods based solely on the *status* of the buying entity; and
2. To the extent that retail pharmacies and retail buying groups can demonstrate an ability to affect market share in the same or similar manner in which managed care entities are able, retailers will be entitled to the same types of discounts given to managed care entities for this reason.

Although we do not believe that the plaintiffs are legally entitled to more than this with respect to pricing practices, we do not believe they are entitled to less. The absence of this or any other commitment with respect to future discount practices renders the settlements less than fair, reasonable, and adequate, and dooms them accordingly. Thus, even though we believe most of the objections to the settlements are without merit, the failure of the settling parties to provide, in any way, for the future pricing practices of the settling defendants is of such sufficient magnitude as to preclude approval by this court.

CONCLUSION

For the reasons stated above, the settlements reached between the Class Plaintiffs and the Settling Defendants are not approved.

FN1. The settling defendants include Abbott Laboratories, American Cyanamid Company, American Home Products Corporation, Bristol-Myers Squibb Company, Burroughs Wellcome Co. (now merged into Glaxo Wellcome Inc.), Ciba-Geigy Corporation, Eli Lilly and Company, Glaxo Inc. (now merged into Glaxo Wellcome Inc.), Knoll Pharmaceutical Company, Merck & Co., Inc., Pfizer Inc., Schering-Plough Corporation, SmithKline Beecham Corporation, Warner-Lambert Company, and Zeneca Inc.

FN2. The notion that class members were unaware of other possible claims or available options defies logic. Over the course of the litigation, Class Plaintiffs were barraged with an assortment of mailings by class counsel, solicitations by the Robinson-Patman attorneys, and articles scattered throughout trade magazines and the national press-- all of which provided the

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plaintiffs with valuable information concerning the litigation.

FN3. The remaining twenty-five percent are attributable to the non- settling defendants. As to these defendants, the Class Plaintiffs' Sherman Act cases remain undisturbed.

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United States Court of Appeals,
Fifth Circuit.

In re CORRUGATED CONTAINER ANTITRUST LITIGATION.
ADAMS EXTRACT CO., et al., Plaintiffs-Appellees,
Great Northern Packaging Corp., et al., CFS Continental, Inc., et al.,
Rossville Packing Co., et al., Andre-Boudin Bakeries, Inc., et al., Townhouse Furniture, et al., Denver Meat Co., et al., Carron Manufacturing Co., Ilikon Corp., Wittek Golf Supply Co., Inc., Plaintiffs-Appellants-Appellees,
v.
PLEASURE HOURS, INC., et al., St. Joe Paper Co., The Continental Group,
Olinkraft, Inc., Container Corporation of America, The Chesapeake Corporation of Virginia, Owens-Illinois, Inc., MacMillan Bloedel, Inc., Inland Container Corp., Menasha Corp., U. S. Corrugated Fibre-Box Co., Stone Container Corp.,
Defendants- Appellants-Appellees.
In re CORRUGATED CONTAINER ANTITRUST LITIGATION.
ADAMS EXTRACT CO., et al., Plaintiffs-Appellees,
CFS Continental, Inc., et al., Townhouse Furniture, et al., Rossville Packing Co., et al., Denver Meat Co., et al., Carron Manufacturing Co., Andre-Boudin Bakeries, Inc., Ilikon Corp., Great Northern Packaging Corp., et al.,
Plaintiffs-Appellants-Appellees,
Pleasure Hours, Inc., et al., London Dry Ltd., et al., Plaintiffs- Objectors-Appellants-Appellees,
v.
The CHESAPEAKE CORPORATION OF VIRGINIA, et al., Stone Container Corp.,
Defendants-Appellants-Appellees.

Nos. 80-1018 and 80-1103

April 3, 1981.

The United States District Court for the Southern District of Texas at Houston, John V. Singleton, Jr., Chief Judge, approved settlements in class actions brought under the Clayton Act, and appeal was brought by objectors. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) plaintiff negotiators were not shown to have had **conflicts** of interest which would render them inadequate representatives of subclasses; (2) lack of presettlement discovery does not alone invalidate settlements; (3) District Court had power to approve settlements releasing defendants from federal and state claims, though state claims were not pending in federal District Court; (4) alleged defects in notice to subclasses did not invalidate settlement; and (5) settlements were properly considered for approval prior to judicial resolution of issue whether nonsettling defendant had right to bring contribution action against settling defendants.

Remanded with instructions.

West Headnotes

[1] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

[1] Federal Courts ⚿753
170Bk753
District court in passing upon proposed class action settlement must determine whether settlement is fair, adequate and reasonable, and appellate function is limited one, especially in light of strong judicial policy favoring settlement of disputes. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[2] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

Even if subclasses had significantly diverging interests so that attorney could not adequately represent all interests throughout litigation, settlements are not necessarily void, but, rather, even irregular settlement negotiations may form basis for judicially acceptable class action settlement if record clearly indicates that representation of class during negotiations was adequate and that settlement itself is fair. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[3] Federal Civil Procedure ⚿165
170Ak165

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So long as all class members are united in asserting common right, such as achieving maximum possible recovery for class, class interests are not antagonistic for representation purposes. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[4] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

Neither subclass in class action succeeded in showing that asserted inadequacy of settlements resulted from tradeoff of rights of one subclass in order to realize interests of the other. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[5] Federal Civil Procedure ⚿176
170Ak176

Where there was no suggestion that steering committee consciously embarked on course of negotiating discounted settlements with defendants in class actions only if market shares of such defendants were disproportionately large with respect to corrugated sheets as opposed to corrugated containers or that committee attempted to negotiate early, heavily discounted settlements for both such subclasses but confined benefits of later, more valuable settlements to container class, but, rather, settlement with defendant which was nation's third largest manufacturer of corrugated sheets was only first settlement in committee's strategy of demanding successively higher payments for each settlement, no prejudice to sheet subclass from unified representation was shown, particularly where it was believed that all defendants would be jointly and severally liable for all damages. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[6] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

In class action wherein container subclass resumed settlement talks but sheet subclass did not, apparently deciding to seek further economic data first, and defendants were reluctant to settle at substantial dollar amounts for release covering only one subclass, approach of container's subclass to settlement, by negotiating for portion of each settlement to be set aside for sheet plant subclass but only in event sheet plants applied to participate in such particular settlements and whereby if sheet plants decided not to participate entire amount paid by each settling defendant would inure to exclusiv benefit of container purchasers was not objectionable on grounds asserted. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[7] Monopolies ⚿25(1)
265k25(1)

On record, discovery requests in antitrust suit were irrelevant, and district court was acting within its discretion in denying them. Clayton Act, § 4, 15 U.S.C.A. § 15.

[8] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

In view of fact that, notwithstanding status of discovery, plaintiffs' negotiators in class action had access to plethora of information regarding facts of their case, formal discovery was not necessary ticket to bargaining table, and even if there was imbalance of information between defendants and plaintiffs, settlements were not necessarily thereby invalidated, but, rather, if terms of settlement were fair, cour could reasonably conclude that counsel performe adequately. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[9] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

District court's most important function in reviewing compromises of class actions is its consideration of settlement terms, and if terms themselves are fair, reasonable and adequate, it matters not whether another team of negotiators might have accomplished better settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[10] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

On proposal of settlement in class action case, settlement terms should be compared with likely rewards class would have received following successful trial, and district court must balance strength of case for plaintiffs against amount offer in settlement, and thus district court should firs evaluate likelihood that plaintiffs would prevail at trial, then establish range of possible recovery and then establish point on, or if appropriate, below,

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range of possible recovery at which settlement is fair and adequate. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[11] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Evaluation of fairness of settlement of class action is not and cannot involve trial on the merits, but district judge must undertake analysis of facts and law relevant to proposed compromise and must support his conclusions by memorandum, beyond mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of facts or analysis of the law, and this is so that appellate court will have basis for judging exercise of trial judge's discretion. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[12] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Where there are objectors to settlement of class action, proponents can be expected to present evidence and arguments suggesting that settlements are within range of reasonableness, and objectors will do same for contrary position, and court can generally fulfill its responsibilities by examining settlements in light of objections raised and by setting forth on the record a reasoned response to objections including findings of fact and conclusions of law necessary to support response. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[13] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

When objectors to class action settlement in price-fixing case seek to include years outside statute of limitations in damage computation period, court should evaluate fraudulent concealment argument and should consider extra problems of proving price-fixing conspiracy for longer period and additional difficulties of proof in assessing damages. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[14] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

Even if offer to settle action for price-fixing was best offer that defendants were willing to make, such fact was not reason to approve otherwise inadequate settlement, and court's comment, that it perceived no challenge to validity, or at least utility, of before-and-after price comparison approach based on excess profits, as a means of estimating damages, was insufficient to explain why such approach was found more accurate than those of objectors' experts, who pegged damages at substantially higher levels. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[15] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

Use of special master in evaluating settlement in particularly complicated cases was endorsed by Court of Appeals on its questioning whether either district judge or panel of Court of Appeals had sufficient acumen in field of economics to consider, unaided by objective independent expertise, economic issues involved in Clayton Act suits at bar. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[16] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

For purposes of passing upon reasonableness of proposed class action settlement, case in which defendants have been acquitted has less settlement value than one in which convictions have been obtained, and court's inference, from acquittal, that ultimate success was by no means assured was entirely proper. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[17] Federal Courts ⚿701.1
170Bk701.1
(Formerly 170Bk701)

Even if district court's relationship with civil and criminal antitrust cases might have provided it with knowledge about strength of plaintiffs' civil action, such knowledge did not enable Court of Appeals to review approval of settlement without specific findings, supported by information in record presented to Court of Appeals. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

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[18] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Federal district court in deciding if settlements in class action are reasonable in light of necessary determinations is not confined to mechanistic process of comparing settlement to estimated recovery times multiplier derived from likelihood of prevailing on merits, but should be guided also by other factors, relevancy of which will vary from case to case, including complexity, expense and likely duration of litigation, reaction of class to settlement and stage of proceedings, and, after court identifies such factors and explains their relevance to settlement, court should proceed to explain why it is either approving or disapproving settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[19] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

Virtually all class actions will result in long, complex and expensive trials, and question for district court in passing upon reasonableness of settlement is whether likelihood of especially long and complex trial is enough in particular case to warrant substantial reduction in what class might otherwise receive in settlement. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[20] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Great support for settlement of class action is factor favoring approval by the court, but low level of vociferous objection is not sufficient to sustain court's approval without explanation. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[21] Compromise and Settlement ⚿71
89k71
(Formerly 170Ak1699)

Overall list of findings may be sufficient for review of approval of class action settlement when court has made detailed and careful explanations as it conducted its consideration of each factor affecting its exercise of discretion, but findings alone are not necessarily sufficient.

[22] Compromise and Settlement ⚿71
89k71
(Formerly 170Ak1699)

Ordinarily, individually negotiated settlement with one of many defendants in class action should be approved or disapproved as individual settlement and not as part of package. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[23] Federal Courts ⚿813
170Bk813

It is not for Court of Appeals on review of district court's approval or disapproval of class action settlement to exercise discretion, but it is for Court of Appeals, rather, to review exercise of discretion by the district court. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[24] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

When there are subclasses in class action, with each subclass independently represented, allocation formula may be negotiated without each subclass undertaking extensive analysis of its relative damages if available evidence is, at time of negotiations, insufficient to indicate need for it. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[25] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

Where at time of negotiations in class action plaintiffs knew that all damages, both to sheet customers and container customers, resulted from common conspiracy, district court could reasonably approve settlement treating sheet and container purchasers in same fashion though sheet plants apparently possessed documents suggesting that overcharge for sheets might have been less than overcharge for containers. Clayton Act, § 4, 15 U.S.C.A. § 15; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[26] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

If adequacy of class action settlement rests on value of one set of claims, distribution of settlement should be weighed heavily in favor of plaintiffs whose

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claims comprise that set, though there might be circumstances in which such rule would not apply. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[27] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

If district court in approving class action settlement based its estimate of what plaintiffs would recover on value of post-1972 claims alone, and if district court failed to provide reasoned explanation why substantial portion of settlement money should be distributed to plaintiffs in satisfaction of their pre-1973 claims, distribution formula could not be approved. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[28] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

In view of proper notification to class members, court as part of settlement could release not only those claims alleged in complaint and before court, but also claims which could have been alleged by reason of or in connection with any matter of fact set forth or referred to in complaint, and district court had power to release state claims even though those claims were not pending before it. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[29] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Releases from state claims, on approval of class action settlement, are generally reasonable, and objectors should point to any extraordinary factors dictating different treatment. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[30] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

[30] Federal Courts ⚿701.1
170Bk701.1
(Formerly 170Bk701)

Where record on appeal did not indicate whether state-law objectors to proposed settlement in federal district court submitted to latter court copy of state court injunction forbidding state defendants to settle state claims as part of compromise of federal actions, district court had no basis to consider relevance of such injunction to federal court's approval of settlement, which included settlement of state law claims not before federal district court, and neither did Court of Appeals. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[31] States ⚿4.16(1)
360k4.16(1)
(Formerly 360k4.16)

Nothing in Tenth Amendment or its accompanying case law mandates judicial reluctance to enter state antitrust area, and Tenth Amendment did not prevent federal district court from approving settlements releasing state claims, which were pending in state court but not in federal court. U.S.C.A.Const. Amend. 10; Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[32] Federal Civil Procedure ⚿164
170Ak164

Where plaintiffs having state law claims pending in state court had opportunity to opt out of class and litigate their state claims in state court and, before they were asked to opt out, knew that settlements comprising class members' state claims had been negotiated, but plaintiffs wanted to participate in class, share in fruits of the class' settlement negotiations and still be free to litigate their state claims, state law claimants accepted risk that they would be precluded in federal district court from pursuing state law claims, and state claim claimants could not complain that class counsel was inadequate for making, in effect, release of their state law claims a condition for participation in the class.

[33] Federal Civil Procedure ⚿179
170Ak179

Notice to class members was not defective because notice of class action was combined with notice of proposed settlements, nor was any prejudice shown from inclusion of claims form with notice, in view of fact that claims form, on which class members were asked to list their purchases, did not waive any rights to object to settlement. Fed.Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

[34] Federal Civil Procedure ⚿1708
170Ak1708

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Where it was unlikely that smaller class members would have objected to settlement or opted out of class on basis of unit recovery figures, and where class members with large claims had sophistication to estimate approximate amount they would secure from settlements, district court did not abuse its discretion by approving class action notice without unit recovery figures, though notice would have been better had it included information that some class representatives thought settlements were inadequate. Fed. Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

[35] Federal Civil Procedure ⚿1708
170Ak1708

District court acted within limits of discretion in approving notice of proposed class action settlements despite contention that notice should have summarized opinions of sheet plant and state-law objectors. Fed.Rules Civ.Proc. Rules 23, 23(c)(2), (e), 28 U.S.C.A.

[36] Compromise and Settlement ⚿64
89k64
(Formerly 170Ak1699)

District court was not required to delay approval of settlements of class action until nonsettling defendant's right of contribution was finally resolved. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[37] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

District court's inherent power to manage class action gives it discretion to decide when to review adequacy of settlement, and court's most important consideration in exercising such discretion is whether proponents are ready to demonstrate that settlement is fair, reasonable and adequate, and, if they are, court should proceed to consider settlement at early date, particularly when approval or disapproval bears on interests of other parties preparing for trial. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

[38] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

Reason court is called on to review class action settlement is to protect rights of many absent class members who were not involved in negotiations leading to settlement, and defendant who negotiates settlement does not need court to act in fiduciary role to protect its interest. Fed.Rules Civ.Proc. Rule 23(e), 28 U.S.C.A.

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James B. Sloan, Michael P. Connelly, Sloan & Connelly, Chicago, Ill., for Ilikon Corp.

Phillip C. Goldstick, Goldstick & Smith, Chicago, Ill., for Wittek Golf Supply Co.

Fletcher H. Etheridge, Houston, Tex., for Alton Box Board Co., et al.

Richard N. Carrell, Houston, Tex., for St. Joe Paper Co.

Bader & Bader, White Plains, N. Y., for London Dry Ltd. and Pleasure Hours, Inc., et al.

Guido Saveri, Saveri & Saveri, San Francisco, Cal., for Andre-Boudin Bakeries, Inc. et al.

Ellis Sostrin, Sostrin & Walner, Chicago, Ill., for Townhouse Furniture et al.

Robert H. Weir, San Jose, Cal., for Denver Meat Co., et al.

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David E. Bennett, Chicago, Ill., for Container Corp. of America.

Thomas G. Slater, Jr., Ray V. Hartwell, III, Douglas W. Kenyon, Richmond, Va., John D. Roady, Houston, Tex., for Chesapeake Corp. of Va.

John D. Roady, Lynda M. Jenkins, Hutcheson & Grundy, Houston, Tex., for Owens- Illinois, Inc.

MacDonald Flinn, New York City, for MacMillan Bloedel, Inc.

David T. Hedges, Jr., Houston, Tex., for Inland Container Corp.

Stephen D. Susman, Susman & McGowan, Houston, Tex., Vance K. Opperman, McGovern, Opperman & Paquin, Minneapolis, Minn., Allen D. Black, Fine, Kaplan and Black, Philadelphia, Pa., Jerry S. Cohen, Kohn, Milstein & Cohen, Washington, D.C., H. Laddie Montague, Jr., Berger & Montague, P.C., Philadelphia, Pa., Charles D. Kipple, Saccomanno, Clegg, Martin & Kipple, Houston, Tex., Kenton C. Granger, Anderson, Granger, Nagels & Lastelic, Overland Park, Kan., Lowell E. Sachnoff, Sachnoff, Schrager, Jones, Weaver & Rubenstein, Ltd., Jack Corinblit, Corinblit, Shapero & Seltzer, Los Angeles, Cal., Lawrence J. Hayes, Maun, Green, Hayes, Simon, Aretz and Murray, St. Paul, Minn., for Adams Extract Co., et al.

Henry L. King, Davis, Polk & Wardwell, New York City, for International Paper Co.

William A. Stearns, Milwaukee, Wis., for Menasha Corp.

David Bland, Houston, Tex., for U. S. Corrugated Fibre-Box Co.

Robert J. Malinak, Houston, Tex., Gottlieb & Schwartz, Chicago, Ill., for Stone Container Corp.

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Appeals from the United States District Court for the Southern District of Texas.

***202** Before TJOFLAT, FAY and FRANK M. JOHNSON, Jr., Circuit Judges.

TJOFLAT, Circuit Judge:

The appellate saga of the Corrugated Container antitrust litigation continues. [FN1] In this chapter, we consider two district court orders approving settlements between plaintiff-class representatives and twenty-four of the thirty-seven defendants.[FN2] The appellants in this appeal include two groups of dissident plaintiffs who argue that the settlements are invalid and must be set aside, and that even if they are valid, the formula by which they are to be distributed must be modified; a third group of plaintiffs who ask us to void those parts of the settlement that prevent them from pursuing state law remedies based on the same operative facts that underlie the settled federal claims; a fourth group of plaintiffs (comprised of one of the first two groups and the third group) who claim the notice informing the class of the settlement was defective; and various defendants who ask that we delay either approval of the settlements or distribution of the settlement proceeds [FN3] until there is final judicial clarification of the rights of non-settling defendants to bring actions for contribution against the settling defendants. [FN4] None of these arguments persuades us that the settlements must be set aside or modified; we are, however, in agreement with certain objectors that the district court's findings are insufficiently detailed to allow us to determine whether the district court abused its discretion in concluding that the terms of the settlements, and the plan to distribute the settlement proceeds to class members, are fair, reasonable and adequate.[FN5] We therefore remand the case to the district court for more detailed findings explaining its approval of the settlements. We retain jurisdiction during this

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limited remand.

FN1. The district court proceedings have already generated the following decisions: In Re Corrugated Container Antitrust Litigation, 606 F.2d 319 (5th Cir. 1979) (appeal dismissed without published opinion); In Re Corrugated Antitrust Litigation, 611 F.2d 86 (5th Cir. 1980); In Re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), cert. denied, --- U.S. ----, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980); In Re Corrugated Container Litigation, 620 F.2d 1086 (5th Cir. 1980).

FN2. Since the district court issued the orders involved in this appeal, twelve more defendants have settled. After this appeal was taken, the remaining defendant proceeded to trial before a jury and was found liable to plaintiffs.

FN3. Amounts paid toward the settlement have been deposited in an escrow account pending resolution of this appeal.

FN4. These settling defendants claim that in the event they are held liable for contribution, they could rescind the settlement under the doctrine of commercial frustration.

FN5. We find the court's findings on matters other than the terms of the settlement adequate. Thus, we are able to affirm the court's rejection of settlement attacks premised upon attorney **conflicts** of interest or the lack of presettlement discovery.

I
The Facts

We begin with a description of this litigation's general history. In 1976, the government convened a grand jury to investigate possible criminal antitrust violations occurring in the corrugated container industry. Several purchasers of corrugated containers and corrugated sheets subsequently filed treble damages actions against thirty-seven defendants under section 4 of the Clayton Act, 15 U.S.C. s 15 (1976). These cases, most of which were class actions, were consolidated in the Southern District of Texas in the fall of 1977. On December 6, 1977, the District Court ordered the formation of a plaintiffs' steering committee consisting of thirteen of the lawyers for plaintiffs in the consolidated actions. The district court order vested the committee with broad authority to control the continuing conduct of plaintiffs' cases; thi authority included the power to enter into settlement discussions with interested defendants.

On January 25, 1978, the grand jury returned indictments against fourteen of the defendants. The indictments charged that these defendants (and several individuals who had been employed by the defendants) conspired to fix corrugated container and sheet prices between 1960 and 1974.

In addition to the consolidated antitrust actions described, a group of container purchasers filed a state-law antitrust action in the Court of Common Pleas for Spartanburg County, South Carolina. The defendants in this action were also defendants in the consolidated cases. The state-court plaintiffs in these actions resisted efforts to remove their case to federal court, where it would have been transferred to the Southern District of Texas for consolidation. After successfully resisting removal, the plaintiffs moved the South Carolina court to enjoin the defendants from entering a settlement ***203** with the federal plaintiffs that released the South Carolina claims. This motion was granted.

In March 1978, plaintiffs in forty of the pending consolidated cases filed a single complaint (in the suit now before us) on behalf of all purchasers of corrugated container and sheet products. Soon thereafter, a motion for certification of a class was filed. The motion had not been ruled upon when, on July 28, 1978, Great Northern Packaging Corporation (Great Northern) and Huron Packaging Corporation (Huron), purchasers of sheets, filed a separate antitrust class action in the United States District Court for the Southern District of Texas against the defendants named in the unified class action. The plaintiff class in this new suit, however, was definitionally limited to sheet plants, that is, sheet purchasers who fabricate containers from their purchases. According to Great Northern and Huron, container purchasers rather than sheet plants had filed, and were prosecuting, the earlier consolidated actions.

Here we digress to consider the differences between the two purported classes. To do this, we must first look at the corrugated container industry. There are three steps in the manufacture of corrugated containers. In the first step, wood pulp is conver into containerboard. In the second step, the containerboard is confected into corrugated sheets. And, finally, in the third step, the sheets are

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fabricated into containers. The defendants in this appeal perform all three of these functions; that is, they begin with wood pulp and wind up with corrugated boxes. They are thus fully integrated operations.

The defendants sell their finished corrugated boxes to purchasers ranging from "ma and pa" grocery stores to such multinational corporations as Xerox Corporation. This group of purchasers composes the class denominated as container purchasers.

The defendants also sell corrugated sheets to independent enterprises that fabricate and sell their own containers.[FN6] These corrugated sheet purchasers comprise the sheet plant class. It should be noted that many container purchasers purchase some sheets, and, similarly, many sheet plants will purchase finished containers.

FN6. The container purchasers who buy from these independent fabricators are different from those that purchase from defendants, although there is some overlap between the two groups.

The various actions that had been consolidated, with one exception [FN7], had been filed by container purchasers. Most of these actions, however, were class actions, and the class definitions were arguably broad enough to include sheet plants. In any event, the plaintiffs' steering committee that was formed pursuant to the district court's December 6, 1977, order was composed entirely of lawyers for container purchasers.

FN7. After the initial consolidation of the various pending actions, and after the formation of the plaintiffs' steering committee, five container purchasers and one sheet plant, Atlas Container Corporation, filed still another federal antitrust suit against the defendants. This case was transferred to the Southern District of Texas to be consolidated with the other cases.

During the summer of 1978, and prior to class certification, the steering committee entered into settlement discussions with St. Regis Paper Corporation, which had not been indicted in the criminal case. These discussions culminated in St. Regis agreeing to pay $1.7 million, which represented $428,000 for each percentage point of the corrugated container market (market point) controlled by St. Regis, to settle the claims against it. St. Regis also made certain concessions and agreed, orally, to cooperate in plaintiffs' discovery effort. [FN8] Later that ***204** summer, plaintiffs concluded a second settlement, with International Paper, which had been indicted in the criminal case. International Paper agreed to pay.$8.3 million, which reflected $1 million for each percentage point of the corrugated market controlled by the company. [FN9]

FN8. At the time of the settlement, Congress was considering legislation that could have conferred standing on indirect purchasers to pursue price-fixing claims and, concomitantly, to permit defendants to assert a pass-through defense against price fixing claims waged by direct purchasers. Plaintiffs represented to the district court that St. Regis, in negotiations, sought to obtain the right to rescind the settlement if such legislation was enacted and exposed it to a possibility of double liability. The negotiated settlement, however, provides a right to rescission only if such legislation were to be enacted before December 31, 1978. A second concession was that St. Regis had no right of rescission in the event the class was not certified or, if certified, later decertified. The settlement was, however, contingent on the court's initial approval of a settlement class of plaintiffs.

FN9. The terms of International Paper's settlement were similar to those agreed to by St. Regis. See note 8, supra. The discovery concessions, however, were reduced to writing.

At the time the steering committee negotiated the aforementioned settlements, it had undertaken no discovery going to the merits of the case. (Such discovery was effectively precluded by restrictions imposed by the district court during the pendency of the criminal prosecution.) The steering committee had available to it certain information, however, which, according to the settlement proponents, was adequate for it to make an informed judgment concerning the value of the claims.[FN10]

FN10. In urging the district court to accept the settlements, the steering committee claimed it had had access to the following sources of information:
(a) The indictments and, in the case of International Paper, the extensive bill of particulars filed recently by the Government in the criminal case.
(b) Documents produced by defendants to the

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Houston Grand Jury.

(c) Extensive memoranda and affidavits submitted by defendants in response to plaintiffs' class action motion.

(d) Motions and memoranda filed by defendants in the criminal case.

(e) Statistics of the Fiber Box Association relating to sales of corrugated containers and sheets.

(f) Arthur Andersen reports relating to economic conditions in the corrugated products industry.

(g) The opinion and record in United States v. Container Corporation of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), and the opinion in United States v. Consolidated Packaging Corporation, 575 F.2d 117 (7th Cir. 1978).

Record Excerpts at 276 (footnote omitted).

On September 6, 1978, after the first two settlements had been concluded, the district court entered an order certifying a single class in the consolidated litigation. Great Northern believed the parameters of the class were imprecisely drawn and, in particular, ambiguous concerning whether sheet plants were included in the class. In response to these concerns, Great Northern, on October 6, 1978, filed a motion to clarify the class definition by excluding sheet plants, or, alternatively, to create a subclass for sheet plants. The court took this motion under advisement. Then, on October 26, 1978, without ruling on Great Northern's motion, the district court designated representatives of the class it had already certified. These class representatives included Atlas Container Corporation, which represented itself as a sheet plant.[FN11]

FN11. See note 7, supra.

The class representatives immediately embarked on an exploration of further settlement possibilities. This led, in December, to settlements with seven additional unindicted defendants. These settlements ranged from $2 million per market point to $2.75 million. In addition, a misdemeanor indictee settled for $3.5 million per point, and a felony indictee for.$4.5 million.

On December 26, 1978, the district court responded to Great Northern's motion by certifying two subclasses, one of container purchasers and the other of sheet plants. The court named Great Northern as one representative of the sheet plant subclass; Atlas Container, which previously had been designated a class representative, was also named a sheet plant representative.[FN12] With the exception of Atlas Container, the representatives of the containe purchaser subclass were the plaintiffs who had been designated on October 26, 1978 to represent the initial unitary class. Also on December 26, the two subclasses declared moratoriums on further negotiations.

FN12. The attorney for Atlas, who had also been representing five container purchasers, withdrew his representation of the container purchasers.

The container purchasers lifted their moratorium on January 5, 1979, and throughout ***205** the month conducted settlement discussions, but strictly on behalf of their subclass. This created a problem for defendants, who desired settlements that would release them from the claims of both subclasses. This problem was compounded by the container subclass's per-point dollar demands, which were in excess of what the single class had received in the December settlements. Defendants refused to negotiate on these terms, at least without the sheet plants' participation in the discussions.

The sheet plants, however, were unwilling to discuss settlement pending resolution of the investigation into damages suffered by their class. In order to break the resulting deadlock between the container class and defendants, a compromise was reached. The compromise was that a portion of any negotiated settlement would be available to the sheet class if the sheet class applied to participate in it, thus providing the defendants a possibility that the settlement they negotiated would release both subclasses' claims.[FN13] Eleven settlements, ranging from $1.5 million to $4 million per point, were negotiated on these terms.[FN14]

FN13. If the sheet subclass elected not to participate, the container class would receive the entire settlement proceeds, even that portion earmarked for the sheet plants; the sheet plants could proceed to trial.

FN14. The sheet plant subclass representatives voted two votes to one to participate in the settlements; after inter-class negotiation, it was agreed that $11 million would be earmarked for sheet plant claims. The sheet plant objectors challenge the sheet plant participation in these settlements in a separate appeal docketed 80-1476, 80-1521. The briefing on that appeal w. not completed until after the issues on this appeal had been briefed and orally argued.

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Late in January, the two classes negotiated additional settlements with two defendants who claimed an inability to pay large amounts in settlement because of borderline solvency. The plaintiff classes retained two accounting firms to investigate these hardship claims. After the firms reported that the claims were founded in fact, the plaintiffs settled at rates lower than those used in earlier settlements.

The criminal trial immediately followed these settlements, and no further settlements were reached while the trial was in progress. In April, 1979, the jury returned a verdict of not guilty against the defendants who stood trial. (Several of the indicted defendants had previously pleaded nolo contendere.)

On April 16, 1979, the plaintiff class representatives filed a motion for preliminary approval of the settlements. Several members of each of the two subclasses opposed the motion. Among the objections were that the settlements were contaminated by **conflicts** of interest; that the dollar amounts were inadequate; that even if the post-class certification settlements were adequate in amount, the pre-certification settlements with St. Regis and International Paper were clearly inadequate; that the negotiating attorneys lacked data necessary to evaluate the settlements; and that the objectors were denied the right to explore the settlement negotiations through discovery. By order dated May 30, 1979, the district court rejected these objections as obstacles to preliminary settlement approval, and held that "these settlements are within the range of possible approval and that notice of them should be given to the class members." In Re Corrugated Container Antitrust Litigation, 1979-1 Trade Reg.Rep.(CCH) P 62,690 at 77,881 (S.D.Tex.1979).

The class representatives thereafter sent a single notice to the class members, advising them they were potential members of a class and that settlements with 24 of the defendants had been reached and preliminarily approved by the court. The notice indicated that the total value of the settlements was $300,000,000. Recipients of the notice were given options of participating, of opting out of the class, or of participating in the class but objecting to the settlements. The sheet plant and South Carolina objectors contended that the notice was defective because it omitted relevant information concerning the settlements and because separate notices should have been used to advise the class of the pendency of the ***206** actions and of the proposed settlements. In any event, the vast majority of potential class members chose to participate in the class, and only a very small percentage of the class members objected to the settlements.

The court, on December 3 and 4, 1979, presided over a hearing on whether final approval should be given to the settlements. At this hearing, the objections to the settlements raised at the preliminary approval stage were renewed. In addition, new objections were raised. Several defendants objected to approval of the settlements prior to final judicial resolution of the validity of the claims for contribution that certain non-settling defendants had raised against them; other defendants requested that the court approve the settlements, but delay distribution of the proceeds until judicial resolution of the contribution issue, thus preserving the assets until such time as a right of rescission might arise. The group of plaintiffs that had filed an antitrust action in South Carolina objected to a settlement provision releasing state law claims. Some sheet plants objected to the manner in which the proceeds were to be divided between the subclasses; some container purchasers made similar objections. The district court, nonetheless, approved the settlements and the objectors have brought this appeal.

We discuss these various objections in the following sections of this opinion. Before beginning this discussion we add, parenthetically, that since the district court's approval of these settlements, twelve of the then thirteen non-settling defendants settled their lawsuits. The plaintiffs proceeded against the thirteenth defendant, Mead Corporation, in a jury trial. The jury found that Mead had conspired to fix prices in the corrugated container industry with eighteen of the settling defendants.

II
Arguments that the District Court Abused Its Discretion in Approving These Settlements

Rule 23(e) of the Rules of Civil Procedure requires that a settlement or compromise of a class action be approved by the district court. The district court below, in its 31st pretrial order, found the twenty-four settlements involved in this appeal to be fair, reasonable and adequate and, therefore, approved them. Two groups of plaintiffs, one comprised of certain members of the sheet subclass and the other of members of the container purchaser subclass,

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contend that the district court's findings and its concomitant approval of the settlements were erroneous. We are, accordingly, asked to set aside the court's approval.

The objecting plaintiff groups, between them, advance three reasons why the district court should not have given these settlements its imprimatur. The first two reasons do not relate directly to the terms of the settlement, but rather to the manner in which those terms were negotiated by the class representatives. Specifically, the objecting plaintiffs contend that the settlements should be set aside because they were negotiated by attorneys who (1) attempted to represent both subclasses as a single client, a representation that, because of the inherent **conflicts** between the subclasses, could not adequately be undertaken; and (2) lacked sufficient data to evaluate the settlement value of their cases against each of the defendants. We hold that neither of these objections provides grounds for reversing the district court's approval.

The dissident plaintiffs' third objection is to the adequacy of the terms of each of these settlements. The plaintiffs argue that on the record before us, we must find that the district court abused its discretion in holding that the settlements were adequate. We are unable to evaluate this contention, however, because the district court's findings and conclusions on adequacy were insufficiently detailed to inform us of why the court acted as it did. Although we are reluctant to delay further ultimate judgment on these settlements, we are, under these circumstances, compelled to remand to the district court for findings of fact sufficient for us to determine whether ***207** its approval of the settlements was a proper exercise of discretion. We will retain jurisdiction of this appeal during the limited remand.

The above-summarized holdings are discussed below.

A.
Standard of Review

[1] Rule 23(e) provides no standard by which a court is to consider the settlement of a class action; rather, the rule states only that "(a) class action shall not be dismissed or compromised without the approval of the court ...." Decisional law, however, provides us with a general measuring rod for considering settlements:

> In determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable....

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977). See also: Young v. Katz, 447 F.2d 431 (5th Cir. 1971). Approval of a settlement under this standard is not to be upset unless "the trial court clearly abused its discretion." Young v. Katz, supra at 432. Thus, our appellate function respecting the various arguments presented on this appeal is a limited one, especially in light of the strong judicial policy favoring settlement of disputes. United States v. City of Miami, Florida, 614 F.2d 1322, 1344 (5th Cir. 1980).

B.
Conflict of Interest

We turn to the dissidents' first argument: that the district court should have disapproved these settlements because they were negotiated by attorneys with **conflicts** of interest that adversely affected their representation of one or both classes. As might be expected, the two classes have somewhat different views on which class was hu and how the hurt was inflicted. The sheet plant dissidents argue that the pre-January 5, 1979, settlements, covering both classes, were negotiated by attorneys representing container purchasers only, and that those attorneys subordinated the interest of sheet plants to the interests of their clients. The container purchaser dissidents present a more subtle argument. They believe that the attempt to negotiate the pre-January 5 settlements on behalf of both subclasses, with their allegedly diverging and irreconcilable interests, made it impossible for negotiating counsel to "have represented the interests of both container purchasers and sheet plants adequately in settlement negotiations." Brief of Plaintiff-Appellant Container Purchasers, at 23. Moreover, the dissident container purchasers also challenge the post-January 5 settlements, arguing that the container purchasers' negotiation of a set-aside fund to be allocated among the sheet plants upon their application polluted those settlements with **conflicts** of interest. [FN15]

> FN15. The sheet plant dissidents do not challenge the post-January 5 settlements on this appeal, b rather do so in related appeals. See note 14, supr.

1. Pre-January 5 Settlements

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[2] We can assume, for purposes of considering the **conflicts** argument, that the two subclasses had significantly diverging interests and that an attorney could not adequately represent all these interests throughout the litigation. [FN16] This does not mean that the settlements are necessarily void, however, because even "irregular settlement negotiations may ... form the basis ***208** for a judicially acceptable class action settlement ... if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement itself is fair." In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1131-32 (7th Cir.), cert. denied, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979) (emphasis supplied). The question of fairness of the settlement terms is considered in a separate section of this opinion. We consider, in this section, the question of adequacy of representation.

> FN16. The district court, however, would dispute this. According to the court,
>
> The order carving out a separate subclass of sheet plants was entered because there was some suggestion that a **conflict** could arise between the two groups, and because the court was not at that time familiar enough with the corrugated industry to be sure that such a **conflict** would not arise. It now appears clear that although differences may exist between the sheets plants and other corrugated purchasers, there are no inherent **conflicts** between them.
>
> In re Corrugated Container Antitrust Litigation, 1979-1 Trade Reg. Rep. (CCH) P 62,690 at 77,882 (S.D.Tex.1979).

Recognizing that the allegedly differing interests of the two subclasses might have conflicted at some point in the litigation, we think the question before the district court was whether these interests conflicted at the point of settlement negotiation, and thus deprived either class of the vigorous and unqualified advocacy in settlement negotiations to which both were entitled. In deciding whether the settlements resulted from proper advocacy, we must inquire, first, whether the general interests of the subclasses respecting the settlements were the same and amenable to being achieved by unified representation; and, second, whether any specific features of the settlement sacrificed the interests of one class in favor of the interests of the other.

[3] The way we have framed our first inquiry indicates our agreement with the district court that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." In Re Corrugated Container Antitrust Litigation, 1980-1 Trade Reg. Rep. (CCH) P 63,163 at 77,788 n.10 (S.D.Tex.1979). We think it clear that the primary settlement goal of each class was to cause defendants to agree to pay substantial compensation in exchange for the most limited possible release from their obligations and potential liabilities as parties to the litigation.

We have carefully reviewed the objectors' appellate briefs, and their submissions to the district court in opposition to the settlements, and have not been pointed to anything suggesting that other significant subclasses' settlement interests existed.[FN17] Neither has there been a suggestion that two sets of negotiators leading to two sets of settlements might have better achieved the common aims of the two subclasses. On the contrary, in these circumstances, logic dictates that one set of negotiators, with the authority to release defendants from all claims, would be in a better bargaining position than negotiators with authority to compromise only part of the action.

> FN17. The district court noted that the only benefit the sheet plants separate representation achieved was injunctive relief.

[4] We next consider whether the negotiators, despite the uniformity of the two subclasses' settlement interests, somehow sacrificed, advertently or inadvertently, the interests of one subclass for those of the other. While objectors from each class argue that the dollar values of the settlements were inadequate, neither class suggests that this inadequacy resulted from a tradeoff of its rights in order to realize the interests of the other class. In fact, the only suggested illustration of potential class **conflict** evolving into actual prejudice concerns the settlement with St. Regis. The sheet-class objectors contend that this settlement should have been larger because St. Regis, while a small container manufacturer, is the nation's third largest manufacturer of corrugated sheets.[FN18]

> FN18. The sheet plant objectors also allege that the settlement with International Paper illustrates the sacrifice of their interests for those of the container-purchaser subclass. The objectors, however, do not suggest that International Paper was a larger manufacturer of sheets than

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Defendants-Appellants (the Continental Group, Inc.) at 2. The second group believes the district court properly placed its final imprimatur on the settlements, but should have delayed distribution of the settlement proceeds until all issues concerning rights of recission were resolved. Brief for Settling Defendants-Appellants Owens-Illinois, Inc., etc. at 8. At this time, we hold only that the district court acted properly in deciding whether to approve the settlements when it did. We do not, in this opinion, reach the question whether the district court should have delayed distribution of the settlement proceeds, since this question will be mooted ***225** if the settlements are ultimately disapproved.[FN44] Our retained jurisdiction will permit us to review the question of distribution when the district court, on limited remand, complies with our request as iterated in Part II, supra.

> FN44. We consider whether the district court should have considered approving the settlements when it did because a negative answer to this question would require us to vacate the order approving the settlements.

[36][37] The argument that the district court should have delayed approving these settlements until the non-settling defendant's right of contribution is finally resolved is without merit. The district court's inherent power to manage the class action gives it the discretion to decide when to review the adequacy of a settlement. In exercising this discretion, the court's most important consideration is whether the proponents are ready to demonstrate that the settlement is fair, reasonable and adequate. If they are, the district court should proceed to consider the settlement at an early date, particularly when approval or disapproval bears on the interests of other parties who are preparing for trial. Here, as in other contexts, justice unnecessarily delayed can be justice diminished.

[38] The settling defendants, however, claim that the court could not determine whether the settlements were fair and reasonable as to them until the contribution claims were resolved. These defendants misconstrue the court's role in passing on the fairness, adequacy and reasonableness of a settlement. The reason the court is called on to review a settlement is to protect the rights of the many absent class members who were not involved in the negotiations leading to settlement. See Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971). A defendant who negotiates a settlement, however, does not need the c to in a fiduciary role to protect its interest. T e provides other remedies if the settlement is ega objectionable from the defendant's standpoint instance, it can seek rescission.

Thus, defendants here, are wrong in claiming t the court abused its discretion in reviewing settlements for final approval in December, 1 79 the defendants' interests in bringing a res iss action required protection, the court could h delayed distribution of the settlement pr ee Whether the court had the duty to ro defendants' interests on rescission, and whet failing to exercise that duty was reversible err , i question we reserve until the district court c api with out limited remand order.

VII
Conclusion

We conclude by summarizing our holdings:

(1) We affirm the district court's holding t at plaintiff negotiators did not have **conflicts** of inter that rendered them inadequate representat s of subclasses;

(2) We affirm the district court's holding t at lack of pre-settlement discovery does not i its invalidate the settlements;

(3) We affirm the district court's holding tha it h the power to approve settlements that rele defendants from federal and state claims;

(4) We affirm the district court's approval f notice to the subclasses;

(5) We affirm the district court's decis n consider the settlements for final approval prior judicial resolution of whether the non-settli defendant has a right to bring a contribution cti against the settling defendants;

(6) We remand to the district court to ente mo detailed findings and conclusions concerni g t adequacy of all but the two "hardship settlements";

(7) We remand to the district court to ente mo detailed findings and conclusions con ing t reasonableness of the formula by ic t settlement proceeds for the pre-January 5, 197 , a the hardship settlements are to be distributed subclass members;

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***226** (8) We reserve judgment on whether the district court should delay distribution of the settlement proceeds until there is judicial resolution of the non-settling defendant's right to bring a contribution action against the settling defendants;

(9) We retain jurisdiction of this appeal pending the district court's compliance with our limited remand.

REMANDED with instructions.

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Appellate Court of Illinois.
First District. First Division.

Joseph F. ELWARD, Appellant,
v.
PEABODY COAL COMPANY, an Illinois corporation, et al., Appellees.

No. 46717.

March 5, 1956
Rehearing Denied March 21, 1956.

Action by shareholder, for himself, and in representative capacity, attacking validity of stock purchase option issued by corporation. The Superior Court, Cook County, Frank M. Padden, J., entered order dismissing complaint, and plaintiff appealed. The Appellate Court, Burke, J., held that corporate directors as intended beneficiaries of stock option were disqualified from voting on resolution authorizing option, and where corporation had seven directors, five of whom attended meeting at which resolution was adopted, and it was adopted by five votes including votes of intended beneficiaries, there was no affirmative action by qualified majority of directors.

Decree reversed and cause remanded with directions.

West Headnotes

[1] Constitutional Law ⚿81
92k81

The public policy of state is to be found embodied in its constitution and statutes and, if they are silent, in the decisions of its courts.

[2] Corporations ⚿158
101k158

The preemptive right of shareholders to share pro rata in any new issue of corporate stock so that their interest will not be diluted but will continue proportionately, is part of common law of State. S.H.A. ch. 32, § 157.24.

[3] Corporations ⚿370(3)
101k370(3)

Implied powers of corporation to effect express powers are not limited to the indispensable but also include those necessary and include the right of choice as to means. S.H.A. ch. 32, § 157.5.

[4] Corporations ⚿316(3)
101k316(3)

Under statute authorizing corporation, by articles of incorporation, to limit or deny preemptive rights of shareholders to acquire additional shares, article enacted by corporation pursuant thereto, and statute providing that corporations have power to elect or to appoint officers and agents, a corporation had implied power to enter into valid contract with officer or employee for a stock option. S.H.A. ch. 32, §§ 157.5, 157.24.

[5] Corporations ⚿316(3)
101k316(3)

Statute providing that corporation may, by articles, limit or deny shareholders' right to acquire additional shares and that, unless otherwise provided by articles, corporation may sell shares to employees, without first offering them to shareholders, upon approval of holders of two-thirds of shares entitled to vote was required to be complied with by corporation in granting stock option. S.H.A. ch. 32, § 157.24.

[6] Corporations ⚿316(3)
101k316(3)

Under statute providing that corporation may offer shares to employees, without first offering them to shareholders, upon approval of two-thirds of shares entitled to vote and statute providing that plural in number may include singular, an Illinois corporation could grant stock options to one or more employees. S.H.A. ch. 32, § 157.24; ch. 131, § 1.03.

[7] Corporations ⚿298(5)
101k298(5)

Corporate directors as intended beneficiaries of stock option were disqualified from voting on resolution authorizing option, and where corporation had seven directors, five of whom attended meeting at which resolution was adopted, and it was adopted by five votes, including votes of intended beneficiaries, there was no affirmative action on resolution by qualified majority of directors. S.H.A. ch. 32, §§ 157.5, 157.24.

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[8] Corporations ⚿99(3)
101k99(3)

Under statute requiring that shares having par value be issued for not less than such value, an employee's stock option agreement under which corporation unequivocally promised to sell shares having par value of $5 for $3 was invalid and it could not be made valid on asserted grounds that difference between such figures could be granted to employee as bonus, that shares could come from treasury shares, it available, or that, at time of exercise of option, par value of shares might be $3 or less, as all such grounds embodied illusory promise requiring action on part of board to implement, and board was free or not to take such action. S.H.A. ch. §§ 157.5, 157.17, 157.24.

[9] Declaratory Judgment ⚿96
118Ak96

A corporate shareholder who brought action, for himself and in representative capacity, to attack stock option authorizing an employee to purchase par value stock for less than par value was entitled to declaratory decree as to whether option agreement was illegal in view of actual controversy involving construction and validity of agreement, and action was not premature merely because optionor had not exercised the option. S.H.A. ch. 32, §§ 157.5, 157.17, 157.24.

[10] Corporations ⚿320(7)
101k320(7)

Where shareholder's action attacking validity of employee's stock option authorizing purchase of common stock below par value alleged in complaint, three alternative methods suggested by management by which option could be effective, complaint sufficiently informed defendants that shareholder claimed transaction was violation of statute and that such alternatives had no validity as to make proper shareholder's argument on appeal that such alternatives were mere illusory promises. S.H.A. ch. 32, §§ 157.5, 157.17, 157.24.

[11] Corporations ⚿316(3)
101k316(3)

In a stock option agreement to employee there is consideration for granting of option, and consideration for purchase of stock is purchase price, without which option could not be consummated. S.H.A. ch. 32, §§ 157.5, 157.24.

[12] Contracts ⚿153
95k153

Whenever possible, contracts will be construed to be lawful.

[13] Corporations ⚿99(3)
101k99(3)

In general, courts will not substitute their judgment for that of directors on issue of consideration paid for stock, but directors cannot grant stock options to sell stock for consideration less than par value, in violation of provisions of business corporations act. S.H.A. ch. 32, §§ 157.5, 157.17, 157.18, 157.24.

[14] Corporations ⚿103
101k103

Shareholders cannot approve action of board of directors agreeing to sell stock for less than par value. S.H.A. ch. 32, §§ 157.5, 157.17, 157.24.

****550 *236** Edward S. Macie & Paul F. Elward, Chicago, for appellant.

****551** Hopkins, Sutter, Halls, Owen & Mulroy, Chicago, for Peabody Coal Co., Stuyvesant Peabody, O. Gressens, Joseph Solari, Frank L. White and John T. Rettaliata. Thomas R. Mulroy, William C. Childs, George Kelm, Chicago, of counsel.

BURKE, Judge.

***237** Joseph F. Elward, for himself and in a representative capacity, filed his second and amended supplemental complaint (hereinafter called the complaint) against Peabody Coal Company, an Illinois corporation, and its seven directors for a declaratory decree that a stock option is invalid, injunctive relief and discovery. He appeals from an order dismissing the complaint on defendants' motion that it is substantially insufficient in law.

The capital stock consists of 562,608 shares of prior preferred 5% comulative $25 par, convertible into common stock at the holder's option at the rate of 2 1/2 shares of common for each share of preffered, and 828,835 1/2 shares of common at $5 par value. Sufficient shares of common stock are reserved for conversion of the preferred stock. The by-laws provide for a board of directors of seven members

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and that a majority shall constitute a quorum for the transaction of business. In October, 1951, Otto Gressens, one of the defendants, became an employee of the corporation. In 1951 the charter of the corporation was amended to provide that any shares of common or preferred stock may, in the discretion of the board of directors, be issued and disposed of from time to time in such manner, to such persons of corporations and for such consideration as may be determined by the board, wihtout first being offered to any class or classes of shareholders. At a special meeting of the directors held December 21, 1953, a resolution was adopted giving Stuyvesant Peabody and Gressens an option during a nine year period commencing December 21, 1954, to purchase common stock at $3 a share, Peabody's option being for 20,000 and Gressens' for 40,000 shares. At this special meeting five out of seven directors attended. Peabody and Gressens were two of the five directors voting for the resolution.

The next day Peabody wrote a letter directing the cancellation of his stock option. On the day of the ***238** special meeting an agreement was executed by the corporation and Gressens, whereby in consideration of the sum of $1 paid by Gressens as optionee to the corporation and the other good and valuable consideration, including the continued service of the optionee at least until December 21, 1954, the corporation granted to him an option to purchase on or before December 31, 1963, 40,000 shares of common stock at $3 a share. On the following day Gressens wrote the president of the corporation a letter stating that in consideration of and as a part of the option agreement he agreed to remain in the employ of the corporation for at least five years "under the salary arrangement suggested by you." On the day the option was granted the market price of the common stock was $3 a share; on June 28, 1954, it was $5 1/8 a share. The parties agree that in June, 1955, the market price was $8 a share.

On January 18, 1954, plaintiff wrote to defendants objecting to the option. On February 8, 1954, plaintiff requested the defendants to annul the option transaction. In May, 1954, plaintiff and the management of defendants sent separate letters to the shareholders soliciting proxies for the annual shareholders' meeting to be held on June 28, 1954. In these communications the shareholders were informed about the option. The management statement said that inasmuch as the statute requires that the corporation must receive as consideration "not less than the par value of $5" that the company has three alternatives. At the annual shareholders' meeting of June 28, 1954, a resolution was adopted approving, ratifying and confirming the option agreement. The vote was 920,404 1/2 shares in favor of the option and 313,761 shares against the option. The vote for the option was 66.15% of all the outstanding ****552** shares and 57.91% of the persons holding stock voted their shares in favor of the option.

[1][2] ***239** The plaintiff asserts that the Business Corporation Act does not empower a corporation to issue a stock option; that this power is not granted in express terms or by implication; that a shareholder is entitled under the common law to preemptive rights; and that the Act should be construed strictly so as not to impair the preemptive rights of stockholders. The public policy of this state is found in the Constitution, the statutes and the decisions of the courts. Plaintiff cites cases pointing out the distinction between the power to sell and the power to give an option. The preemptive rights of shareholders to share pro rata in any new issue of corporate stock so that their interest will not be diluted but continue proportionately, is part of the common law of this State. Eidman v. Bowman, 58 Ill. 444; Tennant v. Epstein, 271 Ill.App. 204. Section 24 of the Business Corporation Act (Par. 157.24, Ch. 32, Ill.Rev.Stat.1955) reads: "The preemptive right of a shareholder to acquire additional shares of a corporation may be limited or denied to the extent provided in the articles of incorporation. Unless otherwise provided by its articles of incorporation, any corporation may issue and sell its shares to its employees or the the employees of any subsidiary corporation, without first offering the same to its shareholders, for such consideration and upon such term and conditions as shall be approved by the holders of two-thirds of its shares entitled to vote with respect thereto or by its board of directors pursuant to like approval of the shareholders."

[3][4] The first sentence of Section 24 provides that the charter of an Illinois corporation may limit or deny the preemptive right of a shareholder to acquire additional shares of stock. The second sentence of the section allows a corporation which does not have an express charter denial or limitation of preemptive rights, to issue and sell stock to its employees free of preemptive rights for such consideration and upon ***240** such terms and conditions as shall be approved

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by the holders of two-thirds of its shares entitled to vote with respect therto or by its board of directors pursuant to like approval of the shareholders. Plaintiff inquires that, keeping in mind the doctrine that corporate powers are to be construed strictly and that no power is to be implied unles reasonably necessary to an express power, under what section or sections could the power to issue stock options be regarded as implied? Section 5 of the Business Corporation Act states that each corporation shall have power to make contracts and incur liabilities, to elect or appoint officers and agents of the corporation, to define their duties and fix their compensations, and to exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed. It cannot be doubted that Illinois corporations are empowered to enter into contracts relating to employment. The implied powers which a corporation has in order to carry into effect those expressly granted and to accomplish the purposes of its creation are not limited to such as are indispensable for these purposes, but comprise all that are necessary, in the sense of appropriate and suitable, including the right of reasonable choice of means to be employed. 13 Am.Jur., Corporations, Sec. 740. We are of the opinion that there is ample implied power in Sections 5 and 24 of the Business Corporation Act and in Article 9 of the amended charter to sustain the action of the defendant corporation in entering into a valid contract with an officer or employee for a stock option.

[5][6] Having decided that under the Business Corporation Act a corporation has the right to impair the preemptive rights of shareholders by granting stock option to officers and employees and that the charter of the defendant corporation as amended authorized the directors to exercise that power, we ***241** turn to a consideration of plaintiff's contention that the stock option granted violates provisions of the statute. We are of the opinion that in granting stock options a corporation is required to comply with the provisions of Section 24 of the ****553** Business Corporation Act and its charter. Plaintiff says that the stock option granted in the instant case violates that section in that it does not run to employees but to one employee. Section 1.03 of the Act governing the construction of statutes (Ch. 131, Ill.Rev.Stat.1955) states that "the plural number may include the singular." We think that an Illinois corporation may grant stock options to one or more persons.

Plaintiff maintains that the proper construction of Section 24 requires that to deny a shareholder's preemptive right by issuing shares to its employees, there must be a determination to that effect and of the consideration therefor by the board of directors and an approval by two-thirds of the outstanding shares, and that satisfaction of one of these conditions is insufficient. Pursuant to the provisions of the first paragraph of Section 24, the corporate charter was amended to provide, among other things, that the board of directors could deny preemptive rights to the shareholders, and we have held that by implication these provisions authorize the making of contracts for stock options to officers and employees. The second paragraph of Section 24 would be operative if there were no denial of preemptive rights as set forth in Article 9 of the charter. The second paragraph of that section commences "Unless otherwise provided by its articles of incorporation" and then goes on to state that shares may be offered to employees "without first offering the same to its shareholders" upon the approval of two-thirds of the total shares. If preemptive rights have been completely denied to the shareholders under a charter provision pursuant to the authority ***242** provided by the first paragraph of Section 24, as in the case at bar, then no requirement exists that the stock be first offered to shareholders.

[7] Plaintiff asserts that the stock option must fail because it is not upon terms and conditions approved by a qualified majority of the directors. At the meeting held on December 21, 1953, wherein the stock option was approved, five of the seven directors attended. These five included Peabody and Gressens, who were the optionees and beneficiaries. The resolution was adopted by five votes. Peabody and Gressens were disqualified to vote on this benefaction to themselves. Without counting these two votes there were only three directors voting for the resolution. Plaintiff argues that of the three directors, two others could be fairly regarded as interested and dominating, leaving only one clearly disinterested director. We agree with plaintiff that under the allegations of the complaint there was never any affirmative action by a qualified majority of directors. Luthy v. Ream, 190 Ill.App. 315; Id., 270 Ill. 170, 110 N.E. 373. Defendants answer that any defect which might have occurred in the action of the directors in adopting the resolution was vitiated by the subsequent approval overwhelmingly voted by the shareholders," citing Kerbs v. California Eastern Airways, Del., 90 A.2d 652, 34 A.L.R.2d 839; Federal Life Ins. Co. v. Griffin, 173

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Ill.App. 5. The action of the board of directors in granting the stock option was approved by 66.15% of all outstanding shares at the annual stockholders' meeting.

[8] Plaintiff insists that the stock option is illegal for the reason that it provides for the issuance at a price of $3 of shares having a par value of $5, in violation of Section 17 of the Business Corporation Act, which requires that shares having a par value may be issued for such consideration, not less than the par value thereof, as ***243** shall be fixed from time to time by the board of directors. The par value of the common shares of the corporation is $5 per share. Plaintiff states that under the stock option the corporation agrees to sell 40,000 shares to Gressens at his option up to December 31, 1963, at a price of $3 per share, and that this is a clear violation of the statute. Defendants say that the option is not illegal. They concede that under the statute stock may not be issued for consideration of less than the par value thereof, and that the corporation must receive consideration totaling in value $5 for each share of stock issued to Gressens under the option. Defendants say that the option agreement provides ****554** that "the corporation shall always receive, prior to the issuance of any shares, that amount of Consideration legally required to make such shares full paid and nonassessable." Section 2 of the option agreement specifically provides that the purchase price of the shares of common stock shall be $3. This section further states that under " certain circumstances such purchase price per share is subject to adjustment as provided in Section 9." Section 9 (a) provides that if prior to the expiration date of the option ending December 31, 1963, "any of the events hereinafter shall occur, the stock purchasable under this agreement and the unit purchase price payable upon the exercise of the option granted herein shall be adjusted as provided in this Section 9." The section then goes on in (b) to provide that in the event the corporation shall issue a stock dividend or a stock split-up, there shall be an adjustment of the "per share or per unit price of the securities which the optionee shall be thus entitled to receive." The section further provides in (c) that in case the corporation shall be merged or consolidated that the optionee shall be merged or consolidated that the optionee shall be entitled to receive the securities which he would have been entitled to receive had he exercised his option prior to the effective ***244** date of the merger of consolidation. The section provides in (d) that in the event of a dispute as to whether an increase of decrease of the per share or per unit price of securities is required under paragraphs (b) and (c), the decision of the independent public accountants who, at the time regularly audit the books of the corporation, shall be final and conclusive. Paragraph (c) of the section concludes with this sentence: "If appropriate, due adjustment shall be made in the per share or per unit price of the securities purchased, provided, however, that the corporation shall always receive, prior to the issuance of any shares, that amount of consideration legally required to make such shares fully paid and nonassessable." In our opinion the option agreement, after fixing the "purchase price" of $3, requires that the "full purchase price of shares purchased shall be paid upon the exercise of the option." The "full purchase price" means the purchase price at $3 a share. The concluding sentence of the paragraph that "under certain circumstances such purchase price per share is subject to adjustment, as provided in Section 9" relates to the adjustment to be made in the per share or per unit price under the contingencies provided for in Section 9, namely, adjustment for stock dividend, stock split-up, merger or consolidation. A careful reading of the option agreement convinces us that the corporation's promise is unequivocal that the purchase price of the shares shall be $3. This construction of the agreement is consistent with the action of the board of directors at the meeting of December 21, 1953, wherein the chairman proposed that consideration be given to the matter of authorizing options to purchase the shares of common stock hereinbefore mentioned "at a price of $3 per share, the present market price of the company's common shares on the New York Stock Exchange." The resolution then adopted, authorized and ***245** directed the officers to enter into an option agreement with Gressens for 40,000 shares, and provides that the officers are authorized to make such changes in the form of agreements as are considered advisable by counsel, provided that the terms shall be " substantially the same as those provided for the instruments submitted to the meeting." The option agreement bears the date of the meeting and was presumably signed immediately after the meeting. In the resolution the officers were authorized and directed to carry out the option agreements according to their terms and to file any reports and give any notices that may be necessary from time to time with the New York Stock Exchange or any governmental agencies. We agree with the plaintiff that it would be reasonable to expect that if there were any qualifications or conditions in the corporation's promise to Gressens, such as the defendants now suggest, namely, that the

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promise included a provision that the corporation is always to receive "consideration totaling in value $5," that somewhere in the agreement or in the minutes of the meeting there would be a reference to this qualification or condition.

****555** Defendants invite attention to the following from the proxy statement of the management sent to the shareholders prior to the annual meeting of June 28, 1954: "The option price is $3 per share, which was the market price on the New York Stock Exchange on December 21, 1953, the day the option was granted, subject however, to the requirement of Illinois law that the company must receiver as consideration not less than the par value ($5.00) for any theretofore unissued shares. * * * In the opinion of counsel for the Company, there is an obligation on the Company before delivery of shares under the option agreement not only to have received $3.00 per share from the optionee but also that the shares delivered be legally issued." ***246** The statement sets forth three of the "alternatives available to the directors in order to fulfill the requirements of Illinois law" in this respect. Plaintiff argues that defendants' position that they have three alternatives to avoid the statute is without merit because each of the alternatives recognizes that the present promise of the corporation is a mere "illusory promise" and therefore void and unenforceable.

The proxy solicitation letter continued: "One of the alternatives available to the directors in order to fulfill the requirement of Illinois law is to recognize at the time Mr. Gressens alects to exercise all or any part of the option that the Company has received services of Mr. Gressens not covered by his current salary equal in value to the spread between the $3.00 a share to be paid by him in cash and the $5.00 par value of those shares. If this were done, there would be a transfer of the aggregate amount of such spread from the Company's surplus (income) account to its capital account." The plan thus outlined depends upon an uncertain future event over which Gressens has no control and which may or may not happen. When and if Gressens decides to exercise his option the future board of directors is under no legal obligation to give him a bonus covering the "spread" between the $3 purchase price and the $5 par value price of the shares. The proxy solicitation letter suggested that a second alternative "could be the delivery of treasuty shares, if available at the time of the exercise of all or any part of the option." At no time since December 21, 1953, has the corporation had any treasury shares of common stock. The corporation is under no legal obligation to acquire shares of common stock to be held in its treasury. The proxy solicitation letter said that a "third alternative could be that the par value of the shares at the time of the exercise of all or any part of this option would be $3 or less per share or no par. ***247** The last alternative would require shareholders' approval by amendment of the charter. If present circumstances continue, neither the second nor third alternative will be adopted." This alternative recognizes that in order to make a valid contract to purchase the common stock at $3 a share, it would be necessary that the charter be amended to change the par value of the common stock to "$3 or less per share or no par value," which would require approval by two-thirds of the shareholders. As the promise of the corporation and Gressens' right to compel performance are conditional upon an uncertain future event which may never take place, it is obvious that there is now no binding promise. "The fundamental element of promise seems to be an expression of intention by the promisor that his future conduct shall be in accordance with his present expression, irrespective of what his will may be when the time for performance arrives." Corbin on Contracts, Sec. 16. The suggested alternatives do not contemplate an intention by the corporation that its future actions with relation to the payment of the consideration for the shares of common stock shall be in accordance with its present expression, irrespective of what its decision may be when the time for performance arrives. We conclude that the proposed alternatives constitute an illusory promise that requires further legal action on the part of the board to implement, which action the board is legally free to take or not to take and that therefore the promise is unenforceable.

[9] Defendants urge that it is premature to entertain the question of a consideration ****556** for the issuance of the stock, pointing out that Section 18 of the Business Corporation Act provides that the judgment of the board of directors or shareholders, as the case may be as to the value of the consideration received for shares shall ***248** be conclusive. No part of the option has as yet been exercised. The defendants say that if and when Gressens exercises the option the directors will then determine how the agreement may be performed so that the shares issued to him will be fully paid anc nonassessable, and that it is impossible to know now the circumstances which will confront the directors at the time the option is exercised. They suggest that if at that time plaintiff has reason to believe that

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"actual fraud" entered into the judgment of the directors in determining the value of the consideration, then he would have a remedy. We are of the opinion that plaintiff is entitled to a declaratory decree as to whether the stock option agreement is illegal. Section 57.1 of the Civil Practice Act (Par. 57.1, Ch. 110, Ill.Rev.Stat. 1955) provides that no action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory decree, judgment or order is sought thereby, and the court may, in cases of actual controversy, make binding declarations of rights having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any deed, will contract or other written instrument, and a declaration of the rights of the parties interested, but the foregoing enumeration shall not exclude other cases of actual controversy. As there is an actual controversy involving the construction and validity of the stock option agreement, the complaint is properly brought. Exchange National Bank of Chicago v. County of Cook, 6 Ill.2d 419, 129 N.E.2d 1.

[10] Defendants say that consideration may not be given on this appeal to plaintiff's theory that the option agreement is void as containing mere " illusory promises" because no such theory was raised below. The complaint alleged and discussed the three alternatives ***249** suggested in the management proxy statement and set out the basis for the contentions advanced by him in this court. These allegations sufficiently informed the defendants that plaintiff claimed that the transaction was in violation of the statute, and that the three alternatives suggested had no validity.

[11][12][13] Defendants state that it is elementary that a contract supported by a consideration will not fail merely because one of several promises therein may be subject to a condition. In an option agreement there is the consideration for the granting of the option and the consideration for the purchase of the stock, namely, the purchase price, without which the option could not be consummated. Gottlieb v. Heyden Chemical Corp., Del.Ch., 99 A.2d 507; 17 C.J.S., Contracts, § 100, page 450. It is unnecessary at this time to consider the adequacy of the consideration for the option because the contract must fail for the reason that the corporation could not contract to sell $5 stock for $3. Defendants cite Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N.E. 711, for the proposition that while consideration is essential to the validity of a contract, mutuality of obligation is not. We do not regard this authority as having any bearing on the power of the corporation to contract to grant a stock option to sell $5 stock for $3. There is no disagreement with the defendants' proposition that contracts will, wherever possible, be construed to be lawful. They say that it will be presumed that the parties intended to makethe option subject to the requirements of Illinois law that stock may not be issued for the consideration of less than par value. In the instant case this presumption cannot be invoked because the option agreement specifically provides that the purchase price will be $3 per share. We agree with the statement of defendants on the general proposition that the courts will not substitute their judgment for that of the directors ***250** on the issue of consideration. Holthusen v. Edward G. Budd Mfg. Co., D.C.E.D.Pa., 53 F.Supp. 488; Kaufman v. Shoenberg, Del. ****557** Ch., 91 A.2d 786. The directors, however, cannot grant stock options to sell the stock for a consideration of less than the par value.

[14] As hereinbefore states, a substantial majority of the shareholders approved the granting of the stock option. Defendants insist that where shareholders have approved an option it will not be set aside except for fraud. Where a stock option is granted under the authority of the first paragraph of Section 24 of the Business Corporation Act and a provision such as Article 9 of the amended charter, it is unnecessary to obtain approval of the shareholders. Defendants cite Eliasberg v. Standard Oil Co., 12 N.J. 467, 97 A.2d 437; Kerbs v. California Eastern Airways, Del., 90 A.2d 652, 34 A.L.R.2d 839; Federal Life Ins. Co. v. Griffin, 173 Ill.App. 5, to support their argument that where shareholders have approved an option it will not be set aside except for fraud. However, in Voorhees v. Mason, 148 Ill.App. 647, 655, a suit brought by a dissenting shareholder to compel restitution by directors who had voted stock to themselves as compensation for services in promoting the company, in answer to the contention that the acts of the directors had been retified by the shareholders the court said:

> "Officers of a corporation occupy the position of trustees for the stockholders with respect to the business and property of the corporation, and cannot have or acquire any pecuniary interest in conflict with their duties as such trustees. Hooker v. Midland Steel Co., 215 Ill. 444 [74 N.E. 445].

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> The voting of the stock by the directors to themselves as compensation for services in promoting the company after the work was done, was voting back pay to themselves and is illegal. 'It is the same as giving away the assets of the company.' Cook on ***251** Stock and Stockholders, sec. 657; Brown v. DeYoung, 167 Ill. 549 [47 N.E. 863]. The acts of the directors in illegally voting stock to themselves could not be ratified by a majority of the stockholders as against a dissenting stockholder of one who had no knowledge of such fraudulent action."

In this case the Appellate Court required an accounting to the plaintiff for his pro rata part of the assets diverted. On appeal, 245 Ill. 256, 91 N.E. 1056, the Supreme Court held that the accounting should be to the corporation for the full amount of the assets diverted and reversed on that point only, approving the rest of the Appellate Court holding. See also Farwell v. Pyle- National Electric Headlight Co., 289 Ill. 157, 124 N.E. 449, 10 A.L.R. 363; Ingebretsen v. Lenc, 308 Ill.App. 510, 32 N.E.2d 329. The Griffin case is not authority for the proposition that the shareholders can ratify an illegal act of the board of directors. On the trial of a case on its merits a chancellor may consider many factors, including the important one that the action of the board of directors has been approved by the stockholders in determining whether the action of the board of directors in a given situation should be sustaines. It is manifest, however, that the shareholders cannot approve the action of the board of directors of a corporation agreeing to sell $5 par value stock at $3.

In Holthusen v. Edward G. Budd Mfg. Co., D.C., 52 F.Supp. 125, 129, the district judge said:

> "There can be no doubt that the granting of bonuses to employees may have a legitimate and valid function in a business whether conducted by a corporation or any other legal entity. It is likewise true that the board of directors of the corporation should have wide discretion in determining the amount of bonuses to be granted to its employees and the terms and conditions upon which they may be granted. But the amount of a bonus and the terms and conditions on ***252** which it is to be computed must have some reasonable relation th the services to be rendered."

In a case of the same title reported in 53 F.Supp. 488, 490, the same district judge said:

> "The burden is on a minority stockholder of a corporation who seeks to ****558** have the courts intervene in corporate management and restrain action approved by the board of directors, to establish that such action transcends the point where the will of the majority may properly be imposed on the minority. Unless this be so, the floodgates would be opened to a surge of litigation by which the courts would be called upon to review the action of corporate directors with respect to all contracts of employment and an unlimited number of other matters."

In Clamitz v. Thatcher Mfg. Co., 158 F.2d 687, 692, Second Circuit, the court said:

> "Of course the directors were fiduciaries who were bound to act at all times fairly and honestly for the best interest of the corporation and could not take advantage of their position as 'insiders' for their own personal gain. They had to see to it that the corporation should have the benefit of their best judgment and act solely and always in good faith to promote its welfare. Pollitz v. Wabash R. Co., 207 N.Y. 113, 100 N.E. 721. Incentive compensation must bear a reasonable relation to the value of the services it is made to obtain. Such reasonable relationship is in the first instance an affair of business to be handled in the light of all the relevant circumstances in the exercise of th unbiased judgment of those in charge of the business itself. * * * Whether these defendants exercised their own sound judgment collectively as directors in granting the options is a matter of fact to be determined like any other fact from the evidence in the case."

***253** In Gottlieb v. Heyden Chemical Corp., De.Ch., 99 A.2d 507, 510, the chancellor in answer to the argument that the optionees were adequately compensated before they received the stock option, he said:

> "Once again, within reason, it is a matter of business judgment and plaintiffs have not sustained the burden showing that such judgment was exercised unlawfully."

It is unnecessary to discuss other points argued in the briefs. For the reasons stated the decree of the Superior Court of Cook County is reversed and the cause is remanded with directions to overrule defendants' motion to strike and dismiss the complaint, and for further proceedings nc inconsistent with the views expressed herein.

Decree reversed and cause remanded with directions.

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Appellate Court of Illinois, First District, First Division.

FIRST NAT. BANK OF CHICAGO
v.
KING EDWARD'S HOSPITAL FUND FOR LONDON et al.

Gen. No. 46056.

Jan. 11, 1954.

Proceedings on trustee's complaint in chancery for instructions. The Superior Court, Cook County, Samuel B. Epstein, J., rendered a decree adverse to the individual defendants, and they appealed. The Appellate Court, Burke, J., held that where it was clear that testator's dominant intent had been to promote health of English community in which he was born rather than to benefit specific entities which owned and operated three hospitals, fact that hospitals had been nationalized after vesting of their equitable remainders but prior to deaths of life income beneficiaries would not cause gifts to hospitals to fail.

Affirmed.

West Headnotes

[1] Charities ⚿31
75k31

The law looks with favor upon charitable trust, and liberal rules of construction will be applied to sustain them.

[2] Wills ⚿440
409k440

Testator's intention must be ascertained from words of will itself, purpose being to arrive at intention as expressed by its language and not intention which may have existed in testator's mind apart from such language but which he failed to express.

[3] Charities ⚿37(.5)
75k37(.5)
(Formerly 75k37)

Under Illinois Law, there can be no failure of charitable gifts so long as charitable purposes embodied therein may be fulfilled.

[4] Charities ⚿37(.5)
75k37(.5)
(Formerly 75k37)

General intention of testator in favor of charity will be allowed to prevail, even though his particular intention as to manner of managing gift falls to ground.

[5] Estates in Property ⚿1
154k1

An estate is "vested" not only where there is an immediate right of present enjoyment but where there is a present fixed right of future enjoyment.

[6] Wills ⚿634(15)
409k634(15)

Where hospitals' possession and enjoyment were to take effect upon death of testator's brothers and sisters, who were life income beneficiaries of testamentary trust, interests bequeathed to hospitals were vested equitable remainders.

[7] Charities ⚿43
75k43

A court of equity has inherent powers with respect to charitable gifts within general equity powers of court, aside from doctrine of cy pres, and court of equity, within its general equity powers, will act to supply any deficiencies in order to preserve gifts.

[8] Charities ⚿36
75k36

Will making testator's brothers and sisters life beneficiaries of testamentary trust income with remainder over to specified hospitals evidenced testator's dominant intent to promote health of community in which he was born rather than to benefit specific entities which owned and operated the three hospitals at the time of execution of will.

[9] Charities ⚿37(.5)
75k37(.5)
(Formerly 75k37)

Fact that hospitals had been nationalized after vesting of equitable remainders but prior to deaths of life income beneficiaries would not cause gifts to

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hospitals to fail where (1) it was clear that testator's dominant intent had been to promote health of English community in which he was born rather than to benefit specific entities which owned and operated the three hospitals at time of execution of will, (2) applicable nationalization statute required governing boards of such hospitals to apply sums received under trusts for purposes specified in trust instruments, and (3) testator had made no alternative provision in event of failure of such remainders.

[10] Witnesses ⚿163
410k163

Where testator's sister was claiming testamentary trust remainder not as legatee under will but as heir of testator, her testimony as to decedent's attitude toward socialized medicine would be incompetent under dead man's statute in proceeding involving issue as to whether nationalization of hospitals, which were trust remaindermen under decedent's will, should cause gifts to fail. S.H.A. ch. 51, § 2.

[11] Charities ⚿38
75k38

Conditions subsequent, especially as applied to charities, are not favored by law, and intention to create such condition must clearly appear from instrument; and in case of reasonable doubt, vested estate will not be divested.

[12] Charities ⚿36
75k36

In will giving specified Hospital Fund share in trust corpus for use as endowment fund, with income only thereof to be used for "current expenditures" of said beneficiary, quoted words referred to current expenditures of Fund itself rather than to current expenditures of hospitals which Fund aided.

***342 **657** Dallstream, Schiff, Stern & Hardin, Chicago, for plaintiff- appellee, Oscar D. Stern, George B. Pletsch, Albert E. Hallett, Chicago, of counsel.

***341** Winston, Strawn, Black & Towner, Chicago, for individual defendants- appellants, Harold A. Smith, Arthur D. Welton, Jr., Calvin Sawyier, Chicago, of counsel.

Riordan, Linklater & Butler, Chicago, for King Edward's Hospital for London, defendant-appellee, ***342** Gorman & Nestor, New York City, of counsel.

McKnight, McLaughlin & Dunn, Chicago, for certain defendants-appellees, T. I. McKnight, Edward J. McLaughlin, Harry L. Kinser, Chicago, of counsel.

****658** BURKE, Justice.

E. Stanley Holland was born in 1867 near Leominster, in Herefordshire, England. He came to the United States when he was 26 years old, became a citizen and maintained his residence in Chicago up to the time of his death. He engaged successfully in the contract construction business. He made and published his last will and testament at Chicago on April 4, 1936. He died on June 2, 1936, and left a substantial fortune. He was a member of a large family and left him surviving several brothers and sisters and nieces and nephews. He had never married. His sister, Ethel Gwendoline Holland, lived with him and had charge of and cared for his home for 23 years. Ethel was naturally the object of the first dispositive provisions of the will. The next 9 articles (7 through 15) contain gifts ranging from 500 pounds to 1,000 pounds each for his brothe and sisters and nephews and nieces. There are tv small remembrances to friends (Articles 16 and 17). After these provisions are four specific charitable gifts to English charities, one of which was an immediate gift to the Cottage Hospital at Leominster, which is also a beneficiary under the residuary trust. Article ***343** 23 establishes a fund of 2,000 pounds to be known as the 'E. Stanley Holland Easter Charity,' a 'Fund for the relief of 40 poor persons residing in the Borough of Leominster aforesaid.' It sets forth detailed directions as to a board of trustees to administer the Fund and for the trustees' conduct in distributing the income equally among 40 poor persons in the opinion of the trustees deserving and in need. The will then makes gifts of $1,000 each to 5 American charities and devises the residue of the estate under Article 30 to the First National Bank of Chicago as trustee.

The trust period is to be measured by the lives of 3 brothers and 4 sisters named as income beneficiaries under this article. During the trust period the income is to be distributed in stated proporitions to those brothers and sisters and, in addition, to 6 nieces and nephews and 2 grandnieces. The share income of any of these beneficiaries who may die .. to be distributed to the charitable beneficiaries who are ultimately to receive the principal of Share B, hereinafter mentioned, in the same proportions as

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they are to receive that principal. On the death of the last brother and sister whose lives measure the trust period, the principal of the trust (after payment of one small contingent legacy) is to be divided into 2 equal parts designated Share A and Share B. Share A is thereupon distributable to the lawful descendants of a brother, 2 sisters and a nephew in various proportions, and with various gifts over, not here important, Share B at the same time is to be distributed among the following, to be held and used by them, subject to the following provisions: 'One half (1/2) thereof to King Edward's Hospital Fund of London, England; One fourth (1/4) thereof to Hereford General Hospital at Hereford, England; One eighth (1/8) thereof to Leominster Cottage Hospital, at Leominster, Herefordshire, England; *344 One eighth (1/8) thereof to Hereford Eye and Ear Hospital, at Hereford, England. Said King Edward's Hospital Fund of London, England, said Hereford General Hospital, said Leominster Cottage Hospital, and said Hereford Eye and Ear Hospital shall each use its respective share of said Share B as an Endowment Fund and the income only thereof shall be used for the current expenditures of said respective beneficiary.'

The First National Bank of Chicago, as trustee, entered upon the performance of the trust when the estate was closed in March, 1938. The individual beneficiaries who were to receive certain percentage proportions of life income under the trust were, at the date of the testator's death, residents of England. One of these died in August, 1936, another in November, 1944, and a third in November, 1946. In consequence, the trustee remitted to the 4 charitable institutions, including the 3 hospitals, shares of net income in accordance with the terms of the will. In 1946 Parliament passed the National Health Service Act, effective July 5, 1948. The Act's announced purpose was to promote the establishment in England and Wales **659 of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose, to provide or secure the effective provision of services in accordance with the Act. The National Health Service Act did not affect the property or management of King Edward's Hospital Fund for London, hereinafter called the Fund, and none of its funds or properties, endowment or otherwise, was taken over under the Act. This corporation, following the passage of the Act, retained all its original charter powers and purposes and continued to act as a charitable corporation. Pursuant to Section 6 *345 of the Act the physical premises of the hospitals were transferred to the Minister of Health.

In November, 1949, the trustee filed its complaint in chancery, seeking instructions whether certain charitable interests established under Article 30 of the will for the 3 hospitals and the fund failed by reason of the nationalization of those hospitals and of medical care in general under the National Health Service Act. Following a hearing before the chancellor, he entered a decree sustaining the claims of representatives of the British Government to succeed to the gifts originally intended for the 3 hospitals which were taken over by the Government, and finding that the gift to the Fund had not failed. The decree conditioned the payment of the gifts to the British Government upon the making of an undertaking by the appropriate agencies of that Government to apply the money exclusively for the benefit of the particular hospitals named in the will in the manner directed by the will. The 3 hospitals were made defendants but entered no appearance and were defaulted. The Minister of Health, the Attorney General of England, the Birmingham Regional Hospital Board (hereinafter called the 'Regional Board') and the Herefordshire Hospital Management Committee (hereinafter called the 'Management Committee') were also made defendants. They entered their appearances and are represented by counsel. The Regional Board and the Management Committee are administrative bodies of the British Government, appointed under the Act to administer the hospital properties once belonging severally to, and operated independently by, the 3 hospital institutions designated in the will. The Fund, a charitable corporation formed by Act of Parliament in 1907 (after a ten-year existence as an unincorporated association) is the fourth beneficiary named in the will. It was made a party defendant, has entered *346 its appearance and is represented by counsel. The individual defendants, who appeal, are now the living heirs-at-law of the testator, including the widow and daughter of a deceased nephew who was an heir-at-law. The heirs ask that the decree be reversed and that we find that the property which is the subject of the charitable trusts made by Article 30 of the will, be paid to them as the testator's heirs-at-law. The Attorney General of Illinois now disclaims any interest in the case.

The individual defendants' theory of the case is that since the gifts under the will were to specific

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institutions, for a particular purpose and cannot literally be carried out, they failed and revert to the testator's heirs, because: (a) as to the gifts to the 3 voluntary hospitals, those institutions have ceased to exist and for that and other reasons it is impossible to carry out the particular intention the donor had in mind; (b) as to the gift to the Fund, the nationalization of the voluntary hospitals under the National Health Service Act of 1946 creates a situation in which it is impossible to carry out the particular intention the donor had in mind, although the Fund, as such, continues its corporate existence. Further, that since these were specific gifts it is improper to apply any theory of *cy pres* or 'broad construction'; that the doctrine of judicial *cy pres* will be applied only where it is possible to carry out the testator's assumed general purpose, and where it is possible for the court applying the doctrine to have certainty that the trusts established will be fully executed; that the assumption by the British Government of all costs of all medical service for all ****660** persons renders it completely impossible to carry out the testator's intention; and that any plan which the court might work out could not be enforced by the court, but would be subject to the future whim of the British Parliament, ***347** which has already destroyed one gift in trust made under the will.

[1][2] The ultimate issue in the case is whether as a consequence of the nationalization of the hospitals and the socialization of medicine, the gifts fail and the property reverts to the testator's heirs-at-law, the appellants herein. The law looks with favor upon charitable trusts and the courts apply liberal rules of construction to sustain them. They are liberal in adjudging a purpose charitable if there is any reasonable amount of social benefit accruing from the trust. In construing such gifts, if there are two possible methods of construction, one of which will render the gift valid and the other invalid, the courts will adopt the construction which will sustain it. Stubblefield v. Peoples Bank, 406 Ill. 374, 384, 94 N.E.2d 127; Village of Hinsdale v. Chicago City Missionary Society, 375 Ill. 220, 231, 30 N.E.2d 657; Webb v. Webb, 340 Ill. 407, 420, 172 N.E. 730, 71 A.L.R. 404; Skinner v. Northern Trust Co., 288 Ill. 229, 232, 123 N.E. 289. The intention must be ascertained from the words of the will itself, the purpose being to arrive at the intention as expressed by its language and not an intention which may have existed in the testator's mind apart from such language but which he failed to express. Turek v. Mahoney, 407 Ill. 476, 482, 95 N.E.2d 330; Appleton v. Rea, 389 Ill. 222, 226, 58 N.E.2d 85 Cahill v. Michael, 381 Ill. 395, 400, 45 N.E.2d 657. Upon the completion of extensive hearings the chancellor wrote a thorough opinion, based upon which a detailed decree was entered. A careful study of the record, the briefs and authorities cited satisfies us that the findings and decree of the chancellor are right.

The provisions of the Act having reference to the gifts involved in this case are Section 59 and 60. By Section 59 a hospital management committee shall have power to accept, hold and administer any property upon trust for purposes relating to hospital service. ***348** Section 60 of the Act provides: '(1) Where property, other than property transferred to the Minister or to the Board of Governors of a teaching hospital, or to a hospital management committee under Section 6 or Section 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorize or require the trustees, whether immediately or in the future to apply any part of the capital or income of the trust property for the purposes of any hospital to which Section 6 of this Act applies, the tr instrument shall be construed as authorizing or, the case may be, requiring the trustees to apply the trust property to the like extent and at the like times, for the purpose of making payments, whether of capital or income--(a) in the case of a hospital designated as a teaching hospital or included in a group of hospitals so designated, to the Board of Governors of that teaching hospital; (b) in the case of any other hospital, to the Regional Hospital Board for the area in which the hospital is situated or to the Hospital Management Committee for the hospital or for the group of hospitals in which it is comprised. (2) Any sums paid as aforesaid to any such Board or Committee shall, so far as practicable, be applied by them for the purposes specified in the trust instrument.'

The Herefordshire Hospital functions as a hospital on the same premises as before the Act, with the same facilities and the same wards. In the large wards there is no payment and in the smaller wards some are pay beds and some amenity beds. If the patient wishes to have use of the smaller wards other than for medical reasons, there is payment. The wards bear the same plaques as they always bo The other accommodations that were maintain prior to the Act are still maintained for substantially the same purpose. The hospital has medical officers, house surgeons and house ***349** physicians.

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The management of the hospital is now carried on by the Herefordshire Hospital Management Committee. The Hospital Association itself has never **661 been dissolved due to the fact that there are certain funds not transferred to the Minister of Health which the Association has been arranging to dispose of. The physical premises have been transferred to the Ministry of Health, but there have been no changes other than a change in management. The Leominster and District Hospitals function as a hospital on the same premises as before the Act. There have been no substantial changes in the premises, with the wards remaining the same and patients in the large wards being treated free, and a private ward and amenity beds, for which a charge is made. The operating room and other accommodations are there as before the passage of the Act. The hospital is now managed by the Management Committee. The hospital has a medical and surgical staff, a consultant-surgeon and an anesthetist. The Victoria Eye Hospital still operates on the same premises under the same name, with the elimination of the word 'Incorporated.' There have been no changes in the premises. There is little or no payment by any patient in the large wards and in the smaller wards. The private patients pay if they can afford to do so. The same ophthalmic surgeon is at the hospital as was there immediately before the Act. The Management Committee conducts the hospital since the effective date of the Act. Many of the members of the hospital management committees were formerly members of the governing boards of the hospitals when they were private institutions. Seven of the present members of the Management Committee were members of boards of the three hospitals prior to the passage of the Act.

Each of the three hospitals was what was known in England as a voluntary hospital. They were private *350 charitable enterprises and each was run by its own governing body which controlled the administration of the property and the functions of the hospital, including the selection and appointment of the medical staff and all other employees. Each of them had endowment funds of substantial amounts. Their income came from these endowments, from annual gifts, from payments by patients who could afford to pay and from contributory 'schemes,' which were a kind of voluntary insurance system somewhat similar to Blue Cross and other systems in this country. The specialists and consultants at the hospital gave their services free and any patient who could not afford to pay received his hospital care free. The voluntary hospitals had been for some 200 years the 'heart of medicine' in England for the treatment of the acute sick. The Act dissolved the old governing bodies except as they might have other functions, not related to the hospitals, which they could carry on. None of the three governing boards has any powers with respect to the hospitals now being run on the premises which they formerly owned and operated, and none has attempted to exercise such power. The hospital properties are now owned by the Minister of Health and operated by the Management Committee as agent for the Regional Board in Birmingham.

[3][4] Appellants maintain that the testator's gifts under Article 30 of the will were to particular institutions and were to be used for particular purposes. The income was to be used for defraying current expenditures. Clearly, the gifts to the three hospitals are charitable gifts. Under Illinois law there can be no failure of such gifts so long as the charitable purpose embodied therein may be fulfilled. The particular mode or method of application of the gifts is not treated as controlling in the eyes of equity. Heuser v. Harris, 42 Ill. 425; Crerar v. Williams, 145 Ill. 625, 34 N.E. 467, 21 L.R.A. 454; Jansen v. *351 Godair, 292 Ill. 364, 127 N.E. 97; Burke v. Burke, 259 Ill. 262, 102 N.E. 293; Webb v. Webb, 340 Ill. 407, 172 N.E. 730, 71 A.L.R. 404. 'The general intention of the testator in favor of charity will be allowed to prevail, even though his particular intention as to the manner of managing the gift falls to the ground.' Ingraham v. Ingraham, 169 Ill. 432, 48 N.E. 561, 566, 49 N.E. 320. The efforts of the courts of this state have always been to sustain a gift for charity if it can be done, and while our courts do not assume to exercise the prerogative powers **662 which the courts of England have at times exercised, if a trust for charity is sufficiently certain to enable the courts, in the exercise of their ordinary chancery powers, to carry out the donor's charitable intent, they will not allow the trust to fail. Heuser v. Harris, 42 Ill. 425; Kemmerer v. Kemmerer, 233 Ill. 327, 84 N.E. 256.

In this state the test of failure of the charitable gift involves the question of whether the charitable purpose embodied in the gift can be fulfilled. We agree with the chancellor that the testator's charitable purpose embodied in his gift to the three hospitals can be fulfilled. As the cases indicate, the rule with respect to charitable gifts is somewhat different than with respect to noncharitable gifts. The courts will make every effort to sustain a charitable gift, and changes in the mode of

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administration or management of the gift are not treated as controlling. Appellants call attention to the fact that during the lifetime of the testator the hospitals were administered and managed by a private board of managers and today they are administered and managed by the Herefordshire Management Committee under the Act. The important question is not who manages the hospitals but are they still functioning as hospitals, serving substantially the same people and furnishing the same hospital service and whether the funds will be applied for the benefit of the hospitals ***352** as desired by the testator. Under Illinois law doubts will be resolved in favor of upholding the gifts.

We find that the testator's charitable purpose embodied in his gifts to the three hospitals can be fulfilled. The three hospitals continue to function as hospitals in the same premises, with the same facilities and serving the same people as they did prior to the effective date of the Act. In no substantial sense can it be said that the hospitals have ceased to exist. They continue to exist and function as hospitals as they always did. It is only the method of administration or management that has been altered or changed. Mr. Holland did not make the gifts to the board of managers of the hospitals or to any particular entity or administration, nor with any limitation that their use was conditioned upon any particular form of administration. The gifts were absolute and not upon any condition precedent or subsequent and without any gift over under any circumstances. The only qualification imposed by law would be that the income be used for the purposes of the hospital with respect to the principal of the trust fund. He specified only that the hospitals should use their respective shares as an endowment fund and that the income be used for the current expenditures of the respective beneficiaries. He left entirely unconditioned the matter of who was to apply the income or in what manner other than it be expended on a current basis. Since he made these gifts in perpetuity, he must have assumed that the management or administration might change. He did not designate them as voluntary hospitals, or hospitals run by any particular board of managers, or in any particular fashion. He made the gifts to the hospitals by the names by which they were known in the area in which they were located. Section 60 of the Act provides, in substance, that property of a type herein involved shall be applied by the board or committee, so far as practicable, ***353** for the purposes specified in the trust instrument. The record shows that the gifts will be applied for the benefit of the three hospitals desired by the testator.

The regulations promulgated under the Act establish that funds coming to the Management Committees under Section 60 are to be accounted for and handled separately, and there are frequent admonitions in those regulations that they are trust funds and are to be applied in accordance with the terms of the trust instrument. The Act iself provides that any sums paid under Section 60 to a board or committee shall, so far as practicable, be applied for the purposes specified in the trust instrument. It appears that the words 'so far as practicable' were inserted in Section 60 with the thought that being a statute of very wide application there might be gifts made attaching conditions to the use of property ****663** that it might not be possible to fulfill. In the instant case there are no such conditions. The testimony and the exhibits establish that the gifts will be applied to the benefit of the three hospitals in the manner desired by the testator. The Herefordshire Hospital Management Committee has filed an undertaking which is attached to the decree, stating unequivocally that monies received by the Committee will be applied for the benefit of the three hospitals in the manner specified in the will and the decree, and further providing that the principal of the fund, when the same is distributed, will be maintained and the income only applied, as specified in the will and the decree. The fact that under the decree the funds will be applied by the Management Committee, which is a Committee appointed by the Minister of Health, does not in any sense make the application any the less charitable. The important fact is that the three hospitals are performing a charitable work, namely, the furnishing of hospital ***354** service, and it was to aid such purpose that the gifts were made.

In Heuser v. Harris, 42 Ill. 425, the court was concerned with charitable gifts to the poor of Madison County and to a school district. Both of the gifts were upheld as charitable gifts despite the fact that in both instances the support of the poor and the maintenance of a school district were and are normal governmental functions. The County Court was decreed to make and manage the funds for the benefit of the poor of Madison County. In In re Estate of Graves, 242 Ill. 23, 89 N.E. 672, L.R.A.,N.S., 283, the court upheld a charitable gift which was to be administered by the Board of South Park Commissioners in the erection and maintenance of a drinking fountain. In Grear v. Sifford, 289

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Ill.App. 450, 7 N.E.2d 371 (petition for leave to appeal denied), a charitable gift was made to an institution known as the Union Academy of Southern Illinois, a private school. Subsequently, the functions of this private school were, for all practical purposes, assumed by a community high school, which was a tax supported institution, and the trustees of the private school applied the income from this endowment fund to the support of the community high school. The court held that there was no failure of the charitable gift to the private school despite the use of the income from the endowment fund for the support of a tax supported community high school. In Rush Medical College v. University of Chicago, 312 Ill. 109, 143 N.E. 434, our Supreme Court approved transfer to and use by the university, an entirely different educational institution, of the charitable gifts that had been made to the Rush Medical School in order to carry out the latter's charitable purposes. The case was decided within the general equity powers of the court. The court said, 312 Ill. 117, 143 N.E. 437:

'The transfer of the property of the college to a similar charity under conditions which assure continuation ***355** of the use of the property in accordance with the purposes of the charter of the college, so that the fulfillment of the charitable purpose will be accomplished and the efficiency of this educational institution increased, is not a diversion of the funds to a purpose foreign to that to which they were dedicated.'

From the case of In re Harrington's Will, decided by the Appellate Division of the Supreme Court of New York, 243 App.Div. 235, 276 N.Y.S. 868, 869, it appears that the testator gave to her niece the life use of certain real and personal property and the remainder (converted into money) at the death of the niece to the "Rome Hospital and the managers and trustees thereof by whatsoever name known in trust however to build with said monies and proceeds as annex or addition to said Rome Hospital building in memory of my late husband George A. Harrington *and for no other use of purpose* said annex or addition to be known as the 'Harrington Annex' or 'Harrington Addition."' The 'Rome Hospital' mentioned in the will was a charitable institution incorporated in 1884 and was operated as a charitable institution until January 1, 1929, when, for the annual rental of $1 and upon certain conditions and covenants all the real and personal property ****664** was leased to the City of Rome for two years, with renewal privileges. The lease continued until, by a deed of December 11, 1930, the lessor, for a consideration of $1, deeded the property to the City of Rome. The deed provided that the premises conveyed "shall either be maintained forever by the City of Rome as a municipal hospital, or if sold, the proceeds of the sale shall be used for the establishment of another municipal hospital *and for no other purpose*", and that the hospital or its substitutes should bear the name "Rome Hospital and Murphy Memorial Hospital." Since that time the City of Rome has operated the property in connection ***356** with the Murphy Hospital as a single municipal hospital. Decedent's will was dated in 1901 and she died in 1903. The Rome Hospital (the original charitable institution) had not been dissolved at the time the opinion was filed. It has never been operated as a hospital since it deeded its property to the City, but continued to exist for the purpose of administering certain trust funds. The surrogate held that the gift lapsed and that there was a lapsing of the legacy because it expressed no general charitable purpose such as would prompt the court to apply the *cy pres* doctrine if possible. The Appellate Division said, 276 N.Y.S. 871:

'Primarily the gift was to an institution charitable by the very terms of its charter, and its work was one of the highest types of charities. * * * But the will, in the instant case, took effect in 1903, at the date of the death of testatrix. The Rome Hospital was then in existence, and, as a legal entity, is still in existence, and then was, and still is, legally capable of accepting this gift. * * * The very real estate which it formerly owned is now being used as a hospital. What difference that it has changed hands and is now operated by the city of Rome? It is said, in answer to the question, that the city of Rome may use the money to pay nurses or buy drugs and thus defeat the whole aim of the testator, both in its memorial and in its charitable features, and that the only purpose that the gift will serve is to relieve the taxpayer's burden. I see only this one impediment in the way of carrying out the purposes of this charitable gift. It is the impediment that must always exist, whenever it is sought to attach a charitable gift to some one's property other than the testator's. If I choose to provide for the creation of a college or hospital, and make a valid will to that end, that is no one's business but the court's to see that the plan is carried out. But if I provide by will for annexing ***357** a library to some one else's college or a sun parlor to some one else's hospital, my plan may be met with objection from the incidental donee. The owner of the property designed to be

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incidentally benefited by a charitable gift may renounce the gift so far as he is concerned, and no one can make him accept it. If the city of Rome, the present owner of the hospital building in question, does not want an annex or addition substantially as testatrix intended it, it need not have it. But, if it is willing to accept it, no reason is apparent why the wishes of testatrix cannot be substantially carried out. * * * A further proceeding, either in Supreme Court or Surrogate's Court, may hereafter be had to apply the cy pres doctrine, and in that proceeding, with the proper parties in court, the court may direct the trustees of the original Rome Hospital in the carrying out of a plan to use the legacy in a manner substantially carrying out the benevolent aim of the testatrix.'

From the language of the Holland will it appears that the testator had in mind only that the principal of the fund be kept intact and that the income be expended on a current basis. He did not specify that the income be used for any particular purpose or impose any limitation as to the type of expenditure. The only requirement is that the principal remain intact. The regulations comprehend that the gifts administered by the hospital management committee are to be applied for such hospital ****665** purposes as the committee managing the hospital shall determine. The funds would be used for 'general or special hospital purposes' or for 'research' or for 'laboratories' or for 'extras or amenities.' The determination of the specific hospital purposes for which the funds will be used will be made by the Hospital Management Committee, the agency administering the hospitals. The gifts would be used for ***358** such hospital purposes or services as the committee managing the hospital would determine, and this is the intention that the testator had in mind. He left the funds to the hospital without specifying the purpose for which they were to be used, except that the income from the principal was to be expended on a current basis.

Appellants rely heavily on Quimby v. Quimby, 175 Ill.App. 367, and Chicago Daily News Fresh Air Fund v. Kerner, 305 Ill.App. 237, 27 N.E.2d 310. In the Quimby case the charitable donee had wholly ceased to carry on the work for which it was organized prior to the time that the bequest was to take effect. In the Kerner case the court said, 305 Ill.App. 244, 27 N.E.2d 313: 'The legatee having renounced the gift, it does not take effect and is as if it had never been made.' We agree with the appellees that these cases are not applicable to t case at bar. In this case there has been no failure of the gifts to the hospitals since the charitable purpose embodied in the gifts can be fulfilled. Appellants also cite Board of Education v. City of Rockford, 372 Ill. 442, 24 N.E.2d 366. There the question was whether a charitable gift of property for educational purposes to benefit persons in a particular area could be used for non-educational purposes to benefit a different class of persons. The case is not in point. In the instant case the appellees do not propose that the gifts to the hospitals be used for other than hospital services and the record shows that the gifts will be used for the purposes the testator desired to benefit.

Appellants assert that the exact question of the failure of a specific gift made to an English hospital which had been nationalized was decided by the Supreme Court of Rhode Island in the case of Pennsylvania Co. for Banking and Trusts v. Board of Governors of London Hospital, 79 R.I. 74, 83 A.2d 881. That court held that the nationalization of these hospitals had brought about a failure of the gifts to two ***359** former voluntary hospitals London. The court in the Rhode Island case stat that if the interests granted had been absolute interests, they would have passed to the Minister of Health or to the successor boards by virtue of the provisions of the Act. The court said, 83 A.2d 888:

'Finally we are unable to agree with the arguments of the English hospitals that, even if in the circumstances the gifts to them have failed, they are entitled to have this cause remanded to the superior court for the application of the doctrine of *cy pres*. It may be granted that the testator's will reveals a general charitable intent, Pell v. Mercer, supra [14 R.I. 412], thus meeting that requirement for the application of such doctrine. However, in Section XI of his will the testator named the respondent churches as his residuary legatees saying: 'so that in case any of my preceding gifts, specially my gifts to Public purposes should fail * * * my property shall surely go, in such event, to the work of establishing the Knowledge & following of Jesus Christ among our American People.' Such provision in effect obviates the application of that doctrine since the testator himself shows clearly his own intent and the alternative disposition of his property in the eve of the failure of the gifts referred to. In t circumstances we see no reason why the above-expressed intent of the testator should not be carried out. It is generally held that when a

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testator makes a specific alternative bequest to take effect if a primary charitable one fails, the doctrine of *cy pres* is not applied, but the estate is distributed in accordance with the testator's express direction. * * * Having determined, in view of the conditions appearing herein and the **666 changes resulting from the passage of the health act, that the gifts to the English hospitals have failed and that this cause is not a proper one for an application *360 of the *cy pres* doctrine under our statute, we find that the assets of the trust now in the hands of the complainant trustee and ready for distribution should be paid, in accordance with the express direction of the testator as contained in Section XI of his will * * *.'

The Rhode Island case is not applicable to the situation presented to us. The gifts to the three hospitals in the case at bar were absolute gifts, were vested equitable remainders, and had vested prior to the passage of the Act. In the Rhode Island case the court found that the gifts were limited to specific uses and by express conditions as part of the essence of the gift so that they failed if such uses and purposes were not to be fulfilled. The Rhode Island opinion discloses that the court would have applied the gifts for the charitable donees under the *cy pres* doctrine except that there was an alternative disposition contained in the will.

[5][6] We agree with the contention of the appellees that the gifts to the three hospitals were absolute interests with possession and enjoyment only postponed for the purpose of letting in the interests of the individual life income beneficiaries. An estate is vested not only where there is an immediate right of present enjoyment but a present fixed right of future enjoyment. Possession and enjoyment were to take effect upon the happening of the event to occur, namely, the death of testator's brothers and sisters who were the life income beneficiaries. The postponement of possession and enjoyment was provided for as a convenience to the estate and not for reasons personal to the hospitals as legatees. The interest bequeathed to the hospitals were vested equitable remainders. Scofield v. Olcott, 120 Ill. 362, 11 N.E. 351; Ashmore v. Newman, 350 Ill. 64, 183 N.E. 1; Continental Illinois National Bank & Trust Co. v. Kane, 308 Ill.App. 110, 31 N.E.2d 351.

[7] *361 A court of equity has inherent powers with respect to charitable gifts within the general equity powers of the court, aside from the doctrine of *cy pres*. A court of equity within its general equity powers will act to supply any deficiencies in order to preserve the gifts. Webb v. Webb, 340 Ill. 407, 172 N.E. 730, 71 A.L.R. 404. In Hitchcock v. Board of Home Missions, 259 Ill. 288, 298, 102 N.E. 741, 745, the court said: 'It is sufficient to say that to sustain this gift does not require the exercise of any prerogative power of a nature sometimes exercised in England, but requires only the exercise of the ordinary jurisdiction of a court of equity.' In First National Bank of Chicago v. Elliott, 406 Ill. 44, 63, 92 N.E.2d 66, 76, the court said:

'It is usually where the charity has entirely failed that the extraordinary power of *cy pres* is used to designate another like charity to be aided or supported by the fund. Here, had the parties so desired, most of the relief could have been obtained by exercise of the court's inherent equity powers, although, since there is a change in location and size of the institution, a decree based upon the doctrine of *cy pres* is proper.'

[8][9] In our opinion the chancellor was correct in finding that the testator's dominant intent was for the general charitable purpose of promoting the health of the community in which he was born rather than to benefit the specific entities which owned and operated the three hospitals at the time of the execution of the will. The findings are amply supported by the evidence. It is significant that the testator made no provision for a gift over to his heirs of the gifts to the hospitals under any condition. Having made ample provision for his heirs he made the gifts to the hospitals absolute in form and without expressing any intention that his heirs should share therein. The voluntary hospitals such as the three hospitals in question, were in dire need of financial help at the time of the passage of the *362 Act. The hospitals are still functioning as hospitals and the application of Mr. Holland's gifts is not an application to a **667 different charitable use but to the same charitable use. We are in accord with the chancellor's statement that 'The wisdom or lack of wisdom of the adoption by the English Parliament of the National Health Service Act is of no concern to this court in determining the issues herein involved. Nor is this court endorsing, by this decision, the system known as 'Social Medicine.' * * * Regardless of the type of government under which people live, whether in accord with our concepts or not, the furnishing of medical and hospital service to human beings, in a worthy charitable purpose. If, as a matter of fact, there to exist deficiencies and

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inadequacies in the services rendered by the hospitals in question, the income from the funds bequeathed by the testator's will should help materially to lessen such deficiencies and should result in better hospital service to that community.'

The chancellor, in finding for the hospitals, places his principal reliance on the *cy pres* doctrine. We are of the opinion that the relief afforded in the instant case could have been obtained by the exercise of the court's inherent equity powers. However, we agree with the appellees that a decree based on the doctrine of *cy pres* is proper. First National Bank of Chicago v. Elliott, 406 Ill. 44, 92 N.E.2d 66; Village of Hinsdale v. Chicago City Missionary Society, 375 Ill. 220, 30 N.E.2d 657; Bruce v. Maxwell, 311 Ill. 479, 143 N.E. 82. These hospitals are identical institutions designated by the testator, rendering the same type of medical service to the same community, in the same buildings and using the same facilities. Only management and ownership of the hospitals have changed by reason of the Act. The award of these funds to these hospitals under the present management and ownership is not just an application of these funds ***363** to institutions of a similar charitable purpose, but to the identical purpose contemplated by the testator.

[10] The testimony of Miss Ethel Holland, sister of the testator and one of the individual defendants, was excluded by the chancellor as incompetent under Section 2 of the Evidence Act, Ill.Rev.Stat.1953, c. 51, § 2. Miss Holland, if permitted, would have testified that her brother had never given money to government-operated charities; that he was emotionally and politically opposed even to the mild policies of the Labour Party in the 1930's; that his only gifts for medical purposes were to voluntary hospitals; that his only gifts for medical purposes in the Herefordshire area were to the three hospitals named in his will; and that he never gave money to convalescent homes, homes for the aged, sick, etc., or to provide 'amenities' in hospital service or for any hospital purpose not concerned with the provision of essential medical service for the acutely ill by voluntary hospitals; and that her brother thought of the Fund simply as an organization which aided the voluntary hospitals in London through contributions to the operating expenses. Appellants say that the proffered testimony would have confirmed that Mr. Holland's intention was to aid certain voluntary hospitals in Hereford and to aid the voluntary hospitals in London and that the situation brought about by the Act would have been anathem to him. Appellants argue that the Illinois courts make one clear exception to the apparent phraseology of Section 2 of the Evidence Act, namely that the statute does not apply to contests concerning the relative rights of devisees as among themselves, so long as no one is asserting a right to the property which is founded outside or against the will. Citing Pigg v. Carroll, 89 Ill. 205; ***364** Mueller v. Rebhan, 94 Ill. 142; Fleming v. Mills, 182 Ill. 464, 55 N.E. 373; Alward v. Woodard, 315 Ill. 150, 146 N.E. 154. Appellants assert that the position of Miss Holland and the other individual defendants falls clearly within the ambit of this exception because this is a controversy solely among various claimants under the testator's will and the individual defendants claim through a construction of the will and not against it. We find that the chancellor properly excluded the testimony of Miss Holland . Appellants are claiming not as legatees under the will but as heirs of the testator. Their theory is that upon failure of the specific gifts, there is a reverter to them as the testator's heirs-at-law.

****668** Appellants urge that the gift to the Fund fai because the testator's specific purpose, to aid t voluntary hospitals in London, can no longer be accomplished by the Fund either in the manner intended by the testator or otherwise. Our views as to the gifts to the three hospitals are applicable to the contentions concerning the Fund. The heirs say that what Mr. Holland had in mind was defraying the current expenditures of the voluntary hospitals; that the Fund had over a long period of time identified itself completely and exclusively with the voluntary hospitals of London; that it aided all of the voluntary hospitals; that the testator had no reason to differentiate in the use of the term 'current expenditures' between the three hospitals and the Fund; and that the only reasonable construction of the language of the will is that the testator wanted the income intended for the Fund to be used for the principal activity of the Fund-payments towards the operating expenses of the voluntary hospitals in London. Appellants insist that the extinction of the voluntary hospitals of London makes it impossible for the Fund to carry out the purposes Mr. Holland intended, and that the nationalization of those ***365** hospitals has created a situation in which the use of the income for 'extras' connected with t nationalized hospitals and not for 'curre expenditures' is equally in conflict with the intention. They state that the testator could not have contemplated that the voluntary hospitals, rather than

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evolving throughout the years so as best to fulfill their function of treating the acute sick, would be exterminated and that these hospitals as social and charitable organizations would come to an untimely end. They state that for the reasons urged, the gifts must be held to have failed.

After the passage of the National Health Service Act the Fund continued its charitable existence corporatively and otherwise, and continued to function as a charitable institution. The Fund's corporate charter authorizes it to apply the capital and income of the funds and property of the corporation in or towards the support, benefit or extension of the hospitals of London, or some or any of them (whether for the general or any special purposes of such hospitals) and to do all such things as may be incidental or conducive to the attainment of these objects. In the charter the expression 'hospitals of London' is defined to mean and include such present and future hospitals, convalescent homes, mursing homes, nursing institutions, lying-in institutions, dispensaries, medical missions, societies for the provision of surgical or medical aid or appliances and institutions for rest, relief or cure of sick persons as shall be instituted within London.

At the time the Holland will was made it was the administrative practice of the Fund, long established, to commingle in a common fund all the receipts (of the same general character as the trust estate net income and later endowment income involved in the instant case) that had come to it free of any restriction against what the practice entailed. Each year witnessed a sizeable ***366** aggregate sum put together in this way. It was and is the administrative practice to pay Fund administrative expenses and to disburse the various charities from the common fund without regard to the source from whence the disbursed sum came and without any studied effort to fit each disbursement into a pattern of what had gone on before with respect to disbursement of an equivalent sum. This practice arose out of a composite of experience and gradual growth over the years and developed from within the Fund as a desirable thing from a management standpoint, and therefore, originated and endures not at all by reason of outside compulsion. The practice tends towards minimizing the administrative expense burden and contributes to employment of its expendable funds to the charitable maximum. It is purely administrative in nature and the practice is observed where contributions to the Fund, by will or otherwise, are unaccompanied by restriction. We have no hesitancy in saying that under the will and the record in the case at bar the income becomes a part of this common fund when it is received and is subject to being so disbursed. The principal of the trust estate income never becomes a part of that common fund. When ****669** the testator of the will chose to say nothing in negation or prohibition of this common fund practice, he tacitly bestowed his approval on the method of administering if he was aware of the practice. If he was not aware of it, then he nevertheless bestowed his approval by reason of having directed that the income therefrom be used for 'current expenditures.'

The Act did not affect the property or management of the King Edward's Hospital Fund for London. None of its funds or properties, endowment or otherwise, was taken over under the Act. The corporation retains all of its original charter powers and continues to act ***367** as a charitable corporation. The fund is now concerned principally with hospitals in the National Health Service which, by reason of the inclusion of hospitals formerly governmentally operated in addition to voluntary hospitals, has substantially expanded the possible scope of Fund assistance in regard to the number of hospitals that could benefit therefrom. The Fund still assists hospitals with the problem of obtaining nurses, with dietary problems, bookkeeping problems and the like. It renders financial assistance to 13 small hospitals in London which were not taken over by the Minister of Health. The Fund renders substantial assistance to convalescent homes and defrays part of the cost of emergency bed service. It makes substantial grants for amenities to patients and the purchase of special equipment in nationalized hospitals is London. It is in the process of setting up a college for the training of hospital administrators, nurses and dieticians.

In the field of financial grants to voluntary hospitals a conspicuous change took place when the Act went into operation. That type of charitable activity was and is substantially curtailed because of the elimination of private financing characteristic when the government took over many of the hospitals. Other charitable activities, or more intense activity in other fields, have been substituted. The long established administrative features, including resort to the common fund, are in vogue substantially as they were in 1936. The Fund's preeminence was attained in ways less spectacular than direct financial grants. Administrative practices are at the bottom of its greatest successes.

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[11][12] There is no limitation in the will upon the nature or type of administration that should manage the fund, nor upon the manner in which the gifts are to be applied, except that the corpus remain as an endowment***368** fund with only the income thereof to be used for current expenditures. Nothing is said concerning the use to which the Fund shall put the income it is to receive out of the trust estate. With respect to the income the testator confines himself to the designation of the Fund by its correct name. The language used does not impose a restriction in the nature of a condition subsequent. The term 'voluntary' in relation to hospitals does not appear in the will, nor is there any reference in the will to 'direct' financial aid to hospitals nor to financial 'grants' in aid of them. The term 'current expenditures' has the signification that it meets obligations of a day-to-day character as they arise and not that it is something to be set aside for long range future requirements to await the obligation. In giving the direction he did about endowment income the testator was looking ahead many years, saying what he wanted done with the income then. It is unreasonable to assume he invoked the term 'current expenditures' in any other sense than with reference to the expenditures that would be current then, the future times when endowment income would become available. It would be unreasonable to say that, looking forward, his firm disposition was that the income be expended then precisely as the Fund had been expending income from its other endowments in 1936. We agree with the chancellor that the words 'current expenditures' mean the current expenditures of the Fund itself in the sense of the outlays is makes from its common fund, and that the language does not comprehend the current expenditures of the hospitals the Fund aids, nor any other institution it aids. Since conditions ****670** subsequent, especially as applied to charities, are not favored by the law, the intention to create such a condition must clearly appear from the instrument, and in case of reasonable doubt the vested estate will not be divested. ***369** Gredig v. Sterling, 5 Cir., F.2d 832, 835; 14 C.J.S., Charities, § 44, pages 495, 496.

Appellants suggest that any plan which the court might work out could not be enforced by our courts but would be 'subject to the future whim of the British Parliament.' We recognize that after the delivery of the corpus of the trusts our courts would not have any effective control over the trust funds. That is true in any case where funds are delivered beyond the jurisdiction of the United States and where there are no parties within the jurisdiction subject to the directions of the court. Mr. Holland accumulated his wealth in the United States. He made four modest bequests to American charities for a total of $6,500. Of the private persons named legatees all but two are relatives and all but one are English residents. That one, an American, was given $1,000. The will disposed of a million dollar estate, all of it personalty, consisting of cash and securities. Mr. Holland visited England frequently. He knew that under the English constitutional system Parliament is supreme, yet he chose to leave nearly all of his estate to his relatives and charities in England. He and the draftsmen of the will knew that after the delivery of the corpus of the estate to individuals and institutions in England that Parliament might pass laws which would affect the funds so distributed. They also knew that whatever bequests were made to American legatees would be protected by the provisions of our state and federal constitutions.

The chancellor was right and the decree of the Superior Court of Cook County is affirmed.

Decree affirmed.

FRIEND and NIEMEYER, JJ., concur.

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United States Court of Appeals,
Seventh Circuit.

In re GENERAL MOTORS CORPORATION ENGINE INTERCHANGE LITIGATION.
Appeal of Betty OSWALD, on her own behalf and on behalf of all other persons similarly situated, and Phil Miller and Eileen Miller, on their behalf and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee.

No. 78-2036.

Argued Sept. 28, 1978.
Decided Feb. 26, 1979.

In engine interchange litigation brought against automobile manufacturer, an appeal was taken from an order of the United States District Court for the Northern District of Illinois, Eastern Division, Frank J. McGarr, J., approving a subclass settlement. The Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that: (1) the trial court's order approving subclass settlement was an appealable collateral order, since it was not tentative, was capable of review without extensive examination of the merits, raised issues which could not be effectively reviewed later, and presented important, unresolved legal questions for appellate consideration; (2) the conduct of the negotiations was relevant to the fairness of subclass settlement, and the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion; in addition, the record failed to adequately support the court's conclusion that the seemingly irregular conduct of the negotiations did not prejudice the interests of the class; (3) where, under the settlement order, a subclass member was presented with an accept-or-else situation, i. e., if he did not accept, his federal claim was lost even though he could not receive the benefits of the settlement package, the dismissal of the action was fundamentally unfair to nonconsenting subclass members and, therefore, the settlement could not be permitted to stand in its present form, and (4) despite the Court of Appeals' reversal of order approving subclass settlement, the district court could approve communication of the manufacturer's offer of settlement to individual members of the class.

Reversed.

West Headnotes

[1] Consumer Protection ⚿36.1
92Hk36.1
(Formerly 92Hk36, 382k864)

Magnuson-Moss Act limits federal court jurisdiction over class actions prosecuted under the Act to those actions in which the amount of each individual claim is at least $25, the total amount in controversy is at least $50,000, and the number of named plaintiffs is at least 100. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, §§ 101-112, 110(d)(3), 15 U.S.C.A. §§ 2301-2312, 2310(d)(3).

[2] Consumer Protection ⚿36.1
92Hk36.1
(Formerly 92Hk36, 382k864)

Magnuson-Moss Act was enacted by Congress to prevent "trivial or insignificant" class actions from being brought in the federal courts. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, §§ 101-112, 15 U.S.C.A. §§ 2301- 2312.

[3] Federal Courts ⚿542
170Bk542

Court of Appeals cannot determine its jurisdiction by a majority vote of counsel appearing before it, and even if the parties unanimously agreed to appeal district court order, the Court of Appeals would be required to raise the jurisdictional issue sua sponte. 28 U.S.C.A. § 1291.

[4] Federal Courts ⚿660.30
170Bk660.30
(Formerly 170Bk660)

Collateral orders are appealable without the express entry of judgment under rule 54(b), that is, without an express determination that there is no just reason for delay and an express direction for entry of judgment. Fed.Rules Civ.Proc. rule 54(b), 28 U.S.C.A.

[5] Federal Courts ⚿660.35
170Bk660.35

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(Formerly 170Bk660)

In close cases, the determination of whether a judgment is appealable must be made by balancing the inconvenience and costs of piecemeal review against the danger of denying justice by delay. Fed.Rules Civ.Proc. rule 54(b), 28 U.S.C.A.

[6] Federal Courts ⚿587
170Bk587

Federal policy against piecemeal review admits no exception merely because the judgment appealed from affects the conduct of a class action.

[7] Federal Courts ⚿571
170Bk571

Requirements of the collateral order doctrine established in *Cohen* are: that the matter appealed from must have been finally determined by the district court; that the matter must be separable from, and collateral to, rights asserted in the action and neither affect nor be affected by decision on the merits; that the rights asserted would be lost, probably irreparably, if review were delayed until the conclusion of proceedings in the district court, and that the order must present important and unresolved legal questions.

[8] Federal Courts ⚿571
170Bk571

As regards the collateral order doctrine's first requirement, viz., that the matter appealed from must have been finally determined by the district court, this does not require that the trial court be without power to reverse its ruling; it only requires that no further consideration be likely.

[9] Federal Courts ⚿571
170Bk571

Ordinarily, settlements of civil litigation are not reviewed by federal courts; thus, as regards the collateral order doctrine, the issue of whether the matter appealed is "separable from, and collateral to, rights asserted in the action" is raised almost exclusively in class or derivative actions.

[10] Bankruptcy ⚿3032.1
51k3032.1
(Formerly 51k3032, 51k640.8, 51k640.80)

Court approval of settlements is necessary in bankruptcy reorganization proceedings.

[11] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Adequate review of the fairness of a settlement necessarily requires some examination of the underlying cause of action.

[12] Federal Civil Procedure ⚿164
170Ak164

Adequate representation is the foundation of all representative actions. Fed.Rules Civ.Proc. rule 23(a)(4), 28 U.S.C.A.

[13] Federal Courts ⚿571
170Bk571

In engine interchange litigation brought against automobile manufacturer, the trial court's order approving subclass settlement was an appealable collateral order, since it was not tentative, was capable of review without extensive examination of the merits, raised issues which could not be effectively reviewed later, and presented important, unresolved legal questions for appellate consideration. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[14] Federal Courts ⚿544
170Bk544

Since, in engine interchange litigation brought against automobile manufacturer, notice of proposed subclass settlement informed subclass members that if they neither opted out of the subclass nor intervened in the lawsuit "attorneys for the named plaintiffs will represent your interest in these suits," subclass members who received the notice could reasonably rely on class counsel to protect their interests by prosecuting an appeal from the judgment of the district court if necessary; therefore, absentee subclass members did not waive their right to have the settlement reviewed by the Court of Appeals.

[15] Federal Courts ⚿544
170Bk544

Decision to appeal a class action judgment must rest with the class plaintiffs, not class counsel.

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[2907-98839] Schaufele, Mike
Doc. # 63053

United States v. HUBBELL, HUBBELL, SCHAUFELE, and OWEN

United States District Court
for the District of Columbia
Criminal No. 98-0151

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27.	United States v. Sun-Diamond Growers of California, 941 F. Supp. 1262 (D.D.C. 1996)
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Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[16] Federal Courts ⚿544
170Bk544

Assuming arguendo the premise that the class attorney is the "dominus litus", the pretrial order, which did not purport to restrict the representative capacity of the named plaintiffs prosecuting appeal from district court order approving subclass settlement of engine interchange litigation, did not prohibit counsel for the named plaintiffs from representing the interests of the class before the Court of Appeals. Fed.Rules Civ.Proc. rule 23(a)(4), (e), 28 U.S.C.A.

[17] Federal Courts ⚿758
170Bk758

In engine interchange litigation brought against automobile manufacturer, the best interests of the class warranted that the Court of Appeals review the fairness of subclass settlement as it affected the entire class.

[18] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1697)

In engine interchange litigation, the conduct of the negotiations was relevant to the fairness of subclass settlement, and the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion; in addition, the record failed to adequately support the court's conclusion that the seemingly irregular conduct of the negotiations did not prejudice the interests of the class.

[19] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1697)

Inquiry into the conduct of the negotiations which led to subclass settlement was consistent with the letter and spirit of federal rule of evidence which bars the admission of evidence of compromise negotiations to prove liability or damages and expressly provides that it "does not require exclusion when evidence is offered for another purpose." Fed.Rules Evid. rule 408, 28 U.S.C.A.

[20] Compromise and Settlement ⚿51
89k51
(Formerly 170Ak1699)

Participants in negotiations to settle class actions are aware that federal rule of civil procedure requires the trial court's approval of any settlement reached; moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[21] Federal Civil Procedure ⚿164
170Ak164

Trial court has the continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[22] Compromise and Settlement ⚿59
89k59
(Formerly 170Ak1699)

Before approving a settlement, the judge must assure himself that the class had been adequately represented during the settlement talks, a conclusion which will not follow automatically from a finding of adequacy for litigation purposes. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[23] Federal Civil Procedure ⚿1923
170Ak1923

Manual for complex litigation does not provide an inflexible formula or mold into which all pretrial procedure must be cast, but in appropriate cases the manual does provide a rough guide by which to measure whether the trial judge acted within his discretion.

[24] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

While the court will not approve a settlement if it is unfair, "fairness" may be found anywhere within a broad range of lower and upper limits. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[25] Compromise and Settlement ⚿59
89k59
(Formerly 170Ak1699)

Since the prestige attendant upon negotiating a large settlement against a corporate defendant and thereby

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acquiring reputations as consumer advocates may place public attorneys in a situation analogous to private counsel who hope to win large fee awards, the possibility of such conflict of interest as a general rule warrants judicial scrutiny of unauthorized settlement negotiations. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[26] Compromise and Settlement ⚿51
89k51
(Formerly 170Ak1697)

Settlement negotiations with less than all class counsel weaken the class' tactical position even if the attorney who enters into the negotiations attempts to represent the class' interests vigorously.

[27] Compromise and Settlement ⚿51
89k51
(Formerly 170Ak1697)

Class counsel should know the options considered and the topics discussed during the negotiations before supporting a settlement as fair.

[28] Compromise and Settlement ⚿61
89k61
(Formerly 170Ak1699)

Exclusion of private counsel from the negotiations that led to subclass settlement of engine interchange litigation weighed heavily against approval of the settlement.

[29] Federal Civil Procedure ⚿1707
170Ak1707

Although the proponents of any class settlement bear the burden of proof on the issue of fairness, proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence.

[30] States ⚿190
360k190

Absent statutory authorization, Illinois could not maintain engine interchange lawsuit against automobile manufacturer in federal court as a parens patriae action.

[31] Federal Civil Procedure ⚿161
170Ak161

Class action, although it also provides a vehicle fc furthering the substantive policies behind legislation, is primarily a device to vindicate the rights of individual class members. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[32] Consumer Protection ⚿41
92Hk41
(Formerly 382k864)

Since the Magnuson-Moss Act provides that the United States Attorney General and the Federal Trade Commission may go to federal court to enjoin violations of the Act, it provides its own mechanism for protecting the general public's interest in enforcement of its provisions; it does not leave protection of the public interest up to the attorneys general of the 50 states. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, § 110(c), 15 U.S.C.A. § 2310(c); Clayton Act, §§ 4A-4H, 15 U.S.C.A. §§ 15a-15h.

[33] Compromise and Settlement ⚿61
89k61
(Formerly 170Ak1699)

Assuming, arguendo, in engine interchange litigation brought against automobile manufacturer, that the Illinois Attorney General's office did not violate pretrial order and thus participated in subclass settlement negotiations solely as a representative in the parallel state court, action, nevertheless, the trial judge should have opened up the negotiations to scrutiny, if only to dispel the questions naturally arising from the unusual posture of the case. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[34] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Unanimous approval of all named plaintiffs is not a prerequisite to judicial approval of a settlement approved by some of the named plaintiffs. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[35] Federal Civil Procedure ⚿1700
170Ak1700

Although, in engine interchange litigation broug against automobile manufacturer, the abandonmen by state attorneys general of the claims of post-April ten car buyers did not by itself warrant reversal of the settlement of the claims of pre-April

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11 buyers, it did indicate that the representation during the negotiations may have been inadequate as to all Oldsmobile buyers who constituted the original class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[36] Federal Civil Procedure ⚿162
170Ak162

Trial court has broad discretion in determining whether to allow a class action to be maintained and must necessarily have an equally broad range of discretion in determining whether to create subclasses. Fed.Rules Civ.Proc. rules 23, 23(c)(4)(B), 28 U.S.C.A.

[37] Federal Civil Procedure ⚿176
170Ak176
(Formerly 170Ak161)

Division of a class or potential class into subclasses to account for differences in proof that may be required at trial is clearly permissible. Fed.Rules Civ.Proc. rules 23, 23(c)(4)(B), 28 U.S.C.A.

[38] Compromise and Settlement ⚿61
89k61
(Formerly 170Ak1699)

As regarded court-approved subclass settlement in engine interchange litigation brought against automobile manufacturer, the proposed settlement's estimate of attorneys' fees and expenses was so vague that subclass members could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[39] Compromise and Settlement ⚿51
89k51
(Formerly 170Ak1697)

An attorney who is counsel in both parallel state and federal actions should request leave of court before entering into settlement negotiations. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[40] Compromise and Settlement ⚿51
89k51
(Formerly 170Ak1697)

[40] Federal Courts ⚿893
170Bk893

In respect to an attorney who is counsel in both parallel state and federal actions, the trial court, before granting the attorney leave to enter into settlement negotiations, should probably require as a condition to such leave at least that the attorney inform other counsel in the proceedings of the matters discussed during the separate negotiations; but although this practice is preferable, the failure to follow it is not necessarily reversible error if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement itself is fair. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[41] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[42] Compromise and Settlement ⚿70
89k70
(Formerly 170Ak1697)

In engine interchange litigation brought against automobile manufacturer, the value of the Oldsmobile engines allegedly warranted and the Chevrolet engines received was a matter upon which the proponents of subclass settlement had the burden of proof. U.C.C. § 2-714(2).

[43] Consumer Protection ⚿36.1
92Hk36.1
(Formerly 92Hk36, 382k864)

Although, in respect to the Magnuson-Moss Act's provision "for damages and other legal and equitable relief," the broad language of the Act falls short of express authorization for an award of punitive damages, it cannot be said that punitive damages are never recoverable under federal law unless expressly authorized. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, § 110(d)(1), 15 U.S.C.A. § 2310(d)(1).

[44] Consumer Protection ⚿36.1
92Hk36.1
(Formerly 92Hk36, 382k864)

Although the legislative history of the Magnuson-Moss Act is silent on the matter of punitive

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damages, it is not unlikely that Congress intended to provide at least the same relief available under state law for breach of warranty. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, § 110(d)(1), 15 U.S.C.A. § 2310(d)(1).

[45] Damages 89(2)
115k89(2)

Although punitive damages are usually unavailable for actions sounding in contract, this general rule is subject to exceptions; for example, punitive damages may be awarded when the breach amounts to an independent tort or is accompanied by fraudulent conduct. U.C.C. § 1-106(1).

[46] Federal Courts 893
170Bk893

Failure of trial court to hold a preliminary hearing prior to mailing notice of proposed settlement is not inevitably reversible error, even though such a hearing is better practice and the manual for complex litigation recommends it.

[47] Federal Courts 812
170Bk812

Court of Appeals has declined to adopt per se rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions, but this does not relieve the Court of Appeals of its duty to reverse the trial court's judgment when it is convinced that there has been a clear showing of an abuse of that discretion. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[48] Compromise and Settlement 59
89k59
(Formerly 170Ak1699)

As regards the settlement of a class action, convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[49] Federal Courts 763.1
170Bk763.1
(Formerly 170Bk763)

Court of Appeals, on appeal from a district court order approving a subclass settlement in engine interchange litigation, only had authority to approve or disapprove the settlement in the form presented to it.

[50] Compromise and Settlement 61
89k61
(Formerly 170Ak1699)

Where, under settlement order, a subclass member was presented with an accept- or-else situation, i. e., if he did not accept, his federal claim in engine interchange litigation was lost even though he could not receive the benefits of the settlement package, the dismissal of the action was fundamentally unfair to nonconsenting subclass members and, therefore, the settlement could not be permitted to stand in its present form.

[51] Federal Courts 5
170Bk5

A fundamental characteristic of the federal courts is their limited jurisdiction.

[52] Federal Courts 14.1
170Bk14.1
(Formerly 170Bk14)

District court, having declined to take pendent jurisdiction over state claims presented by the pleadings, was without power to extinguish them.

[53] Federal Civil Procedure 1709
170Ak1709

Class members can be bound by a settlement over their objections, and the same is true of objecting named plaintiffs. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[54] Federal Civil Procedure 2
170Ak2

Although Congress unquestionably has the power to supersede any federal rule either in its entirety or in particular types of civil actions, the proper rule of construction is that congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal.

[55] Compromise and Settlement 55
89k55
(Formerly 170Ak1699)

Neither the language of the Magnuson-Moss Act nor its legislative history clearly manifests an intent of

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Congress to supersede federal rule of civil procedure requiring court approval before a class action is dismissed or compromised. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[56] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Magnuson-Moss Act does not alter the general rule that the trial court may approve a class action settlement without the consent of every member of the class. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, §§ 101-112, 15 U.S.C.A. §§ 2301-2312; Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[57] Federal Civil Procedure ⚿1709
170Ak1709

In engine interchange litigation brought against automobile manufacturer, the district court did not have the power under federal class action rule to dismiss with prejudice the Magnuson-Moss claims of those subclass members who refused to accept settlement package; as to them, the "settlement" was not a settlement, but was merely an offer to settle with a penalty, the dismissal of their federal claims, if they did not accept. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, §§ 101-112, 15 U.S.C.A. §§ 2301-2312; Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[58] Compromise and Settlement ⚿2
89k2

Essence of a settlement is a bilateral exchange.

[59] Consumer Protection ⚿42
92Hk42
(Formerly 382k864)

From a consumer protection point of view, the Magnuson-Moss Act is clearly preferable to the Uniform Commercial Code, which is difficult to apply to consumer sales transactions and is full of pitfalls for consumers seeking recovery for defective products; in addition, the Magnuson-Moss Act provides the consumer with a more adequate remedy by providing that the successful plaintiff may also recover the costs of litigation. Magnuson-Moss Warranty Federal Trade Commission Improvement Act, § 110(d)(2), 15 U.S.C.A. § 2310(d)(2).

[60] Compromise and Settlement ⚿58
89k58
(Formerly 170Ak1699)

Although support of class members is one factor which should be considered in determining the fairness of a settlement, support cannot necessarily be inferred from silence; acquiescence to a bad deal is something quite different than affirmative support.

[61] Federal Civil Procedure ⚿1707
170Ak1707

Despite the Court of Appeals' reversal of district court order approving subclass settlement in engine interchange litigation brought against automobile manufacturer, the district court could approve communication of the manufacturer's offer of settlement to individual members of the class. U.S.Dist.Ct.Rules N.D.Ill., Civil Rule 22.

[62] Federal Courts ⚿30
170Bk30

Jurisdiction of federal court is determined at the time of filing complaint.

[63] Compromise and Settlement ⚿55
89k55
(Formerly 170Ak1699)

Federal class action rule requires judicial approval of class action settlements to guard against possible ineffective representation of absentees' interests by the representative parties, but this danger does not inhere in offers to settle with individual class members, which the class members are free to accept or reject. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[64] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 170Ak1699)

A proposed offer to settle with individual class members requires a lesser degree of judicial scrutiny than a proposed settlement of a class action. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[65] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

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for judicial approval of communications with individual class members, but the degree of judicial review should be concomitant with the potential for abuse that such communications create. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[66] Compromise and Settlement ⚿55
89k55
(Formerly 170Ak1696)

An offer to settle should contain sufficient information to enable a class member to determine whether to accept the offer to settle, the effects of settling, and the available avenues for pursuing his claim if he does not settle. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[67] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

In contrast to judicial examination of a proposed class action settlement which entails consideration of the fairness of the settlement itself, judicial examination of the offer to settle individual claims largely entails only consideration of the accuracy and completeness of the disclosure. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[68] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Trial court should examine the amount tendered in settlement before approving the offer to settle; yet, because each class member may judge for himself whether the amount offered is acceptable, the court need not determine that the amount is "fair, reasonable and adequate"; the court need only find that the proposed exchange provides each individual class member with a meaningful opportunity to obtain satisfaction of his claim. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[69] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

Whether, in engine interchange litigation brought against automobile manufacturer, the defendant's settlement offer to individual members of the class should contain a statement by plaintiff objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure was a matter for the tri court's discretion; however, the trial court should insist that the notice state that the court's permission to communicate the offer does not indicate any opinion or finding by the court that the settlement package is fair or adequate consideration for the release of a subclass member's claim. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

[70] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

Because a class action defendant may communicate an offer to settle individual claims without the agreement or consent of the named plaintiffs or their counsel, the court need not permit discovery into the conduct of the settlement negotiations before approving communication of the offer. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

***1113** William J. Harte, Chicago, Ill., of counsel, for plaintiffs-objectors Betty Oswald, Eileen Miller and Phil Miller.

Lawrence Walner, Chicago, Ill., for plaintiff appellants.

William J. Scott, Atty. Gen. of Illinois, Springfield, Ill., for plaintiff- appellee State of Illinois; Donald G. Mulack, Chicago, Ill., of counsel.

Charles E. Clark, Birmingham, Ala., for plaintiffs-appellees.

Thomas A. Gottschajk, Kirkland & Ellis, Chicago, Ill., for defendant-appellee.

Before FAIRCHILD, Chief Judge, and BAUER and WOOD, Circuit Judges.

HARLINGTON WOOD, Jr., Circuit Judge.

In 1976 the defendant, General Motors (GM), began substituting engines produced by its Chevrolet Division in many of the 1977 model year cars produced by its Oldsmobile Division. The discovery of the engine switch culminated in the commencement of a plethora of lawsuits against GM in the state and federal courts. The Judicial Panel on Multidistrict Litigation transferred those actic which had been filed in the federal courts to the United States District Court for the Northern District of Illinois for consolidated pretrial proceedings with several actions which were already pending there.

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See 28 U.S.C. s 1407. The district court certified that the actions could be maintained as a class action and later approved the settlement of the actions as to one of two subclasses of Oldsmobile purchasers.

This appeal is from the order of the district court approving the subclass settlement. Although the facts are lengthy, the litigation's history complex, and the resolution of the issues difficult, the issues may be stated with relative simplicity:

First, is the district court's order approving the subclass settlement appealable?

Second, should counsel prosecuting the appeal be limited to representing the interests of those class members who objected to the settlement before the district court?

Third, did the district court err by refusing to permit appellants' counsel to inquire into the conduct of the negotiations that led to the settlement?

Fourth, did the district court err by dismissing with prejudice the federal claims of those class members who declined to release their state law claims pursuant to the settlement agreement?

We find that this court does have jurisdiction to entertain the appeal and hold that the trial court erred in approving the subclass settlement. Consequently, we reverse and remand the order of the district court with instructions.

I. Facts

A. The Engine Interchange Litigation

Beginning in 1974, GM planners began considering the manufacturing requirements for GM cars for the 1977 model year. By 1976 various GM management committees began planning for extensive interdivisional engine exchanges. Because the Chevrolet Division had a significant surplus production capacity, GM planners decided to rely on Chevrolet produced engines to meet part of the engine requirements of GM's Buick, Oldsmobile and Pontiac Divisions.

***1114** To institute the engine interchange in the Oldsmobile Division, GM used codes to identify the different engines that would be used in its 1977 Oldsmobiles. The Rocket 350 V-8 engine produced by Oldsmobile, for example, was given the code name "L34"; the Chevrolet engine used in place of the Rocket was given the code "LM1." [FN1] Moreover, GM, over some objections by the Chevrolet Division, decided to adopt a common engine color for all of its engines. Thus, the distinctive red Chevrolet engine became blue. Despite the planned Oldsmobile-Chevrolet engine change, GM's advertising, EPA gas mileage disclosures and communications to Oldsmobile dealers referred to the changes by the use of the codes.

> FN1. Three Chevrolet produced V-8 engines were used in 1977 Oldsmobiles: the LM1, a 350 engine equipped with a four-barrel carburetor, the L65, a 350 engine equipped with a two-barrel carburetor, and the LG3, a 305 cubic inch displacement engine. The class eventually certified by the district court includes all purchasers of Oldsmobiles with Chevrolet engines regardless of which of the three Chevrolet engines the purchasers actually received.

The switch from standard components to different components in Oldsmobiles was not confined to engines. GM used different components than it had used in previous years for other parts of the power train (the engine, transmission, and drive axle) in some of its Oldsmobiles. For reasons which do not appear with clarity in the record, GM decided in 1976 to install in all 1977 Oldsmobile Delta 88 coupes and sedans the THM 200 transmission instead of the THM 350, the transmission traditionally used in those cars. The THM 200, like the THM 350, is produced by GM's Turbohydramatic Division. The THM 200, originally designed for use in the subcompact Chevette, was used in all 1977 Delta 88 coupes and sedans regardless of whether they contained Oldsmobile or Chevrolet engines. The appellants maintain that GM's advertising materials nevertheless indicated that the THM 350 was standard equipment in all 1977 Deltas.

[1][2] The case before this court is a subset of the Oldsmobile litigation spawned by the discovery of the engine interchange. After filing suit in the Cook County Circuit Court alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. ch. 121 1/2, ss 261-272, the Illinois Attorney General filed suit in the federal court for the Northern District of Illinois on behalf of the State of Illinois, which had purchased a 1977 Oldsmobile with a Chevrolet engine, and more than 100 other Oldsmobile purchasers.[FN2] The

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complaint alleged that the sale of the Oldsmobiles without disclosure of their engine source violated the Magnuson-Moss Act, 15 U.S.C. ss 2301-2312, and sought certification of the action as a nationwide class action.[FN3] The Oswald and Miller actions were later brought to the federal district ***1115** court and consolidated with the State of Illinois action before Judge McGarr. Upon GM's petition, the Judicial Panel on Multidistrict Litigation transferred seven actions then pending in other federal courts to the Northern District for consolidated pretrial proceedings. [FN4]

FN2. The Magnuson-Moss Act limits federal court jurisdiction over class actions prosecuted under the Act to those actions in which the amount of each individual claim is at least $25, the total amount in controversy is at least $50,000, and the number of named plaintiffs is at least 100. 15 U.S.C. s 2310(d)(3). Otherwise, presumably every consumer complaint alleging a violation of the Act could have been maintained in the federal courts, without regard to the amount in controversy, under 28 U.S.C. s 1337. Compare Barnette v. Chrysler Corp., 434 F.Supp. 1167 (D.Neb.1977) (individual action alleging a violation of the Act and seeking recovery of the purchase price of a defective car could not be maintained in federal court, because it failed to meet the $50,000 requirement). On the other hand, the Act's amount in controversy requirements, by lowering from the usual $10,000 to $25 the amount necessary for individual claims but requiring an aggregate amount of at least $50,000, reduce the obstacles normally encountered in meeting the jurisdictional amount necessary to maintain a class action. See Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969); Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). The number of named plaintiffs required, however, remains a substantial barrier to maintaining class actions under the Act. It was enacted by Congress to prevent "trivial or insignificant" class actions from being brought in the federal courts. H.R.Rep.No. 93-1107, 93d Cong., 2d Sess., Reprinted in (1974) U.S.Code Cong. & Ad.News 7702, 7724. Although the Illinois Attorney General's complaint was the only complaint to satisfy the last jurisdictional requirement, we attach no particular significance to this fact.

FN3. General Motors characterizes the case before this court as "only the tip of a litigation iceberg" over GM's interdivisional engine use. The widespread publicity given to the engine switch by the initial lawsuits bred additional lawsuits. Other Attorneys General soon filed st court actions against GM under state consumer protection statutes. Furthermore, many individual car buyers started state court proceedings seeking individual and sometimes class relief. Altogether, GM estimates, over 300 engine interchange actions were filed against GM since March 1977. Forty- one of the suits were filed as class actions and thirty-three were brought by state Attorneys General. Some of the actions were initiated by purchasers of 1977 Buicks and Pontiacs which, like the Oldsmobiles in this suit, were equipped with Chevrolet engines. At least two suits were filed by owners of 1977 Buicks and Cadillacs, alleging that they received cars equipped with Oldsmobile engines. See In re GMC Engine Interchange Litigation, 441 F.Supp. 933 (J.P.M.D.L.1977) (transferring actions to the Northern District of Illinois for consolidated pretrial proceedings). GM's interdivisional engine program also prompted investigation by the Federal Trade Commission. See GMC v. FTC, 1978-1 Trade Cas. P 62,005 (N.D.Ohio 1977) (rejecting GM's challenge to the authority of the Commission to undertake the investigation). The bulk of the lawsuits, however, appear to involve 1977 Oldsmobiles, the subject of the litigation before this court.

FN4. The Oldsmobile actions that eventually were consolidated for pretrial proceedings are: State of Illinois v. GMC, No. 77-C-927 (N.D.Ill.); Oswald v. GMC, No. 77-C-1006 (N.D.Ill.); Miller v. GMC, No. 77-C-1436 (N.D.Ill.); Skokie Central Traditional Congregation v. GMC, No. 78-C-1457 (N.D.Ill.); State of Alabama ex rel. Baxley v. GMC, No. 77-P-0881-S (N.D.Ala.); Creel v. GMC, No. CA-77-P-0440-S (N.D.Ala.); Natter v. GMC, No. CA-77-P-0659-S (N.D.Ala.); Balog v. GMC, No. 77-443 (W.D.Pa.); Hannan v. GMC, No. 77-C-265 (E.D.Wis.); King v. GMC, No. M-77-24-CA (E.D.Tex.); Levine v. GMC, No. 77-C-849 (E.D.N.Y.); Parker v. GMC, No. S-77-0174(N) (S.D.Miss.).

The various federal actions were consolidated before the district court for pretrial purposes only. Although the actions have not been consolidated for trial purposes, the appellants do not contest, and we do not question, the district court's authority to approve a settlement of all the actions before it. See 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3866 at 374-76 (1976); Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts Transferee Courts, 78 F.R.D. 575, 582-83 (1978).

The order certifying the class action found that each of the named plaintiffs would adequately

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represent the class and confirmed the representative status of each. Therefore we need not decide whether all of the actions are technically before us, because we find that the appeal of some of the named plaintiffs is sufficient to permit this court to consider the interests of all class members. See also Part III of this opinion Infra.

On July 22, 1977, the district court entered an order adopting an agreement of the numerous counsel for the plaintiffs in the consolidated cases. The order created an executive committee of six attorneys to represent the plaintiffs in all pretrial proceedings. See generally Manual for Complex Litigation ss 1.92- 1.93.[FN5] Although the committee was given broad power in the pretrial proceedings, the order provided that the committee could conduct settlement negotiations only with the consent of all counsel for the named plaintiffs.

FN5. All citations in this opinion unless otherwise noted are to the Manual's fourth edition. Citations to particular pages follow the pagination of the Wright and Miller edition.

On October 13, 1977, the district court certified the consolidated cases as a class action. The order defined the class as "(a)ll persons . . . who purchased 1977 Oldsmobile automobiles which without their knowledge or consent, contained V-8 engines manufactured by the Chevrolet Motor Division . . ." The court dismissed all federal claims except the Magnuson-Moss claim and declined to exercise its power to take pendent jurisdiction over the related state law claims. The trial court recognized that parallel state court actions were pending, but rejected GM's position that the state proceedings should prevent class certification on the Magnuson-Moss claim. Despite the certification of the class, no notice to class members was mailed to inform them of the pendency of the class action at that time.

B. The Settlement

Sometime during the fall of 1977, General Motors entered into settlement negotiations ***1116** with representatives of the various state Attorneys General who had filed or were contemplating filing actions against GM.[FN6] A representative of the Illinois Attorney General who was also a member of the executive committee participated in the negotiations without leave of the district court or other counsel for the plaintiffs in the federal class action. On December 13, 1977, one of the counsel for the plaintiffs received word that a tentative settlement agreement had been reached by GM and the Attorneys General. The attorney, in essence, requested the district court to order immediate disclosure of the progress of the settlement negotiations or any agreements that had been reached. The trial court, however, regarded the motion as premature. Unwilling to interfere with communications between GM and the Attorneys General before an agreement was reached, the district court declined to order the requested relief. The trial judge remarked that he believed he had sufficient power over the approval of any settlement to protect the interests of class members.

FN6. GM maintains that the negotiations were begun at the suggestion of the Consumer Protection Committee of the National Association of State Attorneys General.

Six days later on December 19, the Illinois Attorney General in his capacity as one of the class counsel moved that the district court consider the settlement agreement between GM and all but five of the fifty state Attorneys General. [FN7] The proposed settlement provided that GM would provide to each consumer who had purchased a 1977 Oldsmobile, Buick or Pontiac equipped with a Chevrolet engine on or before April 10, 1977, $200 plus a 36-month or 36,000-mile extended warranty on the power train. In return each purchaser would be required to sign a release of all state and federal claims concerning the substitution of engines, components, parts, and assemblies in the car. GM also agreed to disclose the source of all engines of new GM cars for the next three years. The Attorneys General, in turn, promised to secure dismissals with prejudice of all actions prosecuted by them.

FN7. Several other state Attorneys General have since joined in the agreement.

The district court showed itself willing to consider the agreement as a basis for settling the class action. Although the court afforded private counsel time to conduct discovery to determine whether the settlement was fair, it denied the motion of some of plaintiffs' counsel for discovery into the negotiations between the Attorneys General and GM. The court maintained that the negotiation process was irrelevant to the central issue of the fairness of the settlement.

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Furthermore, the district court entertained GM's motion to redefine the class to include only those Oldsmobile purchasers to whom the settlement agreement contemplated payment. The class originally included all 1977 Oldsmobile purchasers who bought their cars before October 13, 1977, without knowledge that the cars had Chevrolet engines. The settlement agreement contemplated narrowing the class to purchasers before April 11, 1977. In an order dated March 14, 1978, the trial court denied GM's motion to redefine and narrow the class. The court did, however, designate "for purposes of sending the settlement notice" a subclass of pre-April 11 purchasers.[FN8] Notices informing class members of the pendency of the class action were sent out shortly thereafter. The notice to settlement subclass members, in addition to informing them of the pendency of the action, informed them of the proposed settlement and gave them the opportunity, Inter alia, to opt-out of the action or to object to the proposed settlement. The notice to class members not in the settlement subclass merely provided notice of the action and the opportunity to opt-out.

FN8. The trial court also agreed with GM to broaden the class in one respect. The court, for the purpose of settlement only, struck the no-knowledge-or-consent requirement of the original class certification as to members of the settlement subclass. This conformed the subclass to the precise class of Oldsmobile purchasers contemplated by the GM-Attorneys General agreement.

***1117** In May 1978, pursuant to its authority under Fed.R.Civ.P. 23(e), the district court held a fairness hearing to determine whether it should approve the settlement. Because some of the private counsel objected to the settlement, the hearing was contested and lasted twelve days. The order of proof was irregular. Both sides submitted numerous exhibits. The plaintiff- objectors presented, among others, several 1977 Oldsmobile owners who objected to the settlement and two mechanics who testified that the substituted power train was inferior to the one GM allegedly warranted. GM relied largely on exhibits and the testimony of a Chevrolet staff engineer who testified that the power trains warranted and those provided were comparable.

On July 17, 1978, after considering post-hearing memoranda of the various sides in the litigation, the district court entered an order approving the subclass settlement as fair. Adopting GM's proposed findings of fact almost verbatim, the district court found that the engines and other parts included in the Oldsmobiles were "comparable" to those warranted. Resolving most of the other contested issues in favor of GM, the district court ordered the action dismissed as to all members of the subclass and directed GM to send an approved notice of settlement to each member of the subclass. Before the notice could be mailed, however, some of the plaintiff-objectors prosecuted this appeal. [FN9]

FN9. After the notice of appeal was filed, the Illinois Attorney General made a motion before the trial court requesting permission to send the settlement notice (with additional language indicating the pendency of the appeal) to subclass members. The trial court held that the appeal deprived it of jurisdiction to entertain the motion, but indicated that if it had had jurisdiction, it would have granted the motion. The Attorney General then, with the apparent acquiescence of the plaintiff-proponents and GM, moved this court for relief under Fed.R.App.P. 8(a). Because the contents of the notice were at issue on this appeal, we took the motion under advisement. C decision on the merits of the appeal necessari precludes sending out the notice in its present form. Accordingly, we hereby deny the motion.

II. Appealability

[3] The plaintiff-objectors prosecuting this appeal and GM agree that this court has jurisdiction to hear this appeal. The attorney for one of the plaintiffs and an objector to the settlement before the trial court, however, maintains that the trial court's order approving the settlement is neither a final decision nor a collateral order within the meaning of 28 U.S.C. s 1291.[FN10] Of course, we cannot determine this court's jurisdiction by majority vote of counsel appearing before us and, even if the parties unanimously agreed to appeal the order, we would be required to raise the issue Sua sponte. Levin v. Baum, 513 F.2d 92 (7th Cir. 1975).

FN10. Disagreement between attorneys for the class, as will become apparent, has become the norm in the conduct of this litigation. For our purposes, counsel for the class may be divided into basically three groups. Those who objected to the proposed settlement in the trial court sl be referred to as plaintiff-objectors. Despite the division over the appealability issue, the attorney contesting the jurisdiction of this court to entertain the appeal is a member of this group. Those

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private counsel who supported the settlement shall be referred to as plaintiff-proponents. Finally, the Attorneys General from Illinois and Alabama who represented named plaintiffs in the trial court constitute the third group. The latter two groups have aligned themselves with GM on many of the issues in this appeal.

[4] There is only one apparent obstacle to our hearing this appeal. The trial court's division of the class into two subclasses arguably makes this a multi-party action subject to the requirements of Fed.R.Civ.P. 54(b). [FN11] In an order following its approval ***1118** of the subclass settlement, the trial court refused to make a determination that there was no just reason for delay and to direct entry of judgment. We hold that, despite the refusal of the trial court to enter judgment pursuant to Rule 54(b), we have jurisdiction to review the order approving the subclass settlement as a collateral order.[FN12]

FN11. There is considerable doubt whether Fed.R.Civ.P. 54(b) was intended to govern the situation when two distinct subclasses are created from a single class and one subclass' right to recover under a settlement neither affects nor is affected by the merits of the other subclass' claim. Aside from the difficulty of construing "multiple parties" to encompass separate subclasses, the settlement of one subclass' suit arguably should be treated as a separate lawsuit outside the ambit of Rule 54(b). This practical view of the position of the subclasses accords with the legal effect of creating subclasses under Fed.R.Civ.P. 23(c)(4). That rule provides that when a class is subdivided "each subclass (shall be) treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Each subclass must independently meet the requirements of Rule 23 in order to be maintained as a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure s 1790 at 191-92 (1972), and therefore it seems consistent with the spirit of the rules to treat each subclass action as a separate action for all purposes.

FN12. Because we find that even if Rule 54(b) encompasses the present litigation that an independent basis for jurisdiction exists, we need not attempt to reconcile Rule 23 with Rule 54(b). Collateral orders are appealable without the express entry of judgment under Rule 54(b). See Swanson v. American Consumer Industries, Inc., 517 F.2d 555, 560-61 (7th Cir. 1975).

[5][6] The Supreme Court has taken an "intensely practical" approach when deciding whether judgments are appealable. Mathews v. Eldridge, 424 U.S. 319, 331 n. 11, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In close cases the determination must be made by balancing the "inconvenience and costs of piecemeal review" against "the danger of denying justice by delay." Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). We are cognizant that the federal policy against piecemeal review admits no exception merely because the judgment appealed from affects the conduct of a class action. See Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (striking the death knell for the death knell doctrine); Weit v. Continental Illinois National Bank & Trust, 535 F.2d 1010 (7th Cir. 1976) (order requiring notice to class members is not a collateral order). We believe, however, that although the federal courts have narrowly interpreted the collateral order doctrine established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), that this case falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546, 69 S.Ct. at 1226.

[7][8] The first requirement of the collateral order doctrine is that the matter appealed from must have been finally determined by the district court. [FN13] This does not require that the trial court be without power to reverse its ruling; it only requires that no further consideration be likely. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3911 at 470 (1976). The record amply indicates the trial judge's resolve not to reconsider the fairness of the subclass settlement. After the long fairness hearing, the trial court approved the settlement in an order with fairly extensive findings of fact. The order purported to immediately dismiss the claims of all subclass members. Afterward, the trial court on two occasions declined to reconsider its decision. Moreover, although the trial court retained jurisdiction over the settlement subclass action to supervise the implementation of the settlement, this left the trial court with only the ministerial task of executing its judgment. The trial court's order, therefore, is not tentative and it finally determines the matter appealed to this court.

FN13. "There are two aspects of the final judgment rule. One is that the order be the final

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disposition of the entire case. The other is that the order be the final disposition of the issue. The Cohen rule permits a limited exception with respect to the first aspect but not with respect to the second." Rodgers v. United States Steel Corp., 508 F.2d 152, 159 (3d Cir.), Cert. denied, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975)

[9][10] The second requirement of the collateral order doctrine is that the matter appealed must be "separable from, and collateral to, rights asserted in the action" and neither affect nor be affected by decision on the merits. 337 U.S. at 546, 69 S.Ct. at 1225-1226. Application of this requirement ***1119** to appeals from decisions on the fairness of a settlement presents some difficulties. Ordinarily settlements of civil litigation are not reviewed by federal courts. Thus, the issue is raised almost exclusively in class or derivative actions. [FN14] One court of appeals, however, has held that a refusal of a trial court to approve a class action settlement to be "collateral," Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), Cert. denied, 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971), and another has reviewed such a refusal without expressly considering the appealability issue, In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973).[FN15]

FN14. Court approval of settlements is also necessary in bankruptcy reorganization proceedings. See, e. g., Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968).

FN15. The Second Circuit has recently rejected the position taken by the Eighth and Ninth Circuits and refused to review a trial court's refusal to approve a settlement of a shareholders derivative action. Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978). Because this appeal challenges the trial court's approval of a settlement, we need not align this court on one side of this conflict between the Circuits. This appeal because of the subclassing of Oldsmobile purchasers for the purposes of settlement presents a situation unlike those which ordinarily confront class members or shareholders after the trial court's approval or disapproval of a proposed settlement of a representative action. In Seigal the court stated that "(an approved) settlement . . . is not a deviation from the main path of the litigating process. It is a step on that path directly leading to final judgment. An approval of a compromise, after appropriate notice, becomes a final judgment." 590 F.2d 38. In the case at bar, the trial court's approval of the subclass settlement does not lead directly to final judgment. But unlike a disapproval of a settlement, the trial court's order looks toward neither a renewal of settlement negotiations nor a trial on the merits. Thus, the danger of appellate court interference with proceedings before the trial court is small in comparison with the danger of denying justice by delay.

[11] Although in Norman the court maintained that appellate review of the initial determination of the settlement's fairness was completely divorced from the merits of the claim, adequate review of the fairness of a settlement necessarily requires some examination of the underlying cause of action. 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure s 3911 at 385 (1976); See Manual for Complex Litigation s 1.46 at 56. See also Coopers & Lybrand v. Livesay, 437 U.S. at 469, 98 S.Ct. at 2458 ("the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' "). Nevertheless, several factors bring this appeal within the separateness requirement. Fir the Supreme Court has not applied the requiremen that the issue be "separate" from the merits to require the precise division of the issues presented on appeal and the elements of the underlying cause of action that a semanticist might expect. See National Socialist Party v. Village of Skokie, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). Moreover, to the extent that this appeal raises issues about the regularity of the conduct of the settlement negotiations or the fairness hearing, consideration of the merits of the plaintiffs' cause of action is unnecessary. Similarly, because appellate courts will reverse a trial court's determination on the fairness of a settlement only if there is a clear abuse of discretion, consideration of the merits is necessarily something less than penetrating.

Finally, the order approving the settlement is, in one sense, completely separate from the merits of the action. The trial court's approval of the settlement precludes any decision on the merits of the settlement subclass' claim because the claim will never go to trial.

The third requirement of the collateral orc doctrine is that the rights asserted would be lost, probably irreparably, if review were delayed until the conclusion of proceedings in the district court. It

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is unlikely that the claims of the post-April 10, 1977, Oldsmobile purchasers will be decided any time soon. GM has made clear its intention not to settle with that subclass. Therefore years of litigation before the entire class action is concluded is possible. In ***1120** the meantime, the settlement, if executed, contemplates the release of state and federal claims by those class members who accept the settlement package and dismissal of the Magnuson-Moss claims for those who do not. If the settlement is later undone on appeal, ordering reimbursement by those who accepted the $200 and received benefits under the mechanical insurance policy would be practically impossible.[FN16] Those signing releases might also lose their state claims against GM because of the running of the statutes of limitation. Conversely, those who decline to sign the release, may file and pursue state claims. Any judgment in the state courts may possibly bar subsequent action on their Magnuson-Moss claims.

FN16. These characteristics of the settlement approved by the trial court distinguish this appeal from the appeal which was dismissed for lack of an appealable order in Rodgers v. United States Steel Corp., 541 F.2d 365 (3d Cir. 1976). In Rodgers the trial court permitted the defendant to communicate to individual members of the class an offer to enter into individual settlements. See Rodgers v. United States Steel Corp., 70 F.R.D. 639 (W.D.Pa.1976). See also Part VI of this opinion Infra. The trial court merely approved the communication of the offer; it did not finally determine the rights of any member of the class. See 541 F.2d at 370. In the present case, the trial court dismissed the federal claims of all settlement subclass members and effectively terminated their participation in the class action whether they released their claims or not. Moreover, the settlement offer in Rodgers merely promised payment of back pay in return for signed releases. The Court of Appeals, dismissing the appeal, noted that the parties could be returned to their original positions if the release was subsequently invalidated. Id. at 371. Here, we cannot say with any degree of certainty that we could later return to GM the benefits that class members received under the mechanical insurance policy.

We conclude that "delay of perhaps a number of years in having (their) rights determined might work a great injustice" to the subclass members. Gillespie v. United States Steel Corp., 379 U.S. 148, 153, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964). They "cannot make important decisions about . . . further participation in this suit without having (their) rights determined now." Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1123 (5th Cir.), Cert. denied, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115 (1970). [FN17] The possibility that later appellate review would be effective is simply too slight.

FN17. Cf. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1221 (5th Cir. 1978), Cert. denied, --- U.S. ----, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979):

The court's November 20 order required awardees wishing to opt into the settlement to do so by December 15, 1975 or be deemed to have opted out of the subclass. This created a dilemma for dissatisfied subclass members, who were faced with the equally unpalatable alternatives of opting into a possibly invalid settlement or being relegated to individual lawsuits. A decision to opt into the settlement by endorsing the back pay check and thereby releasing the company of all liability for past discrimination might preclude entitlement to a share in a new agreement or award if the settlement were invalidated on appeal. On the other hand, a decision to opt-out of the subclass by failing to cash the tendered check would create the possibility of receiving no back pay award if the appeal were unsuccessful and an individual lawsuit proved unrealistic. . . .

The procedure adopted by the district court, by requiring claimants to choose whether or not to opt into the settlement Before they could exercise their right to appellate review, unfairly burdened the rights of awardees to appeal the settlement and thereby significantly undermined one of the most important procedural protections associated with the approval of a settlement. We hold that the ability of subclass members to opt into a back pay settlement may not be terminated before a final determination of the propriety of that settlement is made.

[12] A final requirement of the collateral order doctrine is that the order must present "important and unresolved legal questions." Weit v. Continental Illinois National Bank & Trust Co., 535 F.2d 1010, 1015 (7th Cir. 1976); Weight Watchers, Inc. v. Weight Watchers International, Inc.,455 F.2d 770, 773 (2d Cir. 1972). We think this appeal raises at least two important questions concerning the proper balance between the general policy of encouraging settlements and a court's specific duty to insure the fairness of class action settlements. The first question involves the scope of discovery which should be afforded ***1121** to objectors to proposed class settlements which were negotiated under questionable circumstances. Because adequate

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representation is the foundation of all representative actions, See Fed.R.Civ.P. 23(a)(4), Hansberry v. Lee, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) , we think this question is appropriately reviewed at this time. The second question concerns the nature of the "settlement" that Rule 23(e) authorizes the trial court to approve. Because this question goes to the power of the district court in the settlement of representative actions, we believe it is sufficiently important to receive appellate consideration now.

[13] In conclusion, the trial court's order is not tentative; it is capable of review without extensive examination of the merits; it raises issues which could not be effectively reviewed later; and it presents important, unresolved legal questions for consideration by this court. We hold that the trial court's order approving the subclass settlement is an appealable collateral order.

III. Motion to Limit the Appeal

Before oral argument, the attorney representing the State of Alabama in this litigation presented to this court a "motion to limit appeal to certain named appellants." The motion seeks to have the effect of this court's decision limited to (1) only the named plaintiffs, Oswald and Miller, the plaintiff- objectors prosecuting this appeal or, alternatively, (2) only those class members who filed objections to the proposed settlement in the district court. We consider the arguments in support of the second alternative first.

It is argued that this court's decision in Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970), compels this court to restrict the representative standing of the named plaintiffs who prosecute this appeal to those class members who objected to the settlement in the trial court. In Research, the appellants were members of a defendant class represented in the district court by numerous named defendants. Despite adequate notice, the appellants failed either to request exclusion from the defendant class or to object to a proposed settlement negotiated by the named defendants; the appellants attacked the fairness of the settlement for the first time on appeal. This court held that the failure of the appellants to intervene in the action foreclosed their right to appeal. Here it is argued by analogy that each individual subclass member who failed to object to the settlement before the trial court has waived the right to appeal and the right to be represented by others on appeal. We think the argument is without merit.

There is no doubt that the named plaintiffs, Oswald and Miller, preserved the right to appeal. They are parties to the lawsuit; intervention was obviously unnecessary. Moreover, through their attorneys they vigorously objected to the settlement in the district court and created a record adequate for appellate review. Thus, the issue raised by the motion may be refined to whether Oswald and Miller through their counsel may represent the interests of absent subclass members on this appeal.

[14] We would be reluctant to hold that absentee class members waive appellate review merely because they failed to take affirmative action when their interests were already being adequately represented by participants in the lawsuit. Cf. Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 32- 33 (3d Cir. 1971) (objectors' failure to opt-out of a class action does not preclude appellate review). To do so would unnecessarily restrict the representational character of all class actions. We need not reach the issue here, however, because the notice of the proposed subclass settlement inform subclass members that if they neither opted out or the subclass nor intervened in the lawsuit that "attorneys for the named plaintiffs will represent your interest in these suits." We think subclass members who received the notice could reasonably rely on class counsel to protect their interests by prosecuting an appeal from the judgment of the district court if necessary. See Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973) (failure to appeal approval of an ***1122** unfair settlement constitutes inadequate representation). We therefore decline to hold that absentee subclass members waived their right to have the settlement reviewed by this court.

The second argument advanced in favor of limiting the representative capacity of the plaintiff-objectors on this appeal is that the pretrial order of the trial court vested the power to conduct all pretrial actions on behalf of the class in the attorneys' executive committee. Because the executive committee did not authorize the prosecution of the appeal, it is argued, the authority of counsel for the plaintiff-objectors must be confined to representing the individual named plaintiffs before this court.

[15][16] We question initially the premise that it is the attorney, not the named plaintiff, who possesses the power to appeal the approval of a settlement. "(T)he decision to appeal a class action judgment

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must rest with the class plaintiffs," not class counsel. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1177-78 (5th Cir. 1978), cert. denied, --- U.S. ----, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Since the pretrial order did not purport to restrict the representative capacity of the named plaintiffs prosecuting this appeal, it would seem that the argument misses the mark. The court in Pettway, however, acknowledged that "no clear concept of the allocation of decision-making responsibility between the attorney and the class members has yet emerged." Id. at 1176. Consequently, assuming Arguendo the premise that the class attorney is the Dominus litus, we consider and reject the argument that the pretrial order prohibits counsel for Oswald and Miller from representing the interests of the class before this court.

The pretrial order does not on its face vest the power to appeal in the executive committee. The order itself only lists the committee's various duties and powers relating to pretrial proceedings. We would be extremely reluctant to imply a provision that restricts the right to appeal decisions of the trial court. Furthermore, even if the pretrial order contemplated giving the executive committee the power to prohibit individual attorneys from appealing, whether the executive committee has done so is unclear. The minutes of the committee meeting show that the committee did pass a motion that no appeal be taken from the trial court's approval of the settlement. Nevertheless, those minutes also indicate that before passage of the motion "(t)he chair ruled that the motion does not proclude (Sic) anyone from appealing but states the position of the majority of plaintiffs' counsel."

We believe that the question of whether an appeal should be made and the scope of that appeal should be answered by determining the best interests of the class. The plaintiff-proponents maintain that the settlement is fair, that the approval of the trial court is correct, and that the matter is best left unreviewed by this court. Plaintiff-objectors, of course, disagree. The purpose of Fed.R.Civ.P. 23(e) is to protect the interests of absentee class members; the danger of abuse is high and the protection of their interests cannot be left to class counsel alone. Rule 23 imposes on the trial court in the first instance, and on this court eventually, the duty to examine the fairness of proposed settlements. Limiting the representative capacity of the appellants on this appeal would effectively negate this court's obligation to act as the guardian of the class. We do not believe that the interests of class members are best served by leaving the settlement unreviewed. Cf. McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 417 n. 1 (7th Cir. 1977) (permitting briefs and oral arguments by parties who failed to file a separate notice of appeal because the case involved "issues inextricably bound up with" those properly before the court). Restricting the appeal would only leave the door open to additional individual appeals by those who decline to accept the settlement offer. A series of individual and possibly conflicting appellate decisions on the propriety of the settlement would undermine the representative nature of class actions significantly and sacrifice the public's interest in judicial economy unnecessarily. ***1123** We hold that plaintiff-objectors Oswald and Miller are parties who through their counsel will fairly and adequately protect the interests of the class in this appeal. See Fed.R.Civ.P. 23(a)(4) (requirement for class certification).

We do not hold "that each individual plaintiff and lawyer must be permitted to do what he pleases in litigation as complex as this, and can behave in total disregard of the interest of other litigants and of the class . . . ." Farber v. Riker-Maxson Corp., 442 F.2d 457, 459 (2d Cir. 1971). We note the following factors which convince us that the interests of the class will be well represented on this appeal. Cf. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1178-80 (5th Cir. 1978), Cert. denied, --- U.S. ----, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979) (discussing factors relevant to determining whether the named plaintiff may appoint new counsel to appeal the approval of a settlement negotiated by former class counsel). First, the named plaintiffs and their counsel were among the first to file engine switch suits against GM. Second, counsel for the appellants was a member of the class executive committee and is well acquainted with the litigation. Despite suggestions and innuendoes of ulterior motives in some of the briefs which we can only regard as symptoms of "the 'brief writer's hyperbole' syndrome," United States ex rel. Sims v. Sielaff, 563 F.2d 821, 824 n. 6 (7th Cir. 1977), nothing in the record indicates that appellants' counsel has acted with other than the best interests of the class in mind. Third, although vocal objection to the settlement among class members was not widespread, "the sentiment of the class is but one factor in our analysis of the appealability question." Pettway, 576 F.2d at 1178. In Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976), this court heard the appeal of objectors to a class action settlement even

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though the objectors constituted only .0018% Of all class members and their claims constituted only .0022% Of all claims. Id. at 109 n. 1. See also Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976) (reversing settlement even though only 4% Of the class was in active opposition to it). Fourth and finally, we find that the issues raised on appeal are far from meritless.[FN18]

> FN18. In Patterson v. Stovall, 528 F.2d at 109 n. 1, we noted:
> "Although in terms of the class and settlement (appellants') number and size might be considered miniscule, the serious issues raised before this Court are not reduced in their magnitude."

[17] We conclude that the best interests of the class warrant that this court review the fairness of the settlement as it affects the entire class. Consequently, we consider the merits of the objections to the trial court's approval of the proposed settlement.

IV. Conduct of the Settlement Negotiations

The plaintiff-objectors challenge the refusal of the trial court to permit them to conduct discovery into the settlement negotiations. They contend that the trial court's order prohibiting discovery and the court's limitation of examination of the Assistant Illinois Attorney General during the fairness hearing prevented them from being able to determine whether the proposed settlement was fair, reasonable and adequate. The trial court's order limiting discovery evidences its belief that how the settlement was reached was irrelevant to the issue of the fairness of the settlement.[FN19] ***1124** The court's findings of fact, although finding the irregular method of negotiating the settlement did not prejudice subclass members, reaffirmed the court's belief that the objection was irrelevant to the adequacy of the settlement "and would not constitute sufficient grounds to withhold an otherwise fair settlement from consideration by the subclass members."

> FN19. The plaintiffs' second set of interrogatories requested that GM identify all documents that it relied upon during the course of the negotiations. The interrogatories also asked GM to state "the highest demand made by the various State Attorneys General in the course of the negotiations with defendant and identify all factual support for such demand, as well as any documents which relate to such demand or factual support." The trial court entered an order ruling that the proce of the negotiations was not open to discovery. During the fairness hearing, although the court permitted some questioning of the Assistant Illinois Attorney General about the time, place and other aspects of the negotiations, it refused to permit inquiry into what transpired during the negotiations.
> GM maintains that the plaintiff-objectors waived this issue by failing to recall the Assistant Illinois Attorney General after being given the opportunity to do so. The record, however, clearly indicates that, given the trial court's limitation on the scope of examination, any further questioning by the objectors would have been futile. The objectors brought the issue to the attention of the trial court and cannot be deemed to have waived it.

[18][19][20] We think that the conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion.[FN20] In addition, we do not think that the record adequately supports the court's conclusion that the seemingly irregular conduct of the negotiations did n prejudice the interests of the class. We mus therefore, reverse the trial court's order approving the settlement.

> FN20. Neither GM nor the Illinois Attorney General has argued that the conduct of the settlement negotiations is protected from examination by some form of privilege, and we find no convincing basis for such an objection here. Although particular documents or discussions conceivably could be immune from discovery as attorney work product or as privileged attorney-client communications, the existence of such privileges is best determined in the context of particular demands for discovery. Inquiry into the conduct of the negotiations is also consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence. That rule only governs admissibility. It simply bars admission of evidence of compromise negotiations to prove liability or damages and expressly provides that it "does not require exclusion when evidence is offered for another purpose. . . ." The rule is grounded on the policy of encouraging the settlement of disputed claims without litigation. That policy is not undermined by our decision here. Participants in negotiations to settle cl actions are aware that Rule 23(e) requires the t court's approval of any settlement reached. Moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. See Manual for Complex Litigation

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s 1.46 at 53-54. To the extent such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness.

[21][22] This court has several times commented on the trial court's continuing duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation. McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 419 (7th Cir. 1977); Susman v. Lincoln American Corp., 561 F.2d 86, 89- 90 (7th Cir. 1977). The trial court's duty to undertake such an inquiry arises from the requirement that it find that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The trial court's duty is heightened by its responsibility to review the fairness of any compromise of the class action. Id. 23(e).[FN21]

FN21. "Before approving a settlement, therefore, the judge must assure himself that the class has been adequately represented during the settlement talks, a conclusion which will not follow automatically from a finding of adequacy for litigation purposes." Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1537-38 (1976). See also Wolfram, The Antibiotics Class Actions, 1976 A.B. Foundation Research J. 251, 361.

[23][24][25][26] The Manual for Complex Litigation provides that inquiry into the conduct of settlement negotiations is pertinent to the court's examination of the settlement. Manual for Complex Litigation s 1.46 at 53-54. [FN22] It recommends that before sending a notice to class members of a proposed settlement and before considering the substantive fairness of the settlement, the trial court should conduct a preliminary hearing to determine whether the proposed settlement is "within the range of possible approval." Id. Among the questions which merit judicial examination at the "probable cause hearing," the Manual lists:

FN22. We recognize that the Manual does not provide "an inflexible formula or mold into which all . . . pre-trial procedure must be cast." Manual for Complex Litigation at xix; See McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 420 (1977). In appropriate cases, however, the Manual does provide a rough guide by which to measure whether the trial judge acted within his discretion. We rely on it in that manner here.

***1125** Who were the negotiating parties and to what extent were they authorized to proceed with the settlement of their class' claims and possibly those of other classes? [FN23]

FN23. Manual for Complex Litigation s 1.46 at 53 (Consideration 4).

Among the reasons for examining whether settlement negotiations were authorized is the danger of defendant "attorney-shopping."

> (A) person who unofficially represents the class during settlement negotiations must be under strong pressure to conform to the defendants' wishes . . . . (A) n individual, lacking official status, knows that a negotiating defendant may not like his "attitude" and may try to reach a settlement with another member of the class.

Id. at 59 Quoting Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3d Cir. 1971). Thus, unauthorized settlement negotiations create the possibility of negotiation from a position of weakness by the attorney who purports to represent the class.[FN24] In addition, the prestige attendant upon negotiating a large settlement against a corporate defendant and thereby acquiring reputations as consumer advocates may place public attorneys in a situation analogous to private counsel who hope to win large fee awards. [FN25] The possibility of such a conflict of interest as a general rule warrants judicial scrutiny of unauthorized settlement negotiations. Furthermore, settlement negotiations with less than all class counsel weaken the class' tactical position even if the attorney who enters into the negotiations attempts to represent the class' interests vigorously.[FN26]

FN24. The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating (attorney) possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.
Haudek, The Settlement and Approval of Stockholders' Actions Part II: The Settlement, 23 Sw.L.J. 765, 771-72 (1969).

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FN25. Cf. Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1552 (1976) (noting the conflict of interest created not only by counsel seeking large fees after settlement, but also by counsel pursuing "his own ideological goals without regard to the desires of class members").

FN26. A time-honored litigating tactic for a defendant encircled by multiple claimants is to weaken the total force of the attack little by little. The defendant first enters into settlements with the strongest of the plaintiffs. Then it faces the remaining plaintiffs, now isolated and abandoned, with the threat of long and lonely litigation to force a final round of settlements at terms favorable to the defendant.
Wolfram, The Antibiotics Class Actions, 1976 A.B. Foundation Research J. 251, 264.

Finally, unauthorized settlement negotiations deny other class counsel access to information about the negotiations which is helpful in evaluating the fairness of the settlement. "(T)he options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement" [FN27] were all matters which class counsel excluded from the negotiations needed to consider before exercising their fiduciary duties to the class by accepting the settlement. [FN28]

FN27. Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1562 (1976).

FN28. Cf. Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975):
It is little comfort to objector Frackman that Plaintiffs' counsel may have examined the documents sought by objector during the course of . . . discovery. As an objector, Frackman was in an adversary relationship with both plaintiffs and defendants and was entitled to at least a reasonable opportunity to discovery against both.
See also National Conference of Commissioners on Uniform State Laws, Proposed Uniform Class Action Act s 12(c)(4) Reprinted in 32 Bus.Law. 83, 94 (1976) (notice of proposed settlement to class members shall include "a description and evaluation of alternatives considered by representative parties").

The record before this court contains facts which cast some doubt on the adequacy ***1126** of the representation of the class during the settlement negotiations and the fairness of the resulting settlement. These facts warranted in this instance more probing into the conduct of the settlement negotiations than the trial court permitted.

The record establishes that the settlement presented to the court by the Illinois Attorney General was either (1) negotiated without the permission of the other class counsel in the federal action as required by the court's first pretrial order or (2) negotiated by the Attorney General's office in a capacity other than class counsel In this action. The pretrial order prohibited the class counsel executive committee from entering into settlement negotiations without the consent of all plaintiffs' attorneys. The Attorney General's Assistant was a member of the committee and therefore subject to the pretrial order's restrictions. Nevertheless, he participated in negotiations with GM without the consent of other counsel.

[27][28][29] If the negotiations did proceed in violation of the trial court's pretrial order,[FN29] we think that the plaintiff-objectors were entitled to discovery to determine whether the negotiations may have prejudiced the interests of the clas Moreover, even if discovery failed to reveal identifiable prejudice, the exclusion of the private counsel from the settlement negotiations should weigh heavily against approval of the settlement. "(T)he excluded plaintiff might well have improved the settlement terms, and while this may be hard to demonstrate, the proponents of the compromise should not be helped by a difficulty of proof created by their improper conduct." Haudek, The Settlement and Approval of Stockholders' Actions Part II: The Settlement, 23 Sw.L.J. 765, 770 (1969). [FN30]

FN29. The trial court found that at least some private counsel knew of the negotiations between GM and the Attorneys General in advance of the settlement. The knowledge of some counsel, however, falls short of the authorization contemplated by the trial court's pretrial order. That order authorized the class counsel executive committee to conduct negotiations, but only with the consent of all counsel for the named plaintiffs. The trial court made no finding that all class counsel were aware of the negotiations between GM and the Attorneys General. Moreover knowledge of the existence of the negotiatic does not necessarily indicate consent to the negotiations for the purpose of settling the federal action. We do not question the right of the state Attorneys General to settle their parallel state

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lawsuits against GM without the approval of private counsel in the federal class action. Their authority to do so is unquestioned even though the settlement of state actions may have some collateral impact on the federal action, E. g., reducing the size of the class by affording relief to some class members. Here, however, the negotiations were conducted not only to settle the state actions, but also to settle the federal class action. We find no indication in the record that private counsel were aware that the negotiations would have such a broad effect until immediately before the announcement of the GM-Attorneys General agreement.

After the submission of the proposed settlement agreement, six of the private counsel in the federal action did agree to support the settlement. The district court relied on the plaintiff-proponents' support as a factor indicating both the absence of prejudice from the circumstances of the settlement's negotiation and the settlement's fairness. See Manual for Complex Litigation s 1.46 at 53 (Consideration 5). The support of some private counsel after being presented with the agreement as a Fait accompli does not amount to a ratification of the conduct of the negotiations. As noted Supra, class counsel should know the options considered and the topics discussed during the negotiations before supporting a settlement as fair. In the absence of such familiarity of counsel with the conduct of the settlement negotiations, the inference of fairness to be drawn from their support is weak. Cf. id. at 64 ("a plan should not be approved simply because counsel on both sides recommend it").

FN30. Thus, although the proponents of any class settlement always bear the burden of proof on the issue of fairness, Manual for Complex Litigation s 1.46 at 56, proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence. This does not unduly hamper settlements since the disapproval of the settlement always permits the renewal of negotiations between All of the proper participants in the class action. The question of prejudice aside, it is clear that the trial court did not require the proponents of the settlement proposed here to meet such a heavy burden. In fact, the trial court accepted the proposed settlement as Prima facie fair and shifted to the objectors at least the burden of producing evidence disproving the fairness of the settlement. Whether the trial court shifted the burden of persuasion to the objectors as well is unclear. The objectors complain that it did and the Illinois Attorney General's brief seems to concede the point. The trial court's conclusions of law, however, recite that it placed the burden of persuasion on the proponents. Our comparison of the record with the findings of fact leads us to believe that as to some of the court's findings that it may indeed have misplaced the burden.

***1127** The Assistant Illinois Attorney General maintains, however, that his participation in negotiations between the state Attorneys General and GM did not violate the pretrial order because he was not negotiating as a class representative in the action in the federal court but rather was negotiating as a representative of the State of Illinois in the parallel state proceedings in the Circuit Court of Cook County.[FN31] The motion of the Illinois Attorney General for leave to file the settlement took this position also, although the motion's first paragraph based the Attorney General's capacity to present the motion on his status as counsel for the State of Illinois, one of the designated class representatives in the federal action. Also consistent with his position that he did not participate in the settlement negotiations as a federal class representative, the Assistant Attorney General admitted during the fairness hearing that the Illinois Attorney General's office did not obtain consent to the settlement from the over 100 named private plaintiffs that the Illinois Attorney General represented in the federal action.

FN31. During the fairness hearing, Mr. Mulack, the Assistant Illinois Attorney General, described his position as one in which he wore "two hats."

(T)he Attorney General filed a State Court action . . . in the Circuit Court of Cook County, on March 7th of 1977. . . . (T)wo weeks later we filed the Federal Action. So as I told the Court, on several occasions; as we had appeared here during the motions on behalf of the class certification, I was wearing two hats and the Attorney General of Illinois was, likewise, wearing two hats; one as a plaintiff, under the State Court action, under the Consumer Fraud Act, in the Circuit Court of Cook County, and the other as a punitive class representative in the Federal Court Action. . . .

I was perfectly aware of the limitations in Pre-Trial Order No. 1, that prohibited either myself or any representative of the Attorney General's office from taking part in nationwide negotiations on this particular class action. With that particular concern and that understanding, I had approached the posture of the overall negotiations.

Now, attendant at those meetings were Assistant Attorneys General literally from every state that had a major action going against General Motors. Each of those Attorneys General were there in their state capacity only they were only concerned

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about their state lawsuits, as I was concerned, only, about my state lawsuit.

At the opening salvo the opening introductions of the settlement negotiations as people were being introduced, and from which state they attended, and as General Motors' attorneys were being introduced, as I was being introduced, I made this caveat on the record, that "I'm here only as an Assistant Attorney General on behalf of the State of Illinois case; I am not here, at all, as any class representative, or on behalf of the nationwide action; and if any discussions are brought up about the nationwide class action, I cannot participate, because that is not my function." With that caveat, we proceeded to discuss those particular matters attendant to the settlement.

We note that the written settlement agreement between GM and the Attorneys General devoted much space and went into considerable detail reciting the rights and obligations of the parties to the negotiations with respect to the settlement of the Federal action. For example, the agreement, mentioning the Magnuson-Moss class action by name, required the Attorneys General, Inter alia, to seek amendment of the class certification to conform with that group of consumers to whom GM would extend its offer, to represent to the trial court that the proposed settlement was fair and reasonable, and to recommend that the court approve the settlement of the entire action in accordance with the terms of the agreement.

[30][31][32][33][34] The State of Illinois is a representative party in this suit solely because it purchased a 1977 Oldsmobile with a Chevrolet engine. The Illinois Attorney General's ability to maintain the suit on Illinois' behalf as a class action is governed solely by Rule 23. [FN32] In the absence of statutory authorization, Illinois cannot maintain this action in federal court as a Parens patriae action.[FN33] Assuming Arguendo that the Attorney ***1128** General's office did not violate the pretrial order and thus participated in the negotiations solely as a representative in the parallel state court action, we believe, nevertheless, that the trial judge should have opened up the negotiations to scrutiny, if only to dispel the questions which naturally arise from the unusual posture of the case. If the settlement was not negotiated by authorized class counsel in the capacity of class counsel in this action, then it was negotiated in the name of, at best, only one of the named plaintiffs in the federal action, the State of Illinois. This stretches the theory of representation of absentee interests by the named plaintiff to its limit [FN34] and warrants searching judicial examination of the circumstances surrounding and the matters discussed during the settlement negotiations before acceptance of the proposed settlement for possible approval.

FN32. See State of Iowa v. Union Asphalt & Roadoils, Inc., 281 F.Supp. 391, 401-02 (S.D.Iowa 1968); State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 576 (D.Minn.1968).

FN33. Cf. Hawaii v. Standard Oil Co., 405 U.S. 251, 266, 92 S.Ct. 885, 893, 31 L.Ed.2d 184 (1972) ("Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area. Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries").

The class action, although it also provides a vehicle for furthering the substantive policies behind legislation, is primarily a device to vindicate the rights of individual class members. We also note that the Magnuson- Moss Act does provide that the United States Attorney General and the Federal Trade Commission may go to federal court to enjoin violations of the Act. U.S.C. s 2310(c). Thus the Act provides its own mechanism for protecting the general public's interest in enforcement of its provisions. It does not leave protection of the public interest up to the Attorneys General of the fifty states. Compare 15 U.S.C. ss 15a-15h (explicitly vesting power in state Attorneys General to maintain actions against persons engaged in anti-competitive practices which harm state consumers).

FN34. In their briefs and during oral argument the parties devoted a good deal of time to a discussion of whether a settlement could be approved over the objections of some of the named plaintiffs. We agree with General Motors that the unanimous approval of all named plaintiffs is not a prerequisite to judicial approval of a settlement approved by some of the named plaintiffs. See McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977). This case does not present, and we need not here decide, GM's admittedly extreme position taken during oral argument that the trial court can approve a settlement offered unilaterally by a class action defendant with the approval of neither a class representative nor class counsel. Here, at least the State of Illinois, a named plaintiff, agreed settle.

Several additional facts suggest that the representation of the class during the negotiations

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was less than vigorous. The class settlement was reached relatively early in the course of the action. [FN35] The federal action had been filed about nine months before; the class had been certified only two months before; and notice to class members of the pendency of the action had not even been mailed. Although discovery had commenced, GM's answers to many of the requests were less than completely responsive. Moreover, because the proposed settlement contemplated the release of all claims relating to component substitutions, not just the engine interchanges, the range of possible damages to class members was unclear. It is not possible to tell from the record how fully informed the Attorneys General may have been about the value of the claims they were surrendering.[FN36]

FN35. See Manual for Complex Litigation s 1.46 at 53 (Consideration 1).

FN36. Id. (Considerations 2 & 3). The record does not reveal and the briefs of the parties do not detail the extent to which the Attorneys General had proceeded with discovery in their parallel state actions or whether they examined the value of the claim for the entire power train. The trial court's order precluding discovery of the conduct of the settlement negotiations, of course, prevented the objectors from making such a record. To this day, we have no idea how the participants in the negotiations arrived at the settlement package of $200 plus the extended power train warranty.

[35][36][37] Not only was the settlement arguably hasty, but also the settlement agreement contemplated the abandonment of the prosecution of the claims of post-April 10 class members.[FN37] The settlement agreement entered into by the Attorneys General obligated them to seek settlement of the entire class action even though the agreement obligated GM to offer payments to only part of the certified class. The agreement contemplated narrowing the class certified ***1129** to those who purchased Oldsmobiles before April 11, 1977, despite the original certification of the class to include those who purchased before October 13. GM subsequently formally moved the court for such a revised class definition to conform to the settlement agreement. The court denied GM's motion, but did decide to create a subclass for settlement purposes. Although the abandonment by the Attorneys General of the claims of post-April 10 purchasers does not by itself warrant the reversal of the settlement of the claims of the pre-April 11 purchasers, it does indicate that the representation during the negotiations may have been inadequate as to all Oldsmobile purchasers who constituted the original class.[FN38]

FN37. See id. at 54 (Consideration 6).

FN38. We must note that the means by which the trial court attempted to create a subclass also may have seriously jeopardized the rights of the post-April 10 purchasers. Aside from the tactical disadvantage of having their claims separated from the claims of the other class members, the subclassing technique chosen by the court raises doubts about whether those outside the ambit of the settlement could maintain a class action after the settlement with the pre-April 11 subclass.

The trial court has broad discretion in determining whether to allow a class action to be maintained, Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), Cert. denied, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976), King v. Kansas City Southern Industries, Inc., 519 F.2d 20 (7th Cir. 1975), and must necessarily have an equally broad range of discretion in determining whether to create subclasses pursuant to Fed.R.Civ.P. 23(c)(4)(B). Division of a class or potential class into subclasses to account for differences in proof that may be required at trial is clearly permissible. See, e. g., Dorfman v. First Boston Corp., 62 F.R.D. 466, 476 (E.D.Pa.1973) (creating subclasses to account for differences between class members who purchased before and after relevant information received wide public circulation). The trial court's discretion, however, is bounded by the requirements of the applicable law and in this case we believe that the trial court overstepped the bounds of the Federal Rules of Civil Procedure.

The trial court's order creating the settlement subclass did not conform to the requirements of Rule 23 which provides in pertinent part that when appropriate "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed.R.Civ.P. 23(c)(4)(B). The rule contemplates that at least two subclasses will be formed and requires that each independently meet the requirements of Rule 23 for the maintenance of the class action. See Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1077 (10th Cir. 1975). The trial court made no finding that the post-April 10 subclass could be maintained as a class action. The record shows instead that the trial court attempted to create a single subclass for the settlement, leaving the post-April 10 purchasers in the original class. No attempt was made to test whether the nonsettlement subclass

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action met the requirements of Fed.R.Civ.P. 23(a) & (b). Furthermore, the record does not indicate whether any named plaintiff in the current action is even in the nonsettlement subclass. The subclass could be "headless," thus raising serious questions about whether the trial court could proceed to consider the post-April 10 claims. See generally Winokur v. Bell Federal Savings & Loan Association, 560 F.2d 271 (7th Cir. 1977), Cert. denied, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 530 (1978); Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978); Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978) (en banc); Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978). Even if a named plaintiff is before the trial court, no showing has been made that he desires to or will adequately represent the subclass.

The uncertainty about the viability of the subclass action on behalf of class members who purchased their cars after April 10, 1977, is significant. The notice to these subclass members informing them of the pendency of the action has been sent out. The subclass members, therefore, may rely on the federal class action to vindicate their interests. If it is later determined that the action cannot be maintained, the statutes of limitation may preclude individual lawsuits in the state courts.

The questions raised about the viability of the subclass action if the settlement of the other subclass action is executed illustrate the inadvisability of creating tentative subclasses for settlement purposes without careful examination of the adequacy of the representation of Each subclass. Cf. Manual for Complex Litigation s 1.46 at 59-61 (condemning tentative classes for settlement purposes).

[38] One final matter casts doubt upon the circumstances in which the settlement was negotiated by the Attorneys General. The settlement agreement contains GM's promise to compensate the Attorneys General $150,000 "for all the expenses they have incurred in connection with the subject matter of this Agreement." Allocation of the proceeds is left solely to the Attorneys General. The agreement also commits ***1130** GM to pay private attorneys' fees in the federal action "in an amount no greater than the amount of documented time actually expended . . . multiplied by the hourly fee prevailing . . . in the community." These amounts were in addition to the amounts promised class members accepting the settlement. The notice to subclass members informed them of even less than was provided by the agreement,[FN39] and the record does not provide any reliable estimate of the aggregate amount of attorneys' fees and expenses that GM will eventually pay.[FN40] We think the proposed settlement estimate of attorneys' fees and expenses is so vague that subclass members could not determine the possible influence of attorneys' fees on the settlement in considering whether to object to it. [FN41]

FN39. The notice to subclass members merely stated:

As part of the Agreement with the Attorneys General, General Motors agreed to pay an aggregate amount of $150,000, to be divided among those Attorneys General, including the Attorney General of Illinois, accepting the Agreement, in payment for expenses claimed to have been incurred in connection with the subject matter of their litigation. The amount of any attorneys' fees, costs or expenses to be paid to the attorneys for the private plaintiff purchasers in the class litigation will be subject to the review and approval by the Court. Any award of costs, expenses and/or fees to the private plaintiff purchasers and their counsel in the class litigation will be in addition to, and Not deducted from, the $200.00 offered by General Motors per automobile purchased as part of the proposed settlement.

FN40. The record does indicate that GM and six of the nine teams of private attorneys have reached an understanding, if not agreement, about attorneys' fees. The understanding is that GM will not object to a request by those counsel for fees up to $360,000, but that private counsel are free to request that the court award a larger amount. Like the provision for expenses of the Attorneys General, this understanding leaves the allocation of the payment a matter for determination by the recipients of the payment. The agreement apparently contemplates that no requests for fees will be made until the end of all of the litigation, including that concerning the rights of post-April 10 purchasers.

FN41. See Manual for Complex Litigation s 1.46 at 54 (Consideration 7).

Aside from some doubt about whether Attorneys General who, of course, are compensated by the public may ever recover attorneys' fees and expenses, [FN42] we believe that the method by which the GM-Attorneys General agreeme contemplates payment of private attorneys' fees a expenses is questionable. The Manual condemns settlement agreements which provide

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FN42. The Manual regards the question of whether publicly employed counsel may be allowed reimbursement for expenses as an "interesting" and apparently open one. Id. s 1.44 at 42. It notes that expenses and attorneys' fees have been allowed to state Attorneys General in several class action settlements. See also In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 706 (D.Minn.1975). On the other hand, several district courts have preferred state Attorneys General as counsel in class actions, in part because the Attorneys General presumably would not seek attorneys' fees. See State of Illinois v. Harper & Row Publishers, Inc., 301 F.Supp. 484, 494-95 (N.D.Ill.1969); State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D.Minn.1968); Cf. State of Ohio v. Richter Concrete Corp., 69 F.R.D. 604 (S.D.Ohio 1975) (permitting state Attorney General to communicate with putative class members after class certification was denied because salaried Attorney General, unlike private attorneys, had no interest in soliciting litigation or fees). We need not meet the question posed by the Manual. On this record it is not clear that the expenses of the Attorneys General to be reimbursed are those incurred in the litigation before the federal court. It is fair to assume that a large proportion of the expenses, if not all, are due to state court litigation.

that the fees and sometimes expenses of plaintiffs' counsel are to be paid separately by the defendant(s) over and above the settlement. Frequently, the amount thereof is not disclosed at the time the settlement is proposed. Such an arrangement should not be permitted. All amounts to be paid by the defendant(s) are properly part of the settlement funds and should be known and disclosed at the time the fairness of the settlement is considered.

The effect of such an arrangement is to neutralize the court's power and responsibility ***1131** to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel since any reduction by the court in the amount counsel agree upon after the class settlement has been approved will simply go to reduce the aggregate amount defendant(s) will pay and will not increase the amount to be paid to the plaintiffs. As a result, there is little incentive for the judge to reduce the agreed upon fees. On the other hand, the effect of such an arrangement may be to cause counsel for the plaintiffs to be more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs. Only if the aggregate of all payments to be made by defendants is disclosed in the proposed settlement can the class members and the court make any intelligent judgment as to the fairness and reasonableness of a proposed settlement.

Manual for Complex Litigation s 1.46 at 62. This court has previously declined to upset a settlement agreement merely because some problems regarding fees and expenses remained unresolved. See McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 426 (7th Cir. 1977). We do not overrule that decision, but do regard the questionable provision made for expenses and attorneys' fees as one factor requiring examination of the settlement negotiations.

In conclusion, we hold that the trial court abused its discretion by failing to undertake a careful examination of the conduct of the settlement negotiations and by preventing the plaintiff-objectors from showing that the negotiations prejudiced the best interests of the class. Regardless of which of the two possible capacities the Illinois Attorney General's office assumed in negotiating the proposed settlement, the conduct of the negotiations was irregular and the record contains too much evidence tending to indicate prejudice to the class to permit us to allow the trial court's order to stand. Because, however, our decision upsets a settlement of considerable magnitude and because complex class actions are often, although not always, settled before trial, we conclude with a discussion of what we do not hold.

[39][40][41][42][43][44][45] We do not hold that irregular settlement negotiations may never form the basis for a judicially acceptable class action settlement. In fact, a prior decision of this court has approved a settlement negotiated in somewhat similar circumstances. See McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977). [FN43] We realize that the system of state and federal courts often generates simultaneous litigation over the same subject matter. We recommend that an attorney who is counsel in both state and federal actions request leave of court before entering into settlement negotiations. In addition, the trial court should probably require as a condition to such leave at least that the attorney inform other counsel in the proceedings of the matters discussed during the separate negotiations. Although this practice is preferable, the failure to follow it is not necessarily reversible error ***1132** if the record clearly indicates that representation of the class during the negotiations was adequate and that the settlement

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itself is fair.[FN44]

FN43. In McDonald the objectors to a settlement contested, Inter alia, the negotiations conducted in connection with a related state court action. The negotiations had begun prior to the commencement of the federal action which was filed only after the negotiations broke down, 565 F.2d at 420. Negotiations resumed prior to class certification, but largely because the trial court delayed certification of the class during the negotiations. Significantly, the trial court was never afforded an opportunity to pass on the issue of the propriety of the negotiations because the objector failed to raise the issue there.

In this case, a pretrial order expressly limited the conduct of settlement negotiations. The objectors raised the issue before the trial court by seeking discovery and by questioning the Assistant Illinois Attorney General during the fairness hearing. The trial court when given a chance to consider the conduct of the negotiations ruled that the matter was irrelevant. Finally, the record contains some evidence suggesting that the settlement negotiations prejudiced the class.

FN44. Although the trial court concluded that the settlement of the subclass action was fair, our discussion of the conduct of the settlement negotiations necessarily casts doubt upon that conclusion. Moreover, that matter aside, we are not convinced that the court's conclusion finds clear support in the record.

The most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement. Manual for Complex Litigation s 1.46 at 56. Conceptually, this requires a comparison of the amount offered with the product of (1) the probability of plaintiff's prevailing on the merits times (2) the present value of probable damages plaintiff would recover if he did prevail. We do not expect the trial court's conclusions to be set forth with mathematical precision. A fairness hearing is not a trial on the merits. The trial court, however, does have a duty to members of the class and to the reviewing court to assess, if not decide, the issues of law which weigh heavily in the above calculus and to consider the most probative evidence bearing on those issues.

The trial court's findings contain no express discussion of the merits of the Magnuson-Moss claim. Indeed, with respect to the alleged transmission switch in Delta 88s, the court apparently misapprehended the nature of the objectors' claims. The court noted that all Delta 88 coupes and sedans contained the THM 200 regardless of whether they had Chevrolet or Oldsmobile engines. The gist of objectors' claim, as we understand it, is that the transmissions used simply were not those warranted. Thus, the fact that all Delta 88 sedan and coupe purchasers received the smaller transmission is irrelevant. If objectors' contention is correct, GM breached its warranty to all Delta purchasers, not just those who received Chevrolet engines.

On the issue of compensatory damages, the trial court framed the issue as the "comparability" of the Oldsmobile engines allegedly warranted and those Chevrolet engines received. The findings then recite a mass of technical data indicating that the durability, performance and fuel economy of the Chevrolet and Oldsmobile engines were not materially different. The evidence on these technical issues was conflicting, but we are more concerned by the district court's failure to apply the ordinary measure of damages for breach of warranty: "the difference . . . between the Value of the goods accepted and the Value they would have had if they had been as warranted. . . ." U.C.C. s 2-714(2) (emphasis added). This is presumably the measure of damages contemplated by the drafters of the Magnuson-Moss Act. Yet, the court found it unnecessary to resolve an evidentiary conflict on the value of the engine. The objectors presented evidence tending to establish a difference in value of over $400. GM presented evidence that the cost of manufacture was virtually the same. Although neither form of evidence was the "best" evidence of value, this is a matter upon which the proponents of the settlement had the burden of proof. Manual for Complex Litigation s 1.46 at 56. The trial court should have made a more precise estimate of probable compensatory damages. Cf. id. at 61 ("in view of the complexity which ordinarily attends settlement issues, it is wise in most cases to rely upon proven facts, particularly economic facts").

Finally, we question the court's resolution of the possibility of recovering punitive damages against GM. The court declined to consider whether punitive damages are recoverable under the Magnuson-Moss Act because it found the evidence insufficient to permit an inference that GM acted in willful disregard of the rights of Oldsmobile purchasers. We think the objectors presented substantial evidence tending to show that GM deliberately concealed the source of the engines in the cars that it sold as Oldsmobiles and that it did so to increase profits. Moreover, we cannot say that the possible recovery of punitive damages should not have received any weight because they were unavailable under the Magnuson-Moss Act. Although one opinion published after the trial court's approval of the settlement intimates that

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the Act does not permit punitive damages, it does not resolve the issue. See Novosel v. Northway Motor Car Corp., 460 F.Supp. 541 (N.D.N.Y.1978). In any event, that decision is binding on neither this court nor the district court. The Act itself provides "for damages and other legal and equitable relief." 15 U.S.C. s 2310(d)(1). Although this broad language falls short of express statutory authorization for an award of punitive damages, we do not believe as GM does that punitive damages are never recoverable under federal law unless expressly authorized. See Globus v. Law Research Service, Inc., 418 F.2d 1276, 1284 (2d Cir. 1969), Cert. denied, 397 U.S. 913, 90 S.Ct. 913, 25 L.Ed.2d 93 (1970); Comment, Punitive Damages Under Federal Statutes: A Functional Analysis, 60 Calif.L.Rev. 191 (1972). Although the legislative history of the Act is silent on the matter, we think it is not unlikely that Congress intended to provide at least the same relief available under state law for breach of warranty. Although punitive damages are usually unavailable for actions sounding in contract, See U.C.C. s 1-106(1), McGrady v. Chrysler Motors Corp., 46 Ill.App.3d 136, 4 Ill.Dec. 705, 360 N.E.2d 818 (1977); Hibschman Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind.App.1976), this general rule is subject to exceptions. Punitive damages may be awarded, for example, when the breach amounts to an independent tort or is accompanied by fraudulent conduct. See Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 Minn.L.Rev. 207 (1977); 3 Williston on Sales s 25-13 (4th ed. 1974); R. Nordstrom, Sales s 155 (1970).

We do not decide here that an award of punitive damages is appropriate under the Magnuson-Moss Act or that if it were that class members would be entitled to them. We do believe, however, that the possibility of such a recovery is not insubstantial and that this possibility as well as the probable compensatory damages were given insufficient weight by the trial court in the calculus of the fairness of the settlement.

***1133** [46] Similarly, we do not hold that the failure of the trial court to hold a preliminary hearing prior to the mailing of the notice of the proposed settlement is inevitably reversible error. Although we believe such a hearing is better practice and the Manual for Complex Litigation recommends it, this court has gone as far as to affirm the approval of a settlement when no evidentiary hearing on its fairness was held before or after the notice to the class. See Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976). We do hold the record in this case raises so many questions about the adequacy of representation during the settlement negotiations that we cannot say the record clearly supports the trial court's conclusion that the negotiations did not prejudice the interests of the settlement subclass. [FN45]

FN45. Thus, we do not hold that the representation of the class members during the negotiations was in fact inadequate. The record simply does not provide any basis for us to tell. We do note, however, that this is not the first class action in which the State of Illinois has negotiated a settlement without the participation of other counsel representing the class. See Liebman v. J. W. Petersen Coal & Oil Co., 73 F.R.D. 531 (N.D.Ill.1973).

[47] We noted in McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 422 (7th Cir. 1977), that "Per se rules often represent the abdication of judicial discretion rather than its informed exercise." Consequently, this court has declined to adopt Per se rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions. This does not relieve us, however, of our duty to reverse the trial court's judgment when we are convinced that there has been a clear showing of an abuse of that discretion. On the facts of this case, the irregular conduct of the negotiations, the failure of the trial court to examine the irregularities thoroughly, and the evidence in the record indicating that the irregularities may have damaged the interests of the class convince us that such a clear showing has been made. The judgment of the trial court approving the settlement, accordingly, must be reversed.

V. Form of the Settlement

[48][49] Even if we were not constrained to reverse the trial court's approval of the settlement because of the circumstances surrounding its negotiation, we would have to find the settlement defective in another respect. Although the defect may affect only a small portion of those to whom GM's offer would be extended, convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class. As an appellate court we are without power to rewrite the settlement of the parties. We only have the authority to approve or disapprove the settlement in the form it is presented to us.[FN46]

FN46. Patterson v. Stovall, 528 F.2d 108, 111

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(7th Cir. 1976).

[50] The settlement order gives subclass members two options. If the subclass member signs a release he will receive the settlement package and his Magnuson-Moss claim will be dismissed.[FN47] But even if the subclass member refuses to accept GM's offer and refuses to sign the release, the order nevertheless dismisses With prejudice the subclass member's federal claim. [FN48] The ***1134** subclass member is presented with an accept-or-else situation: if he does not accept, his federal claim is lost even though he cannot receive the benefits of the settlement package. We have searched the reported decisions in vain for precedent for such a settlement. Finding none and being of the opinion that the dismissal of the action is fundamentally unfair to nonconsenting subclass members, we cannot permit the settlement in its present form to stand.

FN47. The signed release, of course, operates to preclude the accepting subclass member from proceeding on any state claims he may have against GM.

FN48. The relevant paragraphs of the trial court's order provide:
4. The action on behalf of subclass members who accept and receive the settlement shall be and is hereby dismissed as to defendant General Motors with prejudice.
5. The action on behalf of subclass members who do not accept the settlement shall be and is hereby dismissed as to defendant General Motors. Dismissal as to those persons shall be without prejudice solely to their rights to pursue such other remedies as may be otherwise available to them.

GM argues that the form of the settlement is not unusual. It argues that nonconsenting class members are bound by a class settlement even if it is approved over their objections. Moreover, it argues, the very purpose of the 1966 amendments to Rule 23 was to eliminate the spurious class action in which potential class members could obtain the rewards of a favorable suit, but escape being bound by an unfavorable outcome. Thus, GM would have us hold that the dismissal of the Magnuson-Moss claims of nonconsenting subclass members is permissible. Finally, GM goes on to argue that "(t)he settlement does allow class members, even at this late stage, to reject it and pursue state law remedies. To the extent nonconsenting class members are allowed to pursue any future litigation rights by the settlement . . . it is more favorable to them than federal law or policy require." We do not disagree with GM arguments in the abstract. In the context of the particular settlement here which attempts to settle both state and federal claims, however, we must disagree.

[51][52] We consider GM's last argument first. A fundamental characteristic of the federal courts is their limited jurisdiction. In the same pretrial order in which the trial court certified the class, it also expressly declined to take pendent jurisdiction over the state claims presented by the pleadings. Therefore GM's contention that the settlement was more favorable than federal law requires presumably because the trial court could have forced subclass members to accept the settlement package in return for all state and federal claims is without merit. The trial court, having declined jurisdiction over the state claims, was without power to extinguish them. The form of settlement with its unusual use of individual releases was apparently agreed to by GM and the Attorneys General in recognition of the federal court's inability to settle the state claims of subclass members.[FN49] The opt-out provision which permits nonconsenting subclass members to purs state remedies is a necessary consequence of th limited jurisdiction of the federal courts.

FN49. The use of individual releases to effectuate a class action settlement, although unusual, is not unprecedented. See 3-H. Newberg, Class Actions s 5620p (1977).

[53][54][55][56][57] We do not disagree with GM's statement that class members can be bound by a settlement over their objections and that the same is true of objecting named plaintiffs.[FN50] Similarly, we agree that Rule ***1135** 23 was amended to eliminate the spurious class action. We do not think that it follows, however, that the trial court has the power under Rule 23 to dismiss with prejudice the Magnuson-Moss claims of those subclass members who refuse to accept the settlement package. As to them, the "settlement" is not a settlement; it is merely an offer to settle with a penalty, the dismissal of their federal claims, if they do not accept. We decline to put every subclass member to such an unfair choice.

FN50. In a brief amicus curiae the Congressio sponsors of the Magnuson-Moss Act, Senator Warren G. Magnuson and Representative John E. Moss, also attack the form of the settlement approved by the trial court. The Congressional

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sponsors maintain that the class members' federal rights under the Act cannot be settled or compromised by a class representative without each class member's individual consent. They would have us hold that to the extent that Fed.R.Civ.P. 23(e) authorizes the settlement of class actions over the objections of some class members, it is inapplicable to class actions maintained under the Magnuson-Moss Act. Because we find that the form of settlement in the case at bar was not authorized by the Federal Rules, discussion of this argument is not strictly necessary to our decision. We discuss the issue raised, however, so as not to discourage settlement of the present action after its return to the district court.

The Federal Rules of Civil Procedure provide, with exceptions not important here, that they shall "govern the procedure in the United States district courts in All suits of a civil nature . . . ." Fed.R.Civ.P. 1 (emphasis added). Although Congress unquestionably has the power to supersede any federal rule either in its entirety or in particular types of civil actions, we think that the proper rule of construction is that the Congressional intent to repeal a federal rule must be clearly expressed before the courts will find such a repeal. See United States v. Gustin- Bacon Division, Certainseed Products Corp., 426 F.2d 539, 542 (10th Cir.), Cert. denied, 400 U.S. 832, 91 S.Ct. 63, 27 L.Ed.2d 63 (1970). We think neither the language of the Magnuson-Moss Act nor its legislative history clearly manifests Congress' intent to supersede Rule 23(e).

The Act itself refers to Rule 23 twice. In both cases, however, it merely provides that in class actions maintained in the federal courts, Rule 23 will govern whether the named plaintiff is a proper party to represent the class. 15 U.S.C. ss 2310(a)(3), 2310(e). The explicit mention of the applicability of Rule 23 bolsters our conclusion that Rule 23(e) is applicable to class actions maintained under the Act. We do not find the negative pregnant that the Congressional sponsors find. Nor do the Act's provisions encouraging informal dispute resolution necessarily preclude the later settlement of a class action without individual consent by each class member. Indeed, it would be unreasonable to construe an act whose purpose is to encourage settlement to preclude settlement as a practical matter after a class action is commenced.

The legislative history of the Act also fails to evince a Congressional desire to prohibit class action settlements without the consent of every class member. That history instead suggests that Congress had precisely the opposite intention.

Generally speaking, with specific exceptions set forth in the bill, the procedures are to utilize Rule 23 of the Federal Rules of Civil Procedure. For instance, in negotiating the use of any complying informal dispute settlement procedure or any other settlement procedure the representative party would negotiate on behalf of the 100 named plaintiffs and any other class members.

120 Cong.Rec. 40712 (1974) (remarks of Sen. Moss). The legislative history does indicate some dissatisfaction with the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), and perhaps indicates Congress' intention to make Rule 23(c)(2) inapplicable in some class actions maintained under the Magnuson-Moss Act. See H.R.Rep.No. 93-1107, 93d Cong., 2d Sess., Reprinted in (1974) U.S.Code Cong. & Ad.News 7702, 7724. No issue about the need for notice, however, has been raised in this appeal so we need not decide this question. We decide simply that the Magnuson-Moss Act does not alter the general rule that the trial court may approve a class action settlement without the consent of every member of the class.

[58] This court on two occasions has noted that the essence of a settlement is a bilateral exchange. "The inherent nature of a compromise is to give up certain rights or benefits in return for others." McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 429 (7th Cir. 1977). "A settlement by its very nature is an agreement where both sides gain as well as lose something." Patterson v. Stovall, 528 F.2d 108, 115 (7th Cir. 1976). By the terms of the order of the trial court, subclass members who do not sign the release give up their Magnuson-Moss claims and the opportunity to be represented in the class action in return for nothing.[FN51] The right to pursue state remedies is not a benefit, because, as discussed above, the class members possessed state causes of action against GM independently of the federal litigation and the federal court is without power to extinguish those state- created remedies. GM gains the dismissal of each subclass member's federal claim, but surrenders nothing in return.

FN51. The form of settlement in the case at bar is quite different than a settlement in which the defendant's liability is stipulated and class members must make claims against the settlement fund. In the latter case, the cause of action of a class member who fails to file a claim is extinguished by the settlement, and his right to a recovery is lost because he sleeps on his rights. In this case, the cause of action of a subclass member is extinguished and his right to a recovery is lost because he stands on his rights under state law.

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The federal claims of individual class members cannot be extinguished with neither adequate consideration in return nor a hearing on the merits of their claims. The dismissal of nonconsenting subclass members' claims would serve solely to benefit GM or those subclass members who accept the settlement. Reconciling such a "settlement" with notions of fair play and justice ***1136** is impossible. To permit the trial court to exercise its power to approve class action settlements in this manner would contravene the Rules Enabling Act, 28 U.S.C. s 2072, by abridging the substantive rights of those who did not accept the settlement offer.

Our objection to the form of settlement in this case is similar to the Second Circuit's objection to "fluid class recovery." See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), Vacated and remanded on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977). See also In re Hotel Charges, 500 F.2d 86 (9th Cir. 1974). In Eisen the Second Circuit's rejection of the use of fluid class recovery rested at least in part on the court's concern that that form of recovery would drastically increase the class action defendant's substantive liability. Cf. Beecher v. Able, 575 F.2d 1011, 1016 n. 3 (2d Cir. 1978) (defendant may agree to a settlement which provides for fluid class recovery). In this the converse situation, the form of settlement drastically reduces, in fact extinguishes, the subclass member's substantive cause of action under the Magnuson-Moss Act.[FN52] We hold the trial court's approval of the form of settlement here was unauthorized by the Federal Rules and was inconsistent with the trial court's responsibility to act as the protector of the interests of absentee class members.

> FN52. Although we note the similarity of our reasoning with that of the Eisen opinion, we express no opinion on whether the fluid class recovery technique itself is inconsistent with the Rules Enabling Act.

We cannot hold that the dismissal of the federal claims of those who refuse to accept the settlement offer was insignificant because it merely closed one of the two avenues of recovery against GM. Relegating the nonconsenting subclass member to his state remedies severely reduces his chances of obtaining an adequate recovery on his claim.

The nonconsenting subclass member loses the advantages and economies of having his interes represented in the class action. This tends to defeat the purpose of the class action device to vindicate the interests of the victims of mass production wrongs. "Generally, unless the anticipated recovery exceeds the sum of the measure of the injury and the cost of litigation, multiplied by the probability of a successful decision, the aggrieved person will not seek to vindicate his rights." Note, Judicial Prerequisites to Class Actions in Illinois: Policy, Practice, and the Need for Legislative Reform, 1976 U.Ill.L.F. 1159, 1167. The letters of those subclass members who objected to the settlement proposal indicate the illusory value of the right to pursue their claims individually:

> I will go along with the majority. I can't afford to spend any money on a personal law suit.
> Reguardless (Sic) of the decision of the Court, I will accept it, because I cant (Sic) whip a giant like General Motors, but you do have the powers of your Judgeship and your Court to set things stright (Sic) as they should be.
> This is not to be accepted as notice of withdrawal of Class or Subclass membership.

These letters also refute GM's argument that we can countenance the dismissal of the Magnuson-Moss claim of a nonconsenting subclass member because he was aware of the settlement's terms at the time he made his election to remain in or opt-out of the subclass. The opportunity to opt-out was not a very realistic one. Furthermore, we fail to see that a subclass member's knowledge that he may be treated unfairly excuses committing the injustice.

[59] Even if the subclass member does pursue his state remedies, he is still prejudiced by the dismissal of his Magnuson-Moss claim. "From a consumer protection point of view, the Warranty Act is clearly preferable to the Uniform Commercial Code, which is difficult to apply to consumer sales transactions and is full of pitfalls ***1137** for consumers seeking recovery for defective products." Smith, The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor, 13 Cal.W.L.Rev. 391, 429 (1977). In addition to providing a more certain path to recovery, the Magnuson-Moss Act provides the consumer with a more adequate remedy. It provides that the successful plaintiff may also recover the costs of litigation (subject to the court's discreti not to award attorneys' fees). 15 U.S.C. s 2310(d)(2). Thus, the dismissal of the subclass member's Magnuson-Moss claim, leaving him to pursue his state remedies individually, reduces both

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the probability that the consumer will pursue those remedies and, if he does, the probability that his remedy will be adequate. [FN53]

FN53. The dismissal of the subclass members' claims pursuant to the unusual form of settlement here would also tend to undermine the purpose of the Magnuson-Moss Act. As to nonconsenting subclass members, the purpose of the Act to provide a more certain remedy than is provided under state law would be totally defeated. We think that the settlement provides a unique example of how class action settlements may tend to defeat, rather than promote, the policies and purposes of the laws sought to be enforced. See generally DuVal, The Class Action as an Antitrust Enforcement Device: The Chicago Experience (Part II), 1976 A.B. Foundation Research J. 1273.

[60] GM maintains that we should approve the settlement because it has the "overwhelming" support of the settlement subclass members. GM argues that because only fifteen subclass members or .03% Of the subclass opted out of the action or objected to the settlement after notification of its terms, 99.97% Of the subclass members support the settlement. Although the support of class members is one factor which should be considered in determining the fairness of a settlement, See Manual for Complex Litigation s 1.46 at 56, we are not as willing as GM to infer support from silence.

> When a court evaluates the settlement of a class action brought on behalf of individual shareholders or consumers, it should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting evidence or advancing arguments objecting to the settlement.

Factors Considered in Determining the Fairness of a Settlement, 68 Nw.U.L.Rev. 1146, 1153 (1974). Accord, Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1567-68 (1976); Cf. Simon, Class Actions Useful Tool or Engine of Destruction, 55 F.R.D. 375, 377-79 (1973) (discussing the tendency of class members not to respond to court communications.[FN54] Acquiescence to a bad deal is something quite different than affirmative support. [FN55] In any event, even if a majority of the subclass did favor the settlement, we do not believe that the preferences of the majority can justify the substantial injustice to the individual rights of the minority that the form of settlement proposed here would work.

FN54. Because the bulk of the class consists of individual consumers, this case is unlike State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 743 (S.D.N.Y.1970), Aff'd, 440 F.2d 1079 (2d Cir.), Cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971), in which the court stated that support by class members was entitled to "great weight." Many of the class members in Pfizer were large public or private institutions with large stakes in the litigation. Thus, they could be expected to come forward to protect their interests. The Pfizer settlement, however, may not have been in the best interest of those individual consumers represented in the action. See In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 706 (D.Minn.1975) (approving subsequent settlement offering consumers substantially higher payments). See generally Wolfram, The Antibiotics Class Actions, 1976 A.B. Foundation Research J. 251.

FN55. GM's brief indicates that only 26 individuals wrote to the trial court to express their approval of the settlement.

VI. Directions on Remand

[61] In response to a question from the bench at oral argument, GM represented to the court that even if the Settlement of the federal class action is not effectuated, GM ***1138** may still seek to extend its Offer to individual members of the class.[FN56] Local Rule 22 appears to require the trial court's approval of any such communication.[FN57] The question thus presented is whether the trial court can approve the communication of the offer, despite our reversal of the court's order approving the settlement.

FN56. Indeed, the agreement between GM and the Attorneys General may obligate GM to extend the offer. Paragraph 11 of the agreement provides:

> while failure by (the district) court to allow General Motors to make such offer to such offerees shall relieve General Motors of the obligation under this Agreement to make such offer, failure by such court to approve settlement of such action . . . shall not relieve General Motors of such obligation if the court has nevertheless allowed General Motors to make such offer in exchange for a Release. . . .

FN57. Local Rule 22 of the Northern District of Illinois, captioned "For Prevention of Potential

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Abuse of Class Actions," provides:

In every potential and actual class action under Rule 23, FRCivP, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, FRCivP; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

The rule was adopted in accordance with the Manual's recommendation for preventing unauthorized communications with class members, See Manual for Complex Litigation s 1.41, and follows almost verbatim the local rule contained in the Manual's appendix. See id., Appendix s 1.41. (Suggested Rule No. 7). See also Dole, The Settlement of Class Actions for Damages, 71 Colum.L.Rev. 971, 993-97 (1971).

Questions concerning the district court's authority to promulgate the rule pursuant to Fed.R.Civ.P. 83 have not been raised by the parties and we do not consider them here. See generally Manual for Complex Litigation s 1.41 (4th ed. 1977 & Cum.Supp.1978). In any event, Rule 23(d), See Weight Watchers, Inc. v. Weight Watchers International, Inc., 455 F.2d 770, 775 (2d Cir. 1972), and the court's inherent power to control the conduct of the litigation before it, See Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 425 F.Supp. 145, 150 (D.Minn.1977), provide additional sources for the district court's power to control this particular communication with class members.

[62][63][64] We think that the trial court can. GM's offer to settle, if accepted by individual class members, would not amount to a settlement of the class action itself. Individual class members would be free to reject it and continue to have their interests represented in the federal class action. Thus, the communication falls outside the language and the purpose of Rule 23(e).[FN58]***1139** See Weight Watchers, Inc. v. Weight Watchers International, Inc., 455 F.2d 770 (2d Cir. 1972) [FN59]; Rodgers v. United States Steel Corp., 70 F.R.D. 639 (W.D.Pa.), Appeal dismissed, 541 F.2 365 (3d Cir. 1976); Dickerson v. United States Stee Corp., 11 Empl.Prac. Dec. P 10,848 (E.D.Pa.1976) ; Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 425 F.Supp. 145 (D.Minn.1977); 7A C. Wright & A. Miller, Federal Practice and Procedure s 1797 at 238-39 (1972). But see In re International House of Pancakes Franchise Litigation 1972 Trade Cas. P 73,864 (W.D.Mo.1972); Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1548 n.66 (1976). Rule 23(e) requires judicial approval of class action settlements to guard against possible ineffective representation of absentees' interests by the representative parties. This danger does not inhere in offers to settle with individual class members, which the class members are free to accept or reject. Accordingly, a proposed offer to settle with individual class members requires a lesser degree of judicial scrutiny than a proposed settlement of a class action.

FN58. This case does not present the question, and we need not decide, whether Rule 23(e) would be applicable if so many class members accepted GM's offer that the class action could no longer be prosecuted as a class action. Compare Americ Finance System Inc. v. Harlow, 65 F.R.D. 57 576-77 (D.Md.1974), With Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 425 F.Supp. 145, 150 (D.Minn.1977).

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Predicting the number of class members who might accept GM's offer at this time is admittedly speculative, but even if enough named plaintiffs accept the offer to reduce the number of named plaintiffs below the jurisdictional prerequisite, See 15 U.S.C. s 2310(d)(3) & note 2 Supra, the trial court's jurisdiction to decide the class action would remain unaffected. The general rule is that the jurisdiction of the federal court is determined at the time of the filing of the complaint. See Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539, 6 L.Ed. 154 (1824) (diversity not defeated when party subsequently becomes a citizen of the same state as his opponent. "It is quite clear, that jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events."); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938) (court is not ousted of jurisdiction if plaintiff reduces claim to less than jurisdictional amount subsequent to removal from state court); Cf. Rosado v. Wyman, 397 U.S. 397, 402-05, 90 S.Ct. 1207, 25 L.Ed. 442 (1970) (federal court may decide pendent claim even after claim which provided the basis for jurisdiction becomes moot). We see no reason why the general rule should be changed under the Magnuson-Moss Act, particularly when Congress intended that section 110(d) be "construed reasonably to authorize the maintenance of a class action." H.R.Rep.No. 93-1107, 93d Cong., 2d Sess., Reprinted in (1974) U.S.Code Cong. & Ad.News 7702, 7724. The class action can in no sense be regarded as "trivial or insignificant" merely because some of the named plaintiffs have accepted the benefits which the class action has brought forth. Thus, a reduction in the number of named plaintiffs would not preclude the trial court from proceeding to the merits of the class' Magnuson-Moss claims.

Similarly, even if nearly all the offerees accepted GM's settlement offer a rather unlikely possibility since the offerees number approximately 70,000 those who rejected the offer would not be denied the benefit of class adjudication of their claims in federal court. Their claims could be adjudicated along with those of the 66,000 post-April 10, 1977, class members to whom GM will not extend the offer. Therefore, the class will not be decertified for lack of the numerosity required by Fed.R.Civ.P. 23(a)(1). See Rodgers v. United States Steel Corp., 541 F.2d 365, 370 & n.11 (3d Cir. 1976).

FN59. The court in Weight Watchers expressly reserved the precise question that we decide here. See 455 F.2d 773 n.1. In Weight Watchers the appellant sought review of an order of the trial court permitting communication between the defendant and individual putative class members. Unlike the present case, the pending action had not yet been certified to proceed as a class action. Although the Second Circuit dismissed the appeal from the order for want of appellate jurisdiction, Accord, Rodgers v. United States Steel Corp., 541 F.2d 365 (3d Cir. 1976), its reasoning is plainly applicable to the present case: "(W)e are unable to perceive any legal theory that would endow a plaintiff . . . with a right to prevent negotiation of settlements between the defendant and other potential members of the class who are of a mind to do this; it is only the settlement of the class action itself without court approval that F.R.Civ.P. 23(e) prohibits." 455 F.2d at 773.

[65][66][67][68][69] The Manual for Complex Litigation provides no standards for judicial approval of communications with individual class members, but we think that the degree of judicial review should be concomitant with the potential for abuse that such communications create. The danger that the offer to settle individual claims would create is the possible misleading of class members about the strength and extent of their claims and the alternatives for obtaining satisfaction of those claims. Thus, an offer to settle should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle. In contrast to judicial examination of a proposed class action settlement ***1140** which entails consideration of the fairness of the settlement itself, judicial examination of the offer to settle individual claims largely entails only consideration of the accuracy and completeness of the disclosure.[FN60] See, e. g., Vernon J. Rockler & Co. v. Minneapolis Shareholders Co., 425 F.Supp. 145 (D.Minn.1977) (tender offer which met with preliminary approval of SEC contained sufficient information to allow shareholders-potential class members to make an informed and intelligent decision); American Finance System, Inc. v. Harlow, 65 F.R.D. 572, 576 (D.Md.1974) (permitting the defendant to send only "a neutrally worded notice of settlement containing no more than the terms of the proposed compromise, the position of both parties and a copy" of the court's order).[FN61] Whether the offer to settle should contain a statement by the plaintiff-objectors of their opinion of the adequacy of the settlement package in order to make the communication a full and complete disclosure is a matter left to the trial court's discretion. We do believe, however, that the trial court should insist

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that the notice state that the court's permission to communicate the offer does not indicate any opinion or finding by the trial court that the settlement package is fair or adequate consideration for the release of a subclass member's claim. See American Finance System Inc. v. Harlow, 65 F.R.D. at 576 n.5.

FN60. This is not to say that the amount of the proposed consideration for the settlement is entirely irrelevant. An offer to settle which offers only nominal consideration in return may amount to little more than a request that the class members opt-out of the class. See Manual for Complex Litigation s 1.41 at 27 (condemning unauthorized solicitations to opt-out). Solicitations to opt-out tend to reduce the effectiveness of (b)(3) class actions for no legitimate reason. Offers to settle, however, both provide redress to individual class members and reduce the burden on the courts of trying massive class suits. Determining the difference between the two kinds of communications necessarily requires some judicial examination of the amount of consideration offered by the defendant. Moreover, the amount offered may be so unrealistically low that the consideration itself tends to mislead class members about the strength and extent of their claims. Thus the trial court should examine the amount tendered in settlement before approving the offer to settle. Yet, because each class member may judge for himself whether the amount offered is acceptable, the court need not determine that the amount is "fair, reasonable and adequate." The court need only find that the proposed exchange provides each individual class member with a Meaningful opportunity to obtain satisfaction of his claim. See Rodgers v. United States Steel Corp., 70 F.R.D. 639, 644 (W.D.Pa.), Appeal dismissed, 541 F.2d 365 (3d Cir. 1976).

FN61. See also Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 464 (N.D.Ind.1976) ("although the class action itself may not be voluntarily dismissed without Court approval and scrutiny, an individual claim in a 23(b)(3) action may be settled and dismissed at the class member's own initiative. . . . Because the ability to settle an individual class member's claim could be misused, the Court must be careful to exercise control over the communications of all parties to the suit so that undue influence is prevented"); Dole, The Settlement of Class Actions for Damages, 71 Colum.L.Rev. 971, 995-97 (1971); Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1549-50, 1601-04 (1976).

[70] We do not intend to recommend individual settlements as preferable to a fair settlement of the action for all class members. Given the present posture of this litigation, however, we recommend that the district court consider the advisability of permitting the communication if GM decides to extend its offer to individual members of the class. This procedure would provide those class members who wish to settle the benefit of the settlement package already negotiated, minimize further litigation and discovery on issues collateral to the merits of the Magnuson-Moss claim,[FN62] and permit those who desire to prosecute their claims to do so. Our discussion here is not intended to resolve all questions raised by GM's offer, these matters are best left to the ***1141** district court for determination in the first instance. [FN63]

FN62. Specifically, because a class action defendant may communicate an offer to settle individual claims without the agreement or consent of the named plaintiffs or their counsel, the court need not permit discovery into the conduct of the settlement negotiations before approving the communication of the offer.

FN63. In particular, we leave to the district court the difficult question of the entitlement of the class counsel to attorneys' fees for their part in encouraging GM to extend the offer. If the district court decides attorneys' fees are appropriate, it must then grapple with the even more difficult questions of the allocation of fees among the attorneys and the allocation of the burden of the fees between GM and the class or among class members themselves. See generally Dole, The Settlement of Class Actions for Damages, 71 Colum.L.Rev. 971, 997-1000 (1971); Developments in the Law Class Actions, 89 Harv.L.Rev. 1318, 1547 n.59 (1976).

VII. Conclusion

Our reversal of the district court's approval of the proposed settlement is a decision that we reach with considerable reluctance. We do not seek to discourage a full settlement of this litigation. More than a year has passed since the Illinois Attorney General presented the settlement agreement to the district court for its consideration. Most likely little has been done since then, aside from some additional discovery, to advance toward a trial on the merits. In the meantime, members of the settlement subclass must be wondering whatever became of the $200 and the mechanical insurance policy each had been promised. Our reluctance to unscramble on review

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what has been accomplished in the trial court, however, must yield when what has been done not only creates a substantial doubt about whether the interests of the class were adequately represented during the settlement negotiations, but also unjustifiably prejudices the rights of individual members of the class. We believe that approval of what has been done here would establish a precedent inconsistent with the proper functioning of the class action device.

We do not question in the least the good faith of the group of state Attorneys General who negotiated the settlement. We are well aware of the increasingly important role that state Attorneys General have taken in protecting consumers' rights.[FN64] We are also acutely aware of the difficulties which confront litigants attempting to settle consumer class actions based on the Magnuson- Moss Act. The Act by adopting in substantial part, but not preempting state law remedies provides a legal environment conducive to competing state and federal court actions. The myriad lawsuits make settlement desirable, but simultaneously make achieving an acceptable settlement extraordinarily difficult for all concerned. We hold merely that the method of reaching a settlement that GM and the Attorneys General chose warranted greater scrutiny than the trial court permitted and that the form of effecting the settlement permitted by the trial court was unauthorized. Accordingly, the order of the district court is

FN64. See, e. g., Mooney, The Attorney General as Counsel for the Consumer: The Oregon Experience, 54 Ore.L.Rev. 117 (1975); Tongren & Samuels, The Development of Consumer Protection Activities in the Ohio Attorney General's Office, 37 Ohio St.L.J. 581 (1976); Note, The Role of the Michigan Attorney General in Consumer and Environmental Protection, 72 Mich.L.Rev. 1030 (1974); Note, Consumer Protection by the State Attorneys General: A Time for Renewal, 49 Notre Dame Law. 410 (1973). See also 15 U.S.C. ss 15a-15h.

Reversed.

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United States Court of Appeals,
Third Circuit.

In re GENERAL MOTORS CORPORATION PICK-UP TRUCK FUEL TANK PRODUCTS LIABILITY LITIGATION.
Jack French, Robert M. West, Charles E. Merritt, Gary Blades, Dawn and Tracey Best, Gary and Jackie Barnes, Betty Marteny, John and Mary Southands, Edmund Berning, Dale W. Plummer, Edmund and Anneta Casey, John and Connie Yonki, Carl and Kathryn Corona, Dallas and Patricia Nelson, Mynard and Mildred Duncan, Kirby L. Stegman, DeWayne Anderson, Morris and Barbara Betzold, Appellants in No. 94-1064.
Rudolph Jenkins, William D. Cunningham, Mather Johnson, Forrest Charles Ginn, Buren William Jones and Martin D. Parkman, Appellants in No. 94-1194.
Parish of Jefferson, Appellant in No. 94-1195.
The State of New York, Appellant in No. 94-1198.
Elton Wilson, individually, and Frank I. Owen, individually and on behalf of the residents of the State of Alabama, Appellants in No. 94-1202.
City of New York, Appellant in No. 94-1203.
Betty Youngs, Barbara Phillips, Margaret Engel, Larry Swope, Robbin Maxwell and Center for Auto Safety, Appellants in No. 94-1207.
Betty Youngs, Barbara Phillips, Margaret Engel, Larry Swope, Robbin Maxwell and Center for Auto Safety, Appellants in No. 94-1208.
Commonwealth of Pennsylvania, Department of Transportation, Appellant in No. 94-1219.

Nos. 94-1064, 94-1194, 94-1195, 94-1198, 94-1202, 94-1203, 94-1207, 94-1208 and 94-1219.

Argued Aug. 11, 1994.
Decided April 17, 1995.

Plaintiffs in multidistrict products liability action against manufacturer of pickup trucks based on alleged defect in fuel tanks on trucks sought approval of proposed class settlement, and the United Stated District Court for the Eastern District of Pennsylvania, William H. Yohn, Jr., J., 846 F.Supp. 330, certified settlement class and approved settlement. Objecting members of class appealed, and the Court of Appeals, Becker, Circuit Judge, held that: (1) settlement classes are cognizable in class actions; but (2) courts which use settlement classes in resolution of proposed class action must make formal finding that requisites of rules governing certification of class have been met; (3) failure of district court to make findings required settlement to be set aside; (4) proposed class settlement did not meet adequacy of representation requirement for class certification; (5) district court erred in determining that proposed class settlement was fair, adequate, and reasonable; and (6) district court erred in calculating fee award by applying multiplier to lodestar amount.

Orders vacated, and remanded.

John R. Gibson, Senior Circuit Judge, sitting by designation, concurred in central holding and with judgment and filed opinion.

West Headnotes

[1] Federal Courts ⚿850.1
170Bk850.1

Finding of fact is "clearly erroneous" when, although there is evidence to support it, reviewing court, based on entire evidence, concludes with firm conviction that mistake has been made.

[2] Federal Civil Procedure ⚿161
170Ak161

Class certification enables courts to treat common claims together, obviating need for repeated adjudications of same issues. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[3] Compromise and Settlement ⚿2
89k2

Law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.

[4] Compromise and Settlement ⚿2
89k2

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Courts should favor use of devices that tend to foster negotiated solutions to complex class actions; this includes settlement classes. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] Federal Civil Procedure ⚿161
170Ak161

Procedural requirements governing class actions were designed so that court can assure, to greatest extent possible, that actions are prosecuted on behalf of actual class members in way that makes it fair to bind their interests; rule represents measured response to issues of how due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with litigation system premised on traditional bipolar litigation. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] Federal Civil Procedure ⚿175
170Ak175

Requirement in rule governing class actions that court decide certification motions as soon as practicable aims to reduce possibility that party could use ill-founded threat of class action to control negotiations or possibility that absentees' interests could be unfairly bound. Fed.Rules Civ.Proc.Rule 23(c), 28 U.S.C.A.

[7] Federal Civil Procedure ⚿171
170Ak171

Procedural formalities of certification of class actions are important even if case appears to be headed for settlement rather than litigation. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[8] Compromise and Settlement ⚿55
89k55

[8] Federal Civil Procedure ⚿171
170Ak171

Expanded role of court in class actions relative to conventional bipolar litigation continues even after certification; while parties in normal suit do not ordinarily require judge's approval to settle action, class action parties do. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[9] Compromise and Settlement ⚿70
89k70

Preliminary approval by court of settlement in class action establishes presumption of fairness of settlement where court finds that negotiations occurred at arms length, there was sufficient discovery, proponents of settlement are experienced in similar litigation, and only small fraction of class objected. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[10] Compromise and Settlement ⚿57
89k57

[10] Compromise and Settlement ⚿70
89k70

Under *Girsh* test for determining whether proposed settlement in class action is fair, reasonable, and adequate, courts look at complexity and duration of litigation, reaction of class to settlement, stage of proceedings, risks of establishing liability, establishing damages, and maintaining class action, ability of defendants to withstand greater judgment, and range of reasonableness of settlement in light of best recovery and in light of all attendant risks of litigation; proponents of settlement bear burden of proving that factors weigh in favor of approval. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[11] Compromise and Settlement ⚿71
89k71

[11] Federal Courts ⚿870.1
170Bk870.1

Findings required to be made by district court in analyzing fairness of proposed settlement in class action under *Girsh* test are factual, and will be upheld on appeal unless they are clearly erroneous. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[12] Federal Civil Procedure ⚿161
170Ak161

Provision of Federal Rules of Civil Procedure governing class actions, which is carefully constructed scheme intended to protect rights of absentees and which necessarily relies on active judicial participation to protect those interests, does not authorize separate category of class certification that would permit dilution of or dispense with class certification criteria. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

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[13] Federal Civil Procedure ⚿173
170Ak173

Provision of Federal Rules of Civil Procedure governing class actions enables court to certify class if it complies with its duty to assure that class meets requisites for certification by making appropriate findings. Fed.Rules Civ.Proc.Rule 23(d), 28 U.S.C.A.

[14] Federal Civil Procedure ⚿173
170Ak173

Under provision of Federal Rules of Civil Procedure governing class actions, court retains authority to redefine or decertify class until entry of final judgment on merits; this capacity renders all certification orders "conditional" until entry of judgment. Fed.Rules Civ.Proc.Rule 23(c)(1), 28 U.S.C.A.

[15] Compromise and Settlement ⚿67
89k67

[15] Federal Civil Procedure ⚿161
170Ak161

Settlement classes are cognizable in class actions under Federal Rules of Civil Procedure. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[16] Compromise and Settlement ⚿67
89k67

Courts which use settlement classes in resolution of proposed class action must make formal finding that requisites of rules governing certification of class have been met; legitimacy of settlement classes depends upon fidelity to fundaments of rules. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[17] Constitutional Law ⚿309(1.5)
92k309(1.5)

[17] Federal Civil Procedure ⚿161
170Ak161

Class inquiries into numerosity, commonality, typicality, and adequacy of representation required prior to certification of class constitute multipart attempt to safeguard due process rights of absentees; thus, ultimate focus in making inquiries falls on appropriateness of class device to assert and vindicate class interests. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[18] Compromise and Settlement ⚿67
89k67

Court cannot infer that rights of entire class were vindicated by settlement in class action without having assured that commonality and typicality requirements for certification of class were satisfied. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[19] Compromise and Settlement ⚿67
89k67

While provisional certification of settlement class to facilitate settlement discussions is permissible in class actions, final settlement approval depends on finding that settlement class met all requisites for certification under rules governing class actions. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[20] Federal Civil Procedure ⚿164
170Ak164

[20] Federal Civil Procedure ⚿165
170Ak165

Provision of Federal Rules of Civil Procedure governing class actions is designed to assure that courts will identify common interests of class members and evaluate named plaintiff's and counsel's ability to fairly and adequately protect class interests. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[21] Compromise and Settlement ⚿67
89k67

[21] Federal Civil Procedure ⚿161
170Ak161

Actions in which classes are certified as settlement classes must meet same requirements for certification under Federal Rules of Civil Procedure as litigation classes. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[22] Compromise and Settlement ⚿59
89k59

[22] Compromise and Settlement ⚿67
89k67

Where settlement classes are recognized in

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resolution of class action, need of court to assure absence of collusion and alignment of interests among parties assumes especially crucial rule. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[23] Compromise and Settlement ⚿67
89k67

[23] Federal Courts ⚿633
170Bk633

Failure of district court to make findings that settlement classes in proposed settlement in products liability class action against truck manufacturer complied with provisions of Federal Rules of Civil Procedure governing certification of classes constituted plain error of law and required that certification of settlement be set aside, even though use of provisional certification of settlement classes was acceptable means of facilitating settlement negotiations. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

[24] Federal Civil Procedure ⚿182.5
170Ak182.5

Numerosity requirement for certification of class action was satisfied in class action brought against manufacturer of trucks based on alleged defect in trucks involving fuel tanks where class consisted of nearly six million truck owners. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[25] Federal Civil Procedure ⚿164
170Ak164

Adequacy of representation inquiry in determining whether proposed class may be certified in class action has two components intended to assure that absentees' interests are fully pursued; it considers whether named plaintiffs' interests are sufficiently aligned with absentees, and it tests qualifications of counsel to represent class. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[26] Compromise and Settlement ⚿61
89k61

Proposed settlement in class action against truck manufacturer based on alleged defect in fuel tanks of trucks, under which owners of trucks would receive coupon for discount on purchase of new truck from manufacturer, did not meet adequacy of representation test for certification of class actions; proposed settlement created conflict between interests of owners of fleets including manufacturer's trucks and individual owners as fleet owners would not enjoy benefits of settlement such as options to transfer coupons and may have been unable to receive full benefit of discount of coupon. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[27] Attorney and Client ⚿64
45k64

Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe entire class fiduciary duty once complaint in class action is filed.

[28] Federal Civil Procedure ⚿164
170Ak164

Large fee awards to class counsel, standing alone, do not suffice to show that representation of counsel in class action was inadequate or unethical, even though large fees may create impression of ethical violation since it may appear that counsel has economic stake in clients' case.

[29] Compromise and Settlement ⚿61
89k61

Counsel for proposed settlement class in products liability action against manufacturer of trucks based on alleged defect in fuel tank of trucks did not sufficiently pursue interests of class and did not meet adequacy of representation requirement for certification of class action where settlement called for class members to receive coupon the value of which could only be realized by purchasing new truck, counsel received $9.5 million fee for what was in comparison little work, settlement involved only noncash relief, and evidence indicated that settlement and attorney fee were negotiated simultaneously. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[30] Federal Courts ⚿813
170Bk813

Approval by district court of proposed settlement in class action as fair, reasonable, and adequate is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[31] Compromise and Settlement ⚿57
89k57

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[31] Federal Civil Procedure ⚿161
170Ak161

Provisions of Federal Rules of Civil Procedure governing class actions impose on trial judge duty of protecting absentees, which is executed by court's assuring that settlement represents adequate compensation for release of class claims; where court fails to comply with duty, absentees have action to enjoin settlement. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[32] Compromise and Settlement ⚿57
89k57

Inquiry by district court into adequacy of settlement in class action measures value of settlement itself to determine whether decision to settle represents good value for relatively weak case or sell-out of otherwise strong case. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[33] Compromise and Settlement ⚿57
89k57

Under *Girsh* test for determining whether proposed settlement in class action is fair and reasonable, courts make evaluation of whether decision to settle represents sound decision from two slightly different vantage points; court should determine range of reasonable settlements in light of best possible recovery, and range in light of all attendant risks of litigation. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[34] Compromise and Settlement ⚿57
89k57

In assessing whether proposed settlement in class action is fair, reasonable, and adequate in cases primarily seeking monetary relief, present value of damages plaintiffs would likely recover if successful, appropriately discounted for risk of not prevailing, should be compared by court analyzing settlement with amount of proposed settlement; figure should generate range of reasonableness within which district court approving or rejecting settlement will not be set aside. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[35] Compromise and Settlement ⚿57
89k57

Primary touchstone of inquiry of court in determining whether proposed settlement in class action is fair, reasonable, and adequate is economic valuation of proposed settlement; evaluating court must guard against demanding too large a settlement based on its view of merits of litigation, as settlement is compromise and yielding of highest hopes in exchange for certainty and resolution. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[36] Compromise and Settlement ⚿61
89k61

District court erred in determining that proposed class settlement in products liability action against manufacturer of trucks based on alleged defect in truck fuel tank, in which class members would receive coupons for $1,000 purchase of new truck from manufacturer, was fair, adequate, and reasonable; case was settled too quickly with too little development on merits, certificates may have been worth significantly less than $1.98 billion to $2.18 billion total value estimate, class members would in some cases be unable to use certificates, and relief granted did not address alleged safety defect that formed basis of action. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[37] Compromise and Settlement ⚿57
89k57

One sign that proposed class settlement may not be fair, precluding certification of class and settlement approval by district court, is that some segments of class are treated differently from others. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[38] Compromise and Settlement ⚿56.1
89k56.1

Decision to settle that occurs at too incipient a stage of proceedings weighs against approval by court of settlement in class action. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[39] Compromise and Settlement ⚿61
89k61

[39] Compromise and Settlement ⚿70
89k70

District court abused its discretion in summarily dismissing testimony of former engineer for truck manufacturer that manufacturer could have implemented retrofit to correct defect involving fuel

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tanks in trucks but did not and in determining that settlement in which class members received only coupons for discounts on purchase of new truck in products liability action against truck manufacturer had appropriate value relative to relief requested and was fair, adequate, and reasonable; testimony of engineer might have been important had case proceeded to trial. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[40] Compromise and Settlement ⚿61
89k61

Factor of complexity of suit weighed in favor of approval of proposed class settlement in products liability action against truck manufacturer based on alleged defect in truck fuel tank where trial would have involved complex web of state and federal warranty, tort, and consumer protection claims even if class had been subdivided, discovery would have to have been conducted into background of six million trucks owned by class members, and manufacturer would undoubtedly have contested action at every step, leading to plethora of pretrial motions. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[41] Compromise and Settlement ⚿58
89k58

In measuring class' own reaction to proposed settlement's terms for purposes of determining whether proposed settlement in class action is fair, adequate, and reasonable, court looks to number and vociferousness of objecting class members. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[42] Compromise and Settlement ⚿58
89k58

District court abused its discretion in determining that reaction of class members weighed in favor of approval of proposed class settlement in products liability action against truck manufacturer in which class members would receive coupon for discount on purchase of new truck where poll of members indicated that 63% definitely or probably would not use coupon, seemingly low number of objectors included some fleet owners owning as many as 1,000 trucks, and those who objected did so vigorously, even though only 6,450 members objected out of class of approximately 5.7 million. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[43] Compromise and Settlement ⚿56.1
89k56.1

Stage-of-proceedings facet of *Girsh* test for approval of proposed settlement in class action captures degree of case development that case counsel have accomplished prior to settlement; through this lens, courts can determine whether counsel had adequate appreciation of merits of case before negotiating. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[44] Compromise and Settlement ⚿57
89k57

In considering stage of proceedings at which settlement was reached for determining under *Girsh* test whether proposed settlement in class action is fair, adequate, and reasonable, it is more appropriate to measure stage by reference to commencement of proceedings either in class action at issue or in some related proceeding. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[45] Compromise and Settlement ⚿61
89k61

District court clearly erred in finding that stage of proceedings at which settlement was reached in proposed class action against truck manufacturer based on alleged defect in truck fuel tank weighed in favor of approval of settlement where approximately four months elapsed from filing of consolidated complaint to reaching of settlement of agreement, nothing in record indicated that class counsel had conducted significant discovery or investigation relative to merits of case, and no determination had been made by court that proper class existed. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[46] Compromise and Settlement ⚿56.1
89k56.1

In cases where there has been no determination by district court that proper class exists, mere fact that settlement negotiations transpired does not tend to prove that class' interests were pursued, as will support approval of proposed class settlement under *Girsh* based on consideration of stage of proceedings at which settlement is reached. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[47] Compromise and Settlement ⚿56.1
89k56.1

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By evaluating risks of establishing liability in determining under *Girsh* test whether to approve proposed settlement in class action, court can examine what potential rewards, or downside, of litigation might have been had class counsel elected to litigate claims rather than settle them. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[48] Compromise and Settlement ⚿61
89k61

District court abused its discretion in failing to distinguish between groups of plaintiffs that did and those that did not confront difficult state law defenses in establishing liability against truck manufacturer in determining under *Girsh* test that risks of establishing liability weighed in favor of approving proposed class settlement in products liability action against truck manufacturer based on alleged fuel tank defect in trucks where class of plaintiffs included residents of all states and numbered approximately 5.7 million. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[49] Compromise and Settlement ⚿61
89k61

District court erred in finding that risks of proving damages were so great that they strongly favored approval under *Girsh* test of proposed class settlement in products liability action against manufacturer of trucks based on alleged fuel tank defect where determination by court that class members could not adequately prove diminished value of vehicles was based solely on "blue book" value of vehicles and court refused to consider alternative measures that appeared to provide concrete and substantial damage figures. Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

[50] Federal Civil Procedure ⚿161
170Ak161

Value of class action depends largely on certification of class because, not only does aggregation of claims enlarge value of suit, but often combination of individual cases also pools litigation resources and may facilitate proof on merits; thus, prospects for obtaining certification have great impact on range of recovery one can expect to obtain from action. Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

[51] Federal Civil Procedure ⚿164
170Ak164

[51] Federal Civil Procedure ⚿165
170Ak165

Rules governing class actions does not require that class members share every factual and legal predicate to meet commonality and typicality standards; because separate proceedings can if necessary be held on individualized issues such as damages or reliance, individualized questions do not ordinarily preclude use of class action device. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

[52] Federal Civil Procedure ⚿2737.4
170Ak2737.4

"Lodestar method" calculates award of attorney fees to counsel in class action by multiplying number of hours expended by some hourly rate appropriate for region and experience of lawyer.

[53] Federal Civil Procedure ⚿2737.4
170Ak2737.4

"Percentage of recovery method" for determining award of attorney fees to counsel in class action resembles contingent fee in that it awards counsel variable percentage of amount recovered for class.

[54] Federal Civil Procedure ⚿2737.13
170Ak2737.13

Thorough judicial review of attorney fee applications is required in all class action settlements. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[55] Attorney and Client ⚿155
45k155

"Common fund doctrine" provides that private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve fund to which others also have claim, is entitled to recover from fund costs of his litigation, including attorney fees.

[56] Federal Civil Procedure ⚿2737.4
170Ak2737.4

Lodestar and percentage of recovery methods for determining amount of attorney fees each have distinct attributes suiting them to particular types of cases; ordinarily court making or approving fee award should determine what sort of action court is adjudicating and then primarily rely on

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corresponding method of awarding fees, although there is advantage to using alternative method to double-check fee.

[57] Federal Civil Procedure ⚿2737.4
170Ak2737.4

Lodestar method, which uses number of hours reasonably expended as its starting point, is generally used as appropriate method of determining attorney fee in statutory fee shifting cases.

[58] Attorney and Client ⚿155
45k155

Percentage of recovery method of calculating attorney fee award is used in common fund cases, on theory that class would be unjustly enriched if it did not compensate counsel responsible for generating valuable fund bestowed on class.

[59] Federal Civil Procedure ⚿2737.13
170Ak2737.13

District court erred in applying multiplier to lodestar amount in determining award of attorney fees under lodestar method in approving proposed class settlement in products liability action.

[60] Attorney and Client ⚿155
45k155

In common fund cases, district judge can award attorney fees as percentage of fund recovered.

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Before BECKER, ALITO, and GIBSON, [FN*] Circuit Judges.

FN* Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

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OPINION OF THE COURT

BECKER, Circuit Judge.

This is an appeal from an order of the District Court for the Eastern District of Pennsylvania approving the settlement of a large class action following its certification of a so-called settlement class. Numerous objectors challenge the fairness and reasonableness of the settlement. The objectors also challenge: (1) the district court's failure to certify the class formally; (2) its denial of discovery concerning the settlement negotiations; (3) the adequacy of the notice as it pertained to the fee request; and (4) the court's approval of the attorneys' fee agreement between the defendants and the attorneys for the class, which the class notice did not fully disclose, thereby (allegedly) depriving the class of the practical opportunity to object to the proposed fee award at the fairness hearing.

The class members are purchasers, over a 15 year period, of mid- and full- sized General Motors pick-up trucks with model C, K, R, or V chassis, which, it was subsequently determined, may have had a design defect in their location of the fuel tank. Objectors claim that the side-saddle tanks rendered the trucks especially vulnerable to fuel fires in side collisions. Many of the class members are individual owners (i.e., own a single truck), while others are "fleet owners," who own a number of trucks. Many of the fleet owners are governmental agencies. As will become apparent, the negotiated settlement treats fleet owners quite differently from individual owners, a fact with serious implications for the fairness of the settlement and the adequacy of representation of the class.

While all the issues we have mentioned are significant (except for the discovery issue), the threshold and most important issue concerns the propriety and prerequisites of settlement classes. The settlement class device is not mentioned in the class action rule, Federal Rule of Civil Procedure 23 . [FN1] Rather *778 it is a judicially crafted procedure. Usually, the request for a settlement class is presented to the court by both plaintiff(s) and defendant(s); having provisionally settled the case before seeking certification, the parties move for simultaneous class certification and settlement approval. Because this process is removed from the normal, adversarial, litigation mode, the class is certified for settlement purposes only, not for litigation. Sometimes, as here, the parties reach a settlement while the case is in litigation posture, only then moving the court, with the defendants' stipulation as to the class's compliance with the Rule 23 requisites, for class certification and settlement approval. In any event, the court disseminates notice of the proposed settlement and fairness hearing at the same time it notifies class members of the pendency of class action determination. Only when the settlement is about to be finally approved does the court formally certify the class, thus binding the interests of its members by the settlement.

FN1. Rule 23 provides, in pertinent part:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *(b) Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. *(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits....

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The first Manual for Complex Litigation [hereinafter MCL] strongly disapproved of settlement classes. Nevertheless, courts have increasingly used the device in recent years, and subsequent manuals (MCL 2d and MCL 3d (in draft)) have relented, endorsing settlement classes under carefully controlled circumstances, but continuing to warn of the potential for abuse. This increased use of settlement classes has proven extremely valuable for disposing of major and complex national and international class actions in a variety of substantive areas ranging from toxic torts (Agent Orange) and medical devices (Dalkon Shield, breast implant), to antitrust cases (the beef or cardboard container industries). But their use has not been problem-free, provoking a barrage of criticism that the device is a vehicle for collusive settlements that primarily serve the interests of defendants--by granting expansive protection from law suits--and of plaintiffs' counsel--by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims.

After reflection upon these concerns, we conclude that Rule 23 permits courts to achieve the significant benefits created by settlement classes so long as these courts abide by all of the fundaments of the Rule. Settlement classes must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirements, usually (as in this case) the (b)(3) superiority and predominance standards. We also hold that settlement class status (on which settlement approval depends) should not be sustained unless the record establishes, by findings of the district judge, that the same requisites of the Rule are satisfied. Additionally, we hold that a finding that the settlement was fair and reasonable does not serve as a surrogate for the class findings, and also that there is no lower standard for the certification of settlement classes than there is for litigation classes. But so long as the four requirements of 23(a) and the appropriate requirement(s) of 23(b) are met, a court may legitimately certify the class under the Rule.

In this case the district judge made no Rule 23 findings, and significant questions remain as to whether the class could have met the requisites of the rule had the district court applied them. Principally at issue is adequacy of representation. In particular, the objectors contend that there is a conflict between the positions of individual owners on the one hand and fleet owners on the other hand. The disparity in settlement benefits enjoyed by these different groups, objectors argue, creates an intra-class conflict that precludes the finding of adequacy of representation required by the rule. Moreover,

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they submit, the large number of different defenses available under the laws of the several states involved also creates a potentially serious commonality and typicality problem.

***779 We conclude that the objectors' adequacy of representation claim probably has merit.** At all events, the district court did not properly evaluate the differential impact of the settlement on individual fleet owners, and should determine on remand whether the conflicts among class members are so great as to preclude certification (or at least sufficient to require the creation of sub-classes). The district court should also focus on the commonality and typicality problems, to determine whether the national scope of the class litigation and the plethora of defenses available in different jurisdictions prevent these requirements from being met.

For the reasons that follow at some length, we conclude that, although settlement classes are valid generally, this settlement class was not properly certified. **We also conclude that the settlement is not fair** and adequate; more precisely, we hold that the district court abused its discretion in determining that it was, primarily because the district court erred in accepting plaintiffs' unreasonably high estimate of the settlement's worth, in over-estimating the risk of maintaining class status and of establishing liability and damages, and in misinterpreting the reaction of the class. Finally, although our disposition of the foregoing issues makes it unnecessary for us to pass on the approval of the attorneys' fees, we clarify the governing standards for these fee awards to guide the district court on remand. We therefore reverse the challenged order of the district court and remand for further proceedings.

I. FACTS, PROCEDURAL HISTORY, AND STANDARD OF REVIEW

A. General Background

Between 1973 and 1987, General Motors sold over 6.3 million C/K pickup trucks with side-mounted fuel tanks. [FN2] In late October 1992, after the public announcement of previously undisclosed information regarding the safety of the fuel tank placement in GM pickups, consumer class action lawsuits were filed in several jurisdictions. The National Highway Traffic Safety Administration ("NHTSA") commenced an investigation of the alleged defects relating to side-impact fires on these trucks, and consumer advocacy groups sought a recall. [FN3]

FN2. The class includes both mid-and full-size trucks with chassis model types C, K, R, or V.

FN3. See note 5 *infra*.

On November 5, 1992, plaintiffs in one action sought to enjoin allegedly misleading communications to putative class members and filed an application for expedited discovery. On November 8 and 9, 1992, GM filed notices of removal of this and other state court actions, and a motion with the Judicial Panel on Multidistrict Litigation ("MDL Panel") to transfer and consolidate all actions for pretrial purposes under 28 U.S.C. § 1407 (1993). The MDL Panel transferred all related actions to the District Court for the Eastern District of Pennsylvania on February 26, 1993. Ultimately, dozens of actions were filed in various courts throughout the United States on behalf of consumer classes; the federal cases were dismissed, remanded to state court, or transferred to the Eastern District of Pennsylvania.

On March 5, 1993, pursuant to an order of the (transferee) District Court, plaintiffs filed a Consolidated Amended Class Action Complaint seeking equitable relief and damages that consolidated all of the actions under the MDL caption and listed nearly 300 representative plaintiffs, including both individual and fleet owners. The Complaint alleged violations of two federal statutes, the Magnuson-Moss Act and the Lanham Trademark Act; a variety of common law and statutory claims, including negligence, fraud, breach of written and implied warranty; and violations of various state consumer protection statutes. The complaint sought, inter alia, an order remedying the alleged abnormally high incidence of fuel-fed fires following side-impact collisions by requiring GM to recall the trucks or pay for their repair. GM answered this complaint, denying all substantive allegations and raising numerous affirmative defenses.

Also on March 5, 1993, plaintiffs filed a consolidated motion for nationwide class certification. The court set July 19, 1993, the hearing date on this motion. On March 30, 1993, GM moved to stay this litigation pending***780** the outcome of the NHTSA investigation, initiated in December 1992. This motion was denied on June 4, 1993. Pursuant to a scheduling order issued by

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the court, discovery during the spring of 1993 focused on class certification issues. During this discovery, GM produced more than 100,000 pages of documents from prior C/K pickup product liability lawsuits and GM's responses to NHTSA information requests. Plaintiffs also had access to the depositions and trial testimony in other cases involving the fuel tank design of C/K pickups, including the jury trial in *Moseley v. GM,* No. 90-V-6276 (Fulton County, Ga.). Plaintiffs consulted with their own experts to evaluate this information. In addition, depositions were taken of some GM personnel and certain named plaintiffs. Discovery on the merits of the case had been postponed until autumn 1993. Nothing in the record indicates that, as of the spring of 1993, counsel had identified expert witnesses for trial or deposed GM's engineering experts.

In the midst of these proceedings, the parties began exploring a possible settlement of the litigation. These discussions intensified in June 1993, at which time face-to-face and telephonic meetings, both between the parties and among plaintiffs' counsel, took place on virtually a daily basis. On July 19, 1993, the parties reached a settlement in principle, reduced the terms to writing, and informed the district court. [FN4] For purposes of settlement only and without prejudice to GM's substantial opposition to class certification, the named parties agreed to the certification of a settlement class of C/K pickup owners, described below.

FN4. GM reached a substantially identical agreement with counsel representing a class of C/K pickup truck purchasers who are Texas residents in *Dollar v. General Motors,* No. 92-1089 (71st Judicial District, Marshall, Tex.). That settlement was approved in November 1993, but was overturned on appeal on June 22, 1994. *See Bloyed v. General Motors Corp.,* 881 S.W.2d 422 (Tex.Ct.App.1994), discussed *infra* at Part VI.I. The Texas Supreme Court granted GM's Application for Writ of Error on February 16, 1995 and set the case for oral argument on March 21, 1995.

B. The Settlement Agreement

In general terms, the settlement agreement provides for members of the settlement class to receive $1,000 coupons redeemable toward the purchase of any new GMC Truck or Chevrolet light duty truck. Settlement certificates are transferable with the vehicle. They are redeemable by the then current owner of the 1973-86 C/K and 1987-91 R/V light duty pickup trucks or chassis cabs at any authorized Chevrolet or GMC Truck dealer for a fifteen month period. Settlement class members do not have to trade in their current vehicle to use the certificate, and the certificates can be used in conjunction with GM and GMAC incentive programs.

The class members can freely transfer the certificate to an immediate family member who resides with the class member. Class members can also transfer the $1000 certificate to a family member who does not reside with the class member by designating the transferee family member within sixty days, running from the date that GM mailed notice of the proposed settlement. Additionally, the $1000 certificate can be transferred with the title to the settlement class vehicle, that is, to a third party who purchases the class member's vehicle.

In lieu of a $1,000 certificate, and without transferring title to the settlement class vehicle, a class member may instead request that a nontransferable $500 certificate (counterintuitively known as the "transfer certificate") be issued to any third party except a GMC dealer or its affiliates. This $500 certificate is redeemable with the purchase of a new C or K series GMC or Chevrolet full-size pickup truck or its replacement model. The $500 certificate cannot be used in conjunction with any GMC or GMAC marketing incentive, must be used on the more expensive full size models, and is subject to the same fifteen-month redemption period as the $1,000 certificates. The class member must make a notarized request to GM, and GM will mail the $500 certificate to the transferee within 14 days of its receipt of the request for transfer.

Under the terms of the agreement, the approval of the settlement and corresponding entry of final judgment would have no effect ***781** upon any accrued or future claims for personal injury or death, nor would it affect the rights of settlement class members to participate in any future remedial action that might be required under the National Traffic and Motor Safety Act of 1966, 15 U.S.C. §§ 1381 et seq. (1995). [FN5]

FN5. After oral argument in this case, United States Transportation Secretary Federico Pena announced that NHTSA had settled the proceeding involving the C/K trucks at issue here without ordering a recall, finding an acceptable retrofit, or giving any compensation to the truck owners. The

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settlement provided that GM would contribute $51 million to general safety programs unrelated to the trucks' alleged problems. *See* Statement by Secretary Federico Pena on Dec. 2, 1994, Settlement Regarding DOT Investigation of General Motors C/K Pickup Trucks.

The settlement agreement before us also provides that plaintiffs' counsel would apply to the district court for an award of reasonable attorneys' fees and reimbursement of expenses, both to be paid by GM. GM reserved the right to object to any fees or expenses it deemed to be excessive and to appeal any amount awarded by the court over its objection. Plaintiffs' counsel filed their fee applications on or about September 15, 1993; the fee applications remained in the files of the clerk of the district court where class members could theoretically review them, but no information about attorneys' fees other than the fact that a fee application would be made was included in the class notice. GM did not file any formal objections to the fee applications.

C. Approval of the Settlement and Fees

The district court reviewed the substantive terms of the settlement on July 12, 1993 and made the preliminary determination, in Pretrial Order No. 7, entered July 20, 1993, that the proposed settlement appeared reasonable. Also in Pretrial Order No. 7, the court "provisionally" certified the class of GM truck owners as a settlement class (i.e., for settlement purposes only) pursuant to Rule 23(b)(3); however, the court did not make findings that the requisites of Rule 23(a) or 23(b) were satisfied. The court approved the form of and dissemination to putative class members of the combined notice of the pendency of the action and the proposed settlement pursuant to Rules 23(c)(2) and 23(e). The class definition included all persons and entities who purchased in the United States (except for residents of the State of Texas) and were owners as of July 19, 1993 of (1) a 1973-1986 model year General Motors full-size pickup truck or chassis cab of the "C" or "K" series; or (2) a 1987-1991 model year General Motors full-size pickup truck or chassis cab of the "R" or "V" series. On August 20 and 21, 1993, GM mailed the notice to all registered owners of class vehicles (including nearly 5.7 million vehicles), and it published the full text of the notice in USA Today and The Philadelphia Inquirer on August 27, 1993.

In response to the notice, over 5,200 truck owners elected to opt out of the class, and approximately 6,500 truck owners (a number which includes fleet owners who own as many as 1,000 vehicles each) objected to the settlement. The objectors' filings contained many overlapping claims. The recurring contentions were that: (1) the settlement does nothing to fix the trucks; (2) even with the $1,000 coupon, many owners would be unable to purchase a new truck given their high cost (with list prices from $11,000 to $33,000); (3) state and local government fleet owners would not be able to redeem all of their certificates (by buying new vehicles) within the short redemption period (fifteen months), and they might be further restricted from using the coupons by competitive bidding procurement rules; and (4) GM and class counsel colluded in a manner that compromised the interests of the class and that would preclude a finding of adequate representation. GM rejoined with voluminous material emphasizing the substantial risks plaintiffs faced not only in maintaining class treatment but also in establishing liability and damages.

A settlement fairness hearing was held on October 26, 1993 during which the objectors who submitted written briefs were permitted to speak. The district court approved the settlement in a Memorandum and Order dated December 16, 1993. *In re General Motors Corp.*, 846 F.Supp. 330 (E.D.Pa.1993). In that order, the court confirmed its Pretrial Order No. 7, which had provisionally certified the settlement class. Although the court still made no ***782** findings that the requisites of Rules 23(a) and (b) were met, it did set forth findings of fact and conclusions of law to justify its approval of the settlement as fair, reasonable and adequate based on the nine-factor test established in *Girsh v. Jepson*, 521 F.2d 153 (3d Cir.1975).

The court found that the total economic value of the settlement was "between $1.98 billion and $2.18 billion." 846 F.Supp. at 336. Against the prospect of settlement, the court weighed each of the nine *Girsh* factors. It concluded that "the complexity, expense and likely duration of the litigation would be mammoth." *Id.* at 334. Although the settlement was reached at an early stage of the litigation, just four months after the consolidated complaint was filed, the court found that this did not weigh against the settlement because the court believed that the parties had access to "extensive discovery on the same issues of product defect that was previously conducted in the various personal injury actions that have been litigated throughout the country." *Id.*

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The district court also found that the reaction of class members to the proposed settlement supported approval citing "the infinitesimal number of truck owners who have either objected to or sought exclusion from the settlement." *Id.*

Noting the divided results of the personal-injury jury trials and the numerous defenses GM could raise, the court found that "a substantial risk in establishing liability" weighed in favor of approval. *Id.* at 336. Similarly, the court found that "[p]erhaps the greatest weakness in the plaintiffs' case is the lack of proof of economic damages." *Id.*. The court also addressed the objection that the settlement did not provide for a recall or a "fix," explaining that "no objector that complains that the settlement fails to retrofit the alleged defect has been able to come forth with a practical and safe modification for the trucks that has been designed, evaluated and tested." *Id.* at 342.

On December 20, 1993, four days after approving the settlement, the district court also approved the class counsel's request for attorneys' fees in the amount of $9.5 million. Although the court did not believe at that time that it needed to review that fee award, to which GM had agreed, it subsequently, on February 2, 1994, issued an "amplified order" evaluating the award in greater detail. The court determined that the fee request was reasonable under both a lodestar analysis and the percentage-of-recovery method (*see* Part VII *infra*).

D. The NHTSA Investigation

While this case was under submission to this court, the NHTSA investigation continued. Over the objections of some of NHTSA's engineers who had determined that the trucks complied with relevant safety standards, on October 17, 1994, Secretary of Transportation Federico Pena announced the agency's finding that the trucks contained a safety defect creating an increased and unreasonable risk of side-impact fires. The determination was based on the allegedly enhanced risk of side-impact fires relative to Ford pickups that resulted from GM's placement of the fuel tanks outside the frame rails. GM challenged the propriety of the public meeting NHTSA planned to hold and NHTSA's authority to order a recall of vehicles that met all relevant safety standards. On December 2, 1994, Secretary Pena announced the settlement of the C/K pickup investigation wherein GM contributed over $51 million for a variety of safety programs unrelated to the pickups, and admitted no liability. [FN6]

FN6. *See* note 5 *supra.*

E. Standard of Review

[1] Each of the issues presented here is reviewable for abuse of discretion. *See Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), *cert. denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974) (approval of proposed class action settlement); *In re School Asbestos Litig.*, 921 F.2d 1338, 1341 (3d Cir.1990), *cert. denied*, 499 U.S. 976, 111 S.Ct. 1623, 113 L.Ed.2d 720 (1991) (class certification); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir.1976) (award of reasonable attorney's fees); *Marroquin- Manriquez v. INS*, 699 F.2d 129, 134 (3d Cir.1983), *cert. denied*, 467 U.S. 1259, 104 *783 S.Ct. 3553, 82 L.Ed.2d 855 (1984) (scope of discovery). An appellate court may find an abuse of discretion where the "district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir.1987), *cert. denied*, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 246 (1991). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court, based on the entire evidence, concludes with firm conviction that a mistake has been made. *Oberti v. Board. of Ed. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220 (3d Cir.1993).

II. ANATOMY OF THE CLASS CLAIMS

The consolidated class complaint filed on behalf of the nationwide class of GM truck owners (except those from Texas) alleged violations of the Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2310(d)(1) (1995); and the Lanham Act, 15 U.S.C.A. § 1125(a) (1995); and a variety of state common law and statutory claims, including strict liability in tort for selling a dangerously defective product; negligent design; negligent misrepresentation; fraud (based on defendants' alleged course of conduct in the advertising, promotion, and sale of the GM pickups intentionally concealing material facts about a dangerous latent defect); breach of warranty, including written (from vehicle warranties), express (from public representations by GM), implied (warranties of merchantability) and statutory warranties; and

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finally violations of various state consumer protection statutes. The case did not involve any pickup trucks that had actually experienced fuel tank fires caused by side- impact collisions. Moreover, personal injury or death claims were expressly omitted from the complaint as well as from the settlement--class members remain free to pursue such claims if any should accrue.

The aggregated treatment of these claims was potentially complicated by the differences in underlying facts. The trucks at issue had nineteen different fuel tank systems; proof might thus be required for each design on relevant issues. Furthermore, unlike the federal securities laws where there is a presumption of reliance on a material misrepresentation, *see Basic v. Levinson,* 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), plaintiffs would likely have had to prove individual reliance on the allegedly misleading materials under the various state laws applicable to most of these claims. More fundamentally, the complaint itself invoked state laws that implicated different legal standards on, for example, the warranty claims (the laws contain various privity requirements or the need for an allegedly defective product to fail in service before a warranty claim can be sustained), negligent misrepresentation, negligence, and strict products liability. The state laws implicated by the filing of the nationwide class action also differed on such issues as statutes of limitations; whether pickup trucks are "consumer products;" the application of durational limits on implied warranties; the requirement of reliance to recover for fraud, misrepresentation, and warranty claims; whether intent is a required element of negligent misrepresentation claims; whether comparative fault is a defense; and the relevant test for plaintiffs' design defect claims.

III. Rule 23--Relevant Fundamental Principles

[2] Before turning to the precise questions at issue on this appeal, it is important that we consider the several basic purposes served by class actions in our contemporary, complex litigation-laden legal system. One of the paramount values in this system is efficiency. Class certification enables courts to treat common claims together, obviating the need for repeated adjudications of the same issues. *See* 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 1.06 (3d Ed.1992); *General Tel. Co. v. Falcon,* 457 U.S. 147, 149, 102 S.Ct. 2364, 2366, 72 L.Ed.2d 740 (1982).

The Supreme Court has articulated other important objectives served by class actions. Class actions achieve "the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and ***784** the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 402-03, 100 S.Ct. 1202, 1211-12, 63 L.Ed.2d 479 (1980). The Court has explained the significance of the last goal as

> an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174, 63 L.Ed.2d 427 (1980); *see also* 1 NEWBERG & CONTE § 1.06K at 1-19. Cost spreading can also enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing. *Id.* § 1.06K at 1-18 to 1-20.

[3] The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. *See* 2 NEWBERG & CONTE § 11.41, at 11-85 (citing cases); *Cotton v. Hinton,* 559 F.2d 1326, 1331 (5th Cir.1977); *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir.1976). The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial. *See First Commodity Corp. of Boston Customer Accts. Litig.,* 119 F.R.D. 301, 306-07 (D.Mass.1987). These economic gains multiply when settlement also avoids the costs of litigating class status--often a complex litigation within itself. Furthermore, a settlement may represent the best method of distributing damage awards to injured plaintiffs, especially where litigation would delay and consume the available resources and where piecemeal settlement could result, in the Rule 23(b)(1)(B) limited fund context, in a sub-optimal distribution of the damage awards. *See, e.g., In re Dennis Greenman Sec. Litig.,* 829 F.2d 1539, 1542 (11th Cir.1987).

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[4] Thus, courts should favor the use of devices that tend to foster negotiated solutions to these actions. Prima facie, this would include settlement classes. True, it was once thought that mass tort actions were ordinarily not appropriate for class treatment, *see* Fed.R.Civ.P. 23 Advisory Committee's note, subdivision (b)(3), 39 F.R.D. 69, 103 (1966). It has also been argued that mass tort cases strain the boundaries of Rule 23. *See* Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 Harv.J.Legis. 461 (1988) (suggesting necessity of rule revisions to accommodate class action treatment of mass torts). However, the applicability of Rule 23 to mass tort cases has become commonplace, and the use of the class action device, specifically the (b)(3) class, has created some of the largest and most innovative settlements in these contexts. Prominent examples include the recent $4.2 billion settlement of the breast implant litigation. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.,* 1994 WL 578353 (N.D.Ala.1994).

Despite the potential benefits of class actions, there remains an overarching concern--that absentees' interests are being resolved and quite possibly bound by the operation of res judicata even though most of the plaintiffs are not the real parties to the suit. The protection of the absentees' due process rights depends in part on the extent the named plaintiffs are adequately interested to monitor the attorneys (who are, of course, presumed motivated to achieve maximum results by the prospect of substantial fees), and also on the extent that the class representatives have interests that are sufficiently aligned with the absentees to assure that the monitoring serves the interests of the class as a whole. In addition, the court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity, by approving appropriate representative plaintiffs and class counsel.

Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the *785 individual claims' actual worth. Because absentees are not parties to the action in any real sense, and probably would not have brought their claims individually, *see Mars Steel v. Continental Illinois Nat'l Bank & Trust,* 834 F.2d 677, 678 (7th Cir.1987), attorneys or plaintiffs can abuse the suit nominally brought in the absentees' names. As one court has noted, "[t]his fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems...." *Id.*

[5][6][7] The drafters designed the procedural requirements of Rule 23, especially the requisites of subsection (a), so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests. The rule thus represents a measured response to the issues of how the due process rights of absentee interests can be protected and how absentees' represented status can be reconciled with a litigation system premised on traditional bipolar litigation. Moreover, the requirement in Rule 23(c) that the court decide certification motions "as soon as practicable," *see* note 1 *supra,* aims to reduce even further the possibility that a party could use the ill-founded threat of a class action to control negotiations or the possibility that absentees' interests could be unfairly bound. Hence, the procedural formalities of certification are important even if the case appears to be headed for settlement rather than litigation.

[8] This expanded role of the court in class actions (relative to conventional bipolar litigation) continues even after certification. While the parties in a normal suit do not ordinarily require a judge's approval to settle the action, class action parties do. Rule 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). Courts and commentators have interpreted this rule to require courts to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." 2 Newberg & Conte § 11.41, at 11-88 to 11-89. "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members.... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983); *Sala v. National RR Passenger Corp.,* 721 F.Supp. 80 (E.D.Pa.1989);

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see also Piambino v. Bailey, 610 F.2d 1306 (5th Cir.), *cert. denied,* 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980).

[9] Before sending notice of the settlement to the class, the court will usually approve the settlement preliminarily. This preliminary determination establishes an initial presumption of fairness when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected. *See* 2 NEWBERG & CONTE § 11.41, at 11-9"

[10][11] As noted above, this court has adopted a nine-factor test to help district courts structure their final decisions to approve settlements as fair, reasonable, and adequate as required by Rule 23(e). *See Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir.1975). Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Id.* The proponents of the settlement bear the burden of proving that these factors weigh in favor of approval. *See GM Interchange,* 594 F.2d 1106, 1126 n. 30 (7th Cir. *786 1979); *Holden v. Burlington Northern, Inc.,* 665 F.Supp. 1398, 1407 (D.Minn.1987); MCL 2d § 30.44. The findings required by the *Girsh* test are factual, *see Malchman v. Davis,* 706 F.2d at 434; *Plummer v. Chemical Bank,* 668 F.2d 654, 659 (2d Cir.1982), which will be upheld unless they are clearly erroneous, *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir.1982), *cert. denied,* 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983); *In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 207 (5th Cir.1981).

IV. SETTLEMENT CLASSES

This appeal challenges (among other things) the district court's class certification order. Before we may address the propriety of the court's order we must first decide whether it is ever proper to certify a class for settlement purposes only. We therefore begin our analysis with a closer look at how settlement classes operate.

A. Nature of the Device

As we have explained above, a settlement class is a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification. Despite the directive of Rule 23(c) that courts certify actions as soon as practicable, when a class action has been filed before the settlement has been arrived at courts will often delay the certification determination during the pendency of settlement discussions. If the settlement negotiations succeed, courts will certify the class for settlement purposes only and send a combined notice of class pendency and settlements to the class members. Thus, by the time the court considers certification, the defendant has essentially stipulated to the existence of the class requirements since it now has an interest in binding an entire class with its proffered settlement.

By specifying certification for settlement purposes only, however, the court preserves the defendant's ability to contest certification should the settlement fall apart. Because the court indulges the assumption of the class's existence only until a settlement is reached or the parties abandon the negotiations, settlement classes are also sometimes referred to as temporary or provisional classes. Sometimes the specification may also be seen as assuming that the class may only meet the requirements of Rule 23 if the action is settled, and that certification may in fact be inappropriate if the action will actually be litigated. In any event, notwithstanding that there is an absence of clear textual authorization for settlement classes, many courts have indulged the stipulations of parties by establishing temporary classes for settlement purposes only. *See, e.g., Mars Steel v. Continental Illinois Nat'l Bank & Trust,* 834 F.2d 677 (7th Cir.1987); *Weinberger v. Kendrick,* 698 F.2d 61 (2d Cir.1982), *cert. denied,* 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983); *In re A.H. Robins Co.,* 880 F.2d 709, 738-39 (4th Cir.1989); *In re Dennis Greenman Sec. Litig.,* 829 F.2d 1539, 1543 (11th Cir.1978); *Plummer v. Chemical Bank,* 668 F.2d 654 (2d Cir.1982); *In re Beef Indust. Antitrust Litig.,* 607 F.2d 167, 173 (5th Cir.1979); *Malchman v. Davis,* 706 F.2d 426, 433-34 (2d Cir.1983); *In re Taxable Mun. Bond Sec. Litig.,* 1994 WL 643142 (E.D.La. Nov. 15, 1994); *In re*

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Silicone Gel Breast Implant Prod. Liab. Litig., 1994 WL 578353 (N.D.Ala.1994); *In re First Commodity Corp. of Boston,* 119 F.R.D. 301, 306-08 (D.Mass.1987); *In re Bendectin,* 102 F.R.D. 239, 240 (S.D.Oh.1984), *rev'd on other grounds,* 749 F.2d 300 (6th Cir.1984); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379, 1388-90 (D.Md.1983); *In re Chicken Antitrust Litig.*, 560 F.Supp. 957, 960 (N.D.Ga.1980).

There has been a great deal of commentary, both critical [FN7] and laudatory, [FN8] of the use of these "settlement classes." And some courts have criticized these accommodations ***787** of the negotiating parties and expressed their ambivalence while continuing nonetheless to use them. *See, e.g., Mars Steel,* 834 F.2d 677 (describing considerable dangers of settlement classes but ultimately upholding the settlement). Before we interpret the dictates of Rule 23 with respect to settlement classes, it will be useful to survey both the criticism and the praise.

FN7. *See, e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action,* WALL ST. J. Sept. 7, 1994, at A15.

FN8. 2 NEWBERG & CONTE § 11.27; MCL(First) § 1.46; Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation,* 70 CORNELL L.REV. 779 (1985); Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 HARV.J.LEGIS. 461, 480 (1988).

B. Perceived Problems of Settlement Classes

[12] A number of commentators, particularly the authors of the first edition of the Manual for Complex Litigation, have voiced serious concerns about settlement classes. These criticisms have focused on the fact that Rule 23, a carefully constructed scheme intended to protect the rights of absentees that necessarily relies on active judicial participation to protect those interests, does not authorize a separate category of class certification that would permit a dilution of or dispense with the subsection (a) criteria. MCL § 1.46; *see also Mars Steel 834 F.2d at 680;* In re Baldwin United, Corp. *105 F.R.D. 475 (S.D.N.Y.1984). Other criticisms focus on the potential prejudice to the parties and the institutional threat posed to the court.* See, e.g., *Coffee,* supra *note 7.*

Rule 23 does not in terms authorize the deferral of class certification pending settlement discussions. Indeed, Rule 23(c) provides: "*As soon as practicable* after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed.R.Civ.P. 23(a) (emphasis supplied). Deliberately delaying a class certification determination so that settlement discussions can proceed clearly does not represent an effort to resolve the issue "as soon as practicable." As Judge Posner has noted, "[i]t is hard to see why the propriety of maintaining the suit as a class action could not 'practicably' have been determined much earlier. And, common though the practice of deferring class certification while settlement negotiations are going on is, it not only jostles uneasily with the language of Rule 23(c)(1) but also creates practical problems." *Mars Steel,* 834 F.2d at 680.

The danger here is that the court cannot properly discharge its duty to protect the interests of the absentees during the disposition of the action. Because the class has not yet been defined, the court lacks the information necessary to determine the identity of the absentees and the likely extent of liability, damages, and expenses of preparing for trial. *See* MCL 2d § 30.45, at 243 ("No one may know how many members are in the class, how large their potential claims are, what the strengths and weaknesses of the parties' positions are, or how much the class will benefit under the settlement."); *In re Baldwin United,* 105 F.R.D. at 481. Moreover, the court performs its role as supervisor/protector without the benefit of a full adversarial briefing on the certification issues. With less information about the class, the judge cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses. *See In re Beef Indus. Antitrust Litig.*, 607 F.2d at 174. For example, if the court fails to define the class before settlement negotiations commence, then during the settlement approval phase the judge will have greater difficulty detecting whether the parties improperly manipulated the scope of the class in order to buy the defendant's acquiescence.

Settlement classes also make it more difficult for a court to evaluate the settlement by depriving the

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judge of the customary structural devices of Rule 23 and the presumptions of propriety that they generate. Ordinarily, a court relies on class status, particularly the adequacy of representation required to maintain it, to infer that the settlement was the product of arm's length negotiations. *Cf. Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir.1983) (noting protracted nature of negotiations in approving settlement); *City of Detroit v. Grinnell,* 495 F.2d 448, 463 (2d Cir.1974) (same); *In re Baldwin-United,* 105 F.R.D. at 482 (same). Where the court has not yet certified a class ***788** or named its representative or counsel, this assumption is questionable.

In effect, settlement classes can, depending how they are used, evade the processes intended to protect the rights of absentees. Indeed, the draft of the MCL (Third), although considerably more receptive to settlement classes than the earlier editions of the Manual, explains that "[t]he problem presented by these requests is not the lack of sufficient information and scrutiny, but rather the possibility that fiduciary responsibilities of class counsel or class representatives may have been compromised." MCL (Third) (draft) at 193. Even some courts successfully using these devices to achieve settlements apparently recognize these dangers since they certify these actions more cautiously than ordinary classes. *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 33 (3d Cir.1971) (court must be doubly careful where negotiation occurs before certification and designation of a class counsel); *In re Beef Antitrust Litig.,* 607 F.2d 167, 176-77 (5th Cir.1979) (examining though ultimately rejecting the charge that collusion precluded the certification of the settlement class); *Simer v. Rios,* 661 F.2d 655, 664-66 (7th Cir.1981) (requiring a higher showing of fairness where settlement negotiated prior to certification); *Weinberger v. Kendrick,* 698 F.2d 61, 69 (2d Cir.1982) (judge made findings about discovery and counsel).

In particular, settlement classes create especially lucrative opportunities for putative class attorneys to generate fees for themselves without any effective monitoring by class members who have not yet been apprised of the pendency of the action. Moreover, because the court does not appoint a class counsel until the case is certified, attorneys jockeying for position might attempt to cut a deal with the defendants by underselling the plaintiffs' claims relative to other attorneys. [FN9] Unauthorized settlement negotiations occurring before the certification determination thus "create the possibility of negotiation from a position of weakness by the attorney who purports to represent the class." *GM Interchange Litig.,* 594 F.2d 1106, 1125 (7th Cir.1979). Pre-certification negotiations also hamper a court's ability to review the true value of the settlement or the legal services after the fact. *See supra* at 787. In addition, unauthorized negotiations also result in denying other plaintiffs' counsel information that is necessary for them to make an effective evaluation of the fairness of any settlement that results. *See GM Interchange Litig.,* 594 F.2d at 1125.

> FN9. These sorts of dynamics have led some critics to accuse class action attorneys of ethical violations. While we emphasize that counsel here committed no such violations, we do not preclude the possibility that these violations could occur.

Framed as an issue of Rule 23(a) requisites, these considerations implicate adequacy of representation concerns: "[a]rguments in opposition to settlement classes have merit when they are addressed to the problem of inadequate representation or possible collusion among the named plaintiffs and some or all defendants." *In re Baldwin-United Corp.,* 105 F.R.D. at 480. Another court has warned that the "danger of a premature, even a collusive, settlement [is] increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates...." *Mars Steel,* 834 F.2d at 680; *see also Malchman,* 706 F.2d at 433 (recognizing special potential for collusion or undue pressure by defendants in settlement negotiations); *Weinberger,* 698 F.2d at 73 (requiring a higher showing of fairness to accommodate greater potential for improper settlement). Settlement classes, which constitute ad hoc adjustments to the carefully designed class action framework constructed by Rule 23, lack the regulatory mechanisms that ordinarily check this improper behavior: "There is in fact little or no individual client consultation and no judicial oversight of a hidden process of wheeling and dealing to maximize overall recovery and fees for hundreds and thousands of massed cases." *In re Joint Eastern & Southern District Asbestos Litig.,* 129 B.R. 710, 802 (E. & S.D.N.Y.1991) (discussing the ramifications of class treatment of mass torts).

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In addition to these procedural problems (and the problems created for a judge trying to evaluate both class status and the adequacy ***789** of a class settlement simultaneously) the earlier achievement of settlement through the use of a settlement class also can lead to a settlement that may provide inadequate consideration in exchange for the release of the class's claims. With early settlement, both parties have less information on the merits. That is, they have less information on the membership of the class, on the size of potential claims, on whether the settlement purports to resolve class or individual claims, on the strengths and weaknesses of the case, and on how class members will benefit from the settlement. *See* MCL 2d § 30.45, at 243-44; 2 NEWBERG & CONTE § 11.09, at 11-13. Without the benefit of more extensive discovery, both sides may underestimate the strength of the plaintiffs' claims.

Turning to the question of due process rights, we note that class members may, as a result of these information deficiencies, not be in a fair position at this early stage to evaluate whether or not the settlement represents a superior alternative to litigating. Perhaps more troubling in light of the reality that absentees tend to lack a real understanding of the actions supposedly pursued in their names is that, "where notice of the class action is ... sent simultaneously with the notice of the settlement itself, [the settlement class paradigm], the class members are presented with what looks like a fait accompli." *Mars Steel,* 834 F.2d at 680-81. Thus, even if they have enough information to conclude the settlement is insufficient and unsatisfactory, *see In re Beef Antitrust Litig.,* 607 F.2d 167, 173 n. 4 (5th Cir.1979), *cert. denied,* 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981), the mere presentation of the settlement notice with the class notice may pressure even skeptical class members to accept the settlement out of the belief that, unless they are willing to litigate their claims individually-- often economically infeasible--they really have no choice.

In a different vein, a number of cases have also criticized settlement classes on the grounds that they create an opportunity for "one-way intervention," allowing putative class members to wait to see whether they think the settlement is favorable before deciding whether they want to be bound by it. *See McDonald v. Chicago Milw. Corp.,* 565 F.2d 416, 420 (7th Cir.1977); *Watkins v. Blinzinger,* 789 F.2d 474, 475 n. 3 (7th Cir.1986) ("A deferred ruling [on certification] converts the class action to an opportunity for one- way intervention, which Rule 23 is designed to avoid...."); *Premier Electrical Constr. Co. v. National Elec. Contractors Ass'n, Inc.,* 814 F.2d 358, 363 (7th Cir.1987) (criticizing delay of certification). Because class members have the opportunity to wait until the outcome is known (i.e., the settlement's terms are determined) to decide whether they want to be bound by the result, courts and defendants are exposed to the same potential for multiple lawsuits that class actions are designed to avoid, and the supposed advantages of settlement classes are largely eroded.

Perhaps more troubling, the possibility of pre-certification negotiation and settlement may facilitate the filing of strike suits. Since settlement classes can involve a settlement achieved either before or after the filing of class claims, recognition of the settlement class device allows plaintiffs to file as class actions cases that counsel never intended to have certified, but instead only to settle the claims individually. *Mars Steel,* 834 F.2d at 681 ("[P]laintiffs will be tempted to add class claims in order to intimidate the defendant, then delete them by way of compromise."). Knowing that they would not face judicial scrutiny if they settle before certification, plaintiffs' lawyers face no deterrent from attempting to extract larger settlements by threatening class litigation than they could with the cases filed individually.

In many respects then, the failings of settlement classes are a function of the dearth of information available to judges attempting to scrutinize the settlements in accordance with their Rule 23(e) duties. Because the issue of certification is never actively contested, the judge never receives the benefit of the adversarial process that provides the information needed to review propriety of the class and the adequacy of settlement. This problem is exacerbated where the parties agree on a settlement of the case before the class action is filed, since a motion for certification ***790** and settlement are presented simultaneously.

Last, but by no means least, the use of settlement classes also risks transforming the courts into mediation forums. *See* Coffee, *supra* note 7, at A15. Cases could be filed without any expectation or intention of litigation, with the foreknowledge that the natural hydraulic pressure for settlement may in fact lead to a class settlement, especially given the incentive a defendant has to bind as many potential

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claimants as possible with an approved class settlement. Courts may approve these class settlements even if the case is highly inappropriate for class treatment, since judges confronting the reality of already over-taxed judicial resources, *see* Proposed Long Range Plan for the Federal Courts (March 1995) at 9-12, may feel constrained to dispose of such onerous litigation through the settlement class device. The losers in this type of scenario are not only inadequately represented class members but also the federal courts as an institution, because their resources are further sapped by entertaining cases that arguably do not belong there. [FN10] This increased burden will be especially problematic if the standards for certification are relaxed for settlement classes; as this appeal demonstrates, proceedings attendant to settlement class certification can consume considerable federal judicial time.

FN10. Because the parties do not come before the court until the action has settled, some courts have even expressed concern that such cases do not present a case or controversy for Article III purposes. *Cf. Carlough v. Amchem Prods., Inc.*, 834 F.Supp. 1437, 1462-67 (E.D.Pa.1993).

C. Arguments Favoring Settlement Classes

Although settlement classes are vulnerable to potent criticisms, some important dynamics militate in favor of a judge's delaying or even substantially avoiding class certification determinations. Because certification so dramatically increases the potential value of the suit to the plaintiffs and their attorneys as well as the potential liability of the defendant, the parties will frequently contest certification vigorously. As a result, a defendant considering a settlement may resist agreeing to class certification because, if the settlement negotiations should fail, it would be left exposed to major litigation. *See In re Beef Indus. Antitrust Litig.*, 607 F.2d at 177-78 ("[A blanket rule against settlement classes] may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification...."); *In re Baldwin-United Corp.*, 105 F.R.D. 475 (S.D.N.Y.1984).

In mass tort cases, in particular, use of a settlement class can help overcome certain elements of these actions that otherwise can considerably complicate efforts to settle. These hurdles include "the large number of individual plaintiffs and lawyers; ... the existence of unfiled claims by putative plaintiffs; and ... the inability of any single plaintiff to offer the settling defendant reliable indemnity protection...." Transgrud, 70 CORNELL L.REV. at 835. By using the courts to overcome some of the collective action problems particularly acute in mass tort cases, the settlement class device can make settlement feasible. The use of settlement classes can thus enable both parties to realize substantial savings in litigation expenses by compromising the action before formal certification. *See* 2 NEWBERG & CONTE § 11.09, at 11-13. Through settlement class certification, courts have fostered settlement of some very large, complex cases that might otherwise never have yielded deserving plaintiffs any substantial remuneration.

Settlement classes also increase the number of actions that are amenable to settlement by increasing the rewards of a negotiated solution, in at least four ways. First, the prospect of class certification increases a defendant's incentive to settle because the settlement would then bind the class members and prevent further suits against the defendant. Second, settlement classes may reduce litigation costs by allowing defendants to stipulate to class certification without forfeiting any of their legal arguments against certification should the negotiations fail. Third, because the payment of settlement proceeds, even relatively small amounts, may palliate class members, settlement can reduce differences among class members, and ***791** thus make class certification more likely, increasing the value of settlement to the defendant, since a larger number of potential claims can thus be resolved.

Fourth, the use of settlement classes reduces the probability of a successful subsequent challenge to the class-wide settlement. By treating the class as valid pending settlement, a temporary class facilitates notice to those persons whom the court might consider part of the class. The expanded notice afforded by access to the customary class action notification process protects both the absentees and the defendants by eliminating negotiations between the defendants and the named plaintiffs with respect to the class definition that could leave the defendant vulnerable to additional suits by absentees whose interests, a court later determines, were not adequately served or protected. 2 NEWBERG & CONTE § 11.27, at 11-40 (citing *Midland Mut. Life Ins. Co. v. Sellers*, 101 B.R. 921 (Bankr.S.D.Ohio 1989)). Increasing the certainty that the settlement will be upheld augments the value of settling to the defendant and consequently the amount defendants will be willing to pay. Thus,

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delaying certification, in contravention of a strict reading of Rule 23, encourages settlement, an important judicial policy, by increasing the prospective gains to the defendant (and thus potentially to the plaintiffs as well) from exploring a negotiated solution.

Moreover, critics of settlement classes may underestimate the safeguards that still inhere. Although courts are often certifying settlement classes with sub-optimal amounts of information, and without the full benefit of the processes meant to protect the absentees' interests, the provisional certification of a settlement class does *not* finally determine the absentees' rights. When the simultaneous notice of the class and the settlement is distributed to the proposed class, objecting class members can still challenge the class on commonality, typicality, adequacy of representation, superiority, and predominance grounds--they are not limited to objections based strictly on the settlement's terms. 2 NEWBERG & CONTE § 11.27, at 11-40 (citing *Midland Mut. Life Ins. Co. v. Sellers,* 101 B.R. at 921).

Furthermore, the view that, in settlement class cases, the court lacks the information necessary to fulfill its role as protector of the absentees, may reflect an assumption that the court's approval always comes early in the case. *See* 2 NEWBERG & CONTE § 11.27, at 11-43 to 11-44. While it often does, the certification decision is sometimes made later in the case, when the parties have presumably developed the merits more fully (in discovery or in the course of wrangling over the settlement terms) and when prior governmental procedures or investigations might have also yielded helpful information. *Id.* Whatever the timing of the certification ruling, the judge has the duty of passing on the fairness and adequacy of the settlement under Rule 23(e) and also of determining whether the class meets the Rule's requisites under 23(a). [FN11] Whether or not the court certifies the class before settlement discussions, these duties are the same. 2 NEWBERG & CONTE § 11.27, at 11-46.

FN11. We are somewhat dubious of the court's ability to discharge its duties completely under these circumstances. *See* Part IV.E *infra*.

Although a judge cannot presume that the putative class counsel actively represented the absentees' interests, the court can still monitor the negotiation process itself to assure that both counsel and the settlement adequately vindicate the absentees' interests. Thus, there is no reason to inflexibly limit the use of settlement classes to any specified categories of cases (for example, those cases with few objectors, those which do not involve partial settlements, [FN12] or those which do not involve an expanded class). Even apparently troublesome litigation activity, such as expanding the class just before settlement approval at the defendant's request, is no more free from judicial scrutiny in a settlement class context than it would be otherwise. The court still must give notice to the ***792** now-expanded class and satisfy itself that the requisites of class certification are met. *Id.* at 11-49. Since the party advocating certification bears the burden of proving appropriateness of class treatment, *Davis v. Romney,* 490 F.2d 1360 (3d Cir.1974), where the procedural posture is such that the court lacks adequate information to make those determinations, it can and should withhold the relevant approvals. 2 NEWBERG & CONTE § 11.27, at 11-46.

FN12. MCL 2d expressed concern about partial settlements (settlements only as to certain plaintiffs or certain defendants) since "[m]embers of the settlement class will almost certainly find it difficult to understand their position in the litigation." MCL 2d § 30.45.

But even if the use of settlement classes did reduce a judge's capacity to safeguard the class's interests, it does not necessarily impair the ability of absentees to protect their own interests. Individual class members retain the right to opt out of the class and settlement, preserving the right to pursue their own litigation. *See Premier Elec. Constr. Co. v. N.E.C.A., Inc.,* 814 F.2d 358 (7th Cir.1987) (criticizing settlement classes because they create opportunities for one-way intervention). In fact, the use of the settlement class in some sense enhances plaintiffs' right to opt out. Since the plaintiff is offered the opportunity to opt out of the class simultaneously with the opportunity to accept or reject the settlement offer, which is supposed to be accompanied by all information on settlement, the plaintiff knows exactly what result he or she sacrifices when opting out. *See* 2 NEWBERG & CONTE § 11.27, at 11-51. *See also In re Beef Indus. Antitrust Litig.,* 607 F.2d at 174.

In sum, settlement classes clearly offer substantial benefits. However, the very flexibility required to achieve these gains strains the bounds of Rule 23 and comes at the expense of some of the protections the

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rule-writers intended to construct. As Judge Schwarzer has explained,

> one way to see [the settlement class] is as a commendable example of the law's adaptability to meet the needs of the time--in the best tradition of the Anglo-American common law. But another interpretation might be that it is an unprincipled subversion of the Federal Rules of Civil Procedure. True, if it is a subversion, it is done with good intentions to help courts cope with burgeoning dockets, to enable claimants at the end of the line of litigants to recover compensation, and to allow defendants to manage the staggering liabilities many face. But as experience seems to show, good intentions are not always enough to ensure that all relevant private and public interests are protected. The siren song of Rule 23 can lead lawyers, parties and courts into rough waters where their ethical compass offers only uncertain guidance.

William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos,* CORNELL L.REV. (forthcoming).

D. Are Settlement Classes Cognizable Under Rule 23

Although not specifically authorized by Rule 23, settlement classes are not specifically precluded by it either; indeed, Judge Brieant has read subsection (d), giving the court power to manage the class action, as authorizing the creation of "tentative", "provisional", or "conditional" classes through its grant of power to modify or decertify classes as necessary. *See, e.g., In re Baldwin-United Corp.,* 105 F.R.D. 475, 478-79 (S.D.N.Y.1984). And because of the broad grant of authority in Rule 23(d), at least one commentator has noted that the validity of temporary settlement classes is usually not questioned. 2 NEWBERG & CONTE § 11.22, at 11-31. Courts apparently share this confidence. Indeed, one court believed that "[i]t is clear that the Court may provisionally certify the Class for settlement purposes." *South Carolina Nat'l Bank v. Stone,* 749 F.Supp. 1419 (D.S.C.1990).

[13][14] We believe that the "provisional" [FN13] or "conditional" [FN14] conception of the settlement class device finds at least a colorable textual basis in the Rule. Rule 23(d) enables ***793** a court to certify a class, if it complies with its duty to assure that the class meets the rule's requisites by making appropriate Rule 23 findings (*see* Part IV(E) *infra*). Some courts appear to have concluded that the built-in flexibility of the Rule, which enables the court to revisit the requisites and modify or decertify the class should its nature change dramatically during the negotiation process, renders it acceptable to determine class status after settlement and thus avoid scrutinizing and adjudicating class status at an earlier stage when the outcome is unknown. *See, e.g., In re Baldwin-United Corp.,* 105 F.R.D. at 483; *In re Beef Indus. Antitrust Litig.,* 607 F.2d at 177 ("[T]he Court finds that a conditional class should be certified for the purpose of considering the proposed settlements.")

> FN13. The terms "tentative" and "provisional" appear to be used interchangeably.

> FN14. "Conditional" is actually a term that can be properly applied to *all* class actions, even those that are certified in the normal process. Under Rule 23(c)(1), the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits. This capacity renders all certification orders conditional until the entry of judgment. *See* MCL 2d § 30.18.

Alternatively, some courts have conceived of settlement classes as a "temporary assumption" by the court to facilitate settlement. *See Mars Steel,* 834 F.2d at 680; *In re Beef Indus. Antitrust Litig.,* 607 F.2d at 177; 2 NEWBERG & CONTE § 11.27, at 11-50. The arguments of the late Herbert Newberg, one of the leading advocates of settlement classes, reflect an assumption that the Rule 23 determinations are merely postponed, not eliminated:

> On analysis, however, it would appear that this argument [that courts using settlement classes circumvent the need to test the propriety of the class action according to the specific criteria of Rule 23] may be rebutted by perceiving the temporary settlement class as nothing more than a tentative assumption indulged in by the court.... The actual class ruling is deferred in these circumstances until after hearing on the settlement approval.... At that time, the court in fact applies the class action requirements to determine whether the action should be maintained as a class action....

2 NEWBERG & CONTE § 11.27, at 11-50. [FN15] Newberg posits, therefore, that the temporary assumption conception of the settlement needs no special authorization since the court eventually follows the ordinary certification process, only

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deferring it until the settlement approval stage.

> FN15. *See also In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.Supp. 1379, 1388 n. 13 (D.Md.1983) ("Completely ancillary to the proposed settlement, [a temporary settlement class] lasts only as long as the period between the preliminary approval of the settlement and the court's final determination on the settlement. In effect, a temporary settlement class serves only as a procedural vehicle for providing notice to putative members of a proposed class....").

Courts have also relied on the more general policies of Rule 23--promoting justice and realizing judicial efficiencies--to justify this arguable departure from the rule.

> [T]he hallmark of Rule 23 is flexibility.... Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most Courts have recognized their utility and have authorized the parties to compromise their differences, including class action issues through this means.

Weinberger, 698 F.2d at 72-73. One commentator found implicit authorization for settlement classes under a settlement-oriented interpretation of Rule 23 :

> [Rule 23] provides that a court may certify a common question class action when it will prove "superior to other available methods for the fair and efficient adjudication of the controversy." A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words "adjudicating," the value of claims arising from a mass tort. As a result, if conditional certification of the case as a common question class action for settlement purposes would enhance the prospects for a group settlement, then Rule 23 authorizes certification.

Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 835 (1985) (footnotes omitted).

It is noteworthy that resistance to more flexible applications of Rule 23 has diminished over time. *See In re Taxable Mun. Bond Sec. Litig.*, 1994 WL 643142, *4 (E.D.La.1994) (commenting upon this trend). The evolution of the reception accorded settlement classes has manifested itself in the ***794** successive versions of the Manual for Complex Litigation. The first edition of the Manual criticized the initiation of settlement negotiations before certification, and discouraged all such negotiations. *See* MCL 1st § 1.46. The second edition recognizes the potential benefits of settlement classes but still cautioned that "the court should be wary of presenting the settlement to the class." MCL 2d § 30.45 at 243. The (draft) third version acknowledges that "[s]ettlement classes offer a commonly used vehicle for the settlement of complex litigation" and aims only to supervise rather than discourage their use. *See* MCL 3d § 30.45 at 192 (draft).

A survey of the caselaw confirms the impression that resistance to settlement classes has diminished: few cases since the late 1970's and early 1980's even bother to squarely address the propriety of settlement classes. Moreover, no court of appeals that has had the opportunity to comment on the propriety of settlement classes has held that they constitute a per se violation of Rule 23. *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir.1971) (finding no prohibition but granting absentees standing to appeal settlement approval); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir.1977) (describing how court approved combined notice of the pendency of the class and the terms of the proposed settlement); *In re Beef Indus. Antitrust Litig.*, 607 F.2d at 167; *Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir.1981) (upholding settlement despite pre-certification negotiations with some defendants); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir.1982); *Mars Steel*, 834 F.2d at 681 (criticizing settlement classes but ultimately approving settlement). But some courts recognize that this practice represents a significant departure from the usual Rule 23 scenario and thereby counsel that courts should scrutinize these settlements even more closely.

[15] We acknowledge that settlement classes, conceived of either as provisional or conditional certifications, represent a practical construction of the class action rule. Such construction affords considerable economies to both the litigants and the judiciary and is also fully consistent with the flexibility integral to Rule 23. A number of other jurisdictions have already accepted settlement classes as a reasonable interpretation of Rule 23 and thereby achieved these substantial benefits. Although we appreciate the concerns raised about the device, we are confident that they can be addressed by the

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rigorous applications of the Rule 23 requisites by the courts at the approval stages, as we discuss at greater length herein. For these reasons, we hold that settlement classes are cognizable under Rule 23.

E. Are the Rule 23(a) and (b) Findings Required for Settlement Classes? Does Finding the Settlement to Be Fair and Reasonable Serve as a Surrogate for the Findings?

[16] There is no explicit requirement in Rule 23 that the district judge make a formal finding that the requisites of the rule have been met in order to certify a class. However, most district judges have routinely done so, assuming that it was required, and in published opinions, a number of courts have endorsed or at least acknowledged the compelling policy reasons for doing so. *See, e.g., Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3d Cir.1985); *Plummer,* 668 F.2d at 659; *Interpace Corp. v. Philadelphia,* 438 F.2d 401, 404 (3d Cir.1971); MCL 2d § 30.13 ("The judge should enter findings and conclusions after the hearing, addressing each of the applicable requirements of Rule 23(a) and (b)."). For example, where there has been some dispute over certification, a court should give the litigants, particularly the absentees, some statement of the reasons for its decision. *Eisenberg,* 766 F.2d at 785. Articulated findings also simplify the review of complex cases generally. *Id.* With respect to settlement classes, we hold that courts must make the findings because the legitimacy of settlement classes depends upon fidelity to the fundaments of Rule 23. [FN16]

> FN16. This conclusion is supported by the text of Rule 23(e). That section provides that "class action" may not be compromised without court approval, and arguably a case is not a "class action" in the absence of such findings.

***795** Inasmuch as collusion, inadequate prosecution, and attorney inexperience are the paramount concerns in precertification settlements, *see Malchman,* 706 F.2d at 433; *Beef,* 607 F.2d at 174, the need for the adequacy of representation finding is particularly acute in settlement class situations, given the inquiry's purpose of detecting cases where there is a "likelihood that the litigants are involved in a collusive suit...." *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir.1968).

There appears to be no authority contra this practice. Indeed, the courts and commentators that have endorsed settlement classes have seemed to assume that the approving court made the requisite class determinations at some point. For example, Newberg's argument rebutting the charge that the "tentative assumption" of class status by the court to foster settlement evades the Rule's strictures continues:

> The actual class ruling is deferred in these circumstances until after [the] hearing on the settlement approval, following notice to the class. At that time, the court in fact applies the class action requirements to determine whether the action should be maintained as a class action....

2 NEWBERG & CONTE § 11.27, at 11-50. *See also Whitford v. First Nationwide Bk.,* 147 F.R.D. 135, 142 (WD Ky.1992) (disregarding even the possibility that these classes would not have to meet all of the normal certification requisites). Even the cases where the courts did not recognize a need to make the determinations demonstrate a heightened concern for fairness and a more cautious approach to settlement approval. *See Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 33 (3d Cir.1971) (court must be doubly careful where negotiation occurs before certification and designation of a class counsel); *Mars Steel,* 834 F.2d at 681 (applying a higher standard of fairness); *Simer v. Rios,* 661 F.2d 655, 664-66 (7th Cir.1981) (requiring a higher demonstration of fairness); *Weinberger v. Kendrick,* 698 F.2d 61, 69 (2d Cir.1982) (emphasizing the extensive discovery and ability and experience of counsel).

Some courts have certified settlement classes "without articulating or consciously applying Rule 23 tests." 2 NEWBERG & CONTE § 11.27 at 11-52. *See, e.g., Mars Steel,* 834 F.2d at 681 (suggesting that the certification procedure may not be necessary to combat the potential for abuse created by the use of settlement classes since that potential is "held in check by the requirement that the judge determine the fairness of the settlement ..."); *Weinberger v. Kendrick,* 698 F.2d at 73 (determination that proposed settlement is fair, reasonable, and adequate substitutes for Rule 23 findings); *In re Beef Indus. Antitrust Litig.,* 607 F.2d 167, 177 (5th Cir.1979); *City of Detroit v. Grinnell,* 495 F.2d 448, 464-65 (2d Cir.1974) (rejecting contention that the court erred when it approved a settlement and acquiesced in the settlement's assumption of the existence of a proper class). Some courts neglecting the findings have taken the view that the notice of proposed

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settlement, which must be preliminarily approved by the court, "carries the necessary implication that the action complies with Rule 23." *Beef,* 607 F.2d at 177.

We disagree both with this suggestion and with the conclusion that a fairness determination is a surrogate for Rule 23 findings. [FN17] Even if we set aside the problem of the court's inadequate information, the inquiry into the settlement's fairness cannot conceptually replace the inquiry into the propriety of class certification. Normally, a court makes the required commonality and typicality determinations by referencing the original class complaints in order to assure that the claims alleged by the named plaintiffs are common to the class (although the class need not share every claim in common, *Hassine v. Jeffes,* 846 F.2d 169, 177-78 (3d Cir.1988)), and that the claims alleged by the named ***796** plaintiff occupy approximately the same position of centrality to the named plaintiffs as they do to the rest of the class. *Weiss v. York Hosp.,* 745 F.2d 786, 810 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). Neither the existence of a settlement nor the terms of settlement affect the nature of this important inquiry.

FN17. We note in this regard that other courts have made the determinations of adequacy of representation and homogeneity of the class when evaluating the fairness of the settlement for the express purpose of assuring that they possess enough information to execute their Rule 23(e) duty. *See In re Beef Indust. Antitrust Litig.,* 607 F.2d at 173 n. 4 (quoting ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE (Federal Judicial Ctr.1977)); *see also In re Baldwin-United Corp.,* 105 F.R.D. 475, 483 (S.D.N.Y.1984) (making findings in the opinion which preliminarily approved the settlement).

[17][18] The Rule 23(a) class inquiries (numerosity, commonality, typicality, and adequacy of representation) constitute a multipart attempt to safeguard the due process rights of absentees. Thus, the ultimate focus falls on the appropriateness of the class device to assert and vindicate class interests. Conversely, however, the process of negotiation does not reveal anything about commonality and typicality. One might argue that these requisites are merely means to the end of vindicated rights, and that observing the process of negotiation could demonstrate adequate vindication--the true aim of the Rule. In our view, a court cannot infer that the rights of the *entire* class were vindicated without having assured that commonality and typicality were satisfied.

The 23(b)(3) determination is also important in the regulatory scheme. To be certified as a (b)(3) class, the judge must determine that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). [FN18] But the settlement approval inquiry is far different from the certification inquiry. In settlement situations, the superiority requirement arguably translates into the question whether the settlement is a more desirable outcome for the class than individualized litigation, and may assure that the settlement has not grossly undervalued plaintiffs' interests. But even if this is so, a point we neither concede nor decide, there remains the concern about conflicts between those appointed to represent class interests--the lawyers and named plaintiffs--and the rest of the class. These concerns, particularly acute with settlement classes, concentrate the focus of the certification inquiries on the representational elements.

FN18. As the case before us involves a damages class under Rule 23(b)(3), we do not address the application of the (b)(1) and (b)(2) requisites which, without the important right to opt out, involve different considerations.

Certainly, evaluating the settlement can yield some information relevant to the adequacy of representation determination under 23(a)(4). The settlement evaluation involves two types of evidence: a substantive inquiry into the terms of the settlement relative to the likely rewards of litigation, *see Weinberger,* 698 F.2d at 73; *Protective Comm. for Indep. Stockholders v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968), and a procedural inquiry into the negotiation process. The focus on the negotiation process results from the realization that a judge cannot really make a substantive judgment on the issues in the case without conducting some sort of trial on the merits, exactly what the settlement is intended to avoid. *See Malchman v. Davis,* 706 F.2d at 433. Instead, the court determines whether negotiations were conducted at arms' length by experienced counsel after adequate discovery, in which case there is a presumption that the results of the process

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adequately vindicate the interests of the absentees. *Weinberger,* 698 F.2d at 74; *City of Detroit v. Grinnell,* 495 F.2d at 463; *Baldwin-United Corp.,* 105 F.R.D. at 482 ("In order to supplement judicial examination of the substance of a compromise agreement, and because a court cannot conduct a trial in order to avoid a trial, attention must be paid to the process by which a settlement has been reached.").

Although the procedural focus on the fairness determination yields information pertinent to the adequacy of representation inquiry, it cannot fully satisfy the inquiry. That is because reliance on the negotiation process used to approve the settlement to satisfy the class certification requirements puts excessive pressure on the settlement approved determinations, and, more fundamentally, such a reliance may be circular. *Cf.* 2 NEWBERG & CONTE § 11.28, at 11-54 (suggesting a greater need for a court to carefully articulate ***797** its reasons for settlement approval where the class was not separately certified).

Courts approving settlements have examined the negotiating process in light of the "experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983) (citing *Weinberger,* 698 F.2d at 73; *Grinnell,* 495 F.2d at 465.). Some of these courts have suggested that the fact that vigorous, arm's length negotiations occurred should allay concerns about adequacy of representation. But these inferences depend on the implicit assumption that the lawyers actually negotiating really were doing so on behalf of the *entire* class, *see* 2 NEWBERG & CONTE § 11.28, at 11-59, assumptions which are clearly unjustified in a context where the potential for intra-class conflict further emperils the class's representation. Far too much turns on the adequacy of representation to accept it on blind faith.

Without determining that the class actually was adequately represented, the district judge has no real basis for assuming that the negotiations satisfactorily vindicated the interests of all the absentees. The focus on the negotiation process also cannot address the part of the adequacy of representation inquiry intended to detect situations where the named plaintiffs are unsuitable representatives of the absentees' claims. To state that class members were united in the interest of maximizing over-all recovery begs the question. Although that observation might allay some concern about a conflict between the attorney and the class, a judge must focus on the settlement's distribution terms (or those sought) to detect situations where some class members' interests diverge from those of others in the class. For example, a settlement that offers considerably more value to one class of plaintiffs than to another may be trading the claims of the latter group away in order to enrich the former group.

[19] In short, the prophylactic devices used by judges to approve these pre-certification settlements without ever formally certifying the class fail to satisfy the requirements of Rule 23. Without determining that the class claims are common and typical of the entire putative class and that the class representatives and their counsel are adequate representatives, we have no assurance that the district court fully appreciated the scope and nature of the interests at stake. [FN19] Finally, we note that courts adopting the view that the formal class determinations are not necessary for settlement classes may be contravening not only the language of the rule but also the Supreme Court's pronouncement in *General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982) (disapproving the trial court's insufficient scrutiny of the named plaintiff's capacity to adequately represent the class), that "[a]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable." Thus, while we approve the provisional certification of a settlement class to facilitate settlement discussions, final settlement approval depends on the finding that the class met all the requisites of Rule 23.

FN19. In *Malchman v. Davis,* 706 F.2d at 433, the court was satisfied by the district court's determination that the settlement class satisfied the adequacy of representation inquiry noting: "There is no doubt that the district court must make an independent evaluation of whether the named plaintiffs were adequate representatives of the class.... A judge has an obligation to consider whether the interest of the class are adequately represented." (citing *East Texas Motor Freight Sys., Inc. v. Rodriguez,* 431 U.S. 395, 403-06, 97 S.Ct. 1891, 1896-98, 52 L.Ed.2d 453 (1977)); *see also Plummer,* 668 F.2d at 659 & n. 4. We agree that this is an appropriate focus given the heightened potential for collusion, buy-offs, and other abuses in settlement class situations where the negotiations occur before the court

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appoints class representatives and counsel. We still believe, however, that courts should assure that settlement classes meet *all* of the requirements of 23(a) and (b). This prescription is consistent with the heightened duty of courts in class action settlements to assure that the absentees' rights are adequately protected.

F. Can There be a Valid Settlement Class That Would Not Serve as a Valid Litigation Class?

As we have previously explained, courts using the settlement class device must at some point definitively certify the class and satisfy themselves that the requisites of Rule 23 have been satisfied. To avoid that process ***798** entirely would dismantle the ruie's carefully constructed mechanism that serves to protect absentees' due process rights. Moreover, despite some courts' suggestions that the standards are less rigorous for settlement classes, we do not believe that Rule 23 authorizes separate, liberalized criteria for settlement classes.

At the outset we note that, while some other courts have nominally complied with the rule, they appear to have assumed that lower standards apply in settlement class cases. *See Officers for Justice v. Civil Serv. Comm'n of San Francisco,* 688 F.2d 615, 633 (9th Cir.1982), *cert. denied,* 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983) ("[C]ertification issues raised by class action litigation that is resolved short of a decision on the merits must be viewed in a different light."); *Fisher Bros. v. Phelps Dodge Indus. Inc.,* 604 F.Supp. 446, 450 (E.D.Pa.1985); *In re Dennis Greenman Sec. Litig.,* 829 F.2d 1539, 1543 (11th Cir.1987) ("In reviewing settlement certifications, a special standard has been employed."); *A.H. Robins,* 880 F.2d at 740 (in deciding whether to certify a class, settlement is at least an important factor in favor and might even be a per se ground for certification); MCL 2d at § 30.45. Other courts have stated that settlement reduces the potential conflicts among the class and thus enhances the likelihood of meeting the criteria, presumably the same criteria a litigation class must satisfy. *See, e.g., Bowling v. Pfizer, Inc.,* 143 F.R.D. 141, 159 (S.D.Oh.1992). Newberg is of this view. *See* 2 NEWBERG & CONTE § 11.28, at 11-58.

According to Newberg, though settlement does not impact the numerosity requirement it may indeed increase the likelihood of meeting the commonality and typicality inquiries. "Typicality of claims in a settlement class context requires proof that the interests of the class representative and the class are commonly held for the purposes of receiving similar or overlapping benefits from a settlement." 2 NEWBERG & CONTE § 11.28, at 11-58. On this theory, because the court has delayed the findings until the outcome of the litigation (i.e., the settlement agreement) is known, the judge conducts the inquiry based on the relative rewards to the class members rather than based on the various legal claims of class members. So long as all plaintiffs get similar benefits from the settlement, irrespective of the different strengths of their initial claims, the commonality and typicality inquiries are viewed as likely to be satisfied.

Under this approach, the adequate representation inquiry is also simplified in the settlement class context by a result-oriented approach toward the class requirement findings. Rather than asking whether the lawyers have sufficient resources and skills to prosecute the action (as would be the case with customary class certification procedures), courts, it is said, need only determine, in hindsight, whether the settlement was negotiated at arms' length, and whether the negotiations were long, thorough, and deliberative. *See In re Corrugated Container Antitrust Litig.,* 643 F.2d 195, 212 (5th Cir.1981) (adequacy judged by sufficiency of settlement); *In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 297, 341 (N.D.Ga.1993) (inequitable distribution). Courts adopting this approach require proof only that named plaintiffs' and class interests are not antagonistic. *See, e.g., Goodman v. Lukens Steel Co.,* 777 F.2d 113, 123 (3d Cir.1985) (relying on absence of conflict to find adequate representation); *Lewis v. Curtis,* 671 F.2d 779, 788 (3d Cir.1982) (finding named plaintiff an adequate representative despite small stake in litigation and ignorance of facts and claims); *Steiner v. Equimark Corp.,* 96 F.R.D. 603, 610 (W.D.Pa.1983) ("The key question [for the adequacy of representation inquiry] is whether their interests are antagonistic."). In these cases, courts have effectively relied on the settlement's terms--the outcome of the action--to find the required absence of antagonism. [FN20]

FN20. For example, in finding adequate representation, one court noted: "[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible

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recovery for the class, the class interests are not antagonistic for representation purposes." *In re Corrugated Container Antitrust Litig.*, 1980-1 Trade Cas. (CCH) ¶ 63,163 at 77,788 n. 10, 1979 WL 1751 (S.D.Tex.1979), *aff'd*, 643 F.2d 195 (5th Cir.1981) (citing WRIGHT & MILLER, FED. PRACTICE & PROCEDURE CIVIL § 1768, at n. 7 & 8).

***799** [20][21][22] We disagree with this approach, championed primarily by Newberg. There is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes. [FN21] Although we acknowledge the need for flexible interpretation of Rule 23 to enable it to achieve its broader purposes of vindicating difficult individual claims and conserving judicial resources, *see Beef*, 607 F.2d at 177-78 (discussing the policy needs for flexibility); *Ace Heating*, 453 F.2d at 33 (recognizing need to give small claimants who did not opt out the right to appeal a settlement approval), we emphasize that Rule 23 is designed to assure that courts will identify the common interests of class members and evaluate the named plaintiffs' and counsel's ability to fairly and adequately protect class interests. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 757 (3d Cir.1974). Thus, actions certified as settlement classes must meet the same requirements under Rule 23 as litigation classes. To allow lower standards for the requisites of the rule in the face of the hydraulic pressures confronted by courts adjudicating very large and complex actions would erode the protection afforded by the rule almost entirely.

FN21. Indeed, if any difference in standards is warranted, pre- certification settlement may raise the adequacy of representation standard. Since this inquiry must ascertain "whether there has been any collusion or undue pressure by the defendants on would be class representatives," *see First Comm. Corp. of Boston Consumer Accts. Litig.*, 119 F.R.D. 301, 308 (D.Mass.1987); *Alvarado Partners LP v. Mehta*, 723 F.Supp. 540, 546 (D.Colo.1989), it must carry greater weight in the settlement class context where there is an enhanced potential for those evils. Thus, while the other 23(a) findings remain important when the action settles, the need to assure an absence of collusion and an alignment of interests assumes an especially crucial role. Reliance, for the class requisites analysis, on the settlement's terms and process also increases the importance of an independent conclusion of adequate representation (i.e., one not derived solely by reference to the nature of the negotiations).

Judge Posner has explained the animating concern behind this strict application. "The danger of a premature, even a collusive, settlement is increased when as in this case the status of the action as a class action is not determined until a settlement has been negotiated, with all the momentum that a settlement agreement generates...." *Mars*, 834 F.2d at 680.

The foregoing discussion has focused on adequacy of representation, but the presence of commonality and typicality are equally important to the class action regime. Certifying a class without the existence of questions common to the class (or where the class representatives' claims are not typical) perverts the class action process and converts a federal court into a mediation forum for cases that belong elsewhere, usually in state court. On the other hand, the cases that make the settlement class device appear most useful are cases presenting the most unwieldy substantive and procedural issues, i.e., those diversity cases in which plaintiffs from many states are confronted with differing defenses, differing statutes of limitations, etc.--precisely those cases that stretch the Rule to its outer-most limits.

This is a troublesome issue--and a close one. Many mass tort actions have this problem. The School Asbestos cases and the Breast Implant cases had it, and this case does, as well. It may initially seem difficult to envision an actual trial of these cases because of the differing defenses certain to be raised under the various bodies of governing law. While the problem may be overstated, [FN22] settlement classes still serve the useful purpose of ridding the courts--state and federal--of these litigation albatrosses even though the case may never have been triable in class form. But if that were the primary function of the settlement class, the federal courts would have become a mediation forum, a result inconsistent with their mission and limited resources. In sum, "a class is a class is a class," and a settlement class, if it is to qualify under Rule 23, must meet all of its ***800** requirements. The district court should keep these matters in mind on remand.

FN22. In the *School Asbestos* case, 789 F.2d at 996, the panel asked counsel to analyze all the claims and defenses and write a report reflecting whether the differing claims and defenses

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evidence a small number of patterns that would be amenable to trial through a series of special verdicts. The plaintiffs came up with a demonstration that the claims and defenses were reducible to four patterns. That, in our view, was sufficient to satisfy the commonality and typicality inquiries. The same might be true in this case.

V. IS THE SETTLEMENT CLASS PROPER HERE?

A. Were There Adequate Findings Under Rule 23(a)?

Certain of the objectors in this case contend that the district court committed plain error by never actually certifying the class as required by Rule 23. *See* Brief of French Objectors at 18. This, of course, would be a serious error, since without certification there is no class action, and "[i]n a settlement entered without class certification the judgment will not have res judicata effect on the claims of absent class members." *Simer v. Rios,* 661 F.2d 655, 664 (7th Cir.1981).

[23] The district court certified the class provisionally in a pretrial order. *See* Pretrial Order No. 7. We have already noted that provisional certification constitutes an acceptable means of facilitating settlement negotiations. *See* 2 NEWBERG & CONTE § 11.27, at 55-56. It appears that the court believed that it certified the class by "confirming" the provisional certification in its order approving the settlement. However, the court did not make the findings we today hold that Rule 23 requires, not even upon approving the settlement. Because we hold that courts employing settlement classes must still make findings that the class complies with Rule 23(a) and the appropriate parts of Rule 23(b), the court's failure to comply with the rule in this respect is a plain error of law, and hence an abuse of discretion, requiring that the certification be set aside.

Our conclusion that the settlement class was not properly certified does not mean that the class could not be certified on remand. Accordingly, we must consider whether the existing record is adequate to support class certification, or whether further record development is required.

B. Could the Class Requisites Have Been Met on the Current Record?

1. Numerosity, Commonality, and Typicality

[24] As we have explained, a class action--whether certified for settlement or litigation purposes--must meet the class requisites enunciated in Rule 23. The district court did not make findings on these issues. The numerosity requirement of Rule 23(a) is plainly satisfied in this action encompassing nearly six million truck owners. The commonality and typicality inquiries of 23(a), however, raise substantial concerns about the sufficiency of this class. The record currently lacks the facts needed to establish these requisites, and the defendants also ardently maintain that the applicability of different defenses to different groups of plaintiffs would prevent the class from satisfying the commonality and typicality requirements. At this juncture, we leave open the possibility that, on remand, the district court may indeed find facts sufficient to support these elements.

2. Adequacy of Representation

a. The Situation of the Fleet Owners

[25][26] This settlement class appears to fail to meet Rule 23(a)'s adequacy of representation test. The **adequacy of representation** inquiry has two components intended to assure that the absentees' interests are fully pursued: **it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees',** and it tests the qualifications of the counsel to represent the class. *See Weiss v. York Hospital,* 745 F.2d 786, 811 (3d Cir.1984); 2 NEWBERG & CONTE § 11.28, at 11-58. On the first prong, we are not satisfied that the interests of various class members were sufficiently aligned; indeed the settlement appears to create antagonism within the class. While some courts have been satisfied that there is no intra-class conflict where "all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class," *In re Corrugated Container Antitrust Litig.,* 1980-1 Trade Cas. (CCH) ¶ 63,163 at 77,788 n. 10 (S.D.Tex.1979), *aff'd.,* 643 F.2d 195 (5th Cir.1981), we disapprove such a myopic focus on the settlement terms.

In this case in particular, the conclusion that the settlement--which (supposedly) maximized class recovery--satisfied the requirement that class members' interests not ***801** be antagonistic ignores the conspicuous evidence of such an intra-class conflict in the very terms of this settlement. The substantial impediments to fleet owners' using these certificates creates a conflict between their interests

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in this settlement and those of individual owners. (The named plaintiffs are all individual owners.) Moreover, the dubious value of the transfer option, *see* Part VI.A.1.c *infra,* one of the principal responses to the fleet owners' objection, does little to reduce the disparity in the prospective value to the different sections of the class.

This is not a case where some plaintiffs share the prospect of a future claim with other class members who currently have such a claim. The fleet owners will never enjoy the benefits of the settlement terms, such as the intra- household transfer option, intended specifically for the benefit of individual owners. Thus, we must be concerned that the individual owners had no incentive to maximize the recovery of the government entities; they could skew the terms of the settlement to their own benefit. Not surprisingly, the settlement leaves fleet owners with significantly less value than individual owners. At the very least, the class should have been divided into sub- classes so that a court examining the settlement could consider settlement impacts that would be uniform at least within the sub-classes.

b. Did Counsel Adequately Represent the Interests of the Entire Class?

The other aspect of the adequacy of representation test, whether counsel are qualified and serve the interests of the entire class, also gives us reason to pause. Courts examining settlement classes have emphasized the special need to assure that class counsel: (1) possessed adequate experience; (2) vigorously prosecuted the action; and (3) acted at arm's length from the defendant. *See, e.g., Malchman,* 706 F.2d at 433; *Alvarado Partners,* 723 F.Supp. at 546. The first criterion is no problem, for these counsel clearly possess the experience and skills to qualify them to pursue these sorts of actions. But the second and third points require attention in view of the lack of significant discovery and the extremely expedited settlement of questionable value accompanied by an enormous legal fee.

Before addressing the latter points, it is necessary to begin with some legal theory discussing the structural nature of fee arrangements in class actions of this type, having in mind that even honorable counsel--like class counsel here--may be compromised by the possibility of a large fee.

(1) Class Action Attorneys' Fees Theory and Structure

[27][28] Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed. *See* 2 NEWBERG & CONTE § 11.65, at 11-183; *Greenfield v. Villager Indus., Inc.,* 483 F.2d 824, 832 (3d.Cir.1973). The large fees garnered by some class lawyers can create the impression of an ethical violation since it may appear that the lawyer has an economic stake in their clients' case. But class actions cannot be analyzed in the same framework as conventional bipolar litigation. Because of the collective action problems associated with cases where individual claims are relatively small, *see* 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *Federal Practice and Procedure* § 1754, at 49, and the social desirability of many class suits (the private enforcement model), *id.* at 51; *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194 (7th Cir.1971), large attorneys' fees serve to motivate capable counsel to undertake these actions. Thus, large fee awards standing alone do not suffice to show that the representation was inadequate or unethical. These allowances generally reflect the realization that the lawyer represents numerous individuals with somewhat varying interests, not acceptance of a situation where the lawyer's personal interests trump the interests of the entire class.

Some commentators blame the system of compensating class action lawyers in a manner that fails to confront fully the differences between class action litigation and elassical bipolar litigation for creating incentives that diverge markedly and predictably from their clients' interests. The leading critic is Professor Coffee. *See* John C. Coffee, Jr., ***Understanding*802 the Plaintiff's Attorney: The Implications of Economic Theory For Private Enforcement of Law Through Class and Derivative Actions,*** 86 COLUM.L.REV. 669, 671-72 (1986) (noting that critics "have argued that the legal rules governing the private attorney general have created misincentives that unnecessarily frustrate the utility of private enforcement. These critics have focused chiefly on the conflicts that arise between the interests of these attorneys and their clients in class and derivative actions....") [hereinafter *Understanding the Plaintiff's Attorney*]; *id.* at 677 ("Ultimately, the most persuasive account of why class actions frequently produce unsatisfactory results is the hypothesis that such actions are uniquely vulnerable to collusive

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settlements that benefit plaintiff's attorneys rather than their clients."); John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working,* 42 MD.L.REV. 215 (1983); John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation* 48 LAW & CONTEMP. PROBS. 5 (Summer1985); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee,* 63 CORNELL L.REV. 529 (1978); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingency Fee in Personal-Injury Litigation,* 22 STAN.L.REV. 1125 (1970).

Economic models have shown how conventional methods of calculating class action fee awards give class counsel incentives to act earlier than their clients would deem optimal. *See* Coffee, *Understanding the Plaintiff's Attorney,* 86 COLUM.L.REV. at 688. Because, under a percentage of recovery award mechanism, the attorneys will only enjoy a relatively small portion of whatever incremental award they can extract from the defendant, the defendant can pressure the plaintiffs' attorney into early settlement by threatening to expend large sums on dilatory tactics that would run the expenses up beyond what plaintiffs' attorneys can expect to profit. *Id.* at 690. Rather than presenting a possible solution, the lodestar method seemingly exacerbates the problem of cheap settlement by divorcing the fee award from the settlement's size, since plaintiffs' attorneys have no incentive to take the risk on a trial for a potentially larger award to the class where their own fees will not necessarily reflect the greater risk taken at trial. *See also id.* at 718 (discussing how lodestar method may create structural collusion).

Coffee also blames the principal-agent problem endemic to class actions for creating a situation where the defendants and plaintiffs can collusively settle litigation in a manner that is adverse to the class's interest: "At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees. Although courts have long recognized this danger and have developed some procedural safeguards intended to prevent collusive settlements, these reforms are far from adequate to the task." *Id.* at 714 n. 121 (citing cases). A number of commentators have identified settlements that afford only nonpecuniary relief to the class as prime suspects of these cheap settlements. *See* Coffee, *Understanding The Plaintiff's Attorney,* 86 COLUM.L.REV. at 716 n. 129; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorneys Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U.CHI.L.REV. 1, 45 n. 10 (1991); Nancy Morawetz, *Bargaining, Class Representation, and Fairness,* 54 OHIO ST.L.J. 1, 5 n. 40 (1993).

While courts may fail to appreciate adequately the distinction between conventional bipolar litigation and class actions in many respects, they may over-emphasize these differences in other respects. To be sure, courts will be willing to award fees in class actions that would appear extraordinary and arguably improper in conventional litigation. Nevertheless, some of the critiques based on ethical or collusive concerns remain instructive. Although subsequent versions seem to avoid a discussion, the Manual for Complex Litigation (First) acknowledged the potential for attorney-class conflict. It condemned fees that are paid separate and apart from the settlement funds paid to the class because amounts "paid by the defendant(s) are properly part of the settlement funds and should be known and disclosed at the time the fairness of the settlement is considered." MCL 1st § 1.46.

***803** One court has noted that the "effect of such an arrangement [where the counsel fees are not resolved and the details not included in the class notice] may be to cause counsel for the plaintiffs to be more interested in the amount to be paid as fees than in the amount to be paid to the plaintiffs." *In re General Motors Corp. Engine Interchange,* 594 F.2d at 1131. Commentators have also noted how, where there is an absence of objectors, courts lack the independently-derived information about the merits to oppose proposed settlements. *See* Coffee, *Understanding the Plaintiff's Attorney,* 86 COLUM.L.REV. at 714 n. 131. Of course, by endorsing a practice where the class is, for practical purposes, deprived of information concerning the fees, courts foster a situation where there will be fewer objectors. [FN23]

FN23. The information on fee agreements may prompt potential objectors to oppose not only the awards but, also, to the extent they conclude that arm's length negotiations were compromised, the adequacy of the settlement and the propriety of the class.

(2) The Stewardship of Counsel Here

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[29] A number of factors militate against the conclusion that the class's interests were sufficiently pursued here. First, the settlement arguably did not maximize the class members' interests. Every owner received a coupon whose value could only be realized by purchasing a new truck. Significant obstacles existed to the development of a secondary market in the transfer certificates given that the transfer restrictions and the certificates' limited lifespan minimize the value of the transfer option. Second, class counsel effected a settlement that would yield very substantial rewards to them after what, in comparison to the $9.5 million fee, was little work.

Third, the fact that the settlement involves only non-cash relief, which is recognized as a prime indicator of suspect settlements, increases our sense that the class's interests were not adequately vindicated. The separate negotiation of the fee agreement and the failure to disclose the amount of the award in the class notice only enhance this sense that counsel may have pursued a deal with the defendants separate from, and perhaps competing for the defendant's resources with, the deal negotiated on behalf of the class. And although the degree to which a settlement hurts a defendant is not ordinarily a measure of the settlement's adequacy, the fact that this settlement might actually benefit GM by motivating current owners to buy new trucks from the company (the settlement may arguably be viewed as a GM sales promotion device) certainly does little to allay the concern that the settlement did not advance the interests of the class as much as it might have.

Fourth, our concern about the vigor of counsels' prosecution of the class claims, specifically the possibility that counsel did not do right by the class, is buttressed by the legacy of *Prandini v. National Tea Co.,* 557 F.2d 1015, 1021 (3d Cir.1977). In *Prandini,* this court recognized the potential for attorney-class conflicts where the fees, while ostensibly stemming from a separate agreement, were *negotiated* simultaneously. We characterized simultaneity of fee and settlement negotiations as a "situation ... having, in practical effect, one fund divided between the attorney and client." *Id.* To respond to this danger of collusion between the class counsel and defendant, *Prandini* and the Third Circuit Task Force Report on court-awarded attorneys' fees disapproved fee discussions until after the achievement and approval of settlement. *See Prandini,* 557 F.2d at 1021; *Court Awarded Attorney's Fees, Report of the Third Circuit Task Force,* 108 F.R.D. 238, 266 (1985) [hereinafter *Task Force*]. [FN24]

> FN24. Other cases and authorities have followed this guide. *See, e.g., Ashley v. Atlantic Richfield Co.,* 794 F.2d 128 (3d Cir.1986); MCL 2d § 30.41; 2 NEWBERG & CONTE § 11.29, at 11-62 (recognizing potential for conflict where settlement and fees to be paid by defendant simultaneously negotiated). To implement this prophylactic bar fully, courts would have to require class counsel to disclose all understandings as to fees, not simply concluded, formal agreements. *See* MCL 2d § 34.42, at 237-39. Although it recognized that this prophylactic rule could impede some settlements by making it impossible for the defendant to size up its total liability (i.e. the sum of the settlement amount and any fees the defendant agrees to pay), *Task Force,* 108 F.R.D. at 267-69, the Task Force concluded that avoiding the conflicts justified this cost.

***804** In this case, there were strong indications that such simultaneous negotiations in fact transpired. Indeed, there was evidence in a letter from class counsel that at least some portion of the fees and expenses had to have been negotiated simultaneously with the settlement. The court justified its dismissal of the allegation of simultaneous negotiation by citing (1) a statement in the letter that the "attorneys' fees were negotiated separately, after we agreed on everything else," and (2) GM's reservation of the right to contest any award of fees that it deemed unreasonable. Even though we assume that these are factual findings, thus ordinarily deserving deference, we think these findings were made by reference to an erroneous legal standard. Indeed, neither of these bases is persuasive, especially in view of GM's acquiecence in a patently baseless ground for augmenting the counsel fee, *see* Part VII *infra.*

In considering the adequacy of representation, we are loath to place such dispositive weight on the parties' self-serving remarks. And even if counsel did not discuss fees until after they reached a settlement agreement, the statement would not allay our concern since the *Task Force* recommended that fee negotiations be postponed until the settlement was judicially approved, not merely until the date the parties allege to have reached an agreement. We recognize that *Evans v. Jeff D.,* 475 U.S. 717, 734-38, 106 S.Ct. 1531, 1541- 43, 89 L.Ed.2d 747

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(1986), overruled *Prandini's* strict rule prohibiting simultaneous negotiations. However, many of the concerns that motivated the *Prandini* rule remain, and we see no reason why *Jeff D.* or its underlying policy of avoiding rules that impede settlement preclude us from considering the timing of fee negotiations as a factor in our review of the adequacy of the class's representation. Consequently, the likelihood that the parties did negotiate the fees concurrently with the settlement in this case increases our concern about the adequacy of representation. [FN25]

FN25. While the parties could have sought a waiver pre-approving simultaneous negotiations, *Task Force* at 269, the parties did not seek one here.

Nor would GM's reservation of the right to appeal the fee award establish that the fee was negotiated separately since the likelihood that GM would want to contest an award based on a fee petition to which it agreed is quite small. The fact is confirmed by GM's "lay down" position with respect to the fee application. Although the Supreme Court clearly invalidated the use of multipliers in lodestar awards in 1992, *see City of Burlington v. Dague,* 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), GM did not apprise the district court of this fact when it was approving the fee award, or complain when the district court used a multiplier in the calculations. This posture of GM suggests that its reservation of the right to appeal the fee award should not be given great weight in determining whether the settlement and attorneys' fee were negotiated separately. But we hasten to add that we have not resolved these factors. We only hold today that the court did not make the necessary findings, and we remand to the district court so that it can make the necessary Rule 23 findings.

The thrust of the foregoing discussion is that the circumstances under which the settlement evolved, made possible by the settlement class device, may have compromised class counsel in a manner raising doubts as to adequacy of representation. The district court will examine this aspect of the matter on remand. Perhaps, on a more developed record, the adequacy of representation will be established. These concerns underscore the importance of having the district court make Rule 23 findings. Although we do not believe that the class would meet the requirements for certification on the current record, we do not preclude the possibility that certification could be properly supported on a more developed record. Thus, we will remand this action to the district court so that it can re-examine the class certification and the settlement and, if appropriate, certify the class by making the findings required by Rules 23(a) and (b).

VI. IS THE SETTLEMENT FAIR, REASONABLE, AND ADEQUATE?

[30][31] Invoking the correct standard of review under *Girsh v. Jepson,* 521 F.2d 153, ***805** 157 (3d Cir.1975), the objectors also argue that the district court abused its discretion when it approved the settlement as fair, reasonable, and adequate. Because we leave open the possibility that the district court may on remand properly certify the class pursuant to Part V of this opinion, we address the district court's approval of the settlement. Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring that the settlement represents adequate compensation for the release of the class claims. *See* 2 NEWBERG & CONTE § 11.46, at 11-105 to 11-106. Some courts have described their duty under Rule 23(e) as the "fiduciary responsibility" of ensuring that the settlement is fair and not a product of collusion. *In re Warner Commun. Sec. Litig.,* 798 F.2d 35, 37 (2d Cir.1986); *see also Plummer v. Chemical Bank,* 668 F.2d 654, 658 (2d Cir.1982); *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir.), *cert. denied,* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); *Alvarado Partners L.P. v. Mehta,* 723 F.Supp. 540, 546 (D.Colo.1989). At all events, where the court fails to comply with this duty, absentees have an action to enjoin the settlement. 2 NEWBERG & CONTE § 11.23.

In order for the determination that the settlement is fair, reasonable, and adequate "to survive appellate review, the district court must show it has explored comprehensively all relevant factors." *Malchman,* 706 F.2d at 434 (citing *Protective Committee,* 390 U.S. at 434, 88 S.Ct. at 1168; *Plummer,* 668 F.2d at 659). A number of courts have recognized the need for a special focus on precluding the existence of collusion. *See Malchman,* 706 F.2d at 433 (advocating a focus on the negotiation process to uncover possible collusion); *General Motors Interchange,* 594 F.2d at 1125 (finding a need for heightened scrutiny of the settlement stemming from the potential for collusive settlement).

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The topic of class action settlement has received much attention, which is understandable given the growing frequency of the settlement of increasingly large claims through the class action device. *See In re A.H. Robins Co.*, 880 F.2d 709, 739-40 (4th Cir.1989) (discussing the use of the device to settle various mass tort cases); *In re Taxable Municipal Bond Sec. Litig.*, 1994 WL 643142 at *5 (noting the dramatic change in attitudes of courts and commentators toward the settlement class). The drive to settle class actions has also grown, notwithstanding the potential for collusive settlements to compromise absentee interests. Courts undertaking the special role of supervising class action settlements are apparently heeding the public policy in favor of settlement, *see* 2 NEWBERG & CONTE § 11.41, at 11-85, and acknowledging the urgency of this policy in complex actions that consume substantial judicial resources and present unusually large risks for the litigants.

We have already noted the special difficulties the court encounters with its duties under Rule 23(e) in approving settlements where negotiations occur before the court has certified the class. Because of such difficulties, many courts have required the parties to make a higher showing of fairness to sustain these settlements. *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir.1971) ("[W]hen the settlement is not negotiated by a court designated class representative the court must be doubly careful in evaluating the fairness of the settlement to the plaintiff's class."); *General Motors Interchange*, 594 F.2d at 1125 (attributing a need for heightened scrutiny of the settlement to the potential for collusive settlement); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982) (higher showing of fairness required in pre-certification settlements, and special focus on assuring adequate representation and the absence of collusion); *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir.1983); *Mars Steel v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 681 (7th Cir.1987); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir.1990); 2 NEWBERG & CONTE § 11.23; MCL 2d § 30.42 (citing the informational deficiencies faced by the court and counsel in pre-certification settlements). We affirm the need for courts to be even more scrupulous than usual in approving settlements where no class has yet been formally certified.

Settlements that have survived this heightened standard have involved much stronger ***806** indications of sustained advocacy by the de facto class counsel than we observe in this case. *See Weinberger*, 698 F.2d 61 (settlement discussions did not commence until after four years of discovery supplemented by another investigation by a trustee and after plaintiffs rejected first settlement offer); *In re Beef Indus. Antitrust Litig.*, 607 F.2d at 177-78 (settlement discussions began after six months of discovery; action pending for three years, court fully briefed); *City of Detroit v. Grinnell*, 495 F.2d 448, 464 (2d Cir.1974) (approving settlement after several counsel vied for position for four years and voiced strenuous objections, explaining that Manual's concerns about settlement classes articulated by the Manual for Complex Litigation only pertained to settlement in the early stages of litigation); *cf. Plummer*, 668 F.2d 654 (rejecting settlement where plaintiffs' counsel relied on information voluntarily furnished by defendants).

There are certain basic questions that courts can ask to detect those cases settled in the absence of sustained effort by class representatives sufficient to protect the interests of the absentees. *See* MCL 2d § 30.41. For instance: Is the relief afforded by the settlement *significantly* less than what appears appropriate in light of the preliminary discovery? Have major causes of action or types of relief sought in the complaint been omitted by the settlement? Did the parties achieve the settlement after little or no discovery? Does it appear that the parties negotiated simultaneously on attorneys' fees and class relief? Even acknowledging the possibility of some overpleading, these questions raise a red flag in this case.

With the courts' heightened duty to scrutinize this pre-certification settlement and some of these rudimentary indicators in mind, we now apply our nine-factor *Girsh* test, *see* Part III *supra*, and conclude from the balance of these factors that the district court's conclusion that the settlement was fair and reasonable constitutes an abuse of discretion. Coincidentally, this result tracks the conclusions of a Texas appeals court that, based on an analysis similar to that of *Girsh*, set aside an order approving a substantially identical settlement of similar claims brought by residents of Texas. *See Bloyed v. General Motors*, 881 S.W.2d at 422.

A. Adequacy of Settlement--General Principles

[32][33] This inquiry measures the value of the settlement itself to determine whether the decision to

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settle represents a good value for a relatively weak case or a sell-out of an otherwise strong case. The *Girsh* test calls upon courts to make this evaluation from two slightly different vantage points. According to *Girsh,* courts approving settlements should determine a range of reasonable settlements in light of the best possible recovery (the eighth *Girsh* factor) and a range in light of all the attendant risks of litigation (the ninth factor). *See Girsh v. Jepson,* 521 F.2d at 157; *see also Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir.1983) (identifying a similar test); *City of Detroit v. Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir.1974) (same).

[34][35] In formulaic terms we agree that "in cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." MCL 2d § 30.44, at 252. This figure should generate a range of reasonableness (based on size of the proposed award and the uncertainty inherent in these estimates) within which a district court approving (or rejecting) a settlement will not be set aside. *See Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.1972). The evaluating court must, of course, guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution. *See Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir.1977). The primary touchstone of this inquiry is the economic valuation of the proposed settlement.

[36] We turn to this analysis. As will appear, the district court's conclusion that the settlement was within the range of reasonableness rests heavily on the proposition that the class had never proven any diminution in value of the trucks. It ignored the fact that the coupons provided no cash value ***807** and made no provision for repairing the allegedly life- threatening defect. For the reasons that follow, we believe that the district court did not sufficiently scrutinize the valuations of the settlement, and that, on this record, the settlement appears to be inadequate. Consequently, we will conclude that the district court erred when it found that the settlement fell within the range of reasonableness.

1. Valuation of the Settlement--Introduction

The value of the $1,000 certificates is sharply disputed. GM argues that the certificates are worth close to their face value since they can be redeemed for a broad array of GM trucks and can be used in combination with dealer incentives. For those unable or unwilling to purchase another GM truck, GM argues, cash can be realized from transferring the certificate within the household for full value or selling the certificate for $500. Plaintiffs presented an expert, Dr. Itmar Simonsen, who placed the value of the certificates between $1.98 and $2.18 billion, based on an estimate that 34% to 38% of the class would redeem the certificate in purchasing a new truck and an additional 11% of the class would sell their certificates for $500. Objectors contest these estimates and many of the assumptions used to generate them.

We therefore analyze several of the foundations for the district court's evaluation. First, we inquire about the reliability of plaintiffs' witness's valuation. Second, we explore the adequacy of the district court's consideration of the possibility that some class members would not be able to use the coupons at all. Third, we inquire as to whether the quite significant restrictions on transfer of the certificates present obstacles to the development of a market so as to render the estimates of their worth unreasonably inflated. Finally, we consider whether the size of the attorneys' fees agreement suggests that GM attached a greater value to the class claims than proponents of the settlement would have us believe. These factors lead ineluctably to the conclusion that the district court overvalued this settlement, which in turn gives credence to the contention of the objectors that the proffered settlement was, in reality, a sophisticated GM marketing program.

a. Plaintiffs' Witness Dr. Itmar Simonsen

Dr. Simonsen's methods and assumptions raise serious doubts about the reliability of the valuations they generated. Although Simonsen's conclusion was based on his estimate that between 34% and 38% of the class members would use the certificate, his own telephone survey revealed that only 14% of the class reported that they would "definitely" or "probably" buy a new truck. Apparently Simonsen only excluded those who responded that they would "definitely not buy" or "probably not buy" a new truck, a methodological choice which is questionable. Furthermore, Simonsen discounted the statistics by seemingly arbitrary factors in an effort to be "conservative," but without some basis

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or explanation for the derivation of those factors, we have no way of judging whether they were conservative or aggressive.

Even more importantly, the raw survey data probably overstate the prospects that the certificates will be used since there are substantial obstacles to obtaining and transferring the certificates, none of which Simonsen deals with. Finally, Simonsen supposed that a higher percentage of fleet owners than individual owners would redeem the certificates, but this seems to disregard the statutory and regulatory constraints that often restrict fleet buyers' purchase decisions. Indubitably all of these concerns reduce the value of the settlement, yet Simonsen appears simply to have multiplied his estimated number of users by the coupon amount or transfer value.

On the other hand, although various objectors have made a good argument that the net value of the certificates will also be eroded by rising truck prices (which would allegedly be influenced both by the huge number of certificates that would need to be redeemed within a relatively brief time and by the fact that dealers may take advantage of customers they know to be somewhat tied to the purchase of a GM truck by their desire to realize value from the coupon), we will, to be conservative, not take this factor into account. ***808** Even so, Simonsen's methodology undermines his conclusion to the extent that his valuation cannot support the settling parties' case.

b. Inability of Class Members to Use Certificates

[37] The district court also erred by not adequately accounting for the different abilities (not inclinations) of class members to use the settlement. One sign that a settlement may not be fair is that some segments of the class are treated differently from others. *See Piambino v. Bailey,* 610 F.2d at 1329; *In re GM Corp. Engine Interchange Litig.,* 594 F.2d at 1128; MCL 2d § 30.41, at 236. Consequently, the fact that the coupon settlement benefits certain groups of the class more than others suggests that the district court did not adequately discharge its duties to safeguard the interests of the absentees. *See In re Fine Paper Antitrust Litig.,* 617 F.2d 22 (3d Cir.1980) (ongoing duty of the judge to protect absentees); *Piambino v. Bailey,* 610 F.2d at 1329 (duty to assure the settlement is fair, reasonable, and adequate with respect to *each* category of the class).

People of lesser financial means will be unable to benefit comparably from the settlement. GM cites a number of other judicially approved class action settlements that awarded coupons and argues that, since this coupon provides far more consideration, it necessarily merits approval. *See, e.g., New York v. Nintendo of Am. Inc.,* 775 F.Supp. 676, 679 (S.D.N.Y.1991) ($5 discount coupon for video game purchase of approximately $200); *In re Cuisinart Food Processor Antitrust Litig.,* 1983-2 Trade Cas. (CCH) ¶ 65, at 680, 1983 WL 153 (D.Conn.1983) (discount coupons with maximum value of $100 for machines costing approximately $100 to $300); *In re Domestic Air Transp. Antitrust Litig.,* 148 F.R.D. 297, 331 (N.D.Ga.1993) (certificates worth between $10 and $200 for flights costing between $50 and $1500).

These cases, however, differ dramatically in the amount of money required to purchase the good--i.e. to realize the certificate's value--and in the frequency with which a typical consumer might expect to purchase the good. Whether a new truck costs between $20,000 and $33,000 as some objectors claim or some amount "far less" than that, as GM claims, this purchase is not comparable to buying a new food processor or even an airline ticket. As the district court acknowledged, "a substantial number of class members" would not be able to afford a new truck within the fifteen month coupon period. 846 F.Supp. at 338. Both the high cost of the trucks and the infrequency of a consumer's purchase of a new truck (relative to the fifteen month redemption period) make using these certificates significantly more difficult than those in the other coupon settlements, for all class members but particularly for the poorer ones.

Even where class members do manage to use the certificates, we are concerned about their real value. It may not be the case that the certificates saved those class members $1,000 on something they would have otherwise bought; those class members may only have purchased new GM trucks because they felt beholden to use the certificates. Thus, rather than providing substantial value to the class, the certificate settlement might be little more than a sales promotion for GM, in just the way that the *Bloyed* court characterized the settlement as a "tremendous sales bonanza" for GM. *Bloyed v. General Motors Corp.,* 881 S.W.2d at 431.

We turn then to the fleet buyers, who constitute a

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readily identifiable category of plaintiffs arguably disadvantaged by the settlement. Budgetary constraints prevent some of them from replacing their entire fleets within the fifteen month redemption period. [FN26] Competitive bidding requirements also apparently impede many of these entities from being able to use the certificates. Because there is no assurance that GM will be the lowest bidder, the government entities bound by these requirements may not be able to use the certificates. *See, e.g.* The ***809** Louisiana Public Bid Law, LA.R.STAT. § 38:2212(A)(1)(a). The district court dismissed these objections saying it was "confident that ingenious counsel will be able to structure bidding requirements so that the governmental entities can take full advantage of the certificates." 846 F.Supp. at 341. The district court's observation, while perhaps partially accurate, represents far too cavalier a dismissal of a potentially serious intra-class conflict and inequity.

FN26. This is true of, for example, the State of Iowa; State of Indiana; West Virginia Department of Transportation; State of New York; Commonwealth of Pennsylvania Department of Transportation and Department of General Services; County of Los Angeles, California; Jefferson Parish, Louisiana; and the City of New York.

The named plaintiffs argue that, if certain fleet buyers and individuals were dissatisfied with the settlement's terms, they could simply opt out of the class and pursue their own relief individually. While such an argument might theoretically be true, it ignores the realities of pursuing small claims. It would cost considerably more to litigate individual claims than the litigant could recover, using either a retrofit or a warranty theory to measure damages. And the district court apparently did not consider the possibility of a subclass of fleet owners, though that might alter the anatomy of the settlement. At all events, the right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts among the class. In sum, the relative inability of class members to use the certificates militates against settlement approval.

c. Value of the Transfer Option

In order to support its conclusion that the settlement was reasonable and fair, the district court cited the ability of fleet buyers and those consumers with budget constraints to realize value from the certificates by transferring them. We believe that the value of the transfer option is dubious, and consequently that the **settlement** was **unfair** to substantial portions of the class.

Simonsen's valuation of the settlement includes $157 million attributable to transferred certificates. Simonsen calculated that holders of the certificates could realize $250 from the sale of the transferred certificates (with a $500 face value). He gave *no* explanation for his assumption of a $250 market value. To the extent that this methodology is also dubious, it compounds the skewing of the valuation wrought by his usage estimates, *see* Part VI.A.1.a *supra.*

The value of this option depends on the development of a secondary market for these certificates. But there is no assurance that a market will develop; indeed, the restrictions on transfer, which GM claims are necessary to prevent fraud, pose significant barriers to the creation of such a market. The requirement that holders send in their $1,000 or original certificate to exchange for the $500 transfer certificate imposes very significant transaction costs since the parties must agree on a price before the original holder initiates the transfer process (which could easily last several weeks). During that process, there is substantial market risk, for the price of the transfer certificate could well move dramatically and induce a breach in the purchase agreement by one of the parties. Breaches would pose a real problem in this case because the transfer certificate cannot be reissued in another's name and thus cannot be resold. Because of these risks, individuals will be quite reluctant to contract for these transfer certificates. Even worse, the one-time transfer restriction also precludes the development of a market-making clearing house mechanism. In our view, therefore, it is quite possible that holders will be unable to realize any significant value from the transfer option.

Aside from the effect of the transfer restrictions, we also question Simonsen's valuation on the basis that it did not account for the inability to use the transfer certificates in conjunction with other incentive plans. For example, the incremental value of the $500 transfer certificate to class members would be completely eroded if GM offers a $1,000 dealer rebate program, since the class member would be forced to choose between the plans and would therefore be no better off than the general public.

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The district court did not take cognizance of these factors. It erred when it presumed development of a liquid market for these transfer certificates with very little support in the record for it, and when it relied on a putative value of the transfer option arbitrarily ascribed by plaintiffs' expert to find ***810** that the settlement was fair and reasonable. Although objectors might have made out an even stronger case by proffering their own expert on this valuation, the court has an independent duty to scrutinize the settlement's value and any evidence offered to support it. Accordingly, we find that evidence pertaining to the incremental value created by the transfer option does not support the valuation of the settlement.

d. GM's Implicit Valuation of the Claim

Our concerns about the adequacy of the settlement are complicated by the generous attorneys' fees GM agreed to pay in this case. Although originally GM vigorously contested the viability of the class claims and the class, the company, in view of its willingness to pay attorneys' fees of $9.5 million, may, at the time of settlement, have valued the claims at some substantial multiple of the fee award. [FN27] This $9.5 million attorney's fee award seems unusually large in light of the fact that the settlement itself offered no cash outlay to the class. GM's apparent willingness to pay plaintiffs' counsel close to $9.5 million indicates that the party in perhaps the best position to evaluate the claim may have thought the action, which both plaintiffs' counsel and the defense contend was not worth much, posed a significant enough threat to cause GM to strike a lucrative deal with plaintiffs' counsel.

FN27. GM was apparently so eager to have this $9.5 million fee approved that its counsel did not even object when the district court applied a multiplier notwithstanding clear Supreme Court precedent invalidating the use of multipliers. *See City of Burlington v. Dague,* 505 U.S. at ----, 112 S.Ct. at 2638. In our view, the fact that counsel to this large multinational corporation did not object to this clear error raises a smoking gun signaling GM's awareness of the questionable settlement it made.

[38] On the other hand, perhaps GM's valuation results only from the class counsel's decision to settle the action at an early stage and GM's desire to encourage that decision. Of course, a decision to settle that occurs at too incipient a stage of the proceedings also weighs against settlement approval. In short, while the settlement certainly presented difficult valuation issues, we believe that the district court erred when it uncritically accepted such high estimates of the settlement's value.

2. Valuing This Settlement Relative to the Relief Requested

The ninth *Girsh* factor also undermines the district court's decision. In the class action context, "the relief sought in the complaint" serves as a useful benchmark in deciding the reasonableness of a settlement. *See Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir.1977). Here the adequacy of the certificate settlement is particularly dubious in light of the claims alleged and the relief requested in the original complaint. The coupons offered by GM simply do not address the safety defect that formed the central basis of the amended complaint filed barely four months before the settlement. [FN28] The district court gave two justifications for its conclusion that, notwithstanding this discrepancy, the settlement was fair. First, the court explained, "no objector that complains that the settlement fails to retrofit the alleged defect has been able to come forth with a practical and safe modification for the trucks that has been designed, evaluated and tested." 846 F.Supp. at 342. Second, the court also relied on the fact that "[t]he proposed class settlement does not affect the rights of settlement class members to participate in any recall that NHTSA orders." *Id.* at 344.

FN28. In the amended consolidated complaint, class counsel described the trucks as "rolling firebombs" and estimated that an additional 200 deaths would occur unless GM took prompt corrective action.

Having considered the validity of these arguments, we conclude that they do not alleviate the substantial concerns created by the dramatic divergence of the settlement terms from the relief originally sought. This factor, therefore, strengthens our conviction that the **settlement** was **not fair**, reasonable, or adequate.

a. The Retrofit Issue

It is true that there does not appear to be a consensus retrofit. For each of the suggested ***811** retrofits--relocation of the gas tank to the spare tire

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location, installation of a tank with a rubber bladder, or installation of a metal cage around the gas tank--there was evidence that the retrofit either was ineffective or caused other performance problems for at least some model years. On the other hand, there was also evidence supporting the efficacy of various retrofits. For instance, GM's own documents considered all three options and found that *all* would enhance the safety of the fuel systems. In addition, there was also potentially damaging testimony by Ronald E. Elwell, an engineering analyst at GM for fifteen of his twenty-eight years with the company and its chief expert in defending the fuel tank location and design on the full-size trucks in a number of significant product liability cases, *see, e.g., Bowman v. General Motors,* 427 F.Supp. 234, 236 (E.D.Pa.1977).

[39] In his deposition, Elwell testified that GM designed a retrofit using a steel cage which prevented the gas tanks from rupturing in side impact testing. He further testified that GM abandoned the retrofit (knowing, because of its own secret crash tests, of the increased fire danger) only because GM feared that it would give the public the wrong impression. GM attempted to impeach Elwell by characterizing him as a "disgruntled" (former) employee. By way of rehabilitation, objectors explain Ellwell's reduced duties as a result of health problems. Whether or not Ellwell's testimony could itself establish that the steel cage enhances safety, his testimony might have been important if the case had proceeded to trial. As a consequence, the district court abused its discretion when it *summarily* dismissed Elwell's testimony.

b. Availability of Other Remedies

The district court also relied on the existence of the NHTSA recall mechanism and the class members' unencumbered right to bring personal injury suits to justify its approval of a settlement that did not secure any of the equitable relief originally requested. While individual tort suits are not barred, the court's approval of this settlement (which does nothing to redress the alleged danger) foregoes the opportunity presented by the pleadings [FN29] to prevent injuries that tort suits can at best address only retrospectively. More importantly, the NHTSA remedy may be extremely limited in that it can only require a manufacturer to repair a vehicle first purchased within eight calendar years of the investigation. The court's observation that "all the plaintiffs may have statute of limitations problems in this action that may be equally as severe or worse than the eight year NHTSA limitation," 846 F.Supp. at 344, does nothing to increase the value of the theoretical access to a NHTSA recall remedy to the owner or others who may be injured by the trucks at some future point. Hence, the potential existence of a partial recall under NHTSA does not dispel our doubts about the settlement terms' diverging so far from the original complaint. In so concluding, we do not rely on the subsequent resolution of the NHTSA investigation, which did not include any recall.

FN29. The pleadings alleged a dominant control theory which, if successful, would have required GM, the manufacturer and distributor of these vehicles, to remedy the allegedly unreasonable safety defects before they could cause or exacerbate the damage and injury resulting from a side impact collision.

In sum, we agree with the district court that the evidence of the existence of an effective retrofit to be contradictory; nevertheless, we think that the very murkiness of this evidence and the fact that certain key evidence was wrongly excluded, especially in light of the magnitude of the alleged safety defect, militate against approving a settlement attained at such an early stage of the litigation which does nothing to repair the vehicles, not even creating a fund to finance retrofits. [FN30]

FN30. The district court also based its conclusion that the settlement was reasonable relative to the best possible recovery (i.e., relative to the relief requested) on its doubts that a court could or should award the recall/retrofit remedy requested. The court expressed some doubt that it had the power to order a recall by injunction, citing *Walsh v. Ford Motor Co.,* 130 F.R.D. 260 (D.D.C.1990), and *National Women's Health Network Inc. v. A.H. Robins Co.,* 545 F.Supp. 1177 (D.Mass.1982). Neither of these cases, however, conclusively establishes that the district court would lack the power to order a recall. The fact that no court has done it before and that there may be some logistical issues to surmount do not themselves support the court's conclusion; other class actions and complex litigation settlements have developed mechanisms for supervising and enforcing compliance with detailed affirmative injunctions. *See, e.g.,* MCL 2d § 33.55 ("The court may also

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decide to appoint a master under Rule 53 to monitor future implementation of injunctive features of the settlement."). Although we intimate no view on the matter, it does seem to warrant further consideration. At all events, the district court could clearly have awarded relief that would require GM to set up a fund to finance retrofits initiated by the owners individually. *See Bloyed,* 881 S.W.2d at 433. The district court, therefore, did not lack the power to order a remedy that would have been more responsive to the class's concern about leaving the trucks on the road.

***812** *B. Complexity of the Suit*

This factor is intended to capture "the probable costs, in both time and money, of continued litigation." *Bryan v. Pittsburgh Plate Glass Co.,* 494 F.2d 799, 801 (3d Cir.), *cert. denied,* 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974). By measuring the costs of continuing on the adversarial path, a court can gauge the benefit of settling the claim amicably. The district court here concluded that the litigation "would be mammoth" and would have resulted in a "substantial delay in ... recovery." 846 F.Supp. at 334.

[40] While it is true, as the Youngs objectors argue, that the district court's conclusion in part depended on the ambitious definition of the class in terms of both geography and truck models included, the action would still involve a complex web of state and federal warranty, tort, and consumer protection claims even if the class had been subdivided and some of the legal issues simplified. Had the case not been settled, both plaintiffs and GM would have had to conduct discovery into the background of the six million vehicles owned by class members, including any representations allegedly made to plaintiffs. Each side would also have needed to hire or produce a retinue of experts to testify on a variety of complex issues. Undoubtedly, GM would have ardently contested the action at every step, leading to a plethora of pretrial motions. In contrast, this settlement made its remedies immediately available and avoided the substantial delay and expense that would have accompanied the pursuit of this litigation. The district court thus correctly concluded that the complexity factor weighed in favor of approving the settlement.

C. Reaction of the Class

[41] In an effort to measure the class's own reaction to the settlement's terms directly, courts look to the number and vociferousness of the objectors. Courts have generally assumed that "silence constitutes tacit consent to the agreement." *Bell Atlantic Corp. v. Bolger,* 2 F.3d 1304, 1313 n. 15 (3d Cir.1993). However, a combination of observations about the practical realities of class actions has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement. *See, e.g., In re Corrugated Container Antitrust Litig.,* 643 F.2d at 217-18; *GM Interchange Litig.,* 594 F.2d at 1137.

In a class action case involving securities litigation, this court has recognized the possibility that the assumption that silence constitutes tacit consent "understates potential objectors since many shareholders have small holdings or diversified portfolios, ... and thus have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's pro rata benefit." *Bell Atlantic Corp. v. Bolger,* 2 F.3d at 1313 n. 15. Although this is not a securities class action and the amounts at stake could be significant, the absentees may not fully appreciate the size of their potential claims since, by excluding those owners whose trucks have already experienced some mishap related to the fuel tank design, the class may include only those who have no reason (outside of media coverage) to know of the latent defect or the claim based on the alleged existence of that defect.

Even where there are no incentives or informational barriers to class opposition, the inference of approval drawn from silence may be unwarranted. As we noted earlier, Judge Posner has explained that "where notice of the class action is ... sent simultaneously ***813** with the notice of the settlement itself, the class members are presented with what looks like a fait accompli." *Mars Steel,* 834 F.2d at 681. In this case especially, the combined notice largely defeats the potential for objection since the notice did not inform the class that the original complaint had sought a retrofit. [FN31] Without information about the original complaint, absentees lacked any basis for comparing the settlement offered to them to the original prayer. It is instructive that many of the better-informed absentees, the fleet owners, did object.

FN31. There may also have been other deficiencies in the notice. The fact that the notice

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> did not disclose the attorneys' fees that the class counsel and defendants agreed to, and the fact that the notice suggested that class members could also have a recall remedy from NHTSA (though many of the trucks were so old that NHTSA lacked the power to recall them), may also have helped suppress potential objection.

[42] The fact that a poll conducted by class counsel's marketing expert reported that a minimum of sixty-three percent of the class would probably or definitely not use the coupon to purchase a new truck also suggests that the class could not possibly have so wholeheartedly endorsed the settlement. Moreover, one cannot infer approval of the settlement from requests for the transfer of the certificates, as the district court did. Those requests only signify that certain class members attempted to maximize the value they could realize from the settlement with which they were presented and thus might illustrate how futile class members thought objecting would be.

Although the absolute number of objectors was relatively low, [FN32] there are other indications that the class reaction to the suit was quite negative: The seemingly low number of objectors includes some fleet owners who each own as many as 1,000 trucks, and those who did object did so quite vociferously. In conjunction with the already-noted problems associated with assuming that the class members possessed adequate interest and information to voice objections, the appeals of those who actually objected demonstrate that the reaction of the class was actually negative, and not supported by the "vast majority of the class members" as the district court concluded. 846 F.Supp. at 334. The class reaction factor plainly does not, contrary to the district court's conclusion, weigh in favor of approving the settlement.

> FN32. Of approximately 5.7 million class members, 6,450 owners objected and 5,203 opted out.

D. Stage of Proceedings

[43] The stage-of-proceedings facet of the *Girsh* test captures the degree of case development that class counsel have accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating. The district court found that this factor favored settlement approval, relying on the fact that settlement was presented for approval less than six months prior to the scheduled trial date.

[44] Given the purpose of this inquiry, however, it is more appropriate to measure the stage by reference to the *commencement* of proceedings either in the class action at issue or in some related proceeding. *See In re Beef Antitrust,* 607 F.2d at 180 (court referred to discovery in companion cases); *City of Detroit v. Grinnell Corp.,* 356 F.Supp. 1380, 1386 (S.D.N.Y.1972), *rev'd on other grounds,* 495 F.2d 448 (2d Cir.1974) (noting the extensive discovery in that and parallel cases); *In re Baldwin-United Corp.,* 105 F.R.D. at 483 (access to expert testimony and other evidence from parallel state court proceedings as well as to relevant public documents led court to believe counsel "availed themselves of all of these sources of information and conducted full adversarial negotiations ..."); 2 NEWBERG & CONTE § 11.45, at 11-102 n. 247.

[45] The relevant period of time this case was in litigation was quite brief; approximately four months elapsed from the filing of the consolidated complaint to the reaching of the settlement agreement. To be sure, we cannot measure the extent of counsel's effort from the time of the litigation alone; class counsel in this case are known to be quite industrious, and the district court properly considered class-counsel's review of the materials ***814** from prior product liability proceedings and from the *Moseley* personal injury case, *Mosley v. General Motors Corp.,* No. 90-v-6276 (Fulton County, Ga. Feb. 4, 1993). However, mere access to the materials from other proceedings does not establish that counsel developed the merits, particularly where the other cases were premised on different theories of recovery. While we have no doubt that class counsel diligently reviewed those materials during the relevant period, nothing in the record demonstrates that they had conducted significant independent discovery or investigations to develop the merits of their case (as opposed to supporting the value of the settlement), that they had retained their own experts, or that they had deposed a significant number of the individuals implicated in the materials from these other proceedings. It is particularly noteworthy that the plaintiffs did not depose Ronald Elwell, although he could potentially have offered evidence that would have substantially bolstered the plaintiffs' case. *See* Part VI.A.2.a *supra.*

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At all events, the inchoate stage of case development reduces our confidence that the proceedings had advanced to the point that counsel could fairly, safely, and appropriately decide to settle the action. While the district court may have, laudably, been attempting to minimize the funds expended on discovery in order to maximize the funds available to the class, we think that the district court erred by not assuring that adequate discovery had been taken.

[46] Beyond the incipient stage of the case and the modest indications of substantive development, there is little basis for presuming vigorous prosecution of the case from the fact that settlement negotiations occurred. In ordinary class action settlements (i.e., where the court certifies the class before settlement negotiations commence) courts can presume that the negotiations occurred at arm's length because they have already determined that the counsel negotiating on behalf of the class adequately represents the class's interests. *See* Part IV.E *supra,* (discussion of adequacy of representation). In cases such as this one, however, where there has been no determination by the court that a proper class exists, the mere fact that negotiations transpired does not tend to prove that the class's interests were pursued. *Id.* In short, the incipient stage of the proceedings poses an even larger obstacle to settlement approval in settlement class situations than it would in normal class action settlements since courts have no other basis on which to conclude that counsel adequately developed the claims before deciding to settle.

Furthermore, to the extent that this stage-of-proceedings factor also aims to assure that courts have enough exposure to the merits of the case to enable them to make these evaluations, it cannot support settlement approval here. With little adversarial briefing on either class status or the substantive legal claims, the district court had virtually nothing to aid its evaluation of the settlement terms. We therefore conclude that the district court clearly erred in finding that this factor weighed in favor of settlement approval.

E. Risks of Establishing Liability

[47] By evaluating the risks of establishing liability, the district court can examine what the potential rewards (or downside) of litigation might have been had class counsel elected to litigate the claims rather than settle them. *See In re Baldwin-United Corp.,* 105 F.R.D. 475, 482 (S.D.N.Y.1985) (comparing advantages of an immediate cash payment with risks involved in long and uncertain litigation). The district court here concluded that this factor also weighed in favor of approving the settlement since "there appear[ed] to be a substantial risk in establishing liability because of the complexity and size of [the] case along with the legal and factual problems raised by GM." 846 F.Supp at 336. While we agree with the district court that, on balance, the prospective difficulty faced by a nationwide class of establishing liability favored settlement, we believe the question is much closer than it thought, and thus the factor does not weigh heavily in favor of settlement as the district court believed.

We do not gainsay that the plaintiff class faced considerable obstacles in establishing liability. First, it is not clear that the plaintiffs***815** could maintain the federal causes of action (the Lanham Act and Magnuson-Moss Act claims) without some proof that the trucks suffered some decline in value, which the class was unable to demonstrate by published Kelley Blue Book figures. Second, the trucks complied with the applicable federal safety standards during the relevant times. This would undoubtedly be strong, though not necessarily conclusive, evidence that the trucks were not (legally) defective. Statistics offered by GM also suggest that the trucks presented no greater risk than other trucks or vehicles. Moreover, data from actual accidents, as opposed to crash tests, failed to reveal any statistically significant difference in post-collision fires, injuries, or death relative to Ford or Dodge full-size pickups. Finally, to the extent that state law requires proof of individualized reliance for the misrepresentation claims, that would seem to pose a substantial barrier to proving class-wide liability (though, as noted below, that issue can be the subject of separate proceedings).

On the other hand, we are not impressed by some of the factors relied upon by the district court to support its finding of substantial risk in proving liability. The court cited the legal obstacles faced by the class, such as statutes of limitations varying in different states, the lack of vertical privity for the warranty claims (required in some states), the varying expiration of warranty durational limits, and the bar under some state laws to recovery for economic losses on tort claims. In response to these concerns, we point out that variations in the state procedural rules applicable to the class members have not prevented courts, including this one, from adjudicating class claims. *See Hoxworth v. Blinder,*

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Robinson & Co., 980 F.2d 912, 924 (3d Cir.1992) (affirming finding of (b)(3) predominance despite differences in state law). Moreover, even if these variations precluded the successful prosecution of the class claims, qua class claims, in this case they would not necessarily doom the action to failure.

Many of the difficulties posed by these variations could have been surmounted (or were more likely to be surmounted) if the action were not treated as a national class. Hence, the fact that the only other national automotive product defect class action ended in a defense verdict does not weigh heavily in favor of settlement. Indeed, to the extent that state-by-state variations in procedural laws created legal obstacles, the district court should have considered dividing the action into geographic sub-classes instead of considering the entire nationwide class to be hobbled. Additionally, the court should have considered making the inquiry we made in *In re School Asbestos Litig.,* 789 F.2d at 1011, as to whether the case in terms of claims and defenses might fall into three or four patterns so that, with the use of special verdict forms, the case might have been manageable.

We also note that, in other cases, courts have certified nationwide mass tort class actions, which also include myriad individual factual and legal issues, relying on the capacity for a court to decertify or redefine the class subsequently if the case should become unmanageable. *See, e.g., In re School Asbestos Litig.,* 789 F.2d at 1011 (3d Cir.1986). *See also* Bruce H. Nielson, *Was the Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation,* 25 HARV.J.LEGIS. at 469 ("Some federal district court judges have suggested that this problem could be overcome and that multistate and nationwide classes could be certified by ... using Rule 23(c)(4) subclasses to account for variances in state law...."); *see infra* discussion on Risks of Maintaining Class Status. In any event, the failure of the district court to analyze the applicability of these various defenses to the different groups of plaintiffs may itself constitute an abuse of discretion. *See Piambino v. Bailey,* 610 F.2d 1306, 1329 (5th Cir.1980) ("[Vacatur] is demanded by the failure to assess the interests of the categories of plaintiffs and whether the settlement was fair, adequate and reasonable *as to each.*" (emphasis in original)); *see also Piambino v. Bailey,* 757 F.2d 1112, 1140 (11th Cir.1985).

In addition, a plethora of other evidence buttressed the class claims. First, the depositions and affidavits from GM engineers, including Elwell, characterizing the design as ***816** indefensible would have strongly supported the class claims notwithstanding the fact that Elwell was arguably vulnerable to impeachment on the basis of his own employment history. Second, the evidence from *Zelenuk v. GM,* No. 96-131262 (Tex.1992), that GM concealed crash tests might have been admitted in this proceeding. Third, the fact that GM has prevailed in three of the eight C/K pickup product liability trials does not support the settlement by confirming the weakness of the underlying claims, for at least two other plausible interpretations could explain this statistic. The fact that plaintiffs *prevailed* in five of the eight actions suggests that the claim alleged here was not so weak after all, at least if alleged by suitable plaintiffs. Moreover, such a statistic understates plaintiffs recoveries for these types of claims by not accounting for the individual settlements that have been reached.

[48] While we recognize that establishing liability would by no means have been easy or certain for the plaintiffs, the district court over- emphasized the importance of defenses applicable to only some class members under certain state laws and incorrectly discounted a significant body of evidence pertinent to proving liability. Therefore, it is not clear that plaintiffs faced the grave prospects on the merits that the district court apparently believed existed when it approved this settlement. In any event, the district court's failure to distinguish between groups of plaintiffs that did and those that did not confront difficult state law defenses constitutes an abuse of discretion. *Piambino,* 610 F.2d at 1329.

F. Risks of Establishing Damages

Like the previous factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time. The district court relied heavily on this factor in approving the settlement: "[B]ecause the plaintiffs cannot adequately prove diminished value [of the pickups], the court concludes that risks of proving damages weigh strongly in favor of approval of the proposed class settlement." 846 F.Supp. 337. We do not share the district court's confidence, and conclude that this factor does not weigh strongly in favor of settlement.

GM argues that the class's warranty claim amounts

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to a claim for diminished resale value. Some United States Courts of Appeals and some state courts have rejected such claims either on the grounds that a warranty of merchantability does not include any guarantee about the product's resale value, *see, e.g., Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir.1989), *cert. denied,* 495 U.S. 904, 110 S.Ct. 1923, 109 L.Ed.2d 287 (1990), or on the basis that the tort law of many states precludes tort claims for purely economic loss. In assessing this *Girsh* factor, the district court relied on its belief that the class could not demonstrate any diminution of the trucks' value relative to Ford and Dodge trucks by referring to the Kelley Blue Book.

We do not, however, believe that this is the only permissible approach to measuring the value of the defect. According to the Uniform Commercial Code, "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." UCC § 2-714(2). Although diminished resale value might represent one method of measuring the damage suffered by owners from the publicity about the fuel tanks, it does not fully measure the difference between the value the defect-free truck would have had at delivery and the actual value of the truck as delivered. Measuring damages with a focus on resale value confounds the effects of varying rates of depreciation with the effect of the defect on the market value. The comparisons to the trucks of other manufacturers are similarly deficient measures since they fail to gauge the effect of the defect on the value of the trucks at delivery.

The cost of a retrofit, which effectively puts the truck in the condition in which it allegedly should have been delivered, may constitute an alternative measure of the damages arising from the breach of warranty. It ***817** has the advantage of avoiding the speculative exercise of ascertaining the hypothetical value of defect-free trucks. *See, e.g., McGrady v. Chrysler Motors Corp.*, 46 Ill.App.3d 136, 4 Ill.Dec. 705, 360 N.E.2d 818, 821- 22 (1977) (affirming an award of actual repair expenses where measuring value of vehicles as warranted upon delivery would be speculative); *Nelson v. Logan Motor Sales, Inc.*, 179 W.Va. 539, 370 S.E.2d 734, 737 (1988) (reversing a ruling that repair costs were not evidence relevant to the value of the goods as accepted). Nothing in the UCC precludes such a measure; in fact, § 2- 714(1) of the Uniform Commercial Code provides:

> Where the buyer has accepted goods and given notification he may recover as damages for any nonconformity the loss resulting in the ordinary course of events from the seller's breach as determined *in any manner* which is reasonable.

(emphasis added) (citation omitted). [FN33]

> FN33. GM argues that a repair remedy is available only when it is less costly to the defendant than diminution in value. We think that such rigid rules are inappropriate, and that the court should carefully consider all of the proffered measures of damages. In any event, the costs of retrofit, though unsettled by the district court as of this juncture, will be less than the diminution in value (if the settling parties' valuation of the certificates is any indication of that diminution).

[49] Because the district court based its appraisal of this factor on its exclusive reference to the Kelley Blue Book and refused to consider alternative measures that appear to provide concrete (and substantial) damage figures, we believe that the court erred in finding that the risks of proving damages were so great that they strongly favored settlement approval.

G. Risks of Maintaining Class Status

[50] The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.

The district court found that this factor favored settlement, although it did not place great weight on it. *See* 846 F.Supp. at 337. The Court cited the "myriad factual and legal issues" [FN34] and the vigorous contest waged by GM prior to settlement negotiations as the basis for this finding. *Id.* Two observations, which the district court appeared to ignore, weaken the basis for its finding that the risk involved in maintaining class status favored settlement.

> FN34. The legal issues that might vary among

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> class members included the claims of breach of warranty, negligent misrepresentation, and negligence and products liability, which would be based on the various state laws. Potentially variable factual issues included the fact that the disputed trucks did not use a single gas tank design, and the individualized proof of reliance required in some jurisdictions for fraud, negligent misrepresentation, and breach of warranty claims.

[51] First, Rule 23(a) does not require that class members share every factual and legal predicate to meet the commonality and typicality standards. *Baby Neal v. Casey,* 43 F.3d 48, 56 (3d Cir.1994); *Hassine v. Jeffes,* 846 F.2d 169 (3d Cir.1988). Indeed, a number of mass tort class actions have been certified notwithstanding individual issues of causation, reliance, and damages. *See, e.g., In re School Asbestos Litig.,* 789 F.2d at 1009. Because separate proceedings can, if necessary, be held on individualized issues such as damages or reliance, such individual questions do not ordinarily preclude the use of the class action device. *See, e.g., Eisenberg v. Gagnon,* 766 F.2d 770, 786 (3d Cir.1985).

For example, in *School Asbestos,* the court certified a nationwide (b)(3) class after counsel demonstrated to the court how the laws of the 50 states could be reduced to four general patterns, providing the framework for sub-classes if the nationwide action had proven unmanageable. [FN35] *School Asbestos,* ***818** 789 F.2d at 1011. Although there was no such demonstration in this case, we have no reason to doubt that such a demonstration would have been possible, for we cannot conceive that each of the forty-nine states (excluding Texas) represented here has a truly unique statutory scheme, or that all of the model years possessed distinct fuel tank designs. Damage issues, moreover, are not as individualized as the district court seemed to assume: the cost of repair could have served as the measure, and that cost would not vary much among class members. Hence, it is quite possible that a nationwide class could have been properly certified here.

> FN35. The district court could retain the sub-classes although they might not have properly been brought in that court originally. *Cf. In re Agent Orange Prod. Liab. Litig.,* 100 F.R.D. 718, 724 (E.D.N.Y.1983) (recognizing hypothetical need of the court to apply the laws of different states); *In re Agent Orange Prod.,* 580 F.Supp. 690 (E.D.N.Y.1984) (performing choice of law analysis).

Second, even if the action could not be certified as it was originally filed, the district court disregarded the possibility that there were other ways to aggregate the litigation and/or adjudication of these claims. The court might have considered dividing the class into geographic or model-year sub-classes or allowing the case to continue as a multi-district litigation for the remainder of pre-trial discovery. Each of those alternatives could have surmounted some of the individual issues while retaining some of the substantive advantages of the class action as framed here. Thus, the court's conclusion that this factor favored settlement may have reflected its mistaken all-or-nothing approach to certifying this national class.

Additionally, some of the district court's bases for finding such a significant risk in the ability to maintain class status undermine our confidence in the appropriateness of the district court's certification of the settlement class. For instance, if the district court correctly concluded that there were insurmountable barriers to class treatment, it could not certify the class for settlement purposes. *See* Part IV.F *supra.* It is true that settlement can reduce the differences among class members. But as we have explained, the standard for certification is the same for settlement classes as for conventional classes.

Moreover, if the class members' claims differed so much as to preclude certification even of geographic sub-classes, a settlement that treats all class members alike cannot be adequate and fair to all of them. For reasons stated above, this settlement does not even appear to treat all members of the class equitably. *See* Parts V.B and VI.A.1.b *supra.* Indeed, the settlement arguably affords the least relief to those class members with the most valuable claims, i.e., the fleet owners. *See* Part VI.A.1.b *supra.* The district court's concern, therefore, that the class could not maintain its class status, is somewhat inconsistent with its certification of the class for settlement purposes. [FN36]

> FN36. This anomaly is at least partially attributable to the court's failure to certify the class in the manner required by Rule 23. But some part of the inconsistency signals that the district court ignored the various ways that the class claims could be manageably litigated.

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We must agree that this class, even if appropriately crafted, confronted significant difficulties in maintaining its status in light of the claims alleged. Nevertheless, we are once again left with the impression that the district court too hastily approved a settlement because of its perhaps exaggerated concern that the quite ambitious initial nationwide definition of the class made it too difficult to form a class or group of classes capable of litigating these claims.

H. Ability to Withstand Greater Judgment

We find no error in the district court's resolution of this final *Girsh* factor--whether the defendant has the ability to withstand a greater judgment. The district court determined that GM "could withstand a judgment greater than the proposed settlement," although it did not attribute any significance to this finding "under these facts." 846 F.Supp. at 337.

I. Summary

Assuming arguendo that the district court had validly certified the settlement class (i.e., properly determined that it met the requisites of Rule 23), we hold that the **settlement** is **not fair**, reasonable, or adequate under the nine factor *Girsh* test of this circuit. The case was simply settled too quickly with too little development on the merits for certificates that may well be worth significantly less than the $1.98 to $2.18 billion estimate accepted by the district court. We conclude that the district court erred by accepting plaintiffs' witness's estimated valuations ***819** when those so clearly lacked a sound methodological basis and when there were so many other indications-- including the inability of fleet owners and less wealthy class members to use the certificates, the dubious value of the transfer option, and GM's own apparent valuation of the claim--that the **settlement** was inadequate and **unreasonable**, and may even have been a marketing boon to GM.

Additionally, the failure of this settlement to abate the lingering safety problem, despite the vociferousness of the arguments for some recall or retrofit in the initial complaint, enhances our conviction that this settlement is inadequate. Beyond its dubious valuation of the settlement, the district court also over-estimated the risks of proving liability and damages and of maintaining class-status, and under-estimated the true degree of opposition to the settlement. The district court, however, correctly applied the complexity-of-suit and defendant's-capacity-for-greater-judgment factors.

Although we are not bound in any way by the proceedings in the separate Texas action, our decision today shares many of the concerns expressed by the Texas appellate court which set aside an approval of a very similar coupon settlement. *See Bloyed,* 881 S.W.2d at 422. Rule 42 of the Texas Rules of Civil Procedure, which governs class actions, is patterned after Federal Rule of Civil Procedure 23. The *Bloyed* court also was concerned about a settlement that provided absolutely nothing to those unwilling or unable to purchase another GM truck and that did nothing about the allegedly dangerous vehicles left on the road. The Texas court objected as well to the $9.5 million in attorneys' fees negotiated between that class's counsel and GM.

Balancing the *Girsh* factors, on the current record, this settlement clearly fails to meet the standards required for judicial approval. We leave open the possibility, however, that the district court on remand might develop the record more fully, properly approve the settlement, in either its original or a re-negotiated form, and, following the guidance offered by this opinion, certify the settlement class.

VII. APPROVAL OF THE ATTORNEYS' FEE AWARD

[52][53] The French and Young objectors also contest the district court's award of attorneys' fees. (Orders dated Dec. 20, 1993, 1993 WL 533155 and Feb. 2, 1994, 1994 WL 30301.) The court initially awarded fees without an independent review of the agreement, explaining its refusal to review the award: "[The fee agreement] is a matter of contract between the parties, rather than a statutory fee case, ... and payment of the fees will have no impact on the class members...." Subsequently, on February 2, 1994, the court issued an "amplification" of its prior ruling, which justified the award under both the lodestar [FN37] and the percentage of recovery [FN38] methods. Class counsel maintain that the objectors lack standing to contest the agreement made between GM and themselves, and that the objectors waived their right to appeal the award by not raising their objections below. Although our disposition of the certification and settlement approval issues obviates the need for a review of the fee award at this stage (and moots the waiver question), we highlight some of the primary issues in

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analyzing the appropriateness of a particular fee agreement for the district court on remand (in the event that the record is expanded, the class certified, and the settlement approved).

FN37. The lodestar method calculates fees by multiplying the number of hours expended by some hourly rate appropriate for the region and for the experience of the lawyer.

FN38. The percentage of recovery method resembles a contingent fee in that it awards counsel a variable percentage of the amount recovered for the class.

[54] At the outset, we note that a thorough judicial review of fee applications is required in all class action settlements. The district court did not accommodate practical realities here when, rationalizing its initial refusal to review the fee, it stated that the fee award was "to be paid by General Motors Corporation and will in no way reduce the recovery to any of the settlement class members." Indeed, this court has recognized that "a defendant is interested only in disposing ***820** of the total claim asserted against it; ... the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Prandini v. National Tea Co.,* 557 F.2d 1015, 1020 (3d Cir.1977); 2 NEWBERG & CONTE § 11.09 (purpose of judicial review is to police abuses even where defendant pays plaintiff's fees). In light of these realities, class counsel's argument that objectors have no standing to contest the fee arrangement is patently meritless: the fee agreement clearly does impact their interests, as it is, for practical purposes, a constructive common fund.

[55] Moreover, as discussed at length in the adequacy of representation section, *see* Part V.B.3 *supra,* the divergence in financial incentives present here creates the "danger ... that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees," *Weinberger v. Great Northern Nekoosa Corp.,* 925 F.2d 518, 524 (1st Cir.1991). *See also Prandini,* 557 F.2d at 1020 ("When the statute provides that a fee is to be paid as a separate item, the conflict between client and attorney may not be as apparent.... It is often present nonetheless."). This generates an especially acute need for close judicial scrutiny of fee arrangements that implicate this concern. *See In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 216, 224 (2d Cir.1987) ("The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed."); *Piambino v. Bailey,* 757 F.2d at 1139 ("Because of the potential for a collusive settlement, a sellout of a highly meritorious claim, or a settlement that ignores the interests of minority classes members, the district judge has a heavy duty to ensure that ... the fee awarded plaintiffs' counsel is entirely appropriate."). We have previously acknowledged that the potential for conflict between the class and its counsel is not limited to situations meeting the strict definitions of a common fund. [FN39]

FN39. The common fund doctrine provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase, or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation, including attorneys' fees. *Vincent v. Hughes Air West, Inc.,* 557 F.2d 759 (9th Cir.1977).

As we have also explained in this opinion, courts must be especially vigilant in searching for the possibility of collusion in pre-certification settlements. *See* Part IV.E *supra.* In addition, the court's oversight task is considerably complicated by the fact that these attorney-class conflicts are often difficult to discern in the class action context, "where full disclosure and consent are many times difficult and frequently impractical to obtain." *Agent Orange,* 818 F.2d at 224 (citations omitted). Finally, we emphasize that the court's oversight function serves not only to detect instances of "the actual abuse [that potential attorney-class conflicts] may cause, but also [the] potential public misunderstandings they may cultivate in regard to the interests of class counsel." *Agent Orange,* 818 F.2d at 225 (citing *Susman v. Lincoln American Corp.,* 561 F.2d 86, 95 (7th Cir.1977), and *Prandini v. National Tea Co.,* 557 F.2d 1015, 1017 (3d Cir.1977)); *see also Grinnell I,* 495 F.2d at 469; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1975). On remand, therefore, the district court must be alert to the presence in the fee agreement of any actual abuse or appearance of abuse capable of creating a public misunderstanding.

Having emphasized the necessity for judicial review of fee awards in all class action settlements, we will

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briefly clarify some principles of fee approval for the district court to apply on remand if it certifies a class and approves a settlement.

Because the district court purported to use both the lodestar and the percentage-of-recovery methods, the actual grounds for its approval of the fee are not entirely clear. Although it is sensible for a court to use a second method of fee approval to cross check its conclusion under the first method, we believe that each method has distinct advantages for certain kinds of actions, which will make one of the methods more appropriate as a primary basis for determining the fee. ***821** Here, for the reasons that follow, the court should probably use the percentage-of-recovery rather than the lodestar method as the primary determinant, although the ultimate choice of methodology will rest within the district court's sound discretion.

[56] The lodestar and the percentage of recovery methods each have distinct attributes suiting them to particular types of cases. *See Task Force,* 108 F.R.D. at 250-53. Ordinarily, a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees (though there is, as we have noted, an advantage to using the alternative method to double check the fee). [FN40]

> FN40. For example, a court can use the lodestar method to confirm that a percentage of recovery amount does not award counsel an exorbitent hourly rate; similarly, the percentage of recovery method can be used to assure that counsel's fee does not dwarf class recovery.

[57] Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases. Because the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class.

This de-coupling has the added benefit of avoiding subjective evaluations of the monetary worth of the intangible rights often litigated in civil rights actions. Outside the pure statutory fee case, the lodestar rationale has appeal where as here, the nature of the settlement evades the precise evaluation needed for the percentage of recovery method. The lodestar method has the added benefit of resembling modes of fee determination in conventional bipolar litigation. On the other hand, the lodestar method has been criticized as giving class counsel the incentive to delay settlement in order to run up fees while still failing to align the interests of the class and its counsel, and for not rewarding counsel incrementally for undertaking the risk of going to trial. *See* Coffee, *Understanding the Plaintiff's Attorney,* 86 COLUM.L.REV. at 691.

[58] Courts use the percentage of recovery method in common fund cases on the theory that the class would be unjustly enriched if it did not compensate the counsel responsible for generating the valuable fund bestowed on the class. *See Task Force,* 108 F.R.D. at 250. Because these cases are not presumed to serve the public interest (as evidenced by the lack of a fee statute), there is no social policy reason that demands an adequate fee. Instead, the court apportions the fund between the class and its counsel in a manner that rewards counsel for success and penalizes it for failure. Courts have relied on "common fund" principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund. *See, e.g., In re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006 (5th Cir.1977) (using common fund principles in settlement of consolidated cases). The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source.

We believe that this case presents a situation more closely aligned with the common fund paradigm than the statutory fee paradigm. Although class counsel and GM contend (and the district court believed) that the fee was a separate agreement, thus superficially resembling the separate awards in statutory fee cases, private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case. Certainly, the court may select the lodestar method in some non-statutory fee cases where it can calculate the relevant parameters (hours expended and hourly rate) more easily than it can determine a suitable percentage to award. But the court must vigilantly guard against the lodestar's potential to exacerbate the misalignment of the attorneys' and the

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class's interests. *See* Coffee, *Understanding the Plaintiff's Attorney,* 86 COLUM.L.REV. at 717. ***822**

In this case, the fee clearly was not made pursuant to a statute; therefore no legislatively endorsed policy favors assuring counsel an adequate fee. And the settlement, though difficult to value, did not award the even more hard-to-value intangible rights that could in some limited circumstances justify using the lodestar method. In sum, although this case presents a hybrid, we believe that it more closely resembles a common fund case.

[59] At all events, to the extent that the district court relied on the lodestar method, it erred by applying a multiplier. In the lodestar section of its analysis, the district court calculated the multiplier needed to apply to the simple lodestar result, $3,158,182, to obtain the requested amount, $9,500,000. (*see* Feb. 2, 1994 Order, 1994 WL 30301 at *2.) After estimating the multiplier to be between 2.5 and 3, the court proceeded with a "contingent nature of the success" analysis of the multiplier's appropriateness from *Lindy*. *See Lindy Bros. Builders Inc., v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102, 116-17 (3d Cir.1976). The Supreme Court, however, has rejected the use of multipliers to enhance the lodestar's hourly rate amount. *See City of Burlington v. Dague,* 505 U.S. at ----, 112 S.Ct. at 2638. Notwithstanding this clear Supreme Court precedent, GM's counsel failed to apprise the district court about *Dague* even though its pertinence was patent.

[60] To the extent that the district court construed the fee agreement as a common fund, its analysis also appears to misapprehend key aspects of the percentage of recovery method. In common fund cases, a district judge can award attorneys' fees as a percentage of the fund recovered. *See Blum v. Stenson,* 465 U.S. 886, 900 n. 16, 104 S.Ct. 1541 n. 16, 79 L.Ed.2d 891 (1984); *In re Smithkline Beckman Corp. Secur. Litig.,* 751 F.Supp. 525 (E.D.Pa.1990). One court has noted that the fee awards have ranged from nineteen percent to forty-five percent of the settlement fund. *Id.* at 533. Here, the district court summarily asserted that, although it could not value the settlement precisely, "whatever method is used in computing the ultimate value of the settlement, the attorneys' fees sought in this action will constitute an extremely small percentage of the total value and will be minute compared to the aforesaid 19-45% range." (Feb. 2, 1994 Order, 1994 WL 30301 at *4.)

Given our skepticism of the settlement's value generally and of Simonsen's estimates in particular (*see supra* discussion on settlement fairness), we are much less sanguine that the $9,500,000 fee actually constitutes an acceptable percentage of the class recovery. On the current record, we are constrained to reject that conclusion. At the very least, the district court on remand needs to make some reasonable assessment of the settlement's value and determine the precise percentage represented by the attorneys' fees. The problem, however, is not simple, for arguably, any settlement based on the award of certificates would provide too speculative a value on which to base a fee award. (*See Task Force,* 108 F.R.D. at 250-53 (discussing the preferability of the lodestar method for civil rights actions where the difficulty of valuing injunctive relief complicates the calculation of a fee using the percentage method.))

On remand, the district court might wish to examine the fee primarily under the percentage of recovery scheme. If so, the court will need to determine a precise valuation of the settlement on which to base its award. The court may however, as a check, want to use the lodestar method to assure that the precise percentage awarded does not create an unreasonable hourly fee.

VIII. OTHER ISSUES; CONCLUSION

Objectors also appealed the district court's denial of discovery into the settlement negotiations and the adequacy of the notice with respect to the attorneys' fees. In light of our holding on the certification and settlement approval issues and its effect on the need for us to judge the fee award, we need not reach these issues.

For the foregoing reasons, we will vacate the orders certifying the provisional class and approving the settlement and remand for further proceedings ***823** consistent with this opinion. Parties to bear their own costs.

JOHN R. GIBSON, Senior Circuit Judge, concurring in the central holding and with the judgment.

The court today issues a truly masterful opinion. I concur fully in the central holding of the court that the district court failed to make adequate findings

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under Rule 23(a) to justify class certification, and that the case must be remanded to the district court for further proceedings, and amplification of the record. I concur fully in the reasoning of the court that supports this conclusion and holding, and concur specifically in Parts I, II, III, IV.A, D, E, F, and V.A. and B.1 of the opinion.

In addition, I certainly agree that it follows that the district court on remand must consider further the issues of the adequacy of representation, whether the settlement is fair, reasonable and adequate, and if reached, issues relating to attorneys' fees.

With respect to the remainder of the opinion, I am of the thought that some of the discussion is simply not required to support the holding we reach, specifically Part IV.B and C. In view of the fact that we are remanding for adequate findings under Rule 23(a), I think we need not reach the issue of whether the class requisites have been made on the current record, as we can anticipate that the district court will conduct further proceedings and make additional record in order to fully support such findings. Thus, I think Part V.B.2 dealing with adequacy of representation, Part VI dealing with whether the settlement is fair, reasonable and adequate on the record before us, and Part VII dealing with issues relating to the attorneys' fees simply need not be addressed in detail as they may come before this court on a far different record after remand.

I must make clear that I have misgivings about not joining in the full opinion. The opinion is a most thorough and scholarly analysis of the numerous issues surrounding settlement of class actions and approval of settlement classes. It will stand as the opinion of the court. My concerns are simply that the court has discussed areas that it need not reach.

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Supreme Court of Illinois.

Walter F. KERRIGAN, Appellee,
v.
UNITY SAVINGS ASSOCIATION et al., Appellants.

No. 45922.

Sept. 17, 1974.

Derivative action by permanent reserve shareholder of savings and loan association on behalf of himself, association and all association's other members against five directors of association and against corporate insurance broker for an accounting of profits and injunctive relief. The Circuit Court, Cook County, Walter P. Dahl, J., granted defendants' motion for summary judgment and dismissed the action and plaintiff appealed. The Appellate Division of the First Circuit, 11 Ill.3d 766, 297 N.E.2d 699, reversed and remanded and defendants' petition for leave to appeal was granted. The Supreme Court, Schaefer, J., held that it was within power of savings and loan association to act as broker in placement of insurance; that where some directors of association did not give the association an opportunity to act as an insurance broker, directors organized an insurance agency to which the association referred its borrowers for mortgage insurance, and there were possible conflicts of interest directors were liable to association.

Affirmed in part, reversed in part, and remanded.

Underwood, C.J., and Ward and Goldenhersh, JJ., took no part in consideration or decision of case.

West Headnotes

[1] Mortgages ⚿137
266k137

Mortgagee acquires only lien on the property.

[2] Insurance ⚿1790(7)
217k1790(7)
(Formerly 217k115(5))

Mortgagee's interest is an insurable one to extent of the debt.

[3] Mortgages ⚿124
266k124

Mortgagee may procure insurance on mortgaged property to extent of the debt or may require mortgagor to obtain insurance and, as incident to making of loan, act as broker for borrower in placing the insurance.

[4] Building and Loan Associations ⚿24
66k24

A savings and loan association has power to act as broker in placement of mortgage insurance, because that activity is reasonably incident to making of mortgage loan.

[5] Corporations ⚿315
101k315

Under doctrine of business opportunity, corporation or association must be given opportunity to decide, upon full disclosure of pertinent facts, whether it wishes to enter into business that is reasonably incident to its present or prospective operations and, if directors fail to make such a disclosure and to tender the opportunity, directors are foreclosed from exploiting that opportunity on their own behalf.

[6] Building and Loan Associations ⚿23(1)
66k23(1)

Where savings and loan association was not given opportunity to act as broker of mortgage insurance before some of its directors organized a corporate insurance agency to which borrowers seeking mortgage insurance were referred by association, under doctrine of business opportunity, directors were precluded from profiting from the agency's operations. S.H.A. ch. 32, §§ 701-944, 708, 791(b); ch. 73, §§ 613 et seq., 1065.53.

[7] Corporations ⚿313
101k313

Directors are not to be placed in position where their own individual interests might interfere with performance of their duties to their corporations.

[8] Building and Loan Associations ⚿23(1)
66k23(1)

Where under its articles of incorporation, insurance

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agency formed by some directors of savings and loan association was authorized to make loans on real estate, the same business in which association was engaged, and there were other areas in which interest of agency and those of association might diverge, including selection of insurance carrier by borrowers from association, reliability of agency's performance as to periodic renewal of insurance and size of commissions charged by agency, directors of association violated fiduciary duty to association by placing themselves in position where their individual interests in agency might conflict with interests of the association.

[9] Corporations ⚿307
101k307

Fiduciary obligations of corporate director do not include only situations in which director is seller to or purchaser from corporation, or holds an interest in specific property, or under a contract, adverse to corporation.

***22 **40** David P. List and Jerrold E. Fink, of Sidley & Austin, Chicago, for appellants.

Frank J. Mackey, Jr., and Sidney Z. Karasik, Chicago, for appellee.

SCHAEFER, Justice.

The plaintiff, Walter F. Kerrigan, a permanent reserve shareholder of Unity Savings ****41** Association, a savings and loan association chartered under the Illinois Savings and Loan Act (Ill.Rev.Stat.1973, ch. 32, pars. 701 through ***23** 944), brought this derivative action in the circuit court of Cook County on behalf of himself, Unity, and all Unity's other members against five directors of Unity and against Plaza Insurance Agency, Inc. The complaint sought an accounting of profits and injunctive relief. After the complaint and the answer had been filed, each party moved for summary judgment. The court granted the defendants' motion, and dismissed the action. On the plaintiff's appeal the Appellate Court for the First District reversed and remanded. (11 Ill.App.3d 766, 297 N.E.2d 699.) We granted defendants' petition for leave to appeal.

The complaint alleged that Unity was the successor to a savings and loan association formed prior to 1959, and that Plaza had been organized in 1962 by 'some or all' of the five individual defendants. The five include three directors who are also officers of Unity, Saul Z. Bass, Unity's president, Mitchell H. Bass, a vice president, and Howard Bass, the secretary and also a vice president. These three defendants also hold positions with Plaza. Saul Z. Bass is Plaza's president, Mitchell H. Bass is its registered agent, and Howard Bass is its secretary. The complaint does not specify what positions, if any, are held with either Unity or Plaza by the two remaining individual defendants, Louis Speer and Myron Voss. It is admitted by the answer, however, that the individual defendants control Unity's business affairs.

The complaint further alleges that Plaza has its offices in the building owned and occupied by Unity under a lease from the latter, and that Unity 'refers' its borrowers to Plaza to obtain fire and homeowner's insurance and other forms of insurance coverage in connection with mortgage loans made by Unity. These allegations were all admitted by the answer. In addition, in response to interrogatories from the plaintiff, Plaza admitted that it had advertised itself as an 'agent' of Unity.

The complaint contained a further allegation that Plaza was empowered under its articles of incorporation to ***24** place loans on real estate on terms competitive with loans which Unity was authorized to make. The defendants admitted that allegation, but stated in their answer that Plaza had not done so. Defendants also stated in their answer, and in an affidavit supporting their motion for summary judgment, that the lease of office space to Plaza was at a rental no lower than that prevailing for comparable property.

The theory of the complaint was that the individual defendants, by creating Plaza, had assumed a role which would produce a conflict of interest with their positions as directors and officers of Unity. Plaintiff also made the specific charge that by selling insurance to borrowers from Unity the defendants had appropriated for their own benefit a business opportunity which properly belonged to Unity. The relief sought included an accounting of profits, the imposition of a constructive trust on all shares of Plaza stock, and an injunction restraining defendants from continuing the practices complained of. From the answers to plaintiff's interrogatories by Plaza it appears that over the period from 1962 through 1969 Plaza earned approximately $428,000 in insurance commissions. Although one of plaintiff's interrogatories requested information on the amount of Plaza's commissions on insurance placed on

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persons referred to Plaza by Unity, no figures with respect to that item appear in the record.

The only affirmative defenses raised in the answer with respect to the admitted allegations of the complaint, and the only grounds relied on in defendants' motion for summary judgment were that Unity lacked the power under the Savings and Loan Act to write insurance, and that Unity was in any event forbidden to do so by provisions of the Illinois Insurance Code ****42** of 1937 (Ill.Rev.Stat.1973, ch. 73, par. 613 et seq.). The appellate court determined that Unity did have the legal power to engage in the insurance business, either directly or through a subsidiary, and reversed the decision of the circuit court. ***25** Because the appellate court felt that the asserted liability of the defendants involved questions of fact which could not be determined without a trial, it remanded the case for a determination of those questions.

Each party has argued the cause here, as they did in the appellate court, on the theory that defendants cannot be held liable if Unity lacked the legal power to perform the business activities engaged in by Plaza, since in that event there would have been no business opportunity for defendants to appropriate. We conclude, as did the appellate court, that at the time when Plaza was formed Unity did have the power to engage in the same activities performed by Plaza. We are of the opinion, however, that upon the facts alleged in the complaint and admitted by defendants the liability of the latter does not depend solely on whether in 1962 Unity had the power to engage in the insurance brokerage business.

We turn first to the question of Unity's powers under the Savings and Loan Act. While no power to act as an insurance broker is expressly conferred by the Act, section 1--8 thereof (Ill.Rev.Stat.1961, ch. 32, par. 708) does provide: 'An association also shall have any power conferred on a corporation by the Business Corporation Act, and any power not prohibited by law, which is reasonably incident to the accomplishment of the express powers conferred upon the association by this Act.' One of the powers expressly conferred by the Act is the power granted by section 5--1(b) (Ill.Rev.Stat.1961, ch. 32, par. 791) to make loans to members on the security of real estate.

[1][2][3] When such a loan is made on improved property it is in the obvious interest of the mortgagee that the improvement be covered by insurance in an adequate amount. Although the mortgagee, under Illinois law, acquires only a lien on the property (Kling v. Ghilarducci (1954), 3 Ill.2d 454, 460, 121 N.E.2d 752), its interest is an insurable one to the extent of the debt (Trustees of Schools v. St. Paul Fire and Marine ***26** Insurance Co. (1921), 296 Ill. 99, 102, 129 N.E. 567), and the mortgagee may therefore procure the insurance itself. Alternatively, the mortgagee may require the mortgagor to obtain the insurance, and may, as an incident to the making of the loan, act as the broker for the borrower in placing the insurance.

[4] The question of the authority of the mortgagee to act as broker was answered over 100 years ago in Chicago Building Society v. Crowell (1872), 65 Ill. 453. There a loan association, having obtained a covenant from a mortgagor to keep the buildings on the premises insured, agreed to obtain the policy for him. Before that objective had been realized, however, the buildings were destroyed in the Chicago fire, and the mortgagor brought suit against the association for breach of its agreement. By way of defense the association urged that its charter did not empower it to procure insurance, and that the agreement to do so was not incidental to the purpose for which the association had been formed. In rejecting that defense the court stated:

> 'The company was expressly authorized and empowered by the act of the legislature to make loans and provide for the security of the same on real estate, as well upon improved as upon unimproved property. As an incident to security upon improved real estate, no reason is perceived why it may not be regarded as within the powers granted, that the corporation should have the right to contract for insurance on the improvements on the property, to make more available and certain their security, and such a contract would be for the benefit of the company.' 65 Ill. at 457.

****43** While there is language in the opinion relating to estoppel, the decision, in our opinion, established that it was within the power of a savings and loan association to act as a broker in the placement of insurance, because that activity ***27** was reasonably incident to the making of the mortgage loan. A similar conclusion was reached in Goodman v. Perpetual Building Association (D.D.C.1970), 320 F.Supp. 20. Our own conclusion is reinforced by the fact that section 506 of the Insurance Code (Ill.Rev.Stat.1973, ch. 73, par. 1065.53) contains a specific prohibition against the licensing of certain classes of banks as insurance agents or brokers, but contains no parallel prohibition directed against

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savings and loan associations.

In view of our conclusion that Unity can engage, and in 1962 could have engaged, in the insurance brokerage business directly, we need not decide whether Unity, prior to changes in the Savings and Loan Act made in 1967, could have formed a subsidiary to conduct such a business. For the same reason we need not determine whether the individual defendants, assuming that Unity could not have engaged in the insurance brokerage business until 1967, were obligated at that time to terminate their connection with Plaza or to tender to Unity, in some manner, the opportunity to engage in the insurance business.

With the question of Unity's corporate powers disposed of adversely to defendants, we reach the question whether the individual defendants usurped a business opportunity open to Unity. On this issue we start with the basic proposition that a director of a corporation owes a fiduciary duty to it. That proposition, often endorsed by this court, was reaffirmed in Shlensky v. South Parkway Building Corp. (1960), 19 Ill.2d 268, 166 N.E.2d 793, a case involving leases to and purchases of property from other companies in which directors of the building corporation held an ownership interest or a directorship. It was charged by minority stockholders of the corporation, and this court found, that the challenged transactions were unfair to the corporation, that they amounted to a depletion of its assets and the siphoning off of its profits for the benefit of the other concerns. See 19 Ill.2d at 287, 291, 166 N.E.2d 793.

It may be conceded that if a corporation has been ***28** informed by a director of a business opportunity, which it declines, the director may then be free to pursue the opportunity himself. That was the situation in Diedrick v. Helm (1944), 217 Minn. 483, 14 N.W.2d 913, in which the secretary of a savings and loan association was permitted to establish his own separate insurance agency after the association had considered and rejected the possibility of operating its own agency.

In the present case, however, no claim is made that Unity was informed of the possibility that it might enter into the insurance business or of the intention of the defendants to do so on their own if Unity did not. Defendants stress their belief that Unity could not have legally engaged in the business. But that belief, assuming that it was held in 1962, cannot operate as a substitute for defendants' duty to present the question to Unity for Unity's independent evaluation. Since the individual defendants, as directors, admittedly controlled Unity, the requisite disclosure and tender would necessarily have had to be made to Unity's shareholders.

[5] For various legal, financial, or other reasons Unity might properly have concluded as a matter of business judgment that it did not want to become an insurance broker. But if the doctrine of business opportunity is to possess any vitality, the corporation or association must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. If directors fail to make such a disclosure and to tender the opportunity, the prophylactic purpose of the rule imposing a fiduciary obligation requires ****44** that the directors be foreclosed from exploiting that opportunity on their own behalf. (See Lutherland, Inc. v. Dahlen (1947), 357 Pa. 143, 53 A.2d 143; Durfee v. Durfee & Canning, Inc. (1948), 323 Mass. 187, 80 N.E.2d 522.) In the latter case, with regard to the alleged financial inability of a corporation to make certain purchases, the ***29** court quoted the following passage from Irving Trust Co. v. Deutsch (2d Cir. 1934), 73 F.2d 121, 124: 'If the directors are uncertain whether the corporation can make the necessary outlays, they need not embark it upon the venture; if they do, they may not substitute themselves for the corporation any place along the line and divert possible benefits into their own pockets.' (323 Mass. 187, 202, 80 N.E.2d 522, 530.) We consider that this reasoning is equally applicable to a claim that a corporation was precluded from following a course of action by legal, rather than financial, reasons. See Note, Corporate Opportunity, 74 Harv.L.Rev. 765 (1961).

[6] The present case is not one in which the defendants did no more than capture an opportunity which came their way because of their positions with Unity, an opportunity which Unity had indeed created through its lending activities, although those factors alone would in our opinion be enough to fix liability upon defendants. (See Guth v. Loft, Inc. (1939), 23 Del.Ch. 255, 5 A.2d 503; Rosenblum v. Judson Engineering Corp. (1954), 99 N.H. 267, 109 A.2d 558.) Here it is admitted that the individual defendants caused Unity to 'refer' its borrowers to Plaza, whose office was strategically located in the same building as that of Unity.

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The pleadings do not reveal the terms in which these 'referrals' were couched or the manner in which they were made, but it cannot be supposed that the arrangement between Unity and Plaza was not financially advantageous to the latter. Had it been otherwise the defendants would not have persevered in it. Whether the funneling of prospective customers to Plaza is regarded as an appropriation of an asset of Unity, denominated as good will, or whether it is regarded as an employment of Unity's facilities without compensation to it, the result is the same: The defendants were actively exploiting their position as directors of Unity for their personal benefit. See Guth v. Loft, Inc. (1939), 23 Del.Ch. 255, 5 A.2d ***30** 503; Durfee v. Durfee & Canning, Inc. (1948), 323 Mass. 187, 80 N.E.2d 522; Wadmond, 'Conflicts of Business Interests,' 17 Bus.Lawyer 48 (1961); Wadmond, 'Seizure of Corporate Opportunity,' 17 Bus.Lawyer 63 (1961).

The complaint also charged that in creating Plaza the individual defendants had placed themselves in a position where a conflict of interest would arise.

A potential conflict clearly exists, for under its articles of incorporation Plaza was authorized not only to engage in the insurance business but also to make loans on real estate, the same business in which Unity was engaged. The representation by defendants that Plaza had not hitherto undertaken to exercise that power does not insure that it might not do so in the future. But even as to Plaza's existing operations one can discern areas in which its interests and those of Unity might diverge, among them the selection of the insurance carrier, the reliability of Plaza's performance as to the periodic renewal of insurance, and the size of the commissions charged by Plaza.

[7][8][9] Our decisions have long applied the overriding rule that directors are not to be placed in a position where their own individual interests might interfere with the performance of their duties to their corporation. As early as Gilman, Clinton and Springfield R.R. Co. v. Kelly (1875), 77 Ill. 426, where directors of a railroad company had become stockholders in a company with which the railroad had a construction contract, we observed that the rule 'stands on the obligation which a party owes to himself and his principal, that forbids him to assume a position which would ordinarily excite a conflict between ****45** his individual interest and a faithful discharge of his fiduciary duties.' (77 Ill. 426, 434.) The same thought was expressed in Farwell v. Pyle-National Electric Headlight Co. (1919), 289 Ill. 157, 124 N.E. 449, in which a director had purchased patent rights under which his corporation was the exclusive licensee. (See 289 Ill. at 166--167, 124 N.E. 449.) In our view the fiduciary obligations of a director cannot be diluted to the ***31** point that they include only the situation in which the director is a seller to or a purchaser from the corporation, or holds an interest in specific property, or under a contract, adverse to the corporation.

The defendants have renewed in this court their contention that Unity would have been precluded from entering into the insurance brokerage business by section 508 of the Illinois Insurance Code of 1937 (Ill.Rev.Stat.1973, ch. 73, par. 1065.55). That section specifies that the Director of the Department of Insurance shall not issue a broker's or an agent's license unless the applicant is to be 'actively engaged' in the insurance business. The quoted term is defined to mean that the applicant 'intends' to write insurance on the property or risks of others in an amount such that the total volume of premiums from that source will be at least twice that obtained from insurance on the property or risks of the applicant itself, or the property or risks of its officers or directors, if the applicant is an association or corporation. The argument made is that Unity, as the mortgagee, would be insuring its own risk, as well as the risks of its borrowers, who are thereby its members.

From what we have previously said in this opinion on the question of Unity's powers under the Savings and Loan Act, it is clear that this contention of defendants does not raise a valid defense. That Unity would have been denied a license under section 508 cannot be retroactively assumed, and the record does not show that defendants ever caused Unity to apply for a license.

In reversing the decision of the circuit court the appellate court directed that the cause be remanded and restored to the docket for further proceedings, which the appellate court saw as including a determination whether Unity could 'in fact' engage in the business of insurance brokerage. While a remand is necessary in order for the trial court to ascertain the amounts to which the plaintiff is entitled and to determine what other relief should be ***32** granted, in the view that we take of this case, the question of defendants' liability is established on the basis of the pleadings and no trial is required.

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The judgment of the appellate court is accordingly reversed in this respect, and the cause is remanded to the circuit court of Cook County for further proceedings in accordance with the views expressed in this opinion.

Affirmed in part, reversed in part, and remanded.

UNDERWOOD, C.J., and WARD and GOLDENHERSH, JJ., took no part in the consideration or decision of this case.

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Supreme Court, New York County, New York.

In the Matter of the MANHATTAN EYE, EAR & THROAT HOSPITAL, Petitioner,
and
Memorial Sloan Kettering Cancer Center et al., Intervenors,
v.
Eliot SPITZER, as Attorney General of the State of New York, Respondent,
and
Board of Surgeon Directors of the Manhattan Eye, Ear & Throat Hospital et al., Intervenors.

Dec. 3, 1999.

Charitable corporation filed petition seeking court authorization of transaction that would result in the sale of its real estate assets and closure of nonprofit hospital. The Supreme Court, New York County, Bernard J. Fried, J., held that: (1) proposed sale was not fair and reasonable to the corporation, as required for court approval, and (2) proposed sale did not promote purposes of the corporation, as required for court approval.

Petition denied.

West Headnotes

[1] Charities ⚿48(1)
75k48(1)

Attorney General is made a statutory party to petitions seeking court authorization of disposition of all or substantially all of a charitable corporation's assets, and his "active participation" is presumed. McKinney's N-PCL § 511.

[2] Charities ⚿48(1)
75k48(1)

Attorney General is made a statutory party to petitions seeking court authorization of disposition of all or substantially all of a charitable corporation's assets to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions. McKinney's N-PCL § 511 .

[3] Charities ⚿46
75k46

A charitable Board is essentially a caretaker of the not-for-profit corporation and its assets. McKinney's N-PCL § 511.

[4] Charities ⚿46
75k46

As caretaker of not-for-profit corporation and its assets, charitable Board has fiduciary obligation to act on behalf of the corporation and advance its interests in good faith and with that degree of diligence, care and skill which ordinary prudent men would exercise under similar circumstances in like positions. McKinney's N-PCL § 717(a).

[5] Charities ⚿46
75k46

Board of Directors of charitable corporation is charged with the duty to ensure that the mission of the corporation is carried out.

[6] Charities ⚿46
75k46

"Duty of obedience" requires director of a not-for-profit corporation to be faithful to the purposes and goals of the corporation, since unlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'etre of the organization.

[7] Charities ⚿48(2)
75k48(2)

Director's duty of obedience must inform the question of whether a proposed transaction to sell all or substantially all of a charity's assets promotes the purposes of the charitable corporation under statute requiring court authorization of such transactions. McKinney's N-PCL § 511.

[8] Charities ⚿48(2)
75k48(2)

Factors which court should be concerned with in evaluating transaction to sell all the assets of a

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charitable corporation include whether the seller exercised due diligence in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale; whether the procedures used by the seller in making its decision including whether appropriate expert assistance was used were fair; whether conflict of interest was disclosed, including but not limited to conflicts of interests of board members and experts retained by the seller; and whether the seller will receive reasonably fair value for its assets. McKinney's N-PCL § 511.

[9] Charities ⚿48(2)
75k48(2)

In determining whether sale of charitable corporation's real estate assets was fair and reasonable to the corporation, court would examine transaction as a whole, not just the "fair market value" of the real estate, where sale of real estate, as proposed, was inextricably interwoven with closure of nonprofit hospital. McKinney's N-PCL § 511.

[10] Charities ⚿48(2)
75k48(2)

Proposed sale of charitable corporation's real estate assets, which would have resulted in closure of nonprofit hospital, was not fair and reasonable to the corporation, as required for court approval; although real estate may have been fairly valued, transaction did not take into account hospital's full value as a functioning business or the value of its name. McKinney's N-PCL § 511.

[11] Charities ⚿48(2)
75k48(2)

Proposed sale of charitable corporation's real estate assets, which would have resulted in closure of nonprofit hospital, did not promote purposes of the corporation, as required for court approval, where corporation proposed to change its mission from operating an acute care, specialty teaching and research hospital to instead operating a diagnostic and treatment center. McKinney's N-PCL § 511.

***576** LeBoeuf, Lamb, Greene & MacRae, L.L.P. (Peter K. Vigeland, John M. Aerni, New York City, and Patricia A. Taylor, Staton Island, of counsel), for petitioner.

Eliot Spitzer, pro se, and William Josephson, J. Robert Pigott and Sandra Giorno-Tocco, New York City, of counsel, for Eliot Spitzer, respondent.

Paul, Weiss, Rifkind, Wharton & Garrison (Michael P. Gutnick and Steven B. Rosenfeld, New York City, of counsel), for Memorial Sloan Kettering Cancer Center, intervenor.

Wachtel & Masyr, L.L.P. (John W. McConnell, New York City, of counsel), for Downtown Development Group/Colony Capital, intervenor.

Stillman & Friedman, P.C. (Charles A. Stillman, Scott M. Himes and Peter E. Dolotta, New York City, of counsel), for Board of Surgeon Directors of Manhattan Eye, Ear & Throat Hospital and another, intervenors.

McDermott, Will & Emory, New York City (Andrew B. Roth, Garden City, of counsel), for Lenox Hill Hospital, intervenor.

Swidler, Berlin, Shereff, Friedman, L.L.P. (Kevin O'Brien and Heather Gottry, New York City, of counsel), for Continuum Health Partners, Inc., intervenor.

Levy, Ratner & Behroozi, P.C. (Elizabeth A. Baker , New York City, of counsel), for 1199 National Health & Human Service Employees Union, intervenor.

BERNARD J. FRIED, J.

The Manhattan Eye, Ear & Throat Hospital ("MEETH" or "the hospital") has petitioned for authorization to sell substantially all of its assets, pursuant to Not-For-Profit Corporation Law § 511, which requires that the court be satisfied that the "consideration and the terms of the transaction are fair and reasonable" and that the "purposes of the corporation * * * will be furthered." (Not-For-Profit Corporation Law § 511[d].) What is sought to be sold is MEETH's hospital facility located at 64th Street in Manhattan, to Memorial Sloan Kettering Cancer Center ("MSKCC") and Downtown Group/Colony Capital ("Downtown"), ***577** a real estate developer. The Hon. Eliot Spitzer, in his capacity as Attorney General of the State of New York ("AG"), a statutorily necessary party, has opposed this petition. A thirteen day evidentiary hearing was held which, with the agreement of all parties, merged the preliminary injunction application with the hearing on the merits of the section 511 petition.

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FINDINGS OF FACT

A. Manhattan Eye, Ear and Throat Hospital

Established in 1869, originally located on East 34th Street, and then on East 41st Street, MEETH relocated to its present East 64th Street location in 1906, where it ultimately erected three buildings: the Old Hospital Building, the New Hospital Building and the Annex. At this location, it presently operates a highly sophisticated research and teaching (until it terminated its residency program on June 30, 1999), world-renowned, acute care specialty hospital, providing out-patient and in-patient medical services in three specialized areas: ophthalmology, otolaryngology, and plastic surgery. In February 1995, MEETH opened an Outpatient Extension Center in Harlem (the "Harlem Center"), which, unlike the 64th Street facilities, does not provide in-patient care. Instead, it currently functions similarly to the out-patient clinic at 64th Street, and refers patients to 64th Street, for sub-specialty clinics and surgery.

According to its Certificate of Incorporation, MEETH's corporate purposes are:

> to establish, provide, conduct, operate and maintain a hospital in the City, County and State of New York for the general treatment of persons suffering from acute short-term illnesses; performing general plastic surgery; treating persons suffering from diseases of the eye, ear, nose or throat; and maintaining a school for post graduate instruction in the treatment of such illnesses, performing such surgery, and the treatment of such diseases, and conducting associated and basic research.

By all accounts, MEETH has outstandingly realized these corporate purposes. In order to fulfill its teaching purposes, it developed premier residency programs in the fields of ophthalmology and otolaryngology ("ENT"), as well as a premier fellowship program in aesthetic or plastic surgery. It has consistently been ranked among the top specialty hospitals in the United States. Its physicians have achieved world acclaim for their advancements in medical care and for their provision of acute care in these specialty areas. As to this there is no dispute.

In recent years there have been significant advances in medical technology, and an upheaval in the dynamics and economics of healthcare. The impact of these changes has not escaped specialty hospitals, such as MEETH. Inpatient censuses have been drastically decreasing, a trend which is expected to continue, if not accelerate, with the ongoing shifts to ambulatory surgery. Concomitant with the reduction of inpatient activity, which phenomenon itself has resulted in the reduction of hospital revenues, there have been fundamental changes in hospital economics. This, too, has impacted MEETH, which derives its revenues from several sources, including self-paying patients, reimbursements from Medicare, Medicaid and private health care insurers, and charitable contributions. The Balanced Budget Act of 1997, Pub.L. No. 105- 33, 111 U.S.Stat. 251, has resulted in a reduction of Medicare revenues. There have also been similar reductions in reimbursements from State Medicaid and private health care insurers. This containment of medical expenses, spawned in no small part by the advent of managed care, which has decreased inpatient admission in favor of ambulatory surgery, and other cost cutting measures, is not expected to abate.

MEETH sought to cope with this changed landscape. In 1993, the hospital obtained approval to decertify beds and to ***578** establish six additional operating rooms for ambulatory surgery. In 1995, it opened its Harlem Center as a community outreach program, which also served to funnel patients to 64th Street. Dr. George A. Sarkar, Ph.D., J.D., MEETH's Executive Director, sent to the Board members a "proposed strategic plan," dated November 4, 1998, in which he discussed the "Sale or Lease of the Annex Building" and establishment of the proposed Brooklyn Extension Center ("Brooklyn Center"). Thereafter, in December 1998, MEETH applied to the State Department of Health ("DOH") for authorization to open the Brooklyn Center. In its application, MEETH explained that it "is a specialty hospital located ... at east 64th Street." Although approved, the Brooklyn Center has not been opened.

Then in 1999 MEETH's Board of Directors abruptly decided to sell the 64th Street facility to MSKCC and Downtown; to terminate its residency programs; to close the Hospital; to transform the Harlem Center and the planned Brooklyn Center from extension centers to free standing Diagnostic and Treatment ("D&T") Centers; and to eventually add further D&T centers in the South Bronx. Following these decisions, MEETH entered into a nonbinding "Memorandum of Understanding" for a sponsorship agreement with New York-Presbyterian Hospital ("NYPH"), under which NYPH would

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become MEETH's sole corporate member. Implementation of these plans necessitated the sale of the 64th Street facility, i.e., substantially all of the assets of MEETH, and led to this ligation.

B. "Friends of MEETH" Letter

On October 22, 1998, the Board of Directors received a confidential memorandum, "Re: Crisis at MEETH," from "a group of physicians practicing at Manhattan Eye, [Ear] and Throat Hospital comprising substantially all of the members of the medical staff ... an informal group known as the 'Friends of MEETH.' " This memorandum stated that there was a "crisis at MEETH," discussed a host of problems and recommended "that the Board of Directors, in keeping with its fiduciary responsibility to the Hospital, appoint an independent hospital consulting firm to examine the operations of MEETH in their entirety." Upon receipt of this memorandum, Mr. Lindsay C. Herkness, III, the Board President, contacted Dr. Sherrell Aston, Chairman of the Plastic Surgery Department, and requested that they meet "immediately." Mr. Herkness stated that "[the Friends of MEETH letter] is a bad document, a dangerous document, that could be harmful to both the physicians and the hospital" and asked Dr. Aston "to use [his] influence on the medical staff to withdraw it." When Dr. Aston refused, Mr. Herkness replied if "you guys give me a hard time and don't do that, I'm going to sell the hospital." Mr. Herkness did not deny that he made the remark. Rather, he testified that he did not "recall anything about selling the hospital. It was not on my mind."

Thereafter, Mr. Herkness appointed a Special Committee, consisting of himself, Charles S. Whitman, III, Esq., and Mr. Norman Straus, to "look into the matters raised in the memorandum and to report to the full Board." Mr. Herkness testified that there "was a great deal of concern about the allegations and the need to get to the bottom of it." Deloitte & Touche L.L.P. ("Deloitte"), the Hospital's auditors, were retained to review the financial concerns expressed in the Friends of MEETH letter. In addition, the Special Committee directed the hospital staff to respond, point-by-point, and the Committee had informal meetings with members of the medical staff.

On December 16, 1998, there was a Board meeting, where members of the medical staff were invited to express their views. As Secretary of the Board, Mr. Whitman prepared one page of minutes from the staff notes, which merely mentioned that the physicians in attendance ***579** were allowed to state their concerns, but it did not indicate the nature of the statements. Mr. Whitman explained that "[a]s a corporate lawyer you manage to keep your Board of Directors minutes sanitized." It was after this testimony, and as a result of a court order to produce the staff notes, that twenty-six single-spaced pages of notes were produced. These notes show that twenty physicians spoke out. Mr. Herkness not only described the meeting as "historic" and said that the Special Committee and the "Friends of MEETH" would meet soon, but he sent a memorandum to the Members of the Board of Surgeon Directors confirming that "[o]nce the staff has made their report to the Special Committee, we can meet with the Medical Staff Leadership." No such meeting ever occurred. There was no further Board response to the concerns expressed over the mismanagement of MEETH and the Special Committee never issued a report. Rather, in January 1999, the Special Committee metamorphosed into a Strategic Committee, with an additional Board member added, Richard W. Pendleton, Jr., Esq., and Mr. Herkness changed its mandate.

C. Decision to Monetize MEETH's Assets and to Sell the Hospital

1. Retention of a Strategic Advisor

What occurred was that, as Mr. Whitman put it, there was "[a] bid from [MSKCC] to buy the entire hospital which came out of the blue in the middle of January of 1999." Mr. Whitman had learned of "the approach" from Mr. Herkness, and advised Mr. Herkness that "we have to consider it [the offer] and we would need a committee to do that," which caused Mr. Herkness to reconstitute the Special Committee into a Strategic Committee. Mr. Whitman also advised Mr. Herkness that a "financial advisor was necessary ... because the board would need to have the offer analyzed from a financial point of view." This led to the retention of Shattuck Hammond Partners, a Division of Pricewaterhouse Coopers Securities, L.L.C. ("Shattuck Hammond"), an investment banking firm that provides services exclusively to the healthcare industry. According to Mr. Herkness, the offer from MSKCC was not what caused retention of Shattuck Hammond. Rather, he testified that the strategic advisors were retained after he received a draft of "Proposed 1999

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Operating and Capital Budgets," dated January 15, 1999, which he described as "horrific." It is clear, however, that Shattuck Hammond was retained because of the MSKCC proposal.

On February 5, 1999, Mr. Herkness, with the approval of the Strategic Committee, entered into a written retention agreement with Shattuck Hammond to assist MEETH in evaluating its strategic options. The retainer agreement also authorized Shattuck Hammond to seek out parties "interested in entering into a Transaction with the Hospital," a task which seems irreconcilable with the determination of an appropriate strategic recommendation, a determination which should have come first. [FN1] The "transaction" referred to was defined in the retention agreement as "any merger, consolidation, reorganization, recapitalization, sale, business combination or other transaction pursuant to which the Hospital and/or any assets of the Hospital are involved in acquiring, being acquired by or combining with a third party."

FN1. Interestingly, at the time that this authorization was extended, the full Board had not even considered whether a sale of assets was necessary or strategically prudent.

MEETH agreed to pay Shattuck Hammond a retainer fee of $100,000, and agreed that "[u]pon the closing of a Transaction," it would pay a "Transaction Fee" of one percent (1%) of the "Aggregate Transaction Value." According to Mr. Herkness, he had been informed that this fee arrangement was "standard in the industry." The evidence confirms that there was an understanding that a sale was not ***580** only contemplated at the time Shattuck Hammond was retained, but was the actual expectation of the parties. Thus, Shattuck Hammond had a direct financial interest in an outcome which would require sale of the real estate. Significantly, while the fee arrangement was discussed by the members of the Strategic Committee, it does not appear to be the subject of any discussion by the Board. Indeed, neither Rozlyn Anderson, Esq., nor Mr. Underhill, both Board members, and not members of the Strategic Committee, was aware that if there was no transfer or acquisition of assets, Shattuck Hammond would not be entitled to the 1% transaction fee, although Ms. Anderson testified that had she known it would have been irrelevant.

2. MEETH is Put Up For Sale

On February 22, 1999, Mr. Herkness reported that he had appointed a Strategic Committee to assist in the review of "(1) whether MEETH can survive in today's medical and economic environment as an independent specialty care hospital; (2) what are the strategic options available; and (3) how should MEETH respond to the possible offers from Memorial Sloan Kettering Cancer Center ... and Mt. Sinai-NYU Medical Center Health System [Mt. Sinai]." The Mt. Sinai possibility, as noted by various Board members, "would not involve the closure of the Hospital."

Shattuck Hammond's written report, which Mr. Herkness had described as a "fairness opinion," was presented. However, at trial he acknowledged that it is was not a "fairness opinion," which of course, as a financial advisor at a major brokerage firm, Mr. Herkness would have known is a term of art in the securities field. [FN2] Shattuck Hammond described the "Hospital's ongoing mission.... 'to improve the quality of life for its patients'," and asked:

FN2. Rule 13e-3(e)(1) (17 C.F.R. § 240.13e-[e][1]), promulgated pursuant to Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m, requires the disclosure of various items, listed in Schedule 13E-3, 17 C.F.R. § 240.13e-100, which is important in determining the fairness of a variety of corporate transactions. These statements are commonly referred to as a fairness opinion.

> Can the Board, Management and Medical Staff counteract market forces acting against the Hospital and does the Hospital have sufficient financial resources to sustainably support all aspects of the Hospital's current mission, role and business and charitable purposes?

Having posed this question, Mr. James S. Scibetta, a Shattuck Hammond director, concluded that the "business had no value, but the underlying real estate has considerable value" and "that probably one of the best things for the board to consider was to look at the real estate as a very valuable asset ... and see if it could use that as a way to capture additional resources for the board to sort of refocus its mission and do what the board had been discussing." Mr. Scibetta thought it "ridiculous" to contend that MEETH could remain independent. And he testified that "nobody would pay one dollar in order to just take over the business as is." It was this

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mindset, that the real estate was the only asset of MEETH with value, which determined the future course of events. As Mr. Scibetta put it, the Board wanted to "monetize the assets," rather than seek to preserve MEETH as its main priority.

Neither Shattuck Hammond nor the Board considered MEETH, itself, as having any ongoing economic value. Nor was there recognition or any discussion of the value of MEETH's name, which was considered by Mr. Morton P. Hyman, Chairman of Continuum Health Partners, Inc. (Continuum), to have "great value," and by Mr. Terrence M. O'Brien, Executive Vice President and Chief Operating Officer of Lenox Hill Hospital, to have "marquis value" as "one of the top hospitals in the country." Even Mr. Herkness conceded at trial that the name had "franchise value."

Under the heading "Outlook for MEETH as a Going Concern," Shattuck Hammond concluded that "market forces ***581** have been and are expected to be increasingly unfavorable for the provision of services in a hospital setting," that many of the services provided by MEETH "are being provided in doctors' offices, free standing ambulatory surgery centers, and a number of neighboring hospitals that are competitive for such services with MEETH," and that as a specialty hospital MEETH "has an inherently riskier business model than non- specialty hospitals with considerable financial resources and *harmony* among physicians, management and the Board." (Emphasis added.) The latter, of course, is a recognition by Shattuck Hammond that there was a "[l]ack of confidence and support for the current Management." The strategic plan neither addressed this lack of "harmony," nor discussed whether solving this lack of harmony could or would have changed or altered its evaluation and ultimate conclusions. Instead, Shattuck Hammond determined that "MEETH's recent financial performance is not sustainable and necessitates proactive, dramatic remedial action," pointed out that "MEETH has significant value tied up in unused or underutilized real estate assets" and purported to evaluate various strategic options, including the MSKCC "transaction opportunity," i.e., the sale of all of the real estate, concluding that this would result in the highest "[p]robability of successful implementation vs. financial reward of success," or in other words, it was the best strategic option. However, not all strategic options were evaluated. Shattuck Hammond failed to report Continuum's expression of interest in a non-sale transaction with MEETH as a possible strategic option.

The report continued, "[i]f the [MSKCC] offer were accepted following the implementation and finalization of the plan of closure," Public Health Law, Article 28, would require surrender of the hospital operating certificate; MEETH would be required to obtain certification "to conduct diagnostic and treatment activities in clinic settings"; and "[i]t is unlikely that, given the applicable statutory and regulatory framework, the corporation will be permitted to retain the name 'Manhattan Eye, Ear and Throat Hospital.' " While the latter may or may not be accurate, its inclusion in the Report indicates that Shattuck Hammond recognized, and communicated to the Board, its understanding that the sale of the real estate would definitively alter MEETH's mission. Moreover, although there had been discussion at previous Board meetings about expanding the extension centers, such discussion was always in the context of the continued existence of an acute care hospital on 64th Street. The free standing D&T center proposal appears to be mentioned for the first time as an option identified in the Shattuck Hammond report, as it sought to "reprioritize" MEETH's mission.

At the February 22nd meeting, Cushman & Wakefield submitted a "Restricted Appraisal Report," concluding that value of the 64th Street real estate "was in the range of $46 to $55 million, it being understood that an approximate 12- month marketing period would be required to attempt to realize such value in the real estate market." It was pointed out that the net proceeds would be reduced by "real estate brokerage commissions in the range of 2.3%." The fee arrangement with Shattuck Hammond was not discussed. The February 22nd meeting concluded with the nine board members present (two members had been excused) unanimously voting to sell the real estate to MSKCC or Mt. Sinai, or to "any other not-for-profit health care provider for a price as near as possible to $45 million," which was less than the Cushman & Wakefield appraisal. The Board also authorized filing of the requisite applications for regulatory and judicial approval.

Mr. Herkness testified that this decision to sell was impelled by the "doomsday scenarios" set forth in a January 15, 1999 memorandum from Mr. Leonard Weil, MEETH's Chief Financial Officer, containing three proposed operating budgets for ***582** 1999. Mr. Herkness did not know if any of these budgets,

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which forecast "bottom line losses" ranging from $6,369,000 to $3,417,000, which he described as "warning shots ... was actually adopted." It was this memorandum that "heightened" his concerns about MEETH's financial situation, and which led to the decision, taken within five weeks, to sell the real estate and to close MEETH as an acute care specialty hospital [FN3]. The Board accepted Shattuck Hammond's negative conclusion concerning "the continued viability of MEETH's remaining an independent specialty care hospital," and its recommendation that "the Hospital's current mission would be de-prioritized," a reference to elimination of the Hospital in Manhattan, terminating the performance of plastic and reconstructive surgery, and ending the "school for post-graduate education." The minutes do not record any discussion as to what MEETH planned to do with the net proceeds, although Mr. Herkness and Dr. Sarkar each testified that the sale proceeds were intended to be applied to transform MEETH from its historical role as a teaching specialty hospital into free standing D&T centers in underserved areas of New York City.

FN3. According to Mr. Herkness, these budget proposals also led to the significant February 2, 1999 decision to defease approximately $16.2 million of Dormitory Authority of the State of New York ("Dormitory Authority") bonds, which had been issued in a refinancing on August 1, 1997. The 1997 refinancing dropped the interest rate to below 5%, which Mr. Herkness testified had saved the Hospital "almost a million dollars annually."

The refinancing agreement provided that if the debt service ratio (essentially net income divided by interest payments) fell below 1.25 then the Dormitory Authority "may require the Hospital to employ a Hospital Consultant" and submit a report with regard to "actions to be taken by the Hospital to improve its management and financial position," and if the ratio fell below 1.10 "for any two consecutive fiscal years," then the Hospital "must immediately employ such a consultant, implement its recommendations," and file a report.

Mr. Herkness testified that, since the proposed operating budgets forecast a drastic drop in the debt service ratio, it was decided that the Bonds should be paid off in full. Thus, by "Unanimous Written Consent ... In Lieu of a [Board] Meeting," the Board resolved "to completely defease" the bonds. This required taking $9.4 million from cash reserves and using $6.8 million which had been withheld by the Dormitory Authority. Mr. Herkness was concerned that, if they fell below the ratio MEETH would be forced into "paying off the bonds." And Mr. Whitman thought "then presumably, you could be thrown into bankruptcy by the dormitory authority." Passing the fact that a charitable hospital cannot be put into involuntary bankruptcy (11 U.S.C. § 303) , and that the Agreement provided graduated measures, it appears that there was no effort to determine what action the Dormitory Authority would have taken. Astonishingly, at a time when MEETH was supposed to be facing financial "doomsday," the bonds were paid off without determining how much investment income would be lost compared with the interest that would saved as a result of paying off the bonds, and without ascertaining the position of the Dormitory Authority.

The refinancing also gave "the Authority ... a first mortgage lien" on its real property to "secure all obligations and liabilities" under the Loan Agreement. This was a "condition precedent" to the issuance of the bonds. In its Written Consent, the Board stated that "the equity represented by such bond reserves can be more effectively utilized in connection with a prepayment of the mortgage ... to give the Hospital greater flexibility and options in dealing with its financial needs." This leads to the conclusion that the bonds were defeased as part of the plan to sell the real estate and is evidence that the emphasis was on sale, since if the Board was seeking means to preserve MEETH, defeasance may not have been desirable.

3. Expressions of Interest in Keeping MEETH (Prior to February 22, 1999)

Prior to the February 22nd decision to sell, there had been expressions of interest in keeping MEETH as an acute care specialty hospital which were neither mentioned at the Board meeting, nor in the Shattuck Hammond report. One such expression came from the New York Eye & Ear Infirmary ("NYEEI"), which in February was well into joining Continuum. Discussions with NYEEI had, in fact, been ***583** ongoing for years. Continuum had also shown interest in MEETH: the previous year, in March 1998, Dr. Robert G. Newman, Continuum's President and CEO, met with Dr. Sarkar. Nothing came of that meeting. Thereafter, on December 18, 1998, Mr. Hyman met with Mr. Herkness, and other MEETH officials, in connection with MEETH's desire to sell the Annex. At this meeting, Mr. Hyman referred to Continuum's discussions with NYEEI and suggested that they explore "possibly merging the two institutions [MEETH and NYEEI]." Mr. Herkness replied that MEETH "was very strong

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financially, certainly stronger than New York Eye and Ear and that he wouldn't see any reason really to combine unless basically New York Eye and Ear gave Manhattan Eye and Ear the keys, but he would consider that and possibly get back to me [Mr. Hyman]." Mr. Herkness testified that Mr. Hyman "was rather enthusiastic" about MEETH fitting into the NYEEI affiliation, although Mr. Herkness testified that he had no interest, because "at that point we still thought we had a viable enterprise." Thus, contrary to Mr. Scibetta's view that "nobody would pay one dollar in order to just take over the business as is," there was interest from other medical institutions in seeking to preserve MEETH as a world-class teaching and research hospital, which were ignored by the Board in adopting the recommendations of Shattuck Hammond, its strategic advisor.

4. March 22, 1999 Board Meeting: Mt. Sinai Offer Discussed

On March 11, 1999, Mt. Sinai and MEETH entered into a thirty day, binding agreement, which contained a no-shop clause [FN4], to sell the real estate for $46,000,000. Under this agreement, Mt. Sinai would continue to maintain MEETH's mission as an acute care specialty teaching hospital. This proposal was discussed at the March 22, 1999 meeting of the Executive Committee of the Board of Directors. It was explained by the Strategic Committee that "such a transaction would bring a large critical mass and expertise to MEETH's existing operation, keep the Hospital's present services as well as add to them, ensure the continuance of the Residency Programs, and maintain all Hospital employees in their present or similar positions. This would allow MEETH to continue to run extension centers in underserved areas and fund research." This agreement between MEETH and Mt. Sinai lapsed before the next Board meeting.

> FN4. MEETH agreed "not to solicit, initiate or encourage the submission by a third party of any competing proposal."

5. Board's Decision to Open the Bidding Up

At its April 15, 1999 meeting, the Board was told by Mr. Scibetta that both MSKCC and Mt. Sinai had "backed away from their initial proposals and have indicated an interest only at a price substantially below the $46 million minimum amount ... in the appraisal." Mr. Scibetta recommended that MEETH should "open up the process and inject some competitive forces into the negotiations." Because the Board "wanted to be able to offer [the properties] to real estate developers as well as to make sure that all of the potential bidders on the upper east side real estate [sic] would be approached," it voted to retain Cushman & Wakefield as its broker. Shattuck Hammond was to contact "likely not-for-profit hospital entities" and Cushman & Wakefield would seek to qualify "five or six of the most prominent and likely real estate buyers."

Previously, however, in late February or early March, Mr. Hyman, from Continuum, had spoken with Mr. MacRae, MEETH's attorney who, as required by the no-shop clause, said "that the negotiations between MEETH and another hospital ***584** were so far along that they did not feel they could discuss any other corporate possibilities with [Continuum] or anyone else, and that they felt ethically and morally bound not to enter into such discussions." The Board was not informed of this conversation. From the evidence it is clear that by the time the Mt. Sinai offer had lapsed and Cushman & Wakefield had been retained, the Board's goal, as Mr. Scibetta testified, was "to obtain fair value for the assets, and for the bids to be in by basically, I think we had established early May." No reason has been provided for this haste to sell the real estate, a haste which seems particularly unnecessary in light of the Cushman & Wakefield Restricted Appraisal Report, which had stated that the required marketing period would be approximately one year. Nor was there any reason as to why Continuum's interest in preserving MEETH by entering into a non-sale transaction was not included in Shattuck Hammond's report as a possible strategic option.

On April 25, 1999, the *New York Times* reported that MEETH was for sale.

Thereafter, a scheduled annual Board meeting was held on April 29, 1999, at which time Mr. Scibetta said bids were expected to be received, beginning on April 30th, and he reiterated that Shattuck Hammond had determined "that the Hospital's business had no value." He also advised the Board that "[a]lthough Shattuck Hammond Partners tried to interest Mt. Sinai in taking over MEETH, Mt. Sinai was disinterested in keeping the business and only interested in the real estate aspect of the transaction, at a figure much lower than the appraisal." At this

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meeting, the Board voted to sell the hospital, at a price in excess of $40,000,000. There was no explanation for this decision to sell the real estate for *less* than its appraised value of $46 to $55 million. At this meeting, authorization to seek regulatory approvals was again provided. Moreover, the Board now realized that its sale and closure plan, leading to free standing D&T centers, would require an amendment to the Hospital's Certificate of Incorporation, and a proposed amendment was authorized, although never submitted.

Now, two months after the Board initially had voted to sell its real estate, the minutes for the first time identify, in the context of discussion of the *New York Times* article, that the Board had decided that "the Hospital was going back to its original mission of serving the poor in underserved areas, and redirecting its charitable assets to accomplish this goal." Other than the Shattuck Hammond report, which discusses the Hospital's "original" mission, there is no written record concerning this momentous decision. There had been no study concerning this so-called return to the "original mission" and no proposal or recommendation on the subject was provided to the Board for its review and deliberation. Notably, there was no management plan or recommendation discussing the need to return to this "original" mission, nor do prior Board minutes report any discussion held on the subject.

6. Board Accepts Downtown and MSKCC Offer

By the May 5, 1999 Board meeting, four separate proposals had been received, including a $41,000,000 bid from Downtown and MSKCC (and two proposals from real estate developers). According to this offer, MSKCC would open a breast cancer facility in the New Hospital Building, and the remaining real estate, to be purchased by Downtown, would be used as a building site for an apartment building. Mt. Sinai submitted two alternative proposals: (1) a $27,500,000 offer for the real estate, with the hospital closed; and (2) an offer to acquire the Hospital and its operations for "a very substantially reduced price." Because the second Mt. Sinai offer was "vague," the Board took a "short break" in its meeting during which Mr. Scibetta, at the Board's request, placed a telephone call to Mr. Barry Friedman, Mt. Sinai's ***585** President and Chief Financial Officer, who stated that Mt. Sinai would seek a "very reduced price," in the range of five to eleven million dollars, and would only commit to running MEETH for up to two or three years. This spur-of-the-moment telephone conversation persuaded the five Board members who were present that the MSKCC offer should be accepted "promptly." Somehow, this telephone call to Mr. Friedman had confirmed Shattuck Hammond's view that MEETH had no value, beyond the real estate it was "sitting" on, warranting acceptance of the MSKCC offer.

The Board took no further steps to seek a bidder which would save MEETH's long-established mission. Instead it decided that "the most preferable offer" would be a combination of "fair and reasonable consideration" together with the involvement of a major tax exempt hospital. This sale would "provide the necessary funding for the Board's envisioned diagnostic and treatment centers and other hospital-type activities to be relocated to medically underserved areas in New York City." The Board then approved a sale to Downtown and MSKCC. That same day, Mr. Herkness executed a non-binding letter of intent, without a no-shop clause, to sell the real estate to Downtown and MSKCC. (On June 25, 1999, the parties entered into a "Real Property Contract for Sale" ["Contract"].)

The May 5th minutes record that after the decision to sell was approved, "[t]he Board *then* discussed the issue of closing the Hospital. The Board noted that *no* actual decision had been made to close the Hospital." (Emphasis added.) Previously, on April 29, 1999, the Board had terminated the residency program and authorized the President to prepare for possible hospital closure. However, even as of May 5th, as the minutes show, the Board did not seem to believe that it was actually closing the Hospital. One has to wonder exactly what the Board thought it was doing. Then, without a record of further discussion or Board authorization following this May 5th meeting, MEETH submitted a closure plan to the DOH on June 14, 1999, as an attachment to a letter from Dr. Sarkar, in which he also "requested issuance of a diagnostic and treatment center operating certificate for the existing Harlem facility." It was after this that Mr. Herkness sought (and obtained) "a resolution reaffirming the Hospital's intent to close the East 64th Street facility." This occurred at the July 26, 1999 Board meeting.

As of July 26th, the Board had neither received nor commissioned any study with regard to the Board's planned use of the sales proceeds to establish D&T

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centers, the necessity for such centers, or the viability of such centers. It was an idea in progress. It may be that written documentation, at this point, was not needed, if there had been any other type of evaluation; however, there was none. There had been no consultation with the medical staff or other medical experts or health care experts or anyone else concerning its feasibility or viability. Rather, Mr. Herkness testified that the "best feasibility study is five years of experience." It bears noting, however, that MEETH had no experience with free standing D&T centers. At best, this plan evolved from the Harlem Center, which was an extension center, and not a free standing center. Nonetheless, without such seemingly basic information, the decision to sell and close was made.

From these events, the conclusion is inescapable, based upon all the credible evidence, that the Board, recognizing MEETH's financial problems, certainly after the March 11, 1999 Mt. Sinai letter of intent lapsed, chose not to seek a solution that would preserve the Hospital, either itself, or in some sort of affiliation with a major medical institution that would be willing to try and preserve MEETH's historic purposes. Rather, the Board decided on a course of action which would lead to the sale and closure of the hospital, and then provide the Board with a substantial ***586** sum of money to allow it to take MEETH down the path to new, unstudied and unevaluated charitable purposes.

MEETH began to act, i.e., it terminated the residency program, upon the assumption that it would receive DOH approvals for closure and establishment of the D&T centers. It executed a letter evidencing its intent to sell to MSKCC, and chose to take steps to effectuate closure and receive regulatory approval for its plan, to enter into a contract for sale, and then to seek court approval under section 511. This would have had the effect of presenting the court with what would have been essentially a fait accompli. To put it another way, if everything went as hoped for, MEETH would have been able to present the section 511 petition pertaining to an *already* closed hospital, with DOH approval for the D&T centers, and it would have asked the court to find "that the purposes of the corporation ... will be promoted." This would have effectively neutralized, or substantially compromised, any meaningful judicial role in the section 511 process. Indeed, under the scenario envisaged by MEETH, denial of the petition would have been a pyrrhic victory for its opponents: the hospital would already be closed; under such circumstances, a court order could hardly have restored MEETH.

D. Events Following the Decision to Sell and Close MEETH

1. MEETH Doctors Seek to Enjoin the Proposed Sale

On May 10, 1999, a CPLR article 78 petition was filed to enjoin the proposed sale to Downtown and MSKCC. The Attorney General did not participate in this proceeding. Rather, in a letter from William Josephson, Esq., Assistant Attorney General, Charities Bureau, the court was advised that "[s]ince the proposed transaction is in a preliminary stage, it would be premature for us to take a formal position on it." On May 28, 1999, the petition was dismissed. What the Article 78 proceeding demonstrated, however, is that the medical staff played no role in the decision to sell and close the hospital: it was not consulted and the Board did not respond to written entreaties on behalf of the doctors. While they were not necessary parties, in a legal sense, Mr. Herkness and the Board recognized that it was the medical staff that distinguished MEETH. Nevertheless, the Board members believed that the doctors were acting in their own self-interest in opposing the sale and did not involve them in its fundamental decisions affecting the future of MEETH.

2. MEETH Commissions Business Plan Re: D&T Centers

Following the June 14, 1999 submission of the closure plan to DOH, Mr. Wayne M. Osten, Director, Office of Health Systems Management, DOH, wrote to Dr. Sarkar on July 22, 1999, and requested "a business plan or financial feasibility analysis on the proposed MEETH Diagnostic and Treatment Centers." This request caused MEETH, which had made the decision to transform MEETH's mission without detailed analyses, and had no studies, reports or other documents concerning the D&T plan, to retain outside consultants, Dr. Frank Cicero, of Cicero Shapiro Velazquez & Cicero, and Mr. Charles Kachmarick, President, Sterling Health Capital Management. These consultants were retained "to develop a business plan in support of the proposed MEETH Diagnostic and Treatment Center." Significantly, they were charged with supporting the already decided-upon plan. The

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Cicero/Sterling study, entitled "Manhattan Eye, Ear & Throat Hospital Business Plan For Fulfillment of Mission Statement" ("Business Plan"), not unsurprisingly supported closure of the Hospital, and the transformation of MEETH from a world-class teaching hospital to operating two D&T "sites in under-served areas in Harlem and Brooklyn." The Board had decided upon the Mission statement; the retained consultants then wrote the "Operational Plan," and provided a ***587** "Need Assessment" and "Financial Projections." Neither Dr. Cicero nor Mr. Kachmarick looked at or evaluated, or were asked to look at or evaluate, any of the proposed alternatives to closing MEETH. Indeed, Dr. Cicero, who testified that he was aware of Continuum's interest, and "possibly Mt. Sinai," stated that it would have been "inappropriate" for him to talk with interested potential bidders for MEETH.

At its September 21, 1999 meeting, the Business Plan was accepted by the Board. It was also at this meeting that the Board authorized the filing of a petition seeking court approval of the sale of the hospital's real estate. Under the terms of the June 25, 1999 contract, this petition should have been filed within sixty days. While there has been no explanation for the failure to file in accordance with the contract, there is no doubt that MEETH was putting off instituting the judicial petition while awaiting the hoped-for DOH approvals for the closure and D&T plans. By September 21st, it decided it could not put off the filing any longer.

3. Attorney General Becomes Involved

Since as a Type B, i.e., charitable, corporation, MEETH does not have shareholders, the Attorney General, acting as *parens patriae,* is statutorily involved whenever such a charity seeks to dispose of all, or substantially all, of its assets, as MEETH resolved to do (N-PCL § 511). Upon learning from the *NY Times* article of the decision to sell, Paula Gellman, Esq., Assistant Attorney General, Division of Public Advocacy, wrote to Dr. Sarkar on April 27, 1999, and explained that it was "common practice" for the AG to become involved "before a formal submission is made to the Supreme Court so that we may review the papers and raise any questions or concerns we have in advance." This led to a meeting at the AG's office, which was followed by a June 3rd letter from Mr. Josephson to Thomas Ruggiero, Esq., one of MEETH's counsel, stating that since it decided to sell the Hospital, the Board is required "to entertain all responsible proposals, not to favor any bidder over another in the process, and to treat all bidders and potential bidders identically and fairly." This letter was submitted because the AG had received complaints alleging that other interested buyers were not able to obtain pertinent information. In response, the AG was advised that "a successful bidder has been selected and pursuant to a letter of intent, good faith negotiations regarding the definitive contract are continuing." The AG was not told that the letter of intent was not binding, and that it did not contain a no-shop clause. Nor were other interested parties advised that it was non-binding. Mr. Scibetta testified that MEETH could not "be seen actively soliciting proposals, but we are more than willing to review any proposals, and the board would have a fiduciary responsibility to do so." This statement was incorrect; there was nothing in the non-binding letter which would have prohibited MEETH from actually seeking to preserve its mission.

On June 23, 1999, Dietrich L. Snell, Esq., Deputy Attorney General, Division of Public Advocacy, wrote to MEETH's counsel, complaining that there were other "*bona fide* offerors" and that "[w]e are not aware of ... one single shred of evidence that MEETH is actively exploring in good faith all or even any of these expressions of interest [which would preserve MEETH]." This statement proved to be accurate.

Thereafter, the AG's representatives were ultimately invited to attend the July 26, 1999 Board meeting, both the full meeting attended by several doctors from the medical staff, and the Executive Session. At both of these meetings, Mr. Scibetta evaluated various offers, and reiterated that it was the opinion of Shattuck Hammond that the Hospital's "business had negative value." At the end of the Executive Session, Mr. Herkness said that ***588** "[i]t was the sense of the Board of Directors to monetize the real estate...." The decision to go forward with the sale to MSKCC and Downtown was unchanged.

Representatives of the AG continued to meet with MEETH, DOH officials, and others, over the additional concern that MEETH was engaging in a *de facto* closure of the Hospital, since its closure plan had not received DOH approval. The AG also continued to insist that MEETH must negotiate in good faith with other potential bidders. When MEETH filed this petition, the AG opposed it on the ground that other offers had been submitted, which

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would have preserved MEETH, and that there had been no genuine effort to negotiate with these bidders in good faith.

E. Alternative Proposals Designed to Preserve MEETH

1. Continuum Proposal

Mr. Hyman, Chairman of Continuum, having been told in late February or early March that MEETH was in negotiations which were "far along" with an unnamed hospital, and that it could not discuss other proposals, did nothing further until he read the *New York Times* article. He then met with MEETH's physicians and he agreed to try to accommodate at Continuum the medical staff, who would be dislocated upon the sale of the Hospital, and the residents, whose program was being discontinued on June 30, 1999. This led to Mr. Hyman writing a letter on June 29, 1999 to Mr. Herkness in which he proposed a solution which would allow MEETH to continue its mission. Mr. Hyman testified that Continuum proposed "to take the facility over. We were confident that with different management ... as well as our financial strength ... we could continue MEETH in furtherance of its mission." Continuum's offer was that MEETH "join" its healthcare network and combine with NYEEI, which had just joined Continuum. It was not an offer to purchase the assets. Continuum would have maintained the Harlem Center; however, no commitments were made with regard to the proposed D&T centers since the specific proposal was not shown to Continuum. Mr. Hyman explained that they would have to perform "due diligence" to determine if the proposal was "sound." Continuum was prepared to "guarantee" MEETH against all losses for five years and to invest "$10 million, as needed" (a figure which was later raised to $15 million). Finally, since the proposal was for MEETH to merge with NYEEI, this proposal additionally provided MEETH with the security of the assets of NYEEI, and its unencumbered real estate. Recognizing that "in the future, it might be appropriate for MEETH to sell a portion of its real estate[,]" Continuum guaranteed that "[e]very dollar raised from the sale of any asset of MEETH must stay with MEETH and be used solely for the advancement and enhancement of MEETH."

A condition of Continuum's proposal was that "the existing members of the Board of Directors of MEETH are to resign upon the consummation of this transaction." As Mr. Hyman put it, Continuum's proposal left no money for the use of MEETH's Board in its plan to establish the two D&T centers, or to expand into other geographical areas. He pointedly testified that the Board did not "have an interest separate and apart from the institution itself," and questioned "why a board insists upon receiving money to go off and do their own thing." He explained that if "the standard of comparing a hospital's value as an ongoing concern [is] by looking at the operating income and the operating expenses versus the asset value, then ... almost every hospital in Manhattan would have to sell its real estate and go out of business." To preserve MEETH, Continuum was prepared to keep, as minority members, those current Board members who are prepared "to support" the "one hundred and thirty year old" mission of MEETH.

On July 1, 1999, Mr. Hyman proposed an "immediate" merger between MEETH ***589** and NYEEI, and agreed to "guarantee all obligations now existing at MEETH." He received no response from Mr. Herkness to either of his letters. However, on July 10, 1999 Mr. Hyman received a letter from Mr. Scibetta, asking him to meet with him. On July 13th, they spoke on the telephone, and Mr. Scibetta wanted to know "what Continuum was prepared to bid for the MEETH real estate." Told that Continuum did not want to buy the real estate, but rather to "continue MEETH exactly where it was," Mr. Scibetta replied "that's very nice, but our board has decided that we are going to sell the real estate." When asked the "purpose" of having a meeting, since Continuum was not a bidder for the real estate, Mr. Scibetta replied that "you know what this is all about and I think we should get together." A meeting was scheduled for July 15th but was never held.

What occurred is that after the telephone conversation, Mr. Hyman invited representatives of the AG to the meeting, "because so many misunderstandings seem to have cropped up already, that I didn't want to come out of a meeting and have more misunderstandings." The morning of the meeting, Mr. Scibetta learned that Mr. Hyman had invited representatives of the AG, and told Mr. Hyman that he would not attend the meeting. When asked why, Mr. Scibetta replied that "what he had to tell me he would not [say] in front of the Attorney General." Mr. Scibetta confirmed that he had refused to attend the meeting with representatives of the AG. He testified, as he had informed the Board,

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that it was inappropriate for these representatives of the AG to attend the meeting with Continuum, in light of the fact that other potential bidders had not made similar requests.

At the July 26, 1999 Board's Executive Session, Mr. Scibetta reported that on July 1st Continuum had submitted a proposal. He explained that MEETH would become a "subsidiary," the Board would be required to resign, and then he incorrectly characterized the proposal merely as an offer to "invest up to $10 million ... [which] was inferior in all respects to the Mt. Sinai proposal of May 5, which had already been rejected by the Board of Directors." Neither orally nor in the written report was the Board advised of the full scope and nature of Continuum's proposal, including that it would guarantee all of MEETH's losses for five years.

Thereafter, in mid-September, Mr. Hyman received an invitation to meet with Mr. Scibetta, and on September 17, 1999 he attended a meeting with Mr. Scibetta, Mr. Herkness, and two other Board members, Mr. Chips Chapman Page, and Mr. Richard W. Pendelton, Jr. Continuum's proposal, which included that it was prepared to take over and run MEETH within twenty-four hours, was described. Continuum was also prepared to invest beyond the $15 million, "if we had an opportunity to discuss the proposal with the MEETH board." Mr. Hyman further explained that if MEETH's real estate were to be sold in the future, the proceeds would remain "within the MEETH facility to support its mission." Mr. Herkness and Mr. Scibetta told Mr. Hyman that "the board has decided that we want to sell the real estate. [And asked:] Are you prepared to make a bid," to which Mr. Hyman replied "absolutely not." During the meeting, either Mr. Herkness or Mr. Scibetta inquired whether Continuum was willing to indemnify MEETH against MSKCC, if liability arose from "break[ing]" the Contract. Believing, correctly, as it turned out, that the Contract was conditioned upon regulatory and judicial approvals, Mr. Hyman asked to see the written Contract, in order "to know what it was that we were being asked to indemnify." This request was refused and the meeting ended. There were no further discussions with Continuum.

2. Lenox Hill Proposal

Mr. O'Brien, Executive Vice President and Chief Operating Officer, and Ms. ***590** Gladys George, President and Chief Executive Officer of Lenox Hill, on June 23, 1999, met with Mr. Scibetta, who told them that MEETH was about to sign an agreement to sell its property and inquired whether Lenox Hill "would like to buy their property." Mr. O'Brien replied it was not interested in purchasing "the property, [but] we would be very much interested in having a potential relationship with MEETH, either a merger or a sponsorship, where we could keep MEETH open and could continue to fulfill its mission." This led to a June 25th letter from Ms. George to Mr. Herkness, expressing her desire to meet with him and MEETH's Board "to discuss this matter further."

On July 1, 1999, Lenox Hill sent Mr. Herkness a written proposal to sponsor MEETH, which would become a subsidiary of Lenox Hill, with Lenox Hill as the sole voting member. Under the terms of this proposal, which Ms. George wrote would "result in an approximately $50 million financial benefit," MEETH would continue in the New Hospital Building on East 64th Street, and Lenox Hill would guarantee "to invest not less than $3 million per year for not less than ten years to support the hospital and related services provided by MEETH." Title to the Old Hospital Building and Annex, which had been appraised as worth from $16.6 to $20.2 million, would be transferred to a newly created MEETH Foundation, whose trustees would be MEETH's existing Board. This Foundation could use the proceeds to further MEETH's corporate purposes, including patient care at the New Hospital. Lenox Hill was prepared to operate MEETH immediately. Ms. George was "anxious" to meet with MEETH to "refine the terms and conditions" of this proposal. On July 14, 1999, Lenox Hill officials again met with only Mr. Scibetta, even though they had "requested on a number of occasions" to meet with MEETH's board members. Mr. Scibetta made it clear that MEETH was "very focused on trying to complete the [MSKCC] transaction." This led to Lenox Hill formulating another proposal, which was contained in a July 15th letter sent to Mr. Herkness, the so-called Lenox Hill # 2 proposal which continued the sponsorship proposal, but recognized the MSKCC and Downtown contract.

The Lenox Hill proposals were discussed at the July 26, 1999 Board meeting, at which representatives of the AG and the DOH were present by invitation. Also invited were Mr. Michael P. Gutnick, Senior Vice President, Cushman & Wakefield, and James Lytle, Esq., attorney for MSKCC. Several members of the medical staff were also present. No

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invitation had been extended to Lenox Hill. Shattuck Hammond presented a written report in which, *inter alia,* it described the Lenox Hill proposals, and mischaracterized the proposals concerning the purpose of the MEETH Foundation. Moreover, Mr. Scibetta failed to inform the Board that Lenox Hill, as stated at the July 14th meeting, would be willing to establish "a separate LH-MEETH subsidiary" if that would be more desirable to the Board. On July 30, 1999, Ms. George wrote to Mr. Scibetta, complaining of these mistakes, and sent copies to the Board members. She also requested a meeting with Mr. Scibetta and the Board. There was no response. Thereafter, a meeting was held on September 16, 1999; representing Lenox Hill were Mr. James Marcus, Chairman of the Board, Ms. George, Mr. O'Brien, and representing MEETH were Mr. Scibetta, Dr. Sarkar, Mr. Herkness, Mr. Whitman (who had to leave early), and another Board member. At this meeting, Lenox Hill explained its proposals. Mr. Herkness then requested that MEETH be provided with additional documentation "outlining exactly what the MEETH Division would be." Ms. George responded that it would take "a week or so to put together the [requested] detailed information." Mr. Herkness replied "fine," they all shook hands, and the meeting ended. Lenox Hill started to assemble material requested by Mr. Herkness. ***591** However, it never completed the assembly and forwarding of the materials because on the following Tuesday, September 21, 1999, the Board authorized its counsel "to proceed as expeditiously as practicable to file the Section 511 petition" seeking judicial approval of the sale to MSKCC and Downtown. This petition was filed later that day. The Board was not informed of the meeting held with Lenox Hill, nor was it informed that Mr. Herkness had requested additional information and that he had been told by Ms. George it would be submitted in "a week or so."

F. MEETH'S Plan

MEETH's plan is to sell a part of its real estate to MSKCC, one of the world's outstanding cancer treatment and research centers. MSKCC plans to convert the New Hospital Building to expand its breast cancer center. Undeniably, this would be an extremely worthwhile use. However, the issue under section 511 is not the buyer's planned use of the real estate, however worthy that use may be, but whether seller's use of the sale proceeds will promote its own corporate purposes. (E.g., *Matter of St. Luke's Hospital,* 33 Misc.2d 888, 228 N.Y.S.2d 25 [Sup.Ct., N.Y. County 1962].) The remaining real estate will be sold to Downtown, a real estate developer, which intends to erect an apartment building on the site.

Upon completion of the transaction, and following the hoped-for DOH approval, MEETH will close its existing specialty hospital. If further DOH approvals are obtained, MEETH will then convert the existing Harlem Center, and the already approved though-not-yet built Brooklyn center to the proposed D&T centers. In addition, as part of the transaction MEETH also has proposed entering into a sponsorship agreement with New York-Presbyterian Hospital.

Although there is no mention of it in the minutes of the April 29th Board meeting, at which the sale of the real property and termination of the residency programs were authorized, the day before, on April 28th, Mr. Herkness had met with Dr. David B. Skinner, Vice Chairman and Chief Executive Officer of NYPH, and proposed placing MEETH's soon-to-be displaced residents at NYPH. Also discussed was "developing a continuing working relationship with" NYPH. After a series of meetings between MEETH and NYPH officials, on July 26, 1999, the Board authorized an "affiliation agreement ... with [NYPH] relating to the Hospital's Harlem Center and its proposed Brooklyn Center." The Board authorized the NYPH arrangement, and thereafter NYPH and MEETH entered into a "non-binding" Memorandum of Understanding, dated September 30, 1999. Under this agreement, as Mr. Louis F. Reuter IV, Vice President of Administration for NYPH, testified, $10 million of the proceeds from the sale of the real estate would be placed into a restricted fund for MEETH's programs which would be housed at NYPH; the remaining $31 million would be available for MEETH's use, including the D&T Centers proposal. This NYPH sponsorship does not necessarily envisage a separate MEETH hospital facility; rather, "the ophthalmology and otolaryngology clinics at NYPH will have appropriate plaques and/or signage which will acknowledge the MEETH Division."

CONCLUSIONS OF LAW

At issue is whether, as required under section 511(d) of the Not-For-Profit Corporation Law, [FN5] MEETH has shown "to the satisfaction of the court," both that the "consideration and the terms of

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the transaction are fair and reasonable" [FN6] and that ***592** "the purposes of the corporation ... will be promoted" [FN7] by the sale of all or substantially all of the hospital's assets to Downtown and MSKCC. The few reported decisions dealing with this section have held that whether "the consideration and the terms of the transaction are fair and reasonable to the corporation" is to be evaluated at the time that the contract to sell is entered into. (*Church of God of Prospect Plaza v. Fourth Church of Christ, Scientist, of Brooklyn,* 76 A.D.2d 712, 717-18, 431 N.Y.S.2d 834 [2d Dept.1980], affd. 54 N.Y.2d 742, 442 N.Y.S.2d 986, 426 N.E.2d 480; *Wolkoff v. Church of St. Rita,* 132 Misc.2d 464, 471, 505 N.Y.S.2d 327 [Rich. Sup.Ct.1986]; *Matter of the Church of St. Francis de Sales of New York,* 110 Misc.2d 511, 512, 442 N.Y.S.2d 741 [Sup.Ct., N.Y. County 1981]). On the other hand, the cases hold that whether "the purposes of the corporation ... will be promoted" is to be evaluated "in light of conditions prevailing at the time the issue is presented to the court." (*Manhattan Theatre Club, Inc. v. Bohemian Benevolent and Literary Assoc. of the City of New York,* 120 Misc.2d 1094, 1097, 467 N.Y.S.2d 143 [Sup.Ct., N.Y. County 1983], citing *Church of God,* 76 A.D.2d 712, 717, 431 N.Y.S.2d 834). Given my Findings of Fact, I conclude that MEETH has not satisfied either prong of section 511 . Therefore I deny MEETH's petition to approve the proposed sale.

FN5. The origins of section 511 date to 1876 (Code Civ. Pro. of 1876, §§ 3390-3393, added by L. 1890, c. 95); its lineage can be traced through the General Corporation Law § 52 to 1969, when it became a part of the new Not-For-Profit Corporation Law (L.1969, c. 1066).

FN6. This requirement was added in 1972 (L.1972, c. 961 § 6). Prior to this amendment, judicial decisions had required "fair market value" (e.g., *Matter of St. Luke's Hospital,* 33 Misc.2d 888, 891, 228 N.Y.S.2d 25 [Sup.Ct., N.Y. Cty., 1962]).

FN7. Before 1969, the court was required to be satisfied "that the interests of the corporation will be promoted" (Gen.Corp.L. § 52). The newly enacted Not-For-Profit Corporation Law changed the statutory language to "the purposes of the corporation ... will be promoted." While no legislative history has been found for this change, it is in consonance with Article 2 ("Corporate Purposes and Powers"), which for the first time defined a non-profit corporation in New York (Wyckoff, Practice Commentaries, McKinney's Cons.Laws of NY, Book 37, Not-For-Profit Corporation Law, § 201, at 43-44) and N-PCL § 402, which requires, as did former law, that the certificate of incorporation set forth, *inter alia,* "the purpose or purposes for which it is formed." (N-PCL § 402[a] [2].)

Before turning to section 511, there are several areas that warrant brief discussion. Not-for-profit corporations operate under legal regimes designed for traditional for-profit corporations [FN8]. However, fundamental structural differences between not-for-profit corporations and for- profit corporations render this approach incapable of providing effective internal mechanisms to guard against directors' improvident use of charitable assets. For example, in the for-profit context, shareholder power ensures that Boards make provident decisions, while in the not-for-profit context, this internal check does not exist. To put it another way, a nonprofit corporation has no "owners" or private parties with a pecuniary stake to monitor and scrutinize actions by the directors. This distinction is even more significant in the case of charitable corporations, such as MEETH, where there are no members, because the board is essentially self-perpetuating. (Explanatory Memoranda No. 1, January 13, 1969, McKinney's Cons.Laws of NY, Book 37, Not-For-Profit Corp. L., p. XX [1970 ed.]).

FN8. The N-PCL was designed to reflect the Business Corporation Law as closely as the subject matter would permit. (See V. Bjorkland, J. Fishman, D. Kurtz, *New York Nonprofit Law and Practice: With Tax Analysis,* § 1-3(c), p. 15.)

[1][2] The Not-for-Profit Corporation Law addresses this lack of accountability by requiring court approval of fundamental changes in the life of a Type B charitable corporation, such as a disposition of all or substantially all assets, since there are no shareholders whose approval can be sought. The Attorney General is made a statutory party to such petitions, and his "active participation" is presumed. (See V. Bjorkland, *op. cit.,* § 8-2[a], p. 238). This is to ensure that the interests of the ultimate beneficiaries of the corporation, the public, are adequately represented and protected from improvident transactions. (*Rose Ocko Foundation, Inc. v. Lebovits,* ***593** 259 A.D.2d 685, 688, 686 N.Y.S.2d 861, 864 [2d Dept.1999], citing *Church of God,* 76 A.D.2d at 716, 431 N.Y.S.2d 834; *Wolkoff*

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v. Church of St. Rita, 132 Misc.2d 464, 467, 505 N.Y.S.2d 327). It is pursuant to this mandate that this court is called upon to review the sale of substantially all of MEETH's assets to MSKCC and Downtown.

[3][4] A charitable Board is essentially a caretaker of the not-for- profit corporation and its assets. As caretaker, the Board "ha[s] the fiduciary obligation to act on behalf of the corporation ... and advance its interests" (*Pebble Cove Homeowners' Association, Inc. v. Shoratlantic Development Co. Inc.,* 191 A.D.2d 544, 545, 595 N.Y.S.2d 92 [2d Dept.], lv. to app. dsmd. 82 N.Y.2d 802, 604 N.Y.S.2d 559, 624 N.E.2d 697 [1993]) in "good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." (N-PCL 717[a]). This formulation of the Board's duty of care is an "expansion" of the comparable section of the Business Corporation Law which does not contain the words "care" and "skill" (Wyckoff, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 37, N-PCL 717, at 350-352), and firmly establishes the appropriate standard of care for directors of a not-for-profit corporation.

[5][6][7] It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the "duty of obedience." It requires the director of a not-for-profit corporation to "be faithful to the purposes and goals of the organization," since "[u]nlike business corporations, whose ultimate objective is to make money, nonprofit corporations are defined by their specific objectives: perpetuation of particular activities are central to the raison d'etre of the organization." (Bjorkland, *op. cit.,* § 11-4[a], at p. 414). Analysis of the duties of charitable directors more commonly arises in an action brought by the AG alleging breach of the duties owed to the corporation under N-PCL §§ 112 and 720, and does not appear to have been discussed in any reported decision under section 511. But the duty of obedience, perforce, must inform the question of whether a proposed transaction to sell all or substantially all of a charity's assets promotes the purposes of the charitable corporation when analyzed under section 511.

In recent years, across the United States, there have been a series of transactions that, although certainly different from this petition, nevertheless resemble, in certain basics, MEETH's proposal. I am referring to the nationwide spate of conversions of nonprofit hospitals into for-profit hospitals which has caused a substantial output of commentary. (E.g., Stampone, "Turning Patients Into Profit: Nonprofit Hospital Conversions Spur Legislation," 22 Seton Hall Legis. J. 627 [1998]; Hyman, "Hospital Conversions: Fact, Fantasy, and Regulatory Follies," 23 J. Corp. L. 741 [1998]; Brody, "The Limits of Charity Fiduciary Law," 57 Md. L.Rev. 1400, 1458-1476 [1998]; Hernandez, Note, "Conversions of Nonprofit Hospitals To For- Profit Status: The Tennessee Experience," 28 U. Mem. L.Rev. 1077 [1998]; Krause, " 'First, Do No Harm': An Analysis of The Nonprofit Hospital Sale Acts," 45 U.C.L.A. L.Rev. 503 [1997]; and Rubin, "Nonprofit Hospital Conversions in Kansas: The Kansas Attorney General Should Regulate All Nonprofit Hospital Sales," 47 U. Kan. L.Rev. 521 [1999]; see also, Gassel & Gerzog, "Conversions of Not-for-Profit Organizations Proliferate," N.Y.L.J., 8/29/96, p. 7, col. 1.) It has also resulted in some twenty states enacting or considering legislation regulating such conversions (see Hernandez, *op. cit.,* at 1102, note 125, collecting statutes and pending legislation). However, there has been no similar activity and little discussion in New York where such conversions are not permitted.

[8] Nonetheless, the conversion analogy is analytically useful. This is because, absent the for-profit component, which of course is absent in a Section 511 petition, ***594** a conversion is conceptually similar to MEETH's petition, inasmuch as in both there is a charitable organization which alleges that it is incapable of continuing its primary mission of operating a hospital, seeks approval of the sale of all its assets, and plans to apply the sale proceeds towards a newly revised mission. As is relevant to the analysis, for example, legislation in one state requires that the attorney general examine the transaction to determine "(2) Whether the nonprofit hospital exercised due diligence in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale; (3) Whether the procedures used by the seller in making its decision, including whether appropriate expert assistance was used (were fair); (4) Whether conflict of interest was disclosed, including, but not limited to, conflicts of interest [of] board members ... and experts retained by the seller[;] [and] (5) Whether the seller will receive reasonably fair value for its assets." (Krause, *op. cit.,* at 551, summarizing criteria specified in the Nebraska

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statute). I believe this to be a clear and concise statement of factors which a court should be concerned with in evaluating a transaction under section 511 to sell all the assets. Indeed, they are in many respects mirrored in the AG's June 3, 1999 letter to MEETH, in essence agreed to by MEETH's counsel, in which the AG wrote "Elementary principles of corporate and fiduciary law require the Board, after it has decided to sell the hospital, to entertain all responsible proposals, not to favor any bidder over another in the process, and to treat all bidders and potential bidders identically and fairly."

[9][10] I turn now to the first prong of section 511, which requires that "the consideration and terms of the transaction are fair and reasonable to the corporation." Because the sale of the real estate, as proposed, is inextricably interwoven with the closure of MEETH as it exists today, I believe that the transaction as a whole must be examined, not just the "fair market value" of the real estate. This transaction is unlike, for example *Matter of Church of St. Francis De Sales, supra,* a simple transaction which dealt only with the question of the value of a building being sold by the Church; there was no larger transaction involved. There do not appear to be reported decisions of more complex transactions, such as here, where implementing its decision to sell its real estate assets to MSKCC and Downtown would require the closing of MEETH and a fundamental change to its corporate purposes. The Board accepted Shattuck Hammond's conclusion that "the business [of MEETH] had no value," which I have found to be incorrect. Clearly MEETH, as a functioning acute care, specialty hospital, had value: major medical entities were willing to operate it and keep it open and guarantee the expenditure of substantial sums to do so. Thus, while it may be that the real estate was fairly valued, this is not enough. The transaction did not take into account MEETH's full value, and the NYPH proposal to establish a MEETH pavilion or building, with "plaques and/or signage," does not correct this since it does not necessarily contemplate preserving the business of MEETH, and therefore preserving the total assets of MEETH. Moreover, as I have also found, evidence at the hearing established that MEETH's name itself had significant value. Again under the terms of the proposed transaction, this value is not evaluated nor is it clear that it will be preserved. The Board disregarded these components of value when it decided to "monetize" its assets and sell the real estate. This is a fundamental flaw which leaves me unsatisfied that the terms and conditions of the proposed transaction are "fair and reasonable."

[11] Under the second prong of section 511, which requires that "the purposes of the corporation ... will be promoted" (N-PCL 511[d]), MEETH's petition fares no better. Unfortunately, there is lacking judicial precedent concerning a proposal of ***595** this magnitude [FN9]. While MEETH has argued that the proposal to abandon the acute care, teaching and research hospital component of its mission and to pursue the D&T centers does not require an amendment, this argument is belied by the Board's own action on April 29th, authorizing submission of an Amendment to its Certificate of Incorporation (although never submitted) expressly providing for the D&T centers. This is behavioral evidence that the Board knew that it was proposing a fundamental change in the corporation's mission, which indeed it was doing For generations MEETH's mission, as stated in its Certificate of Incorporation, was understood to be the operation of an acute care, specialty teaching and research hospital dedicated to "plastic surgery" and to the treatment of "persons suffering from diseases of the eye, ear, nose or throat." While it is certainly correct that the definition of "hospital" contained in section 2801(1) of the Public Health Law includes a diagnostic and treatment center, as MEETH now argues, it is sophistry to contend that this means that MEETH is not seeking a new and fundamentally different purpose, in light of the overwhelming evidence which demonstrates this is exactly what it is doing. The conclusion is inescapable that the proposed use of the assets involves a new and fundamentally different corporate purpose.

> FN9. There are reported decisions dealing with somewhat complicated sales. (E.g. *Agudist Council of Greater New York v. Imperial Sales Co.,* 158 A.D.2d 683, 551 N.Y.S.2d 955 [2d Dept., 1990] [sale disapproved where services provided to senior citizens will be disrupted] and *Church of God,* 76 A.D.2d 712, 431 N.Y.S.2d 834). Such decisions generally deal with the impact of the sale of the assets on the existing mission, and do not involve a concomitant proposal to change or reprioritize the existing mission.

Before I turn to analysis of MEETH's failure to establish that the proposed transaction will further its corporate purposes as required by section 511, a prescient passage from one text is instructive:

[A] hospital or clinic providing specialized

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services, that is so deeply in debt that its provision of services is seriously jeopardized, may wish to transfer its assets to another clinic or hospital providing basically the same services in return for assumption of its debt. The only alternative may be the protection of federal bankruptcy laws or a receivership under state law for the protection of creditors. [Bjorklund, *op. cit.*, § 8-2[b][3], at p. 243.]

While it may be appropriate, in certain cases, to solve financial difficulties by eliminating the organization's mission by selling its assets and then undertaking a new mission, the passage properly focuses attention upon the duty of obedience, which mandates that a Board, in the first instance, seek to preserve its original mission. Embarkation upon a course of conduct which turns it away from the charity's central and well-understood mission should be a carefully chosen option of last resort. Otherwise, a Board facing difficult financial straits might find sale of its assets, and "reprioritization" of its mission, to be an attractive option, rather than taking all reasonable efforts to preserve the mission which has been the object of its stewardship.

As has been documented in the Findings of Fact, the record is clear that this case is not a situation where the Board first made a reasoned and studied determination that there was a lack of need for MEETH as a hospital, or that the financial difficulties made it impossible to ensure the survival of MEETH. Rather, the credible evidence is that MEETH's decision to sell was impelled by MSKCC's offer, which caused the Board to recognize the value of the underlying real estate; then its realization that it could "monetize" this asset drove subsequent events.

The MSKCC offer initially drove the decision to retain a strategic advisor, Shattuck Hammond, which had a direct and substantial interest in a sale of the real estate, i.e., the 1% transaction fee. This arrangement, regardless of whether it was traditional in investment banking, as Mr. ***596** Hammond testified, resulted in a situation where the Board put its reliance upon a strategic advisor which had an actual interest in the recommendations of its strategic study. It is not necessary for me to conclude that this conflict of interest compromised the result; the fee arrangement certainly gives the appearance that the integrity of the process was flawed and that the Board had not obtained the assistance of a truly independent expert. Moreover, there does not appear to have been full disclosure to the Board of the potential for a conflict of interest in the expert. The evidence showed that two Board members were unaware of the percentage fee which was a part of Shattuck Hammond's retention. Additionally, there was no discussion or deliberation by the Board over the fact that its strategic advisor had a direct, and perhaps disabling, financial interest in the outcome of the strategic option it was recommending. Nor was there a decision by the Board to retain and rely upon Shattuck Hammond, notwithstanding this issue. The issue simply was never raised. As a result, it cannot be concluded with confidence that the Board received wholly disinterested advice. This becomes more troubling in view of the manner in which Shattuck Hammond dealt with bidders such as Continuum and Lenox Hill, which were not interested in purchasing the real estate, by providing misleading information concerning their offers, often omitting crucial details, and by asserting that the only realistic option was the sale of the real estate.

It is also clear that the MSKCC offer, which drove the decision to "monetize" the assets, drove the subsequent decisions to create a new or "reprioritized" mission, to prematurely terminate the residency programs, to seek approval to close the hospital, and virtually every other decision made by the Board, as I have detailed above.

This decision to "monetize" drove the need to change the corporate purposes, and these new or reprioritized purposes then became the basis for the argument that "purposes of the corporation ... will be promoted." A careful evaluation of whether there was a basis for changing the corporate purposes should have determined the need to sell, not vice versa. The total absence of any study beforehand, concerning the D&T centers, and the retention of healthcare experts, only after submission of the proposal to the DOH, and only to prepare a business plan "for fulfillment" or in "support" of the D&T proposal, not to independently evaluate the plan's feasibility, buttresses the conclusion that the sale drove the change in purpose. Indeed, the report submitted by Dr. Cicero and Mr. Kachmarick states that "[t]he following business plan describes how MEETH will achieve [its] goal, in keeping with its expanded mission statement." To argue that MEETH was returning to its original purposes without an iota of evidence that it made this fundamental determination prior to the decision to sell and close, cannot obscure the fact that this decision, of necessity, eliminated MEETH's historic

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mission, its historic raison d'etre.

Moreover, the record also demonstrates that the Board failed to properly consider the various alternatives submitted which would have preserved MEETH's mission. The Board had concluded that these alternatives were the equivalent of "giving the keys away," and summarily rejected them [FN10]. However, the Board has no independent vitality. It appears that the Board confused preservation of the Hospital with preservation of the Board, when the appropriate calculus should be what is good for the Hospital is good for the Board. This is borne out by the testimony ***597** concerning Mr. Herkness' promise to consider the additional Lenox Hill materials, and his bringing the matter to vote without advising the Board of this commitment to Lenox Hill, which effectively foreclosed the Board from considering a proposal which would have preserved MEETH's mission. It is borne out by Mr. Scibetta's refusal to meet with Continuum in the presence of the AG, who is a statutory party to any section 511 petition, a decision acquiesced in by the Board. It also is borne out by the lack of interest in pursuing potential bidders who were willing to preserve MEETH. This conclusion is reinforced by the events on September 17, 1999 when Mr. Herkness inquired whether Continuum was willing to indemnify the Board and then refused to let Mr. Hyman examine the MSKCC contract.

FN10. See Bjorklund, *op. cit.*, § 8-2[c], at p. 246, n. 58, discussing when a charitable "business" is being transferred, and in exchange the acquirer is assuming all liabilities and guaranteeing continuation of the seller services and noting that the "value (i.e., total assets transferred) may be much greater than the consideration (i.e., liabilities assumed)." Neither Continuum nor Lenox Hill was proposing this scenario, as was suggested by the "keys" metaphor.

In sum, it is evident that this petition fails to meet the two pronged test of section 511. The terms of the transaction are not fair and reasonable to the corporation, inasmuch as no consideration was given to the value of MEETH as a going concern; rather, this value was disregarded. Moreover, evaluating the transaction at the time of the petition, it is clear that there has not been a showing that the sale will promote the purposes of the corporation. To the contrary, MEETH decided to sell, and then evolved its new or "reprioritized mission." There has been no reasoned determination that MEETH cannot continue to operate an acute care, specialty research and teaching hospital, as other medical institutions are proposing to do, and are willing to invest substantial sums to accomplish. MEETH instead chose to sell its real estate, to seek DOH approval to close its hospital, and then apply for judicial imprimatur of this plan. I conclude that this sales transaction should be disapproved.

[Portions of opinion omitted for purposes of publication.]

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Supreme Court of Illinois.

John R. MARTIN, On His Own Behalf and On Behalf of All Others Similarly Situated, Appellee,
v.
HEINOLD COMMODITIES, INC., Appellant.

No. 75013.

Sept. 22, 1994.
Rehearing Denied Dec. 5, 1994.

Investors in commodity option contracts London Commodity Options (LCO's) brought suit against broker for breach of fiduciary duty and violations of Illinois Consumer Fraud and Deceptive Business Practices Act. The Circuit Court, Cook County, Albert Green, J., certified cause as class action and granted summary judgment for investors. The Appellate Court, 139 Ill.App.3d 1049, 94 Ill.Dec. 221, 487 N.E.2d 1098, reversed, and the Supreme Court affirmed in part, reversed in part and remanded, 117 Ill.2d 67, 109 Ill.Dec. 772, 510 N.E.2d 840. After remand and judgment for class, the Appellate Court affirmed in part and vacated in part, 240 Ill.App.3d 536, 181 Ill.Dec. 376, 608 N.E.2d 449. Leave to appeal was granted. The Supreme Court, Nickels, J., held that: (1) broker had preagency fiduciary duty to inform investors of all material facts concerning its compensation; (2) failure of broker to include that information in its disclosure statement was not authorized by the Commodity Futures Trading Commission or its regulations, and violated the Illinois Consumer Fraud Act; but (3) investors could not recover their full investment losses, but were limited to amount broker received in commissions and foreign service fees.

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded.

Freeman, J., filed opinion concurring in part and dissenting in part, in which McMorrow, J., joined.

West Headnotes

[1] Brokers 34
65k34

Broker had preagency fiduciary duty to inform investors in commodity option contracts London Commodity Options (LCO's) of all material facts concerning its compensation, where, at that time, fiduciary nature of parties' future relationship as principal and agent was already known, and where, due to complexity of LCO trading, investors were uniquely dependent upon broker for information concerning proper charges in the transaction.

[2] Brokers 34
65k34

[2] Consumer Protection 6
92Hk6

Failure of broker of commodity option contracts London Commodity Options (LCO's) to include in its disclosure statement that the "foreign service fee" to be charged investors was a commission from which it would derive compensation was not authorized by the Commodity Futures Trading Commission or its regulations, and violated the Illinois Consumer Fraud Act. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.; 17 C.F.R. § § 32.5(a)(1), 32.9.

[3] Trusts 91
390k91

Restatement of trusts, and its provision allowing recovery of full investment losses with a showing of proximate cause, did not apply to suit by investors in commodity option contracts London Commodity Options (LCO's) to impose constructive trust on broker for failing to disclose that "foreign service fee" broker charged investors was actually commission. Restatement (Second) of Trusts § 205.

[4] Brokers 38(7)
65k38(7)

[4] Implied and Constructive Contracts 110
205Hk110

Investors in commodity option contracts London Commodity Options (LCO's), alleging that broker breached fiduciary duty by failing to disclose that "foreign service fee" was actually commission, and seeking to impose constructive trust on broker, could not recover their full investment losses, but were limited under Restatement of Restitution to amount broker received in commissions and foreign service fees, where broker received no benefit or profit from money actually paid for the LCO's. Restatement (Second) of Restitution § 9.

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[5] Brokers 38(7)
65k38(7)

Fiduciary breach by broker of commodity option contracts London Commodity Options (LCO's) in failing to disclose that "foreign service fees" charged investors were actually commissions did not allow investors to rescind their contracts under Illinois law, where they had received and used the LCO's, and therefore investors could not recover their full investment losses on theory that broker, a fiduciary, acted in bad faith and self-dealed.

[6] Torts 15
379k15

Plaintiffs must prove that defendant's actions proximately caused their injuries before they can recover in tort, even in instances of intentional tort where fiduciaries are involved.

[7] Brokers 34
65k34

Investors in commodity option contracts London Commodity Options (LCO's), seeking to recover in tort under Illinois Consumer Fraud Act for broker's failure to disclose that "foreign service fees" were actually commissions, were required to prove, prior to any recovery of damages, what federal courts have termed "loss causation," which is proof that investor would not have suffered a loss if the facts were what he believed them to be. Ill.Rev.Stat.1979, ch. 121 1/2, § 261 et seq.

[8] Brokers 38(7)
65k38(7)

Investors in commodity option contracts London Commodity Options (LCO's), suing broker in tort under Illinois Consumer Fraud Act for failing to disclose that "foreign service fees" broker charged were actually commissions, failed to prove that broker's misrepresentation proximately caused their entire investment losses; broker's misrepresentation had no effect on value, risk, or profit potential of the LCO's, and had no effect on whether options made or lost money. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.

[9] Brokers 38(7)
65k38(7)

That commodity option contracts have much shorter life in which to realize profit than other types of securities did not compel finding that broker of options London Commodity Options (LCO's), by failing to disclose that "foreign service fees" charged investors were actually commissions, proximately caused investors to lose their entire investment; while broker's deception made break-even price of options higher, investors had been willing to assume risk of volatile futures market at that price. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.

[10] Brokers 38(7)
65k38(7)

Even if broker intentionally deceived investors in commodity option contracts London Commodity Options (LCO's) by failing to disclose that "foreign service fees" were actually commissions, that fact did not relieve investors of obligation to prove that deception proximately caused their full investment losses, as investors had willingly chosen to invest in options knowing risk of volatile futures market.

[11] Brokers 38(7)
65k38(7)

That investors in commodity option contracts London Commodity Options (LCO's), suing broker for failing to disclose that "foreign service fees" were actually commissions, were proceeding under the Illinois Consumer Fraud Act did not relieve them of obligation of showing loss causation in order to recover their full investment losses. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.; S.H.A. 815 ILCS 505/10a(a).

[12] Jury 25(6)
230k25(6)

Broker of commodity option contracts London Commodity Options (LCO's), being sued by investors under Illinois Consumer Fraud Act and for breach of fiduciary duties, did not waive right to jury trial by waiting eight years, until eve of trial, to move to transfer action from chancery to law division; broker filed jury demand when it answered investors' complaint, and noted that its motion to transfer cause to law division was a reaffirmation of jury demand it had filed eight years before. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.; S.H.A. 735 ILCS 5/2-1105(a).

[13] Jury 12(1.1)
230k12(1.1)

[13] Jury 14(1)

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230k14(1)

Illinois Consumer Fraud Act is statutory proceeding unknown to common law, and thus Illinois Constitution does not confer right to jury trial for claims under the Act. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.; S.H.A. Const. Art. 1, § 13.

[14] **Jury** 14(3)
230k14(3)

[14] **Jury** 14(5)
230k14(5)

Broker of commodity option contracts London Commodity Options (LCO's), being sued by investors for breach of fiduciary duty and seeking imposition of constructive trust and accounting, was not entitled to a jury trial on those claims, as claims were equitable in nature, even though investors sought only money damages.

[15] **Jury** 14(5)
230k14(5)

Breach of fiduciary duty claims seeking imposition of constructive trust on funds on account is an equitable claim, triable without right to jury.

[16] **Jury** 14(3)
230k14(3)

Action for an accounting for breach of fiduciary duty is an equitable action with no right to jury trial.

[17] **Brokers** 38(7)
65k38(7)

[17] **Consumer Protection** 40
92Hk40

Conduct of broker of commodity option contracts London Commodity Options (LCO's) in failing to disclose to investors that "foreign service fees" were actually commissions, thereby intentionally breaching its fiduciary duty and willfully violating Illinois Consumer Fraud Act, warranted award of punitive damages in amount of $500,000 under each of the two counts. Ill.Rev.Stat.1979, ch. 121 1/2 , § 261 et seq.

****736 *37 ***445** William J. Nissen, Thomas K. Cauley, Jr., Joseph D. Kearney and Robert M. Hatch, Sidley & Austin, Chicago, for appellant.

William J. Harte, Ltd., and Plotkin & Jacobs, Ltd., Chicago (William J. Harte, John G. Jacobs, Jonah Orlofsky and Joshua Karsh, of counsel), for appellee.

****737 ***446** Justice NICKELS delivered the opinion of the court:

Defendant, Heinold Commodities, Inc., appeals from an appellate court decision affirming in part and reversing in part a judgment entered for plaintiffs and ***38** against defendant. Plaintiff filed a four-count complaint against Heinold for breach of fiduciary duty and violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill.Rev.Stat.1979, ch. 121 1/2 , par. 261 *et seq.*). Plaintiff's suit alleged that Heinold had misrepresentated the nature of a "foreign service fee" in the sale of London Commodity Options (LCO's) to class members from September 12, 1977, through May 31, 1978. On remand from this court in a previous appeal, the trial court found for the plaintiff class (hereinafter, plaintiffs) on both the breach of fiduciary counts and Consumer Fraud Act counts. The trial court also awarded plaintiffs punitive damages and prejudgment interest under both claims. The appellate court affirmed the award of compensatory damages, but reversed the award of punitive damages under both claims. The appellate court also reversed the award of prejudgment interest under the Consumer Fraud Act. We granted leave to appeal (134 Ill.2d R. 315).

BACKGROUND

This is the second time this case has reached this court. Plaintiff, John Martin, originally filed a four-count complaint against Heinold for breach of fiduciary duty and for violation of the Consumer Fraud Act in 1980. Plaintiff alleged that Heinold had intentionally misrepresented the nature of a "foreign service fee" charged in connection with the sale of LCO's. The action was subsequently certified as a class action. After initial discovery, plaintiff moved for summary judgment on the fiduciary duty counts. The trial court granted plaintiffs' motion, finding a fiduciary relationship between Heinold and plaintiffs as a matter of law and that Heinold had breached its fiduciary duties to plaintiffs.

The appellate court reversed the trial court's decision finding a fiduciary relationship as a matter of law. ***39** On appeal from the appellate court, this court affirmed on that matter, and found a material question of fact to exist as to whether, at the time Heinold discussed its compensation with plaintiffs, a

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fiduciary duty existed for Heinold to breach. This court remanded for a factual determination as to whether a preagency fiduciary relationship existed between Heinold and plaintiffs at the time Heinold's compensation was discussed. *Martin v. Heinold Commodities, Inc.* (1987), 117 Ill.2d 67, 109 Ill.Dec. 772, 510 N.E.2d 840.

Trial Court's Findings on Remand

On remand, the trial court made the following findings of fact and law.

Findings of Fact

LCO's were commodity option contracts obtained in London, England. The purchaser of such option had the right, but not the obligation, to buy or sell a commodity futures contract at a certain price. This right to either purchase or sell a futures contract was of limited duration, after which time the option would expire and become worthless. Purchasers of such options would only profit if the market moved favorably in their direction, enough to offset the price of the option plus any transaction costs. At that time, purchasers could buy or sell a futures commodity contract at a profit.

The Commodity Futures Trading Commission (Commission), a Federal commission established to regulate commodity and futures trading, banned the sale of LCO's effective June 1, 1978. The Commission's ban was necessitated by the fact that an overwhelming majority of firms engaged in the sale of LCO's at that time were employing fraudulent or unlawful practices. One of the specific practices cited by the Commission in banning the sale of LCO's was the use of terms such as "foreign service fee" to conceal markups. The Commission noted:

"The fact most scrupulously concealed by the vast majority ***40** of firms is the full extent of fees and mark-ups. * * * [The firms' confirmation statements] uniformly avoid disclosure and in fact conceal such fact by using various explanations or definitions. Mark-ups frequently are defined in promotional materials and customer confirmations ****738 ***447** as * * * [*inter alia*] 'foreign service fees' * * *." 43 Fed.Reg. 16162 (1978).

The trial court made the following specific findings concerning the trading of LCO's:

"[Trading was] an extremely complex undertaking for investors, with little or no information available to American purchasers from any source other than from their brokers. The mechanics of the options themselves, the workings of the various London exchanges, the impact of currency conversion rates, the lack of information concerning the underlying commodities and other factors all made LCO investing exceedingly complicated. Investing in LCOs * * * was more complicated and much less understood than the trading of securities.

During the relevant period, it was difficult for customers to compare potential transactions effected through different brokers. One of the problems causing such difficulty was that different brokers used differing terminology.

During the relevant period, potential customers were completely dependent upon the LCO broker for information about fees and commissions charged in connection with LCO transactions; during the relevant period, the investor was at the mercy of the broker to learn what the expenses charged in London were, and had to rely upon the broker to state very clearly what the compensation to the broker was, since the customer had no other source for such information.

During the relevant period, virtually no investor in America, regardless of how sophisticated, could truly understand London commodity options trading without the help of a broker. * * * During the relevant period, customers were uniquely dependent upon, and at the mercy of, their brokers in obtaining information relative to such transactions.

The Plaintiff class has established by clear and convincing ***41** evidence that during the relevant period the creation of the customer-broker relationship between Heinold and its LCO customers involved a special trust and confidence on the part of the customer in the subsequent fair dealing of Heinold."

In opening an LCO account, each class member executed a customer agreement and statement signifying that he or she had received and understood a summary disclosure statement from Heinold regarding LCO's. Two forms of summary disclosure statements were used by Heinold during the relevant time. The first was a typewritten form and the second was a printed form. Both forms indicated that the entire price of an LCO consisted of three components: (1) a premium for the option; (2) a commission; and (3) a foreign service fee. The typewritten version of the summary disclosure statement described the commission and foreign service fee as follows:

"[Heinold] adds a foreign service fee equivalent to 20% of the premium as well as 1/2 the commodity futures commission rate normally charged on futures transactions. These charges have the following purpose: to recover costs of telephone,

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telex, bookkeeping, floor brokerage, clearing fees, costs involved with the segregation of customer funds and use of Heinold funds to pay for London Commodity Options, and research costs involved with options transactions; as well as to compensate [Heinold] and the registered representative who services the options customer during the life of options for conducting such business."

The printed version was virtually identical to the typewritten disclosure form, except that the foreign service fee was changed from 20% of the premium to $1,200. The printed form also noted that the foreign service fee for options with shorter lives would be smaller.

The trial court further found that Heinold could operate profitably on LCO transactions by charging only the price of a standard commission. The court arrived at ***42** this by noting that Heinold believed it could operate profitably by charging, and in fact only charged, a commission, and no foreign service fee, on London *futures,* the mechanics of which were indistinguishable from LCO's. Because Heinold had determined that it could pay all costs, compensate the registered ****739 ***448** representative who serviced the customer's account and still operate profitably by charging only a flat commission on a futures position, the trial court found the charging of a foreign service fee on LCO's a means by which to receive additional compensation for services already covered by the commission. The court further found that Heinold offered no credible explanation for the assessment of the foreign service fee. In fact, the foreign service fee was treated by Heinold internally as a commission.

The court further found that the word "commission" has a commonly understood meaning: a broker's compensation for a transaction as well as payment for the broker's general overhead. However, the term commission is not usually meant to include a broker's out-of-pocket expenses paid to third parties in connection with a particular transaction. In contrast to the understood meaning of commission, the court noted that the term foreign service fee has no common understanding. Thus, the court found that Heinold's use of the term "foreign service fee" was intended to give, and did give, the impression that this fee was not what would normally be known as a commission but, instead, was an additional expense the broker necessarily incurred in the transaction and had to pay to third parties.

The trial court found Heinold's use of the term foreign service fee misleading and deceptive. This information was material to the investor, the court found, and Heinold knew it would be material. The court also found that during the relevant period, Heinold sought ***43** to instill confidence in the investing public by conveying to its customers that, unlike other firms, it was not charging exceedingly high commissions and markups on its LCO's. In fact, through the use of the foreign service fee, Heinold accomplished the very same thing.

The trial court concluded that investors would not have engaged in LCO trading through Heinold had they known the true purpose of the foreign service fee. The court then determined that the relief sought by the class, which involved determining how the monies deposited by the class in their Heinold accounts was used and what losses were suffered, required an equitable accounting. The court accepted the parties' stipulation concerning the total amount of money plaintiffs paid to Heinold for the LCO's, $1,728,948.27, of which $597,800 was payment for foreign service fees.

Findings of Law

The trial court found that a preagency fiduciary relationship existed between Heinold and plaintiffs. Thus, Heinold was under an affirmative duty to inform plaintiffs at the time LCO's were discussed all material facts concerning its compensation. Heinold did not disclose all material facts concerning its compensation and thus violated its fiduciary duty to plaintiffs. The court also noted that but for Heinold's misrepresentations, plaintiffs would not have purchased LCO's through Heinold. The court found this sufficient causation to award plaintiffs their full investment losses. The court further found an additional reason to award plaintiffs their full investment losses irrespective of causation: breaches of fiduciary duty with bad faith and malice. The court next found that Heinold violated the Consumer Fraud Act and awarded the same amount of damages.

Next, the court found that an award of prejudgment interest was proper under both the breach of fiduciary duty counts and the Consumer Fraud Act. The court also awarded punitive damages under both claims.

***44** The appellate court affirmed the trial court's decision in part, and reversed concerning the award of punitive damages and the award of prejudgment interest under the Consumer Fraud Act.

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ISSUES

Heinold presents four issues for review and argues that the appellate court erred in: (1) finding a preagency fiduciary duty; (2) holding that Heinold violated the Consumer Fraud Act; (3) upholding a damages award of investment losses where no proof of loss causation was shown; and (4) holding Heinold had no right to a jury trial on plaintiffs' Consumer Fraud Act or fiduciary duty claims. Plaintiffs have requested cross-relief, arguing that the appellate court erred in: ***449 **740 (1) reversing the trial court's award of punitive damages; and (2) reversing the trial court's award of prejudgment interest under the Consumer Fraud Act.

I.
Preagency Fiduciary Duty

We first address Heinold's contention that the appellate court erred in affirming the trial court's finding that Heinold owed plaintiffs a preagency fiduciary duty. Heinold argues: (1) plaintiffs did not prove such a duty; and (2) the appellate court erred in creating a new basis for the existence of a fiduciary duty in focusing on the complexity of the LCO transactions rather than on any relationship between the parties.

In *Martin*, 117 Ill.2d 67, 109 Ill.Dec. 772, 510 N.E.2d 840, this court remanded the cause to the trial court to make a factual determination as to whether Heinold owed plaintiffs a preagency fiduciary duty at the time Heinold discussed its compensation with plaintiffs. In doing so, this court noted the general rule that

"an 'agent is subject to no fiduciary duty in making the agreement by which he becomes [an] agent and may thereafter *45 act in accordance with its terms.' (Restatement (Second) of Agency sec. 389, comment b (1958) * * *.)" (*Martin*, 117 Ill.2d at 78, 109 Ill.Dec. 772, 510 N.E.2d 840.)

However, this court also adopted the exception to this rule found in the Restatement:

"[W]e are unwilling to conclude, as a matter of law, that a fiduciary duty can never be imposed upon a prospective agent prior to the formal creation of an agency relationship. Thus, while the general rule governing preagency contracts does not require disclosure of the terms of a prospective agent's compensation, we believe that facts could be established which would support imposition of a fiduciary duty upon a prospective agent applicable to preagency contracts. * * *

* * * * * *

We also note that, where the very creation of the agency relationship involves a special trust and confidence on the part of a principal in the subsequent fair dealing of an agent, the prospective agent may be under a fiduciary duty to disclose the terms of his employment as an agent. (Restatement (Second) of Agency sec. 390, comment e (1958) * * *.)" *Martin*, 117 Ill.2d at 78-79, 109 Ill.Dec. 772, 510 N.E.2d 840.

Whether Plaintiff Class Failed to Prove Relevant Factors

Heinold first argues that plaintiffs failed to prove relevant factors from which the court could find an exception to the general rule that no fiduciary duty exists at the time an agent's compensation is negotiated prior to the existence of the agency relationship. Heinold argues:

"A fiduciary relationship exists where there is special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. It exists where confidence is reposed on one side and resulting superiority and influence is found on the other. [Citations.] The relationship may exist as a matter of law between attorney and client, guardian and ward, principal and agent, and the like, or it may be moral, social, domestic, *46 or even personal. Where the relationship does not exist as a matter of law or is sought to be established by parol evidence, the proof must be clear, convincing, and so strong, unequivocal, and unmistakable as to lead to but one conclusion." (*Kolze v. Fordtran* (1952), 412 Ill. 461, 468, 107 N.E.2d 686.)

Heinold further notes the factors to be considered when determining whether a fiduciary relationship exists where one does not exist as a matter of law:

"When a confidential or fiduciary relationship does not exist as a matter of law, it must be proved by clear and convincing evidence in order to establish a basis for raising a constructive trust. Factors to be taken into consideration are degree of kinship, if any, disparity in age, health, mental condition, education and business experience between the parties, and the extent to which the allegedly servient party entrusted **741 ***450 the handling of his business and financial affairs to the other and reposed faith and confidence in him. [Citation.]" (*Cunningham v. Cunningham* (1960), 20 Ill.2d 500, 504, 170 N.E.2d 547.)

Heinold argues that none of the factors pertinent to

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a showing of fiduciary duty were shown by the plaintiffs.

[1] While Heinold correctly cites the law applicable in instances where no fiduciary relationship exists as a matter of law and must be proven by facts, it does not focus on the law applicable here, where a future principal and agent are discussing terms of the agency, specifically compensation, for a relationship that will be fiduciary as a matter of law. Restatement (Second) of Agency, section 390, comment *e*, adopted by this court in the previous appeal, addresses this specific factual situation and provides:

"If * * * the creation of the relation involves peculiar trust and confidence, with reliance by the principal upon fair dealing by the agent, it may be found that a fiduciary relation exists prior to the employment and, if so, the agent is under a duty to deal fairly with the principal in arranging the terms of the employment." (Restatement (Second) of Agency § 390, Comment *e* (1958).)

We find this to be a different inquiry than the factual ***47** inquiry on which Heinold relies. While the general inquiry determines whether a fiduciary relationship exists at all, the inquiry here determines at what time that relationship attached concerning the agent's disclosures about his compensation. Thus, while Heinold argues that the inquiry must include a determination as to the parties' relationship, that relationship is already known: future principal and agent discussing the agent's compensation. And, while Heinold argues that the evidence did not show that it accepted the trust and confidence plaintiffs placed in it, this inquiry is not required under comment *e*. All that is required is that the *creation* of the agency relationship involve peculiar trust and confidence, with reliance by the principal on the fair dealing by the agent. This is a factual determination to be made by the trial court. The trial court found peculiar trust and confidence to exist here, and we cannot say that the court's finding was manifestly erroneous. Findings of fact will not be overturned on appeal "unless they are palpably against the weight of the evidence, even though we might be inclined to find otherwise." *Kolze*, 412 Ill. at 468-69, 107 N.E.2d 686.

Plaintiffs' evidence demonstrated that few, if any, investors at the time could understand the complexities of LCO transactions, including the mechanics involved in the purchase and trading of such commodities. Because of this, the trial court found that plaintiffs could not have known what expenses a broker would incur in the overseas transactions and subsequently pass on to the investors. As the trial court found, plaintiffs were "at the mercy of the broker to learn what the expenses charged in London were, and had to rely upon the broker to state very clearly what the compensation to the broker was." Moreover, plaintiffs could not determine this information from other brokers because brokers used different terminology for their fees. Thus, plaintiffs ***48** had a peculiar trust and confidence in Heinold during these negotiations and relied on Heinold to deal fairly. It should also be noted that Heinold failed to present any evidence to contradict plaintiffs' evidence on this point.

Heinold relies heavily on *Apple v. Apple* (1950), 407 Ill. 464, 95 N.E.2d 334, where the issue was whether a fiduciary relationship existed prior to one party's granting another party the power of attorney, which resulted in a fiduciary relationship as a matter of law. We note, however, that *Apple* is not controlling here because: (1) *Apple* did not involve negotiations for compensation prior to an agency relationship, and (2) this court had not yet adopted comment *e* to section 390 of the Restatement.

Whether the Appellate Court Erred in Affirming the Trial Court

Heinold also argues that the appellate court erred in holding that a fiduciary duty exists simply where the subject matter of a contract is complicated. Heinold's argument is based on its belief that the traditional criteria for the existence of a fiduciary duty were not met here and that the appellate ****742 ***451** court created a new basis on which to find a fiduciary duty. The appellate court affirmed the trial court on this point, stating:

> "The record indicates that members of the Class were uniquely dependant upon information obtained from defendant and its soliciting brokers in order to make a profit on LCO transactions. The trading of LCO's during the relevant period was exceedingly complicated due to the mechanics of LCO's and the London exchanges, the volatility of the commodity options market, the impact of currency conversion rates and the differing terminology used among brokers offering LCO's to the public." (240 Ill.App.3d 536, 541, 181 Ill.Dec. 376, 608 N.E.2d 449.)

The appellate court's opinion merely summarizes the trial court's findings that few investors,

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including plaintiffs, could have understood the mechanics of LCO ***49** trading or known what type of charges were proper. The appellate court's finding is not that a preagency fiduciary duty attaches when a transaction is complex, but that under these unique circumstances, where a future principal and agent are discussing compensation, and where the plaintiffs were uniquely dependant upon Heinold for information concerning the proper charges in the transaction, a duty attached. There was no error by the appellate court on this issue.

II.
Consumer Fraud Act

[2] Heinold next argues that the appellate court erred in affirming the trial court's finding that Heinold violated the Consumer Fraud Act through the use of its misleading summary disclosure statement. Heinold argues that it literally complied with the Commission's disclosure regulations by disclosing the various elements of the LCO's, and thus could not have violated the Consumer Fraud Act.

Heinold first argues that the Consumer Fraud Act does not apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." (815 ILCS 505/10b(1) (West 1992).) Moreover, Heinold argues, this court has held that "compliance with the disclosure requirements of [Federal statutes and regulations] is a defense to liability under the Illinois Consumer Fraud Act." *Lanier v. Associates Finance, Inc.* (1986), 114 Ill.2d 1, 18, 101 Ill.Dec. 852, 499 N.E.2d 440.

In addition to arguing that it listed all the elements comprising the purchase price of the LCO's in its summary disclosure statement as required by the Commission's regulations, Heinold also notes the great lengths to which it went in order to ensure that all disclosures were made. Thus, Heinold asserts, it could not have violated the Consumer Fraud Act.

***50** Heinold's deception was neither specifically authorized by the Commission, nor in compliance with the Commission's regulations. The Commission has noted that literal compliance with disclosure regulations will not necessarily ensure that a violation of the Commission's regulations has not occurred. In certain circumstances, "a customer may be deceived about [material facts] despite receipt of the information required by [the Commission's regulations]." (*Hammond v. Smith Barney, Harris Upham & Co.* [1987-1990 Transfer Binder] Comm.Fut.L.Rep. (CCH) par. 24,617 (C.F.T.C.1990).) In *Hammond*, the Commission noted that it had reviewed "the overall message conveyed by" the solicitation in question in determining whether a violation of Commission disclosure regulations had occurred. It has also been noted:

"[I]nformation is imparted not just through the use of individual words-- information is also gained from the context in which those words are placed. When determining what has been disclosed, therefore, it is wrong to treat each individual piece of information separately, as if it had no relation to the other pieces which surround it." *Isquith v. Middle South Utilities, Inc.* (5th Cir.1988), 847 F.2d 186, 201 n. 9.

The pertinent Commission regulations are found at section 32.5 of the Code of Federal Regulations:

****743 ***452** "(a) Except as provided in paragraph (b) of this section, prior to the entry into a commodity option transaction, each option customer or prospective option customer shall be furnished a summary disclosure statement by the person soliciting or accepting the order therefor. The disclosure statement shall contain the following:

(1) A brief description of the commodity option transactions being offered including:

* * * * * *

(ii) A listing of the elements comprising the purchase price to be charged, including the premium, mark-ups on the premium, costs, fees and other charges, as well as the method by which the premium is established;

***51** (iii) The services to be provided for the separate elements comprising the purchase price * * *." 17 C.F.R. § 32.5(a)(1) (1977).

As the trial court found, "Heinold's Summary Disclosure Statement, which concealed and failed to disclose an additional commission by using the misleading and deceptive term 'Foreign Service Fee,' failed to satisfy these requirements." By labeling a commission a foreign service fee rather than an additional commission, Heinold deceived the plaintiff class into believing the foreign service fee was an additional separate charge Heinold necessarily incurred and paid to third parties in LCO transactions.

Moreover, we note that Commission regulation 32.9 provides:

"It shall be unlawful for any person directly or indirectly:

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(a) To cheat or defraud or attempt to cheat or defraud any other person;
(b) To make or cause to be made to any other person any false report or statement thereof or cause to be entered for any person any false record thereof;
(c) To deceive or attempt to deceive any other person by any means whatsoever; in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, any commodity option transaction." (17 C.F.R. § 32.9 (1977).)

Again, as the trial court noted, "Heinold violated this provision when it cheated, defrauded and deceived the class."

We note that this finding is supported by the fact that the Commission banned the offer and sale of commodity options, including LCO's, to the general public effective June 1, 1978. This ban was due, *inter alia,* to the fact that firms were using such terms as "foreign service fee" to conceal the true extent of fees and markups. 43 Fed.Reg. 16162 (1978).

Heinold also argues that the Commission inspected its summary disclosure form and did not object to the ***52** foreign service fee. Thus, Heinold argues, the disclosure was proper. This argument is without merit, as is seen by the following which Heinold was required to have printed on the summary disclosure form:
"THESE COMMODITY OPTIONS HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE COMMODITY FUTURES TRADING COMMISSION *NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS STATEMENT.* ANY REPRESENTATION TO THE CONTRARY IS A VIOLATION OF THE COMMODITY EXCHANGE ACT AND THE REGULATIONS." (Emphasis added.)

Heinold also argues that the appellate court erred in holding that Heinold violated the Consumer Fraud Act "because [the summary disclosure statement] does not disclose the full extent of compensation [Heinold] derived in LCO transactions." (240 Ill.App.3d at 544, 181 Ill.Dec. 376, 608 N.E.2d 449.) Heinold argues that it was impossible to know and disclose at the time plaintiffs signed the summary disclosure forms how much compensation Heinold would derive from the transaction. Heinold also argues that the Commission's regulations do not require that it state the full amount of its compensation. However, we simply note that Heinold's deception was not in failing to disclose the *exact* amount of its compensation, but in failing to disclose that the foreign service fee was a commission, from which it would derive compensation. We further note the ease with which Heinold could have ****744 ***453** avoided this deception. Heinold could have simply informed the plaintiff class that the foreign service fee was an additional commission, which is how Heinold treated it internally.

III.
Proximate Cause

We next address Heinold's argument that the appellate court erred in affirming the trial court's award ***53** of full investment losses where no proof of loss causation existed. In finding causation sufficient to award plaintiffs their full investment losses, the trial court found: (1) plaintiffs would not have engaged in LCO trading through Heinold had they known the truth about the foreign service fee; and (2) but for Heinold's misrepresentations, plaintiffs would not have suffered their losses. The trial court also awarded plaintiffs full investment losses irrespective of causation, due to Heinold's bad-faith breach of its fiduciary duty.

The appellate court affirmed and noted that proximate causation is a necessary element under the fiduciary duty and Consumer Fraud Act counts. The appellate court found proximate causation had been shown for plaintiffs' full investment losses, in that class members would not have purchased LCO's through defendant had they known the truth about the foreign service fee. In so finding, however, the appellate court also noted that " 'neither [defendant's] representations concerning the foreign service fee nor its use of that fee had any effect on the value, risk or profit potential of [LCO's].' " 240 Ill.App.3d at 545, 181 Ill.Dec. 376, 608 N.E.2d 449.

Heinold argues that in Illinois, as in most jurisdictions, a " 'fundamental principle' of tort law" is that a plaintiff must prove a defendant's actions proximately caused the plaintiff's injury. Heinold adopts the Federal courts' term "loss causation" to refer to proximate causation in securities cases. Heinold further argues that plaintiffs failed to prove loss causation and that its conduct did not proximately cause plaintiffs' damages. Plaintiffs respond that Heinold's version of causation is not the law in Illinois for intentional breaches of fiduciary duty or for recovery under the Consumer Fraud Act. Plaintiffs argue that, in Illinois, all that need be

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previously stated:
"It is a fundamental principle applicable alike to breaches of contract and to torts, that in order to found a right of action there must be a wrongful act done and a loss resulting from that wrongful act; the wrongful act must be the act of the defendant, and the injury suffered by the plaintiff must be the natural and not merely a remote consequence of the defendant's act." (*Town of Thornton v. Winterhoff* (1950), 406 Ill. 113, 119, 92 N.E.2d 163.)

***59** This principle is applicable to actions for negligence as well as intentional torts, such as fraud:
"[I]t is a well settled principle in regard to false representations, that fraud without damage is neither sufficient to support an action at law, nor a ground for relief in equity. Fraud and injury must concur to furnish a ground for judicial action. In an action for fraudulent representations, the ****747 ***456** plaintiff must not only show, that the representations were made, and that they were false and fraudulent, but he must also show affirmatively that he has been injured thereby. [Citations.]" *Jones v. Foster* (1898), 175 Ill. 459, 469, 51 N.E. 862.

As has been more recently noted by our appellate court in an action for an intentional tort, fraud: "damages * * * must be a proximate, and not remote, consequence of the fraud." (*Brown v. Broadway Perryville Lumber Co.* (1987), 156 Ill.App.3d 16, 25, 108 Ill.Dec. 593, 508 N.E.2d 1170; see also W. Prosser, Torts § 110, at 732 (4th ed. 1971) ("the damage upon which a deceit action rests must have been 'proximately caused' by the misrepresentation").) It has also been noted by our appellate court that proximate cause must be shown in actions for intentional misrepresentations, even where fiduciaries are involved. See *Kev v. Jewel Cos.* (1988), 176 Ill.App.3d 91, 98, 125 Ill.Dec. 652, 530 N.E.2d 1061 (suit alleging intentional breaches of fiduciary duty and violation of the Consumer Fraud Act); *Vermeil v. Jefferson Trust & Savings Bank* (1988), 176 Ill.App.3d 556, 563, 126 Ill.Dec. 603, 532 N.E.2d 288; *Martin v. Allstate Insurance Co.* (1981), 92 Ill.App.3d 829, 835, 48 Ill.Dec. 316, 416 N.E.2d 347 (suit against insurance agent for breaching his duty to plaintiff and fraud).

We conclude that plaintiffs must prove that a defendant's actions proximately caused their injuries before they can recover in tort, even in instances of intentional torts where fiduciaries are involved. We note, however, that Heinold adopts the term "loss causation" in its argument, a term used by Federal courts in dealing with the issue of proximate cause in ***60** Federal security cases. Plaintiffs argue that loss causation has never been the law in Illinois.

[7] In order to understand Heinold's use of the term loss causation, we briefly discuss Federal decisions involving Rule 10(b)--5 of the Securities and Exchange Act of 1934 and loss causation. (17 C.F.R. § 240.10b--5 (1993).) Such decisions are pertinent to our analysis because Rule 10b--5 involves misrepresentations in the sale of securities. Moreover, since a right of action under Rule 10b--5 is an implied right of action, with no statutory guidance as to damages, Federal courts have developed this area of law through reliance on common law principles of fraud and proximate cause. See *Bastian v. Petren Resources Corp.* (7th Cir.1990), 892 F.2d 680, 683.

In order for a plaintiff to recover for a violation of Rule 10(b)--5, the great majority of Federal courts require plaintiffs to show two types of causation: (1) transaction causation; and (2) loss causation. (*Bastian*, 892 F.2d at 685.) Transaction causation has been defined as meaning that "the investor would not have engaged in the transaction had the other party made truthful statements at the time required." (*LHLC Corp. v. Cluett, Peabody & Co.* (1988), 842 F.2d 928, 931.) Loss causation, on the other hand, has been defined as meaning "that the investor would not have suffered a loss if the facts were what he believed them to be." (*LHLC Corp.*, 842 F.2d at 931.) In this regard, loss causation is analogous to proximate cause. It has thus been noted:
"The plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss." *Huddleston v. Herman & MacLean* (5th Cir.1981), 640 F.2d 534, 549.

We find Illinois law to be similar to the analysis used by these Federal courts which require both transaction causation and loss causation in order to recover for misrepresentation ***61** in securities cases. Thus, plaintiffs here must prove what the Federal courts have termed loss causation prior to any recovery of damages.

Loss Causation: Whether Heinold's Deception Proximately Caused Plaintiffs' Losses

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[8] Plaintiffs have alleged and proven that Heinold misrepresented the nature of its foreign service fee. The trial court found that plaintiffs would not have purchased LCO's from Heinold had they had known the truth about the fee. While the trial court correctly found transaction causation, it did not find loss causation, or proximate cause, ****748 ***457** for plaintiffs to recover their full investment losses. The trial court thus erred in awarding plaintiffs their full investment losses. We find, however, that plaintiffs are entitled to recover the amount paid for the foreign service fee as damages due to Heinold's misrepresentation, as the deception proximately caused plaintiffs to pay a fee they would not have paid had they known the truth. However, Heinold's misrepresentation concerning the foreign service fee did not proximately cause plaintiffs' entire investment losses.

Prosser has noted that while a transaction may have been induced by a misrepresentation, proximate causation limits recovery to "those damages which might foreseeably be expected to follow from the *character* of the misrepresentation itself." (Emphasis added.) (W. Prosser, Torts § 110, at 732 (4th ed. 1971).) We must thus determine the character of Heinold's misrepresentation.

It is important to note that Heinold's deception did not induce plaintiffs into believing that their LCO's were more profitable than they actually were, or that they were risk free. Heinold's misrepresentations also did not concern the size of the foreign service fee. Instead, Heinold's misrepresentations concerned the *use* of the foreign service fee. As the appellate court noted, Heinold's misrepresentations had no effect on the value, ***62** risk, or profit potential of plaintiffs' LCO's. Plaintiffs were aware of the amount of money they risked and that the market had to move enough to offset the price of the option as well as the transaction costs in order to make a profit. This was a risk plaintiffs willingly undertook at the price Heinold charged for the transactions. Plaintiffs made a market decision and either won or lost because the market did or did not move in their favor. Thus, the character of Heinold's misrepresentation had no effect on whether plaintiffs' options made or lost money. As Prosser has also noted:

> "Would the decline in plaintiff's investment have occurred even if defendant's misrepresentation had been true? If the answer to this question is 'yes,' plaintiff has failed to prove that the misrepresentation proximately caused the decline." W. Prosser, Torts § 110, at 732 (4th ed. 1971).

We agree with Heinold that even if Heinold had used the foreign service fee as plaintiffs believed, plaintiffs would have suffered the same losses. Plaintiffs have not proven loss causation, or proximate cause, for investment losses.

Plaintiffs argue, however, that loss causation is against public policy because it favors the wrongdoer. Plaintiffs argue that loss causation is a call for leniency, letting wrongdoers escape their crime by simply returning the money they took from plaintiffs. We note, however, that loss causation ensures that defendants, even where an intentional tort is committed, do not become insurers of plaintiffs who make unwise investments. Without such a requirement, the law "would become an insurance plan for the cost of every security purchased in reliance upon a material misstatement or omission." (*Huddleston*, 640 F.2d at 549.) This policy is especially strong here where plaintiffs voluntarily undertook known market risks and lost. In this regard, loss causation respects the individual investor's market decision. Plaintiffs were content in assuming the risk of ***63** purchasing the options, even if Heinold's deception had been true.

[9] Plaintiffs next argue that Heinold's misrepresentations did proximately cause their loss because of the uniqueness of options. Plaintiffs argue that if Heinold's misrepresentations concerned a different type of security, such as stock, and that stock thereafter lost its value due to market fluctuation, such misrepresentations would not have caused the stock's decline in value. However, plaintiffs argue that options are different from stock in that they have a much shorter life in which to realize a profit, after which they become worthless. Plaintiffs claim that Heinold's misrepresentations prevented them from exercising otherwise profitable options because the break-even point was that much higher. Thus, plaintiffs argue, they lost their entire investment, rather than simply paying an additional fee.

We agree with plaintiffs that options are different from stock, but do not find their argument persuasive. Investing in securities necessitates undertaking risk in an attempt ****749 ***458** to make a profit. In selecting securities, the investor must determine what type of risk he is willing to take. For a minimal price, the investor who chooses to invest in options is allowed to enter the volatile futures market without the risks associated with purchasing a futures contract. If the market moves in an option holder's favor, the holder may profitably enter the futures market. If the market

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does not move in the holder's favor, he has the security of knowing the exact amount of money he can possibly lose, the price paid for the option plus any transaction costs. Through the use of options, the holder avoids the risk, and escapes any loss, potentially great, the market could have caused if he would have purchased a futures contract. Thus, for the security of having the right, but not the obligation, ***64** to enter the futures market, the option holder knows that he may very well lose his entire investment. Those courageous enough to enter the commodities options market knowingly assume this risk.

The investor who chooses to purchase stock, on other hand, has entered a not- so-volatile market. What the stockholder gives up, however, is the potential to reap the great profits the option investor may make from one single leveraged transaction.

Thus, the issue is the undertaking of risk. Plaintiffs could have invested in stock, or futures, but instead chose to invest in options. They did this with the knowledge that they could possibly lose their entire investment, but with the chance that they could profit greatly on a single leveraged transaction. The misrepresentations here did not induce plaintiffs to purchase a type of security, LCO's, but only induced them to pay an additional fee. While Heinold's deception made the break-even price of the option higher, plaintiffs were willing to assume the risk of the volatile futures market at that price.

[10] Plaintiffs next argue that Heinold's deception was intentional, and thateven remote causation will be found in intentional torts. (*Shades Ridge Holding Co. v. Cobbs, Allen & Hall Mortgage Co.* (Ala.1980), 390 So.2d 601, 607, 609.) Plaintiffs note that intentional tortfeasors are commonly liable even for unforeseeable consequences of their conduct. See *Smith v. Moran* (1963), 43 Ill.App.2d 373, 193 N.E.2d 466 (doctrine of transferred intent).

We believe, however, that the fact that plaintiffs willingly assumed known market risks defeats any such argument. Moreover, even intentional tortfeasors do not become the insurers of safety for wronged plaintiffs. (See *Johnson v. Greer* (5th Cir.1973), 477 F.2d 101, 106.) The plaintiffs' willingness to assume risks in a volatile market was the more direct cause of their investment losses than Heinold's misrepresentation.

***65** Plaintiffs further cite several decisions for the proposition that it is no defense for a fiduciary breach that losses have been due to market risks. (*Merchants National Bank v. Frazier* (1946), 329 Ill.App. 191, 67 N.E.2d 611; *In re Estate of Busby* (1937), 288 Ill.App. 500, 6 N.E.2d 451.) These decisions, however, are inapposite, as they involve trustees who breached their fiduciary duties. These cases deal with the law of trusts, which is not applicable here.

Plaintiffs also rely on language from one of this court's decisions:
"The limitation on a plaintiff's recovery proposed by defendants would mean that a fiduciary could violate his duty without incurring any risk. For if his misconduct were discovered the most he could lose would be the profit gained from his illegal venture; the law would have operated only to restore him * * *." (*Vendo Co. v. Stoner* (1974), 58 Ill.2d 289, 305-06, 321 N.E.2d 1.)

While this language seems to support plaintiffs' argument, the facts involved in *Stoner* reveal otherwise. *Stoner* involved an employee of plaintiff who violated his contract and principles of agency by helping fund and launch a company to compete against his employer. Defendant helped this new company develop a better machine, which damaged plaintiff's business. The issue was damages. Plaintiff argued for its lost profits while defendants argued for the money their machine made. This court found the appropriate amount of damages to be plaintiff's lost profits because plaintiff had proven that defendant's actions actually, or proximately, ****750 ***459** caused those losses. In the instant case, Heinold's misrepresentation did not proximately cause plaintiffs' losses. We further note that there does exist a way in which to punish Heinold so that the law does not operate merely to restore it to its previous position. Punitive damages may be assessed to punish Heinold, which we discuss later.

Plaintiffs further argue that the United States ***66** Supreme Court has held that damage measures in Federal securities fraud cases may do more than simply make the plaintiff whole for the economic loss proximately caused by the defendant's fraud. (*Randall v. Loftsgaarden* (1986), 478 U.S. 647, 106 S.Ct. 3143, 92 L.Ed.2d 525.) We note, however, that this decision did not mean that proximate causation need not be required under every set of facts. Moreover, the *Loftsgaarden* decision addressed the issue of whether section 28 of the Securities Act of 1934 limited "rescissory

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recovery to the plaintiff's net economic harm." (*Loftsgaarden*, 478 U.S. at 662, 106 S.Ct. at 3152, 92 L.Ed.2d at 541.) The Court found that section 28(a) of the Securities Act did not impose "a rigid requirement that every recovery on an express or implied right of action under the 1934 Act must be limited to the net economic harm suffered by the plaintiff." (*Loftsgaarden*, 478 U.S. at 663, 106 S.Ct. at 3153, 92 L.Ed.2d at 541.) The Court thus allowed the rescission of a contract from which plaintiffs had already received tax benefits, even though defendants argued that plaintiffs should have to reimburse defendants the value of the tax benefits.

It should further be noted that while the United States Supreme Court found that allowing plaintiffs to recover more than their net economic harm serves a deterrent effect, punitive damages, which may serve that same effect in Illinois, are not permissible under the Federal securities act. (See *Straub v. Vaisman & Co.* (3d Cir.1976), 540 F.2d 591, 599; *Carras v. Burns* (4th Cir.1975), 516 F.2d 251, 259; *Green v. Wolf Corp.* (1968), 406 F.2d 291, 302.) We find the imposition of punitive damages, where justified, to more properly serve as a deterrent than in awarding plaintiffs full investment losses where those losses were not proximately caused by defendant's misrepresentations.

Plaintiffs next argue that loss causation need not be ***67** proven in cases involving broker and fiduciary fraud. Plaintiffs rely on Federal decisions involving brokers which allow a recovery of damages without proof of loss causation. (See *Chasins v. Smith, Barney & Co.* (2d Cir.1970), 438 F.2d 1167; *Clark v. John Lamula Investors, Inc.* (2d Cir.1978), 583 F.2d 594.) Those courts are of a minority view, however, and this is not the law in Illinois. Most Federal courts, it should be noted, do require general loss causation and do not recognize the existence between the parties as an exception to the rule in 10b--5 actions. See, *e.g.*, *In re Catenella* (1984), 583 F.Supp. 1388, 1417.

We further note that the cases on which plaintiffs rely do not support their argument. These decisions involve brokers who fraudulently induced investors to purchase securities by misrepresenting their intrinsic value, such as their profit potential or risk (*Barthe v. Rizzo* (S.D.N.Y.1974), 384 F.Supp. 1063), or who engaged in churing or unauthorized trading (*Board of Trustees of the Fire Fighters' Pension Fund v. Chicago Corp.* (N.D.Ill.1989), 708 F.Supp. 1499; *Hatrock v. Edward D. Jones & Co.* (9th Cir.1984), 750 F.2d 767). Courts have noted in these cases that if a fiduciary relationship or privity does not exist between buyer and seller, loss causation must be shown. If, however, either relationship exists, the court must determine what type of fraud occurred. If the misrepresentation consisted of a fraudulent inducement to purchase the security, then loss causation need not be proven. If, however, the evil is only the price paid for the security, then loss causation must be shown. (See *In re Letterman Brothers Energy Securities Litigation* (5th Cir.1986), 799 F.2d 967, 972.) As one of these courts has noted:

"A plaintiff 'should not have to prove loss causation where the evil is not the price the investor paid for the security, but the broker's fraudulent inducement of the investor to purchase of the security.' [Citation.] However, loss ***68** causation is relevant when a plaintiff complains that a defendant's misrepresentations inflated the price paid for the security. [Citation.] In ****751 ***460** that case a defendant would not be liable if the decline in value was caused by an event occurring subsequent to any misrepresentation." *Kafton v. Baptist Park Nursing Center, Inc.* (D.C.Ariz.1985), 617 F.Supp. 349, 350.

The harm here was not the inducement to purchase the LCO, but the inducement to pay an additional fee, the fraudulent foreign service fee. The evil was the price paid. Thus, even under the analysis used in the decisions on which plaintiffs rely, they would not recover their full investment losses.

[11] Plaintiffs next argue that damages for investment losses due to broker fraud are available under the Consumer Fraud Act without a showing of loss causation. Plaintiffs correctly note that the Consumer Fraud Act was intended to afford a broader range of protection than the common law. (See *Kellerman v. Mar-Rue Realty & Builders, Inc.* (1985), 132 Ill.App.3d 300, 87 Ill.Dec. 267, 476 N.E.2d 1259.) Plaintiffs then argue that remedies under the Consumer Fraud Act should thus be broader and that proximate cause need not be shown.

However, while the intent of the Consumer Fraud Act was to lessen the burden of proof in a claim for certain misrepresentations, there is no suggestion in the Act that damages are to be determined in any manner different than is customary in our State. While plaintiffs note that section 10a(a) of the Act states that the trial court "in its discretion may award actual damages or any other relief which the

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court deems proper" (815 ILCS 505/10a(a) (West 1992)), we cannot agree with plaintiffs that this section allows the court free reign to award any amount of damages it chooses. The damages must be "proper." As our appellate court has noted, "[a] plaintiff can recover damages under the Consumer Fraud Act *only* when his injury is a direct and proximate ***69** result of an alleged violation of the Act." (Emphasis in original.) (*Stehl v. Brown's Sporting Goods, Inc.* (1992), 236 Ill.App.3d 976, 981, 177 Ill.Dec. 267, 603 N.E.2d 48, citing *Petrauskas v. Wexenthaller Realty Management, Inc.* (1989), 186 Ill.App.3d 820, 832, 134 Ill.Dec. 556, 542 N.E.2d 902; see also *Fitzpatrick v. ACF Properties Group, Inc.* (1992), 231 Ill.App.3d 690, 711-12, 172 Ill.Dec. 657, 595 N.E.2d 1327.) We further note that an award of punitive damages, where appropriate, more properly serves the purpose plaintiffs wish absolute liability to serve in this case.

Plaintiffs finally cite *Warren v. LeMay* (1986), 142 Ill.App.3d 550, 96 Ill.Dec. 418, 491 N.E.2d 464, for the proposition that under the Consumer Fraud Act market fluctuation was a foreseeable intervening force:

"In assessing proximate cause where an intervening force is alleged to be present, the only question of concern is 'whether or not this intervening force is without or within the range of reasonable anticipation and probability.' [Citation.] Each case must turn on its own facts. [Citation.]" (*Warren v. LeMay* (1986), 142 Ill.App.3d 550, 570, 96 Ill.Dec. 418, 491 N.E.2d 464.)

Plaintiffs argue that because market fluctuation was a foreseeable intervening force, Heinold's deception was the direct cause of its investment losses.

However, each case must turn on its own facts. Plaintiffs, as investors, necessarily assumed a risk, and that risk was the possibility that the market would not move in their favor. Where plaintiffs knowingly assumed the risk of the market at the price Heinold offered, this argument has no merit. Heinold's deception did not affect the known market risk.

IV.
Right to a Jury Trial

Heinold next argues that it had the right to a jury trial on plaintiffs' claims for violation of the Consumer Fraud Act and breach of fiduciary duties. The trial court denied Heinold's request for a jury trial, and the ***70** appellate court affirmed that decision. We affirm those courts' decisions.

Waiver

[12] Before we address Heinold's contentions, we first address plaintiffs' argument that Heinold has waived the right to a jury trial on both claims. Plaintiffs argue that Heinold waived any right to a jury trial by ****752 ***461** waiting eight years to effectuate its request. Although plaintiffs acknowledge that Heinold filed a jury demand when it answered plaintiffs' complaint, plaintiffs note that this case was originally assigned to, and always remained in, the chancery division of the circuit court. Plaintiffs argue that Heinold waited eight years, until the case was on the eve of trial in October 1988, to move to transfer this action to the law division. Although plaintiffs have found no cases dealing directly with this issue, they do cite several where much shorter delays resulted in waiver of a right to seek a change in venue. *Horn v. Rincker* (1981), 84 Ill.2d 139, 49 Ill.Dec. 315, 417 N.E.2d 1329; *Wagner v. David* (1966), 35 Ill.2d 494, 221 N.E.2d 248.

Plaintiffs' argument has no merit. Heinold did not waive the issue of its right to a jury trial under either claim. Section 52-1105(a) of the Code of Civil Procedure provides:

"A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his or her answer. Otherwise, the party waives a jury. If an action is filed seeking equitable relief and the court thereafter determines that one or more of the parties is or are entitled to a trial by jury, the plaintiff, within 3 days from the entry of such order by the court, or the defendant, within 6 days from the entry of such order by the court, may file his or her demand for trial by jury with the clerk of the court." (735 ILCS 5/2-1105(a) (West 1992).)

Heinold filed a jury demand when it answered plaintiffs' ***71** complaint. This is all Heinold was required to do under section 2-1105 of the Code of Civil Procedure.

Plaintiffs argue, however, that Heinold waited until the eve of trial to file a motion to transfer the case to the law division. We note, however, that the law and chancery divisions are not separate courts from which one must seek a change of venue. Section 9 of article VI of the Illinois

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Constitution provides: "Circuit Courts shall have original jurisdiction of *all* justiciable matters * * *." (Emphasis added.) (Ill. Const.1970, art. VI, § 9.) Moreover, the record shows that Heinold filed a motion after the remand from this court and prior to trial asking the trial court to transfer the cause to the law division. At oral argument on the motion, Heinold noted that it was simply reaffirming its jury demand which it had filed when it answered plaintiffs' complaint some eight years before. Heinold was merely asking the trial court to impanel a jury. As this court noted long ago:
"Conferring jurisdiction in chancery is not excluding trial by jury. Courts of chancery may submit issues of fact to trial by jury, and although it is discretionary to do so in their ordinary course of practice, yet where there comes bestowal upon such a court jurisdiction in a case where there existed, before the adoption of the constitution, the right of trial by jury, it is to be presumed that there would be, in such case, allowance of jury trial,--that there would be obedience to the constitutional injunction that the right of trial by jury, as enjoyed at the time of the adoption of the constitution, should remain inviolate." (*Gage v. Ewing* (1883), 107 Ill. 11, 15.)

Heinold has not waived this issue for review.

Consumer Fraud Act

[13] Heinold first argues that it had the right to a jury trial under the Consumer Fraud Act. Heinold argues that "it is well settled constitutional law in Illinois that actions for legal relief, including statutory actions, are triable to juries as of right." Heinold finds Illinois' right ***72** to a jury trial similar to that right under the seventh amendment of the Federal constitution in that both look to whether the remedy sought is legal or equitable in nature. (U.S. Const., amend. VII; see *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* (1990), 494 U.S. 558, 565, 110 S.Ct. 1339, 1345, 108 L.Ed.2d 519, 528.) Plaintiffs sought money damages, Heinold argues, which is the traditional form of damages in a case at law. Thus, it had the right to a jury trial. Heinold also notes that Consumer Fraud Act claims have routinely been tried to juries. Although the appellate court has found no right to a jury trial under ****753 ***462** the Consumer Fraud Act, Heinold insists that those decisions are in error.

Heinold is mistaken in its belief that all actions for legal relief are triable in Illinois to juries as of right. Heinold is further mistaken in analogizing Illinois' right to a jury trial with the right under the Federal Constitution. Section 13 of article I of the 1970 Illinois Constitution provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const.1970, art. I, § 13.) A similar provision was included in the constitutions of 1818, 1848, and 1870. As this court has noted:

"We do not think there is any substantial difference between the provisions incorporated in the three constitutions. The right of trial by jury was the same under one constitution as under the other. The right protected by each constitution was the right of trial by jury as it existed at common law." *George v. People* (1897), 167 Ill. 447, 455, 47 N.E. 741.

As this court has more recently noted: "for the true meaning of the guarantee it was necessary to examine the English common law." (*Grace v. Howlett* (1972), 51 Ill.2d 478, 509, 283 N.E.2d 474.) Thus, our constitution does not guarantee the right to a jury trial in any action nonexistent at common law, even if such action is legal in nature:
"The constitutional provision that 'the right of trial by jury has heretofore enjoyed shall remain inviolate,' means that the right to a jury trial shall continue in all cases ***73** where such right existed at common law at the time the constitution was adopted, *but that constitutional provision has never been held to prohibit the legislature from creating new rights unknown to the common law and provide for their determination without a jury.* [Citation.]" (Emphasis added.) (*Standidge v. Chicago Rys. Co.* (1912), 254 Ill. 524, 532, 98 N.E. 963.)

Moreover, " '[t]he constitutional provision * * * was not intended to guarantee trial by jury in special or statutory proceedings unknown to the common law.' " *People ex rel. Keith v. Keith* (1967), 38 Ill.2d 405, 408, 231 N.E.2d 387, quoting *People v. Niesman* (1934), 356 Ill. 322, 327, 190 N.E. 668.

On the other hand, the Federal Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial shall be preserved * * *." (U.S. Const., amend. VII.) Unlike Illinois' constitution, the Federal Constitution has been interpreted to "extend[ ] beyond the common-law forms of action recognized at" the time the bill of rights was adopted. (*Curtis v. Loether* (1974), 415 U.S. 189, 193, 94 S.Ct. 1005, 1007, 39 L.Ed.2d 260, 265.) In fact, the Supreme Court has stated:
" 'By *common law,* [the Framers of the amendment] meant ... not merely suits, which the

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common law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. ... In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' *Parsons v. Bedford,* 3 Pet. [28 U.S.] 433, 446-447 [7 L.Ed. 732] (1830) (emphasis in original)." *Curtis,* 415 U.S. at 193, 94 S.Ct. at 1008, 39 L.Ed.2d at 265-66.

As can be seen, Illinois' constitutional right to a jury trial is not the same as that found in the Federal Constitution. In Illinois, the right to a jury trial does not attach to every action at law. Instead, such right only attaches ***74** in those actions where such right existed under the English common law at the time the constitution was adopted. Under the United States Constitution, however, any action at law, or one not of equity or admiralty jurisdiction, confers the right to a jury trial. It should be noted that Heinold does not argue that the Federal right applies here.

Heinold cites several cases for the proposition that the right to a jury trial depends upon the relief sought. (See *Zurich Insurance Co. v. Raymark Industries, Inc.* (1987), 118 Ill.2d 23, 112 Ill.Dec. 684, 514 N.E.2d 150; *****463**754***Lazarus v. Village of Northbrook* (1964), 31 Ill.2d 146, 199 N.E.2d 797.) These decisions are inapposite, however, as they involve actions for declaratory judgment. The right to a jury trial depends on the relief sought in an action for declaratory judgment, but this is due to the nature of the declaratory judgment. While statutory, and unknown to common law, a declaratory judgment "is strictly remedial and *does not create new rights or duties,* but affords a new, additional and cumulative procedure." (Emphasis added.) (*Berk v. County of Will* (1966), 34 Ill.2d 588, 591, 218 N.E.2d 98.) Thus, an action for declaratory judgment merely provides a procedure to bring existing actions which either confer or do not confer the right to a jury trial. As the statute provides: "If a proceeding under this Section involves the determination of issues of fact triable by a jury, they shall be tried and determined in the same manner as issues of fact are tried and determined in other civil actions." 735 ILCS 5/2-701(d) (West 1992).

Heinold also relies on *Flaherty v. Murphy* (1920), 291 Ill. 595, 126 N.E. 553, where this court stated: "[T]he test whether or not the right to trial by jury exists in a given case depends on the nature of the controversy rather than the form of the action [;] there was no right of trial by jury on such issue as is raised by section 10, or on one analogous thereto, provided for under the laws of this State prior to the adoption of the constitution of 1870." (*Flaherty,* 291 Ill. at 598, 126 N.E. 553.)

***75** Heinold argues that the nature of the controversy under the Consumer Fraud Act is money damages, a legal issue, and the Consumer Fraud Act is analogous to the common law action of fraud. However, we find an action under the Consumer Fraud Act to be a new statutory right created by the legislature and, as such, does not confer the right to a jury trial.

This issue was first discussed in *Richard/Allen/Winter, Ltd. v. Waldorf* (1987), 156 Ill.App.3d 717, 109 Ill.Dec. 239, 509 N.E.2d 1078. There, the appellate court found no right to a jury trial under the Consumer Fraud Act. All subsequent appellate decisions addressing this issue have agreed. See, *e.g., Rubin v. Marshall Field & Co.* (1992), 232 Ill.App.3d 522, 173 Ill.Dec. 714, 597 N.E.2d 688; *Wheeler v. Sunbelt Tool Co.* (1989), 181 Ill.App.3d 1088, 130 Ill.Dec. 863, 537 N.E.2d 1332.

We find, as did the court in *Waldorf,* that the Consumer Fraud Act "created a new cause of action different from the traditional common law tort of fraud." (*Waldorf,* 156 Ill.App.3d at 721, 109 Ill.Dec. 239, 509 N.E.2d 1078.) As this court noted in *Siegel v. Levy Organization Development Co.* (1992), 153 Ill.2d 534, 542-43, 180 Ill.Dec. 300, 607 N.E.2d 194:
"[I]n order to establish a claim for common law fraud in Illinois, a plaintiff must allege and prove: (1) a false statement of material fact; (2) the party making the statement knew or believed it to be untrue; (3) the party to whom the statement was made had a right to rely on the statement; (4) the party to whom the statement was made did rely on the statement; (5) the statement was made for the purpose of inducing the other party to act; and (6) the reliance by the person to whom the statement was made led to that person's injury." (*Seigel,* 153 Ill.2d at 542-43, 180 Ill.Dec. 300, 607 N.E.2d 194.)

However, to recover under the Consumer Fraud Act, a plaintiff need only show:
"(1) a deceptive act or practice, (2) intent on the

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defendant's part that plaintiff rely on the deception, and (3) that the deception occurred in the course of conduct involving trade or commerce." (*Seigel*, 153 Ill.2d at 542, 180 Ill.Dec. 300, 607 N.E.2d 194.)

***76** Of note, the Consumer Fraud Act does not require actual reliance, an untrue statement regarding a material fact, or knowledge or belief by the party making the statement that the statement was untrue. As one appellate decision has noted of the Consumer Fraud Act:

"[T]he intention of the seller--his good or bad faith--is not important. Rather, we focus our attention upon the effect that that conduct might have on the consumer * * *." ****755***464***American Buyers Club of Mt. Vernon, Illinois, Inc. v. Honecker* (1977), 46 Ill.App.3d 252, 259, 5 Ill.Dec. 666, 361 N.E.2d 1370.

We thus find that the Consumer Fraud Act is a statutory proceeding unknown to the common law. Because of this, our constitution does not confer the right to a jury trial for a claim under the Consumer Fraud Act.

We further note that the Consumer Fraud Act does not provide for jury trials. In fact, the wording of the statute, and its legislative history, indicate that the legislature intended the action to be tried without a jury. See *Waldorf*, 156 Ill.App.3d at 722-25, 109 Ill.Dec. 239, 509 N.E.2d 1078.

Heinold argues, however, that many Consumer Fraud Act claims have been tried before juries. (See *Warren v. LeMay* (1986), 142 Ill.App.3d 550, 96 Ill.Dec. 418, 491 N.E.2d 464; *Tague v. Molitor Motor Co.* (1985), 139 Ill.App.3d 313, 93 Ill.Dec. 769, 487 N.E.2d 436; *Gent v. Collinsville Volkswagen, Inc.* (1983), 116 Ill.App.3d 496, 72 Ill.Dec. 62, 451 N.E.2d 1385.) While this may be true, the issue of whether a right to a jury trial existed was never addressed in those cases. These cases were also all decided prior to the *Waldorf* decision. Heinold further argues that if this court finds no right to a jury trial in actions under the Consumer Fraud Act, we open the door to making such findings in other instances, such as the Structural Work Act. However, that issue is not now before the court.

We conclude by noting that the drafters of our constitution were aware that the legislature could create a new statutory right that is not subject to the right of trial by jury. In fact, it was noted at the 1970 Constitutional ***77** Convention that "a right to recover [in a personal injury action] without regard to fault might be regarded by the courts as a new cause of action, distinctively different from the common law right to recover for negligence." (3 Record of Proceedings, Sixth Illinois Constitutional Convention 1430.) The drafters chose not to change this area of the constitution.

Breach of Fiduciary Duty Claim

Heinold also argues that the trial court erred in denying it a jury trial on plaintiffs' breach of fiduciary duty claims. On appeal, Heinold attacks the appellate court's finding on this matter:

"While the Illinois Constitution provides that the right to a jury trial shall remain inviolate, this right is not absolute and there is no right to a jury trial in equity actions. [Citations.] It is well established that a breach of fiduciary duty claim is an equitable action. [Citation.] Moreover, this court has consistently held that no right to a jury trial exists where an equitable accounting is sought in a breach of fiduciary duty action. [Citations.] Defendant argues, however, that the breach of fiduciary duty claim here lost its equitable nature when the parties stipulated to the numerical calculations involved in the accounting. We find that a breach of fiduciary duty claim remains an equitable action triable without a jury irrespective of how damages are calculated." 240 Ill.App.3d at 540, 181 Ill.Dec. 376, 608 N.E.2d 449.

Heinold again argues that whether the right to a jury trial exists depends upon the nature of the controversy rather than on the form of the action. (*Turnes v. Brenckle* (1911), 249 Ill. 394, 403-04, 94 N.E. 495.) According to Heinold, plaintiffs sought only money damages, which constituted legal relief. Thus, according to Heinold, it had the right to a jury trial on plaintiffs' breach of fiduciary duty claims.

[14] Without addressing the appellate court's finding that all actions for breach of fiduciary duties are equitable, we note that plaintiffs' claims for a breach of fiduciary ***78** duty sought the imposition of a constructive trust and an accounting. Under these circumstances, plaintiffs' claims were clearly equitable.

Constructive Trust

[15] Heinold's argument concerning money damages and the imposition of a constructive trust warrants little discussion. There is no doubt that a breach of fiduciary duty claim seeking the imposition of a

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constructive trust on funds on account is an equitable claim, triable without the right to a jury. "A constructive trust is solely the creature of a court of chancery and is established upon ****756 ***465** purely equitable grounds." (*Miller v. Miller* (1915), 266 Ill. 522, 531, 107 N.E. 821.) A constructive trust "is imposed by a court of equity to prevent a person from holding for his own benefit an advantage which he has gained by reason of a fiduciary relationship or by fraud." (*Anderson v. Lybeck* (1958), 15 Ill.2d 227, 232, 154 N.E.2d 259.) While plaintiffs sought the return of money, the remedy wasnot money damages, but restitution in the form of Heinold's unjust enrichment. Plaintiffs sought to impose a constructive trust on a specific fund, plaintiffs' accounts with Heinold. While Heinold believes any suit in which money is recovered constitutes an action at law, triable to a jury as a matter of right, this has never been the law in Illinois.

Accounting

[16] We next note that an action for an accounting for breach of fiduciary duty is also an equitable action, with no right to a jury trial. This court has previously noted that "jurisdiction in equity exists * * * where a fiduciary relation exists and a duty rests upon the respondent to render an account." (*Miller v. Russell* (1906), 224 Ill. 68, 72, 79 N.E. 434.) It has been further held that " '[c]ourts of equity have jurisdiction to compel an accounting, although the complainant has an adequate remedy at law, where fiduciary ***79** relations exist * * *. [Citations.]' " (*Mayr v. Nelson Chesman & Co.* (1915), 195 Ill.App. 587, 602.) This is due to the fact that "[e]quity [has traditionally] recognized and enforced fiduciary duties, so it naturally [gives] an accounting remedy against fiduciaries." 1 D. Dobbs, Law of Remedies § 2.6(3), at 158 (2d ed. 1993); see also Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind.L.J. 463 (1985).

Heinold argues, however, that the fact that it stipulated to the amount of money at issue makes this an action for money damages, and thus an action at law. Without addressing this argument, we note that not only were plaintiffs entitled to an accounting as to how much money Heinold was unjustly enriched by their deception, plaintiffs were also entitled to an accounting to determine what Heinold actually did with the foreign service fee.

We do note that plaintiffs asked for their full investment losses under the accounting action, which is the measure of legal damages. However, in their complaint, at the trial court, and on appeal, plaintiffs have argued for an accounting based on the breach of fiduciary duties. Plaintiffs' failure to request the proper amount of recovery for an accounting in their complaint does not affect their right to pursue an equitable accounting. Section 2--603(c) of the Civil Practice Law provides that pleadings are to be liberally construed. 735 ILCS 5/2--603 (West 1992).

PLAINTIFFS' CROSS-RELIEF
V.
Punitive Damages

[17] Plaintiffs argue that the appellate court erred in reversing the trial court's award of punitive damages. We agree and reinstate the trial court's award of punitive damages.

***80** The trial court awarded punitive damages under both counts in the amount of $500,000. In doing so, the court stated:

"Mindful of the bad faith and intentionally misleading and deceptive nature of Heinold's conduct in this matter, and mindful of the need to deter others conducting business in Illinois affecting a vital aspect of our nation's commerce, the Court concludes that an award of $500,000 in exemplary and punitive damages shall be assessed against Defendant, such amount to be divided among class members on a *pro rata* basis in proportion to the amount that any individual class member's losses bear to the total losses awarded the class."

The appellate court reversed the award of punitive damages and stated:

"Punitive damages are clearly disfavored at law and will be awarded only for conduct that is outrageous either because the acts are done with malice, an evil motive or because they are performed with a reckless indifference toward the rights of others. [Citations.] While the record supports the trial court's finding that defendant's conduct was intentionally misleading ****757 ***466** and deceptive, we cannot say that it rises to the level of malice or reckless indifference towards the rights of others so as to justify an award of punitive damages." 240 Ill.App.3d at 545-46, 181 Ill.Dec. 376, 608 N.E.2d 449.

Plaintiffs argue that the appellate court erred because the decision to award punitive damages is within the discretion of the trial court and such decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. (See *Black v. Iovino* (1991), 219 Ill.App.3d 378, 162 Ill.Dec. 513, 580 N.E.2d 139.) Heinold replies

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that the correct standard of review is whether the evidence supports the award of punitive damages (*Loitz v. Remington Arms Co.* (1990), 138 Ill.2d 404, 150 Ill.Dec. 510, 563 N.E.2d 397), which is a question of law. See *Parsons v. Winter* (1986), 142 Ill.App.3d 354, 96 Ill.Dec. 776, 491 N.E.2d 1236.

In *Kelsay v. Motorola, Inc.* (1978), 74 Ill.2d 172, 23 Ill.Dec. 559, 384 N.E.2d 353, this court stated: "It has long been established in this State that punitive ***81** or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. [Citation.] Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. [Citation.] And, while the measurement of punitive damages is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly one of law. [Citation.]" (*Kelsay*, 74 Ill.2d at 186, 23 Ill.Dec. 559, 384 N.E.2d 353.)

This court has also noted:

"Punitive damages are *permissible* where a duty based on a relationship of trust is violated, the fraud is gross, or malice or willfulness are shown; such an award is not automatic." (Emphasis in original.) *In re Marriage of Pagano* (1992), 154 Ill.2d 174, 190, 180 Ill.Dec. 729, 607 N.E.2d 1242.

Plaintiffs' suit alleged intentional breaches of fiduciary duty and willful violations of the Consumer Fraud Act. The trial court found Heinold breached its fiduciary duties to plaintiffs and that its conduct was intentional and deceptive. The appellate court agreed. As in *Pagano*, punitive damages are permissible where a duty based on a relationship of trust is violated and where the violation has been willful. We find that the facts of this case justify a claim for punitive damages.

We next find the trial court's award of punitive damages was not against the manifest weight of the evidence. Heinold intentionally misled the plaintiff class, a group to which it owed a fiduciary duty, in order to obtain higher commissions. The trial court found that Heinold acted "with malice," that Heinold "cheated, defrauded and deceived the class," and that Heinold's breaches were "intentional and in bad faith." The trial court noted that its findings were based on the evidence presented in addition to the demeanor of the witnesses at trial. The purpose of punitive damages is to punish ***82** the wrongdoer. A fiduciary such as Heinold would have little reason not to conduct its business in a fraudulent manner if the most it would be required to pay to plaintiffs would be Heinold's gains, as is the case here.

Heinold argues, however, that "[t]here is no evidence in this case to support a finding of 'conduct involving some element of outrage similar to that usually found in crime,' which is the legal standard that must be met to support a punitive damages award," citing *Loitz v. Remington Arms Co.* (1990), 138 Ill.2d 404, 150 Ill.Dec. 510, 563 N.E.2d 397. Heinold also notes the great lengths to which it went in order to ensure that the summary disclosure statement was complete and that the statement complied with the applicable Commission regulations. As noted previously, however, we do not agree that Heinold's deception complied with Commission regulations. Heinold's intentional deception, which the trial court found was done with malice, did involve an element of outrage similar to that usually found in crime.

****758 ***467** VI.

Prejudgment Interest

Plaintiffs next argue that the appellate court erred in reversing the trial court's award of compounded prejudgment interest under the Consumer Fraud Act. However, because the trial court also awarded prejudgment interest on the breach of fiduciary duty count, which award has not been appealed, we need not discuss this issue.

CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed in part and reversed in part. The judgment of the circuit court is affirmed in part and reversed in part, and the cause is remanded to the ***83** circuit court for entry of judgment in accordance with this opinion.

Appellate court affirmed in part and reversed in part; circuit court affirmed in part and reversed in part; cause remanded.

Justice FREEMAN, concurring in part and dissenting in part:

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I disagree with that part of today's decision which holds no right to a jury trial exists under this State's constitution for Consumer Fraud Act claims for legal damages. (163 Ill.2d at 71-77, 205 Ill.Dec. at 461-464, 643 N.E.2d at 752-755.) The holding owes much to a perceived difference between article I, section 13, of our constitution and the seventh amendment of the Federal Constitution. (163 Ill.2d at 71-74, 205 Ill.Dec. at 461-463, 643 N.E.2d at 752-754. The holding is also grounded on the view that Consumer Fraud Act claims are singular in nature. 163 Ill.2d at 74-77, 205 Ill.Dec. at 462- 464, 643 N.E.2d at 753-755.

The majority is wrong in both respects. The expression of the right to a jury trial in this State's constitution is the same as that of the seventh amendment. No basis exists to construe the clauses' respective scopes differently. Thus, the conclusion that the seventh amendment right operates in statutory actions applies for article I, section 13, as well. The concern for any particular statutory claim is whether the right remedied resembles one for which the common law also afforded recovery.

The jury trial right operates for a Consumer Fraud Act claim because similar recovery was recognized at common law. The Consumer Fraud Act merely expands rights previously enforceable; it does not create entirely new ones. Rights now statutorily actionable are similar to ones protected at common law under a theory of fraud.

***84** For those reasons, as explained more fully below, I dissent.

The Illinois Constitutional Jury Trial Right and the Seventh Amendment

This State's Constitution of 1970 guarantees that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate." (Ill. Const.1970, art. I, § 13.) The majority notes that similar clauses found in each of this State's earlier constitutions have been construed the same in substance. (163 Ill.2d at 72, 205 Ill.Dec. at 461, 643 N.E.2d at 752, citing *George v. People* (1897), 167 Ill. 447, 455, 47 N.E. 741.) True enough. But different phraseology has been used by the respective drafters over time in expressing the right. As the clauses are construed to express the same right, the different phraseology reveals much about the right's scope.

The phrase "shall remain inviolate" pertaining to preservation of a jury trial right is found in all four of this State's constitutions. However, the clauses of the 1818 and 1848 constitutions did not also contain the phrase "as heretofore enjoyed" pertaining to what exactly was preserved. (Ill. Const.1818, art. VIII, § 6; Ill. Const.1848, art. XIII, § 6.) What jury trial right "remain[ed] inviolate" was first defined as one "heretofore enjoyed" in the 1870 constitution. (Ill. Const.1870, art. II, § 5; see generally G. Braden & R. Cohn, The Illinois Constitution: An Annotated and Comparative Analysis 24-27 (1969).) Our present constitution retains the phrase "as heretofore enjoyed" as a reference point.

The phrase "as heretofore enjoyed" precludes an expansive construction of what jury trial right exists under this State's constitution. It was not intended that the constitutional expression of the right would change the scope or nature of it. That is, what *****468 **759** "remain[s] inviolate" under article I, section 13, is a jury trial right as was enjoyed at English common law during the 18th century. See *Grace v. Howlett* (1972), 51 Ill.2d 478, 509, 283 N.E.2d 474.

***85** The phraseology of the jury trial right clause of the 1848 constitution provides a second reference point. That clause defined the jury trial right as one which "shall extend to all cases at law." (Ill. Const.1848, art. XIII, § 6.) The jury trial right was thus also limited to claims for legal, or money, damages as distinguished from equitable relief.

That is significant, again, because the substance of the right expressed has been held to be "the same under one constitution as under the other." (See *George*, 167 Ill. at 455, 47 N.E. 741.) Our present constitution, too, must distinguish between common law legal damage claims--for which the right operates--and common law claims for equitablerelief--for which it does not.

Article I, section 13, thus must operate to provide a jury trial right as existed for actions at common law for legal damages. The majority here seems to understand the point. It observes that this State's jury trial right does not operate for any claim "nonexistent" at or "unknown" to the common law even if legal damages are sought. (163 Ill.2d at 71-73, 205 Ill.Dec. at 461-462, 643 N.E.2d at 752-753.) What the majority ignores, however, is that, by virtue of the Supreme Court's construction, the seventh amendment's scope is identical.

The seventh amendment, unlike the expressions of the jury trial right clauses of this State's constitutions,

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directs its operation to "suits at common law." (U.S. Const., amend. VII.) But the phrase "suits at common law" has long been interpreted to mean more than the body of English decisional law predating the amendment's adoption. The phrase is read to mean suits at common law "in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights * * * were administered." (Emphasis added.) *Parsons v. Bedford* (1830), 28 U.S. (3 Pet.) 433, 446-47, 7 L.Ed. 732, 737.

***86** Both article I, section 13, and the seventh amendment therefore preserve only such a jury trial right as existed at common law for legal damage claims. The central question is whether that includes claims for legal damages based on a statute.

That the seventh amendment's scope includes statutory claims is considered by the Supreme Court a point " 'too obvious to be doubted.' " (*Curtis v. Loether* (1974), 415 U.S. 189, 193, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260, 266, quoting *Rogers v. Loether* (7th Cir.1972), 467 F.2d 1110, 1114 (listing an "unbroken line of cases" in which the Court has so acknowledged the seventh amendment's operation).) But, though the majority seems to see that, like the seventh amendment, article I, section 13, preserves a jury trial right as existed at common law for legal damage claims, it finds the same conclusion does not apply here. It cites, as reasons to more narrowly construe article I, section 13, two of this court's passing observations about the jury trial right. The observations merely beg the central question.

The first observation is that this State's jury trial right was not intended to operate " ' "in special or statutory proceedings unknown to the common law." ' " (163 Ill.2d at 73, 205 Ill.Dec. at 462, 643 N.E.2d at 753, quoting *People ex rel. Keith v. Keith* (1967), 38 Ill.2d 405, 408, 231 N.E.2d 387, quoting *People v. Niesman* (1934), 356 Ill. 322, 327, 190 N.E. 668.) I agree with that. The point, however, has no meaning here. Actions "nonexistent" at or "unknown" to the common law plainly fall outside the reach of the constitutionally expressed right.

The second observation is that nothing in that constitutional expression " 'prohibit[s] the legislature from creating new rights unknown to the common law and provide for their determination without a jury.' " (163 Ill.2d at 73, 205 Ill.Dec. at 462, 643 N.E.2d at 753; *Standidge v. Chicago Rys. Co.* (1912), 254 Ill. 524, 532, 98 N.E. 963.) The point is no less evident than the first. New rights--those truly nonexistent at or unknown ***87** to the common law--are beyond the express protections of the constitutional expression. Given such a new right, a jury trial could only be ****760 ***469** guaranteed as a matter of legislative prerogative.

Ironically, the majority misses what aid the second observation provides on the issue. The quoted statement refers, quite accurately, to rights--not actions--nonexistent at or unknown to the common law. The type of action is immaterial in determining what could be said to be nonexistent at or unknown to the common law. (See *Parsons*, 28 U.S. (3 Pet.) at 445-46, 7 L.Ed. at 737 (noting that the Federal right extends to all suits "whatever may be the peculiar form which they may assume to settle legal rights").) Statutory actions, of course, did not exist at common law in any literal sense. The concern is simply whether the substantive right giving rise to legal recovery resembles one for which recovery could be had at common law. That a right formerly actionable or enforceable at common law is now the subject of codification is immaterial. See *Rogers*, 467 F.2d at 1117.

Beyond misapprehending what has been noted in the past about this State's constitutional jury trial right, the majority does not explain why article I, section 13, and the seventh amendment should not be similarly construed. The analysis regarding the seventh amendment was first expounded in *Curtis v. Loether* (1974), 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260, which involved an action under the Civil Rights Act of 1968. But the basic principle had actually been established in *Parsons*, 28 U.S. (3 Pet.) at 446- 47, 7 L.Ed. at 737. There, Justice Story had concluded that the amendment " 'embrace[d] all suits * * * not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.' " (*Curtis*, 415 U.S. at 193, 94 S.Ct. at 1008, 39 L.Ed.2d at 266, citing ***88** *Parsons*, 28 U.S. (3 Pet.) at 446-47, 7 L.Ed. at 732.) The seventh amendment right therefore operated even for a statutory claim so long as the "statute create[d] legal rights and remedies[ ] enforceable in an action for damages in the ordinary courts of law." (*Curtis*, 415 U.S. at 194, 94 S.Ct. at 1008, 39 L.Ed.2d at 266.) In that sense, the Court had remarked, the seventh amendment "extends beyond the common law forms of action." *Curtis*, 415 U.S. at 193, 94 S.Ct. at 1007, 39 L.Ed.2d at 265.

The majority here finds, in that last quoted remark, reason to believe allusion was being made to a more expansive scope for the seventh amendment than that of article I, section 13. (See 163 Ill.2d at 73, 205 Ill.Dec. at 462, 643 N.E.2d at 753.) That reading is

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inaccurate. The Court's holding makes plain that the seventh amendment "extends beyond common law forms of action" only to the extent it operates in statutory actions at all. As Justice Brennan has explained:

"The * * * test * * * expounded in *Curtis v. Loether* [citation] requires a court to compare the right at issue to 18th-century English forms of action to determine whether the historically analogous right was vindicated in an action at law or in equity, and to examine whether the remedy sought is legal or equitable in nature." (*Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry* (1990), 494 U.S. 558, 574, 110 S.Ct. 1339, 1349-50, 108 L.Ed.2d 519, 534 (Brennan, J., concurring in part and concurring in the judgment).)

The seventh amendment does not go beyond the common law in any other respect. Eighteenth-century English forms of action remain the basis for operation of the right--just as they do for article I, section 13. See *Howlett*, 51 Ill.2d at 509, 283 N.E.2d 474.

Let there be no doubt, the majority's decision today limits this State's constitutional jury trial right in a way never envisioned by its drafters. By failing to apply the same analysis given the seventh amendment, the ***89** majority precludes the operation of article I, section 13, in every statutory claim. Its misreading of case law reduces the concerns about what actions existed at or were known to the common law to a literal exercise; only actions of a type which, in fact, existed at or were known to the common law would come within reach of the scope of article I, section 13. Abandoned is any notion of the constitutional jury trial right as "an object of deep interest and solicitude" about which every encroachment has been "watched with great jealousy." (*Parsons*, 28 U.S. (3 Pet.) at 446, 7 L.Ed. at 736.) It is too obvious to me that, like the seventh amendment, statutory claims ****761 ***470** for legal damages involving rights enforceable at common law come within the protection of article I, section 13, of this State's constitution.

The Consumer Fraud Act

Whether article I, section 13, affords a jury trial right specifically for Consumer Fraud Act claims is a matter of two considerations: the claim must seek legal, not equitable, damages; and the claim must be based on a right similar to one enforceable at common law. The second of those concerns is the more important here. That concern directs a comparison of Consumer Fraud Act claims to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. (See *Chauffeurs, Teamsters & Helpers, Local No. 391*, 494 U.S. at 565, 110 S.Ct. at 1345, 108 L.Ed.2d at 528; see also *Flaherty v. Murphy* (1920), 291 Ill. 595, 598, 126 N.E. 553 (stating that the claim must be at least "analogous" to one "provided for under the laws of this State prior to the adoption of [this State's constitution]").) Again, material to the analysis is not simply the type of action, but whether it involves "rights and remedies of [a] sort typically enforced in an action at [common] law." *Curtis*, 415 U.S. at 195, 94 S.Ct. at 1009, 39 L.Ed.2d at 267.

***90** The majority rejects the argument here that a claim under the Consumer Fraud Act is analogous to one at common law for fraud. That conclusion is based on adaptation of the appellate court's analysis in *Richard/Allen/Winter, Ltd. v. Waldorf* (1987), 156 Ill.App.3d 717, 109 Ill.Dec. 239, 509 N.E.2d 1078. (163 Ill.2d at 75, 205 Ill.Dec. at 463, 643 N.E.2d at 754.) The analysis in that case makes much of the Consumer Fraud Act's purpose in affording consumers protection broader than that afforded at common law. 163 Ill.2d at 75, 205 Ill.Dec. at 463, 643 N.E.2d at 754; see *Richard/Allen/Winter, Ltd.*, 156 Ill.App.3d at 721-22, 109 Ill.Dec. 239, 509 N.E.2d 1078.

There is no question about the broad protection afforded under the Consumer Fraud Act. Not only are claims satisfying the elements of common law fraud subsumed by it, the act relaxes those elements to reach other types of related claims. (*Siegel v. Levy Organization Development Co.* (1992), 153 Ill.2d 534, 543, 180 Ill.Dec. 300, 607 N.E.2d 194.) Neither a showing of an intent to deceive nor a scheme to defraud is required under the Act. It is therefore possible to recover for innocent misrepresentations. (Ill.Rev.Stat.1979, ch. 121 1/2 , par. 262; see B. McDonald, *The Applicability of the Illinois Consumer Fraud and Deceptive Business Practices Act to Private Wrongs*, 39 DePaul L.Rev. 95, 96 (1989); see also 163 Ill.2d at 75-76, 205 Ill.Dec. at 463-464, 643 N.E.2d at 754-755.) It is not even necessary to prove actionable reliance. (Ill.Rev.Stat.1979, ch. 121 1/2 , par. 262; see 163 Ill.2d at 75-76, 205 Ill.Dec. at 463-464, 643 N.E.2d at 754-755.) Remedies, too, are extended under the Act. Ill.Rev.Stat.1979, ch. 121 1/2 , par. 270a(c) (providing for the recovery of attorney fees).

In so eliminating various hurdles met in pursuing common law fraud actions, the majority is satisfied

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that the Consumer Fraud Act creates rights "unknown to the common law." (163 Ill.2d at 76, 205 Ill.Dec. at 464, 643 N.E.2d at 755.) I am not. I do not believe the mere broadening of a right for which legal recovery may be had makes the right new.

Instructive on the point is the Seventh Circuit Court of Appeals' analysis in *Rogers*, adopted by the Supreme ***91** Court in *Curtis*, 415 U.S. at 195, 94 S.Ct. at 1009, 39 L.Ed.2d at 267. The jury trial right issue arose there, as noted earlier, pursuant to a statutory Federal civil rights action. The claim specifically alleged racial discrimination against a landlord for refusing to let an apartment. The nature of the right protected, the court concluded, was analogous to ones protected at common law. *Rogers*, 467 F.2d at 1117.

Those actions, however, were hardly identical to the breadth of protections afforded under section 812 of the Civil Rights Act of 1968, the section allegedly violated. The actions cited included ones against innkeepers for refusing room to travellers without justification and a species of defamation available against landlords who refused to let rooms citing a tenant's unfitness when race was the reason. (*Rogers*, 467 F.2d at 1117.) The comparison to common law actions was ****762 ***471** stretched even further. The court noted common law claims for intentional infliction of emotional distress reflected possible aspects of a Civil Rights Act claim. (*Rogers*, 467 F.2d at 1117.) The point is simple: statutory claims for legal damages do not have to be identical to common law actions for the jury trial right to attach, they need only be similar.

Given its view of our Consumer Fraud Act, the majority, I am certain, would view the Federal Civil Rights Act of 1968 to provide new rights and remedies beyond those which existed at or were known to the common law. That act expanded, in no small way, the manner and type of actionable discrimination. Citing the court of appeals analysis, the Supreme Court determined statutory claims pursuant to the Federal Civil Rights Act were analogous to common law actions. (*Curtis*, 415 U.S. at 193, 94 S.Ct. at 1008, 39 L.Ed.2d at 266.) Unfortunately, the majority fails to appreciate the import of that analysis.

***92** The same logic applied by the Supreme Court applies here to show that the Consumer Fraud Act is analogous to actions based on fraud at common law. The requisite elements of a Consumer Fraud Act claim are irrelevant. A claim under the Act is analogous to one at common law simply if the underlying right protected, not what is necessary to its enforcement, is new.

The Consumer Fraud Act does not create fundamentally new rights not previously enforceable. Instead, it continues to protect consumers' interests in the marketplace. Those same interests found similar protection at common law under a theory of fraud. The Act may more comprehensively protect those interests by expanding, similar to the Civil Rights Act, the manner and type of actionable conduct. But the underlying interests protected by the Consumer Fraud Act are not dissimilar to those long protected at common law. Those rights, now statutorily enforceable, are no less analogous to common law fraud actions than are Federal Civil Rights Act claims to the common law actions noted above.

The majority also notes that the Consumer Fraud Act nowhere provides for jury trials. (163 Ill.2d at 76, 205 Ill.Dec. at 464, 643 N.E.2d at 755.) It again is persuaded by the appellate court's reasoning in *Richard/Allen/Winter, Ltd.* The appellate court there noted that the Consumer Fraud Act provides only that a "court" may provide damages "in its discretion." (*Richard/Allen/Winter, Ltd.*, 156 Ill.App.3d at 724-25, 109 Ill.Dec. 239, 509 N.E.2d 1078.) Noting "court" to be synonymous with "judge" or "judges," it was determined that the General Assembly envisioned no participation by a "jury" in a Consumer Fraud Act claim. *Richard/Allen/Winter, Ltd.*, 156 Ill.App.3d at 724-25, 109 Ill.Dec. 239, 509 N.E.2d 1078.

Even if that conclusion is correct, and I have serious doubt as to it, the point is of no consequence. The jury trial right at issue here is a matter of constitutional grace. The legislature has no legitimate authority to ***93** encroach upon it. Given that Consumer Fraud Act claims for legal damages create no new rights, the General Assembly could not, even if it so intended, preclude the operation of article I, section 13.

McMORROW, J., joins in this partial concurrence and partial dissent.

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Supreme Court of Illinois.

METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO ex rel, William F. O'KEEFFE,
Appellee,
v.
INGRAM CORPORATION et al., Appellees (The Metropolitan Sanitary District of Greater Chicago, Appellee; the Metropolitan Sanitary District of Greater Chicago ex rel. Aram A. Hartunian, Appellant).

No. 53799.

June 4, 1981.
Rehearing Denied Oct. 19, 1981.

Taxpayer appealed from order of the Circuit Court, Cook County, James H. Felt, J., which made award of attorney fees to another taxpayer who had brought a taxpayer's action under the Purchasing Act which had been **settled**. The Appellate **Court** held that taxpayer lacked standing to appeal and Supreme **Court** granted leave to appeal. The Supreme **Court**, Clark, J., held that: (1) provision of **settlement** whereby the relevant agency agreed not to appeal the award of attorney fees would not be enforced as a matter of public policy; (2) decision not to appeal was presumptively wrongful where the taxpayers' interests were not being represented by any of the parties on the attorney fees issue; and (3) trial court erred in using a multiplier of two in determining the award of attorney fees.

Reversed and remanded.

West Headnotes

[1] Municipal Corporations ⚿997
268k997

Provision of the Purchasing Act authorizing taxpayer suits allows citizen access to judicial forums to enforce causes of action when public official fiduciaries neglect or refuse to do so. S.H.A. ch. 42, § 331.22.

[2] Municipal Corporations ⚿987
268k987

Precondition of taxpayer's suit under the Purchasing Act is that the taxpayer either ask the body to sue or demonstrate that such a request would be futile. S.H.A ch. 42, § 331.22.

[3] Municipal Corporations ⚿1000(2)
268k1000(2)

Where government agency, knowing of taxpayer's suit against a company with which the agency had contracted did not seek to intervene and dismiss the action for more than two years and had requested the taxpayer to periodically advise the agency of the suit's status, taxpayer's suit was not barred by his failure to ask the agency to bring the suit. S.H.A ch. 42, § 331.22.

[4] Municipal Corporations ⚿1000(7)
268k1000(7)

Agreement, contained in settlement of taxpayer's Purchasing Act suit against company with which government agency had entered into contract, which called for no appeal by the agency of any award of attorney fees made to the taxpayer would not be enforced as a matter of public policy as the general taxpayers were not adequately represented at the fee determination proceeding. S.H.A ch. 42, § 331.22.

[5] Estoppel ⚿92(1)
156k92(1)

Fact that public agency on whose behalf taxpayer's suit under the Purchasing Act had been brought had accepted payment from the defendant in connection with settlement of the suit did not preclude it, through another taxpayer, from challenging the attorney fees awarded to the plaintiff in the Purchasing Act action as the fee award was severable from the remainder of the settlement. S.H.A ch. 42, § 331.22.

[6] Municipal Corporations ⚿1000(7)
268k1000(7)

Where neither government agency on whose behalf taxpayer's suit under the Purchasing Act had been brought nor the taxpayer was adequately taking into account the interest of the general taxpayers with respect to an award of attorney fees to the plaintiff taxpayer, the refusal of the agency to appeal the award of attorney fees was presumptively wrongful, so that another taxpayer could appeal the award. S.H.A ch. 42, § 331.22.

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[7] Municipal Corporations ⚿1000(7)
268k1000(7)
(Formerly 102k172)

Trial court did not err in determining that attorney for taxpayer in action under the Purchasing Act reasonably spent 3,600 hours on the litigation, with an associate spending 300 hours. S.H.A ch. 42, § 331.22.

[8] Municipal Corporations ⚿1000(7)
268k1000(7)
(Formerly 102k172)

In making an award of attorney fees to attorney representing taxpayer in taxpayer's suit under the Purchasing Act, trial court improperly used a multiplier of two in determining the award where the litigation, although complex and bitterly contested and contingent, was not likely to result in an insubstantial recovery. S.H.A ch. 42, §§ 331.18, 331.22.

***462 **861 ***536** Aram A. Hartunian, of Pressman & Hartunian, pro se.

Sonnenschein, Carlin, Nath & Rosenthal, Chicago, for appellees Ingram Corp., Ingram Barge Co., and Ingram Barge Inc.

A. Denison Weaver, Chicago, for plaintiff-respondent.

CLARK, Justice:

On April 18, 1979, the Cook County circuit court awarded petitioner A. Denison Weaver "the sum of $900,000.00 as and for attorney's fees" and "$16,842.30 for the expenses incurred" on behalf of "the taxpayer William F. O'Keeffe," and awarded petitioner George J. Cullen "$60,000.00 for services rendered on behalf of the taxpayer as co-counsel." Taxpayer O'Keeffe had instituted a derivative suit on behalf of the Metropolitan Sanitary District of Greater Chicago (MSD) against the Ingram Corporation and various related persons and entities (Ingram), in December 1975. The suit was brought under sections 11.18 and 11.22 of the Purchasing Act for the Metropolitan Sanitary District of Greater Chicago (the Purchasing Act or the Act) (Ill.Rev.Stat.1971, ch. 42, pars. 331.18, 331.22). This suit and related actions filed by the MSD in Federal and State **courts** were **settled**. On May 17, 1979, Aram A. Hartunian, pro se, attempted to appeal the attorney fee award **derivatively** on behalf of the MSD. ***463** As part of the **settlement**, the MSD had agreed not to appeal the fee award, and it refused Hartunian's demand to appeal. The appellate court held that Hartunian lacked standing to appeal (85 Ill.App.3d 859, 41 Ill.Dec. 129, 407 N.E.2d 627), and we granted leave to appeal. We reverse.

A contract to haul sludge, negotiated by the purchasing agent of the MSD on a noncompetitive-bid basis, was awarded to Ingram on May 12, 1971. In 1974, a Federal grand jury began investigating the circumstances under which the contract was awarded. The MSD's records were subpoenaed. Trustees, officers, and employees of the MSD appeared before the grand jury and testified. In late 1975, William F. O'Keeffe, a lawyer and MSD taxpayer, heard "(r)umors on the street" to the effect that the contract was let illegally, and published reports of the grand jury investigation appeared soon thereafter. He retained counsel and filed a complaint for declaratory judgment in the United States District Court for the Northern District of Illinois and in the circuit court of Cook County. The gravamen of the complaint was that the contract to haul sludge had been awarded in violation of section 11.18 of the Purchasing Act, which read, in pertinent part:

> "All officers and employees (of the MSD) are expressly prohibited from accepting, directly or indirectly, from any person, association or corporation to which any purchase order, lease or contract may be awarded, any rebate, gift, money, or anything of value." (Ill.Rev.Stat.1971, ch. 42, par. 331.18.)

Section 11.22 of the Act provides that "(a)ny purchase order or contract executed in violation of this Act shall be null and void." (Ill.Rev.Stat.1971, ch. 42, par. 331.22.) The complaint averred that plaintiff was an MSD taxpayer and sought the return of all money Ingram had been paid pursuant to the contract. That sum was approximately $24 million.

The complaint was defective in several respects. The MSD was not made a party defendant. The complaint did ***464** not aver that the MSD was unwilling to sue Ingram ****862 ***537** for this violation. Nor did the complaint aver that O'Keeffe had asked the MSD to sue or why O'Keeffe had not asked the MSD to sue. Copies of the complaint, however, were sent to the MSD on December 29, 1975.

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Proceedings were begun by the Illinois Commerce Commission on December 30, 1975, related to Ingram's alleged tariff overcharges on the same contract, and the MSD hired special counsel, Aram A. Hartunian, in January 1976, to secure an adjustment on the tariff charged by Ingram. The MSD, represented by Hartunian, filed suit in March 1976 in the United States District Court for the Northern District of Illinois (Metropolitan Sanitary District of Greater Chicago v. Ingram Corp. et al., No. 76 C 1009). The gist of this action was that Ingram overcharged the MSD, breaching the contract.

The grand jury, in that same month, returned a 39-count, 66-page indictment against, variously, the president and the chairman of the board of Ingram Corporation, E. Bronson Ingram and Frederic B. Ingram, respectively, MSD trustees Valentine J. Janicki and Chester P. Majewski, the general superintendent of the MSD, Bart T. Lynam, and other individuals, the names and positions of whom are irrelevant. If convictions were had on the indictments, a violation of section 11.18 would have been established.

Ingram had originally assigned the contract to an Illinois Ingram subsidiary corporation. The assertion of Federal jurisdiction, accordingly, was problematic, and O'Keeffe nonsuited the Federal case on August 3, 1976. Repeated difficulties in obtaining jurisdiction over the Ingram individual defendants and obtaining discovery against them occupied O'Keeffe for the rest of the year.

O'Keeffe and the MSD had an arrangement whereby O'Keeffe would keep the MSD apprised of the status of his suit. One such letter was sent to the MSD on March 5, 1976. On January 17, 1977, however, the MSD, in responding ***465** to another O'Keeffe letter, advised him that it regarded "the O'Keeffe suit as being neither authorized by us nor necessary at this time. The (MSD) has this situation under review and will, at the appropriate time, enforce any rights which we may have under (the Purchasing Act) * * *." The letter continued, however, stating that the MSD intended "to be cooperative in responding to any request by you (O'Keeffe) for assistance. We hope that you will keep us informed of the status of the case. * * * " O'Keeffe's counsel argued in a responsive letter that the MSD's position was inconsistent with his position, for the MSD's actions in Federal court were predicated on the validity of the contract, and noted that he never requested authorization for the suit in part because the chief administrative officer and chairman of the judiciary committee of the MSD were under indictment.

Hartunian, on March 1, 1977, filed a motion to quash deposition subpoenas directed to the MSD's attorney by O'Keeffe and Ingram. The deposition was ordered to be taken, however, and two days after it was taken, Hartunian resigned as the MSD's special counsel, citing adverse media publicity. A new firm, Jerome H. Torshen, Ltd., was engaged one week later.

For the next several months, problems of discovery occupied the parties. After the Ingram individuals, one MSD trustee, and others not relevant here, were convicted in the Federal criminal case in November 1977, the MSD amended its Federal-court complaint to include a count based on Ingram's alleged Purchasing Act violations. A separate suit in the same cause of action was filed by the MSD in circuit court (Metropolitan Sanitary District of Greater Chicago v. Ingram Corp. et al., No. 77 L 24930).

On January 3, 1978, the MSD moved to appear as amicus curiae in the O'Keeffe suit, for the purpose of suggesting O'Keeffe's lack of standing. This motion was denied. On January 20, 1978, the MSD's motion to intervene ***466** in the O'Keeffe suit pursuant to section 26.1 of the Civil Practice Act (Ill.Rev.Stat.1975, ch. 110, par. 26.1) was granted.

****863 ***538** In February 1978 the Federal district court denied O'Keeffe's petition to intervene under Federal Rule 24 (Fed.R.Civ.P. 24). The court found that the MSD's suit was being "vigorously prosecuted." This ruling was affirmed from the bench by the Seventh Circuit Court of Appeals.

In March 1978 O'Keeffe amended his complaint, setting forth reasons why he could maintain his action despite his failure to demand that the MSD sue Ingram. On May 12, 1978, the trial court, after an extensive hearing on the issue of O'Keeffe's standing, ruled that a demand upon the MSD to sue would have been useless, and held that O'Keeffe had standing. The MSD unsuccessfully sought review of this ruling in the appellate court and in this court.

On May 17, 1978, the MSD filed a motion for summary judgment in Federal court on the Purchasing Act count of its complaint. In October 1978 O'Keeffe also moved for summary judgment in

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the circuit court. In March 1979 O'Keeffe was given leave to withdraw this motion and the case was set for trial in May. On April 4, 1979, however, O'Keeffe petitioned the **court** to approve a **settlement**. In pertinent part this verified petition stated:

"That during the pendency of this litigation and at the suggestion of this Honorable Court, the parties hereto engaged in negotiations for the purpose of determining whether a common ground existed upon which a settlement of all disputes between MSD and Ingram relating to MSD's sludge removal program could be resolved. That pursuant to said negotiations, on March 30, 1979, an agreement was reached to settle this and all other litigation between the MSD and Ingram, subject to the approval of this **Court**, on the terms and conditions as stated in the form of **Settlement** Agreement attached hereto whereby:

(a) Ingram will pay to MSD the sum of ***467** $8,250,000. In addition, Ingram will relinquish any claims which it might have to recover any sum of money from MSD, said claims being in the approximate amount of $3,500,000.

(b) MSD has agreed to pay your Petitioner's attorneys' fees and expenses out of the funds recovered in such sum as awarded by this Court upon a petition to be filed by Petitioner's counsel and after hearing in open court. MSD reserves the right to contest said petition at said hearing, but both your Petitioner and MSD have agreed to waive their respective rights of appeal from any order entered pursuant to said fee petition. MSD has further agreed not to contest Petitioner's standing. Petitioner has agreed with MSD that MSD's net cash recovery after the payment of Petitioner's attorneys' fees and expenses shall not be less than $7,250,000.

(c) All parties agree that upon the approval of this petition, they will execute a Release in the form attached hereto.

The foregoing settlement proposal has been duly considered by Ingram, MSD's Board of Commissioners and your Petitioner, all of whom have accepted said proposal, subject to this **Court's** approval."

The circuit **court** approved the **settlement** and established a schedule for the filing and a hearing on the fee petition. Jurisdiction was retained to fix the amount of attorney fees, but subject to that, the cause was dismissed with prejudice. On April 5 and 6, 1979, the Federal district court case and the MSD's circuit court action were dismissed with prejudice. Ingram delivered a cashier's check for $8,250,000 to the MSD. On April 9, 1979, the circuit court dismissed O'Keeffe's cause of action against defendants with prejudice. On April 18, 1979, the trial court, after an evidentiary hearing, awarded $960,000 in fees and $16,842.30 in costs to be paid by the MSD. On April 19, 1979, the MSD approved this fee award and directed that it be paid.

Hartunian subsequently informed the MSD that he was disturbed by the fee award and stated his intention to appeal ***468** the award in the absence of such action by the MSD. The MSD refused to appeal and ****864** *****539** Hartunian filed his derivative notice of appeal on May 17, 1979. The MSD has refused to issue a check for the fees until this matter is resolved on appeal. There was some confusion among the parties, originally, regarding the scope of the purported appeal, but it is now clear that Hartunian is challenging only the fee award, and that part of the settlement agreement related to it. For that reason, Ingram has moved that it be dismissed from the action. Ingram has also filed a brief on the merits.

(1) Taxpayer Hartunian initially argues that the award of attorney fees to O'Keeffe's counsel was unauthorized because O'Keeffe had no standing to sue. Taxpayer O'Keeffe argues that taxpayer Hartunian has no standing to appeal. We consider first the status of taxpayer O'Keeffe.

Section 11.22 of the Purchasing Act (Ill.Rev.Stat.1971, ch. 42, par. 331.22) authorizes taxpayer suits: "Public funds which have been expended * * * (in violation of the Act), may be recovered in the name of the sanitary district in any court of competent jurisdiction." This provision allows citizen access to judicial forums to enforce causes of action when public-official fiduciaries neglect or refuse to do so. No other remedy is as "direct, speedy and efficacious." Colton v. Hanchett (1852), 13 Ill. 615, quoted in Droste v. Kerner (1966), 34 Ill.2d 495, 506, 217 N.E.2d 73 (Schaefer, J., dissenting); see also People v. Holten (1919), 287 Ill. 225, 122 N.E. 540; City of Chicago ex rel. Cohen v. Keane (1976), 64 Ill.2d 559, 2 Ill.Dec. 285, 357 N.E.2d 452; see generally Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895 (1960); 18 McQuillan, Municipal Corporations secs. 52.01 through 52.52 (3d ed. 1977); 74 Am.Jur.2d Taxpayers' Actions (1974).

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(2) The crux of Hartunian's argument, however, is that O'Keeffe neither asked the MSD to sue Ingram nor demonstrated that such a request would have been futile. (A ***469** secondary argument that O'Keeffe did not, as required, join the MSD as a party defendant we need not address, because the MSD did ultimately intervene and become a party.) This requirement is a precondition of taxpayer actions. (People ex rel. City of Chicago v. Schreiber (1944), 322 Ill.App. 452, 483, 54 N.E.2d 862; see 74 Am.Jur.2d Taxpayers' Actions sec. 31 (1974).) Hartunian has cited cases in which corporation motions to dismiss shareholder derivative actions were granted for failure to demonstrate, in the complaint, that a majority of corporate directors would fail to enforce the corporate cause of action, if called upon. (See, e. g., Brooks v. American Export Industries, Inc. (S.D.N.Y.1975), 68 F.R.D. 506; Abrams v. Mayflower Investors, Inc. (N.D.Ill.1974), 62 F.R.D. 361; see Annot., 99 A.L.R.3d 1034 (1980).) The analogy is urged because only two of the nine MSD trustees were indicted.

(3) We find those cases inapplicable, for the MSD here, knowing of the O'Keeffe suit, did not seek to intervene and dismiss his action for more than two years, and, meanwhile, had requested O'Keeffe to periodically apprise them of the suit's status. The private letter to O'Keeffe in January 1977 advising him that his suit was "unauthorized" cannot, for obvious reasons, substitute for appropriate action in court. When the MSD finally filed a motion to intervene and dismiss O'Keeffe, the trial court appropriately held a hearing (cf. DePinto v. Provident Security Life Insurance Co. (9th Cir. 1963), 323 F.2d 826, cert. denied (1964) 376 U.S. 950, 84 S.Ct. 965, 11 L.Ed.2d 969) and appropriately decided on the basis of the whole record not to eliminate the taxpayer from the suit. Green v. Jones (1924), 164 Ark. 118, 124, 261 S.W. 43, 45. Cf. Palmer v. Morris (5th Cir. 1965), 341 F.2d 577 (per curiam).

Hartunian argues that the MSD "prudently" decided to await the outcome of the Federal criminal case before suing Ingram. The short answer is that this argument ***470** admits that an original demand upon the MSD to sue would have been futile. Neither section 11.22 of the Act nor prior case law required O'Keeffe to wait until the conclusion of the criminal case to ascertain whether the MSD would follow through in accordance with its belated and ambiguous ****865 ***540** private assurances. If the MSD was willing to sue Ingram, that willingness should have been promptly brought to the attention of the trial court.

The two years prior to the conclusion of the criminal case were not wasted years. Motions, pleadings, and discovery, however time-consuming, are integral parts of litigation. O'Keeffe cannot be faulted on account of, in Hartunian's words, procedural squabbles occurring during this time, for many of those squabbles were initiated by Ingram, obviously interested in fully litigating a lawsuit with a potential liability of many millions of dollars. Some of the squabbles, moreover, were initiated by the MSD, for reasons not fully or adequately explained. We therefore defer to the trial court's determination that keeping O'Keeffe in the case helped assure that the public interest in the case was fully represented. We also wonder, as did the trial court, what the obstacle was to the MSD and O'Keeffe jointly litigating the case against Ingram, once the MSD decided that it, too, was interested in pursuing Ingram for the alleged Purchasing Act violations.

(4) A necessary predicate to the trial court's conclusion, which we have now approved, that O'Keeffe had standing, was that there were grounds to believe that the MSD was inadequately protecting the public interest. It is puzzling, therefore, that O'Keeffe suggests, as one reason for dismissing Hartunian's appeal, that the MSD validly bound all taxpayers by its agreement, in advance of the determination, not to appeal the fee award. Nevertheless, it is true that **courts** favor **settlements.** Agreements and consent decrees generally are enforced according to their terms. A long-standing exception has existed, however, for agreements ***471** which are contrary to public policy. Massell v. Daley (1949), 404 Ill. 479, 89 N.E.2d 361.

Several sources of public policy persuade us that the agreement to forgo an appeal should not be enforced here. **First, the protections afforded in two similar areas of the law, class actions and shareholder derivative actions, were absent in this proceeding. Second, the taxpayers were not adequately represented at the fee-determination proceeding. Third, this court has a policy of refusing to enforce the terms of settlement agreements which disadvantage unincluded parties.**

Although class actions represent the aggregation of

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private causes of action (in contrast to a derivative suit), the representative character of the suit and the fiduciary nature of the relationship between the class representative and absent parties who will be bound by the outcome provide a clear analogy to taxpayer actions. Settlements in Federal and State courts generally are preceded by notice to the class of the settlement's terms. (Fed.R.Civ.P. 23; Ill.Rev.Stat.1977, ch. 110, par. 57.7.) Those opting in to a settlement agreement are permitted to appeal on the question of its adequacy whether or not they have signed waiver forms giving up that right as a condition to opting in. (Pettway v. American Cast Iron Pipe Co. (5th Cir. 1978), 576 F.2d 1157, cert. denied (1979), 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74; see also Ace Heating & Plumbing Co., Inc. v. Crane Co. (3d Cir. 1971), 453 F.2d 30.) Some Federal courts have appointed guardians ad litem to protect the interests of absent class members at a fee-determination proceeding. (Haas v. Pittsburgh National Bank (W.D.Pa.1977), 77 F.R.D. 382, and case therein cited.) It has been held that courts should insist on the settlement of the damage aspect of the case prior to any attorney fees determination. Prandini v. National Tea Co. (3d Cir. 1977), 557 F.2d 1015.

The analogy between shareholder and taxpayer derivative *472 suits, though imperfect, was recognized as early as 1871 in this State and has been maintained since then. (Sherlock v. Village of Winnetka (1871), 59 Ill. 389, 398; City of Chicago ex rel. Cohen v. Keane (1976), 64 Ill.2d 559, 568, 2 Ill.Dec. 285, 357 N.E.2d 452.) The actions are similar in that they each are based upon a combination of two causes of action: one against the directors or public officials for failing to sue and the other based upon the cause of action belonging to the corporation **866 ***541 or governmental body. Recovery runs in favor of the corporation or governmental entity, which is why they are necessary parties to these suits. The suing taxpayer or shareholder represents absent members of his class, who are bound by final judgment or decree. A fiduciary duty is owed by the representative to these absent parties. See Ross v. Bernhard (1970), 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729; Cohen v. Beneficial Industrial Loan Corp. (1949), 337 U.S. 541, 549, 69 S.Ct. 1221, 1227, 93 L.Ed. 1528, 1538; Clayton v. Mimms & Co. (1979), 68 Ill.App.3d 443, 25 Ill.Dec. 181, 386 N.E.2d 452; Prunty, The Shareholders' Derivative Suit: Notes on Its Derivation, 32 N.Y.U.L.Rev. 980 (1957); Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895 (1960) (noting also the analogy's imperfections).

Shareholder derivative suits are litigated frequently in Federal court, and several principles applied there are worthy of note. Notice of proposed settlements is sent to all shareholders. (Fed.R.Civ.P. 23.1; compare C. W. Murdock, The Illinois Business Corporation Act Annotated sec. 45(a) (3d ed. 1975).) Objectors, summoned by the trial court's notice to state their case, are allowed reasonable discovery (Girsh v. Jepson (3 Cir., 1975), 521 F.2d 153, 156-57) and are allowed to contest the reasonableness of the settlement on appeal (In re Pittsburgh & Lake Erie R. R. Co. Securities & Antitrust Litigation (3d Cir. 1976), 543 F.2d 1058). These provisions are a clear outgrowth of the fears prompted by the uncertain positions of settling*473 parties in a derivative suit regarding attorney fees. McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L.J. 421 (1936); C. W. Murdock, The Illinois Business Corporation Act Annotated sec. 45(a) (3d ed. 1975).

Conflicting loyalties were present in the instant case. O'Keeffe was allowed to sue because the MSD inadequately represented the interests of the taxpayers. No change in the MSD occurred between the time its motion to dismiss O'Keeffe was denied and the time of the settlement to persuade us that we should defer to the MSD's judgment on behalf of the taxpayers, regarding the decision not to appeal the attorney fees award. O'Keeffe's counsel, perhaps more significantly, could not validly represent the taxpayers regarding his own fee. See Barliant v. Follett Corp. (1978), 74 Ill.2d 226, 23 Ill.Dec. 522, 384 N.E.2d 316.

Public policy is traditionally found primarily in the Constitution and statutes and only secondarily in case law. Nevertheless, in Popovich v. Ram Pipe & Supply Co. (1980), 82 Ill.2d 203, 45 Ill.Dec. 167, 412 N.E.2d 518, this court declined to enforce a settlement agreement according to its terms where such enforcement would have violated the long-standing policy against double recoveries. The prohibition against double recovery is one found in our case law. The companion case, Palmer v. Avco Distributing Corp. (1980), 82 Ill.2d 211, 45 Ill.Dec. 377, 412 N.E.2d 959, noted, in addition, the problem with settlement agreements that prejudice unincluded parties.

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Here, the advance agreement not to appeal the attorney fees award was made by parties inadequately representing absent taxpayers. It was intended, nevertheless, for the taxpayers to have been bound by the judgment entered. They had no advance notice of what the settlement entailed or how they could register a protest. (It is not clear that, and we do not decide whether, Hartunian could have intervened after the entry of the decree (see Lenhart v. Miller (1940), 375 Ill. 346, 31 N.E.2d 781; Annot., 69 *474 A.L.R.2d 562 (1960).) There is no justifiable reliance on O'Keeffe's part, upon the agreement not to appeal his fee, for his conclusion that the settlement's damage figure was reasonable and that the litigation should cease could not depend upon the amount of his fee.

In the Pettway class action case (Pettway v. American Cast Iron Pipe Co. (5th Cir. 1978), 576 F.2d 1157, cert. denied (1979), 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74) previously cited, the court held that "(r)equiring claimants to opt into a back pay subclass before they have an opportunity to seek appellate review of the **settlement** **867 ***542 would be inconsistent with the design of Rule 23(e), which bounds the **court's** discretion in approving proposed **settlements.** Subclass members have an interest in ensuring that a **settlement** is reviewed by the district **court** in conformity with **settled** legal standards, and we will not allow subversion of the protections afforded by Rule 23(e) by requiring claimants to opt-out of a settlement in order to obtain appellate review." (576 F.2d 1157, 1182.) The instant agreement not to appeal affects taxpayers in the same way, for to gain the benefits of a settlement, they were required to give up their interest in having the award of attorney fees decided "in conformity with **settled** legal standards." As the **court** in Pettway would not permit the subversion of Rule 23(e), we will not allow the subversion of our prior cases in which the appropriate standards for fee awards were articulated.

For the foregoing reasons, we decline to enforce the agreement not to appeal.

(5) O'Keeffe argues that the MSD through Hartunian, is estopped from challenging the fee award under the settlement because it has accepted payment from Ingram. The fee award is severable, however, and O'Keeffe's counsel have not been prejudiced, for reasons we have just explained. This principle, therefore, is inapplicable. Layfer v. Tucker (1979), 71 Ill.App.3d 333, 337, 27 Ill.Dec. 440, 389 N.E.2d 252; Reinken v. *475 Reinken (1933), 351 Ill. 409, 184 N.E. 639; compare County of Cook v. Malysa (1968), 39 Ill.2d 376, 235 N.E.2d 598, see generally, Morton Grove Park District v. American National Bank & Trust Co. (1980), 78 Ill.2d 353, 359, 35 Ill.Dec. 767, 399 N.E.2d 1295.

Ingram and O'Keeffe contend, however, that Hartunian's failure to seek such intervention leaves the record barren as to the merits of his petition. Of course, had Hartunian been denied leave to intervene, we would be considering exactly the same issue on this appeal, for in that case, as in this one, the adequacy of the representation afforded the taxpayers and the validity of the agreement would have been the points in dispute. Ill.Rev.Stat.1977, ch. 110, par. 26.1(1)(b).

Hartunian's motive in entering this suit is irrelevant. (Turkovich v. Board of Trustees (1957), 11 Ill.2d 460, 464, 143 N.E.2d 229; 74 Am.Jur.2d Taxpayers' Actions sec. 32 (1974).) There is no conflict of interest, as contended, for his actions can only benefit the MSD. No one else has indicated an intention to appeal on its behalf and in behalf of the inadequately represented taxpayers.

In a related argument, it is said that Hartunian's failure to seek intervention at trial has resulted in an undeveloped record with respect to arguments about the hours O'Keeffe's counsel charged on particular days. Ingram concludes that Hartunian's brief represents undocumented charges of an appellate brief writer. In the sense just related, this is true. But that conclusion is equally applicable to other briefs filed in this court by parties fully represented in the trial court. We can deal with this problem here in the same way we always have dealt with it: by refusing to consider arguments on appeal to which evidence could have been presented in the trial court had the issues been raised there. Hux v. Raben (1967), 38 Ill.2d 223, 230 N.E.2d 831.

The appellate court held, however, that Hartunian, as a nonparty lacked standing to appeal because he was only "indirectly aggrieved in some indefinite manner in *476 common with taxpayers generally." (85 Ill.App.3d 859, 866, 41 Ill.Dec. 129, 407 N.E.2d 627.) This holding, resting upon the nature of the taxpayers' interest in the controversy, contravenes our holding in Paepcke v. Public Building Com. (1970), 46 Ill.2d 330, 263 N.E.2d 11, adopting, on the standing issue, the dissent filed

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in Droste v. Kerner (1966), 34 Ill.2d 495, 217 N.E.2d 73. In that dissent it was stated that a taxpayer's interest in the litigation was grounded "upon his status as a taxpayer, and it is his equitable interest as a taxpayer, in the public property which is being illegally disposed of that determines his standing to maintain the action." (34 Ill.2d 495, 511, 217 N.E.2d 73 (Schaefer, J., dissenting).) In this case, the taxpayers have an equitable interest in ****868 ***543** the monetary recovery from Ingram, which was diminished by the award of attorney fees to counsel.

(6) Our decision in White Brass Castings Co. v. Union Metal Manufacturing Co. (1907), 232 Ill. 165, 83 N.E. 540, and the appellant court's decision in Chicago & South Side Rapid Transit R. R. Co. v. Northern Trust Co. (1900), 90 Ill.App. 460, aff'd on other grounds (1902), 195 Ill. 288, 63 N.E. 136, are also urged as reasons for denying Hartunian derivative appellate standing. These cases, involving the denial of such standing to corporate shareholders, rest upon the failure of the shareholders to establish that their corporation's decision to forgo an appeal was wrongful. The dual nature of the derivative action was previously referred to. In shareholder derivative actions there must be a wrongful refusal of the shareholder's demand to take action. (Compare Dodge v. Woolsey (1855), 59 U.S. (18 How.) 331, 15 L.Ed. 401, and Hill v. Wallace (1922), 259 U.S. 44, 42 S.Ct. 453, 66 L.Ed. 822, with Hawes v. Oakland (1882), 104 U.S. 450, 26 L.Ed. 827, and In re Cutting (1877), 94 U.S. 14, 24 L.Ed. 49. See the opinion of the court and the concurring opinion in Ashwander v. Tennessee Valley Authority (1936), 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688.) (Compare Maldonado v. Flynn (Del.Ch.1980), 413 ***477** A.2d 1251 (the shareholder was not precluded from suing corporate directors for breach of fiduciary duty despite an independent, "disinterested" committee of directors' business judgment that such a suit was not in the best interests of the corporation) with Maldonado v. Flynn (S.D.N.Y.1980), 485 F.Supp. 274 (applying Delaware law, reaching an opposite conclusion).) As this is written, both Maldonado cases are now on appeal. (Maldonado v. Flynn (Del.Ch.1980), 417 A.2d 378 (res judicata issue); see also Burks v. Lasker (1979), 441 U.S. 471, 99 S.Ct. 1831, 60 L.Ed.2d 404.) Thus the decisions cited by Ingram and O'Keeffe are inapposite because the record fully establishes here that neither the MSD nor O'Keeffe was adequately taking into account the interests of the taxpayers on the attorney fees issue. (See Henry v. Jeanes (1890), 47 Ohio St. 116, 24 N.E. 1077 (Per curiam).) Accordingly, we do not have to reach the question whether, due to the imperfections in the derivative shareholder/derivative taxpayer analogy (see Comment, Taxpayers' Suits: A Survey and Summary, 69 Yale L.J. 895, 903 (1960)), taxpayers must establish a wrongful refusal to appeal because the refusal here was presumptively wrongful.

It has been argued that nonparties should be granted appellate standing in those few cases in which the public interest is adversely affected. Judicial review would thereby be permitted in situations where it is needed. Significantly, it has been contended that allowing such appeals would help prevent "public interest strike suit(s)." It has been urged that such appeals be granted even in the absence of trial court intervention, because intervention may have been neglected because it was thought that the public interest was already protected. Rotunda, The Public Interest Appellant: Limitations on the Right of Competent Parties to **Settle** Litigation Out of **Court**, 66 Nw.U.L.Rev. 199 (1971).

***478 Research reveals that this court has on several occasions, where equitable, granted derivative appellate standing to non-trial-court parties. In Iago v. Iago (1897), 168 Ill. 339, 48 Ill.Dec. 30, the** wife of an insane husband instituted an action for divorce and the trial court appointed a guardian ad litem for defendant. A judgment in favor of the wife was rendered, and the guardian ad litem took no further action. A writ of error was sued out by the husband's next friend, a nonparty in the trial court. This court stated:

> "The power possessed by courts of equity to provide that such defense shall be made is not exhausted by the appointment of a conservator ad litem or next friend to defend in the trial court, but may be exercised in courts of review, and further defense of the action for divorce prosecuted by any remedy provided by law whereby reversal of a decree of the trial court may be obtained. * * *. ****869 ***544** It is not essential the same person who represented the insane party as guardian ad litem in the circuit court should appear as next friend in a writ of error." 168 Ill. 339, 342-43, 48 Ill.Dec. 30.

In In re Estate of Tomlinson (1976), 65 Ill.2d 382, 3 Ill.Dec. 699, 359 N.E.2d 109, a will was admitted to probate in the circuit court of Peoria County. The appellate court reversed the circuit court, finding no

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evidence that the decedent intended to grant the remainder of her estate to the American Cancer Society. The Attorney General had received no notice of the proceedings and was not a party in the trial or appellate courts. This court permitted him to appeal nevertheless:

"He has the authority to protect a charitable trust either defensively, where an attack is made on its validity, or by an action as plaintiff, by securing the construction of the trust instrument. In a suit by others where the validity or the enforcement of *479 a charitable trust may come into question, the Attorney General should be made a party defendant. (Citations.)

* * * If an outright gift of property to a charitable corporation without restrictions on its use or disposition is involved, the corporation is under a duty to apply the property to one or more of the charitable purposes for which it was organized. This duty is ordinarily enforceable by the Attorney General. (Citations.) The Charitable Trust Act (Ill.Rev.Stat.1973, ch. 14, par. 51 et seq.) vests in the Attorney General authority to enforce and supervise charitable trusts. For these reasons we hold that the Attorney General is a proper party to this appeal." (65 Ill.2d 382, 387-88, 3 Ill.Dec. 699, 359 N.E.2d 109.)

See also People ex rel. Pollastrini v. Whealan (1933), 353 Ill. 500, 187 N.E. 491; Layfer v. Tucker (1979), 71 Ill.App.3d 333, 337, 27 Ill.Dec. 440, 389 N.E.2d 252.

In Tomlinson it was demonstrated that the Attorney General, the guardian of the public interest, had an array of powers normally exercisable in trial court. He should have been, but was not, made a party defendant, yet this court did not confine his ability to represent the public interest to actions available in courts of original jurisdiction. The interest in judicial economy supports that decision.

Here the taxpayers must guard their own equitable interest in the disposition of the monetary recovery from Ingram, and as private attorneys general are permitted to intervene where their interests require additional representation (Dowsett v. City of Moline (1956), 8 Ill.2d 560, 566, 134 N.E.2d 793). Here, as in Tomlinson, those able to protect the public interest received no effective notice of the proceeding. The judicial-economy interest, present in Tomlinson, also supports resolving the attorney fee issue on appeal in the instant case. And, as we have noted, the inadequate taxpayer representation, a fact not required in Iago, supports *480 granting Hartunian derivative appellate standing. Accordingly, this case is within the narrow holding of the Indiana Supreme Court that taxpayers may "sometimes take up and carry forward a pending litigation which the officers wrongfully abandon * * *." (Pipe Creek School Township v. Wagler (1924), 194 Ind. 496, 498, 143 N.E. 514.) Hartunian, therefore, has derivative appellate standing.

We turn then to the remaining issue whether the attorney fees were excessive. The settlement petition included a schedule of services for A. Denison Weaver, O'Keeffe's counsel, and listed expenses. On April 17, 1979, Weaver introduced in evidence his original diary entries for the years 1975 to 1977. Witnesses for Weaver testified that an hourly rate of $125 was justified due to the nature of the case. Attorney Torshen, for the MSD, called witnesses who testified that rates customarily charged to the public bodies like the MSD approximated $75 per hour. (The MSD paid Hartunian $100 per hour and Torshen $85 per hour; a lesser rate was charged for work of their associates.) The witnesses recognized that a higher rate was charged by privately retained attorneys in cases like this one.

**870 ***545 The court ordered the hearing continued for one day to allow the MSD time to examine Weaver's time records. The next day, in a morning session, the court and counsel reviewed purported discrepancies pointed out by the MSD. The MSD had not been able to review all of the records, but did not object to the trial court rendering its decision in the afternoon.

In the afternoon session, the court found that the issues involved "substantial questions of law and fact with numerous complex legal issues," that the attorney fees "were entirely contingent on success until the case was settled," that "the litigation by the taxpayer was vigorously contested by the Ingram Group and (the MSD)," *481 that the MSD "benefitted substantially by the suit," and that "Mr. Weaver and Mr. Cullen (O'Keeffe's cocounsel) were very well qualified to prosecute this litigation and did so in an outstanding manner." The trial court, however, disallowed 421/2 hours from Weaver's petition and 31 hours from Cullen's petition. (Cullen's petition had been submitted on April 17.) Weaver had earlier agreed to strike another 40 hours from his petition, as it was time spent collecting his time records. Nor was 250

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hours of law clerk time included. The trial court had spot-checked the records for accuracy. It was found, therefore, that Weaver had spent 3,600 hours and that Cullen had spent 60 hours on this litigation. The court compared these hours to the 1,262 hours spent on the case for the MSD by Hartunian and his associates and 3,056 hours of time spent by Torshen, his associates, and his law clerk son this litigation. The total billings of Hartunian and Torshen, amounting to $273,413.75, were also used as a benchmark. The court expressed its belief that Weaver had spent more than 3,600 hours on this litigation, although no documentation was available, and noted that "I have personal knowledge of the hours that were spent before me because I have spent at least 100 days of my court time and office time on this case in the last year and a half."

In setting an hourly rate, the court explicitly found that since Weaver and Cullen were not retained by the MSD, they should be paid at the "going rate" for counsel privately retained for complex civil litigation. The court found $125 per hour for Weaver and $100 per hour for Cullen reasonable under that standard.

The court held that the principles enunciated in Fiorito v. Jones (1978), 72 Ill.2d 73, 18 Ill.Dec. 383, 377 N.E.2d 1019, applied and, therefore, multiplied this hourly rate by two. The court reasoned that the case was very contingent, asserting that section 11.18 of the Purchasing Act (Ill.Rev.Stat.1971, ch. ***482** 42, par. 331.18), if interpreted literally to result in total forfeiture, was of doubtful constitutionality. The court noted that a multiplier of three undoubtedly would have been applied if the case had been tried.

(7) We agree with the trial court that the principles of Fiorito v. Jones (1978), 72 Ill.2d 73, 18 Ill.Dec. 383, 377 N.E.2d 1019, Leader v. Cullerton (1976), 62 Ill.2d 483, and Flynn v. Kucharski (1974), 59 Ill.2d 61, 319 N.E.2d 1, apply here. (Alyeska Pipeline Service Co. v. Wilderness Society (1975), 421 U.S. 240, 257, 95 S.Ct. 1612, 1621, 44 L.Ed.2d 141, 153; Sprague v. Ticonic National Bank (1939), 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; Trustees of International Improvement Fund v. Greenough (1882), 105 U.S. (15 Otto.) 527, 26 L.Ed. 1157.) On this record we cannot say that the trial court erred in its determination that Weaver spent 3,600 hours and that Cullen spent 300 hours on this litigation. (We cannot validly rule on several challenges to the hours charged on particular days because evidence could have been produced in the trial court on these issues.) We do not reach the issue of whether Weaver and Cullen should be compensated at a rate comparable to other privately retained attorneys because they were hired by O'Keeffe, because that issue was not argued here. We note, however, the conceptual difficulty in allowing that rate in a derivative action, in which the client is a public entity and customarily pays less than the going rate for privately retained counsel.

****871 ***546** (8) We disagree with the trial court, however, regarding the multiplier of two. This litigation was complex and bitterly contested, and the fee was contingent to be sure. However, the Federal prosecution provided the facts necessary to establish the violation (Fiorito v. Jones (1978), 72 Ill.2d 73, 91, 18 Ill.Dec. 383, 377 N.E.2d 1019). No case has been presented, moreover, which would demonstrate that an action under section 11.18 of the Purchasing Act (Ill.Rev.Stat.1971, ch. 42, par. ***483** 331.18) would result in an insubstantial recovery. It is also significant, again in contrast to Saltiel, that the MSD filed its motion for summary judgment in Federal court prior to the time O'Keeffe filed his motion in the circuit court. The filing of that motion certainly aided O'Keeffe.

The problem of excessive attorney fees is at least a century old. (See Trustees of International Improvement Fund v. Greenough (1882), 105 U.S. 527, 26 L.Ed. 1157.) We have now allowed for the first time derivative appellate standing to a taxpayer to challenge an attorney fees award. This holding is new but not unforeshadowed by prior cases. Taxpayer suits significantly supplement the public's remedial arsenal for combatting official wrongdoing, and we will not permit excessive fee awards to undermine their value.

Accordingly, we reverse the judgments of the circuit and appellate courts, eliminate the multiplier, and remand the cause to the circuit court of Cook County for entry of the appropriate fee award, amounting to $450,000 for Weaver, and $30,000 for Cullen, plus costs, and to dismiss Ingram from the cause.

Reversed and remanded, with directions.

SIMON, J., took no part in the consideration or decision of this case.

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United States District Court,
S.D. New York.

NEW YORK HOTEL AND MOTEL TRADES COUNCIL, AFL-CIO, et al., Plaintiffs,
v.
HOTEL ASSOCIATION OF NEW YORK CITY, INC., et al., Defendants.

Nos. 85 Civ. 0216, 85 Civ. 0222, 85 Civ. 0223, 85 Civ. 0225-85 Civ. 0231, 85 Civ. 1020 and 85 Civ. 9925.

Oct. 4, 1990.

Union brought class actions on behalf of its members against hotel association and member hotels, alleging violations of the Equal Pay Act, and the Civil Rights Act. On petition to approve settlement, the District Court, Edelstein, J., held that settlement agreement was fair, adequate and reasonable, notwithstanding objection by hotel based on insufficient notice and attorney conflict of interest.

Petition granted.

West Headnotes

[1] Compromise and Settlement ⚿57
89k57

In approving settlement of an action, court should determine whether the settlement is fair, reasonable, and adequate.

[2] Compromise and Settlement ⚿70
89k70

Presumption in favor of settlement exists where settlement was reached after arms-length negotiations; proponents are counsel experienced in similar cases; there has been sufficient discovery to enable counsel to act intelligently; and the number of objectants or their relative interest is small.

[3] Compromise and Settlement ⚿70
89k70

Presumption in favor of settlement of labor dispute between union and hotels existed, where settlement negotiations were conducted at arms-length, counsel for plaintiffs and defendants were experienced labor lawyers who had represented their respective parties for years, cases had been litigated for years with extensive discovery, and not one plaintiff in any of the consolidated class actions objected to single term of settlement.

[4] Compromise and Settlement ⚿62
89k62

Settlement agreement in consolidated class actions brought by union against hotels was fair, adequate and reasonable, notwithstanding objection of hotel based on insufficient notice and attorney conflict of interest; hotel should have raised its notice of objection earlier and any conflict arose after determination of settlement terms.

***1074** Solomon & Rosenbaum, Dreschler & Leff, New York City, David Rothfeld, Robert M. Schanzer, Stephen Steinbrecher, for defendants.

Seyfarth, Shaw, Fairweather & Geraldson, New York City, Eric Rosenfeld, Jane B. Stewart, of counsel, for defendants.

Proskauer, Rose, Goetz & Mendelsohn, New York City, Bettina Plevan, Bernard Plum, Andrew P. Marks, of counsel, for defendant Marriott Corp.

Shea & Gould, New York City (Vincent Pitta, Newman & Newell, Washington, D.C. Herbert Semmel, Winn Newman, of counsel) for plaintiffs.

***1075** EDELSTEIN, District Judge:

Defendant Marriott Essex House objects to a settlement reached by the parties in the above-captioned consolidated class actions. For reasons to be discussed, defendant Marriott Essex House's objections to the settlement are denied in all respects. The Court adopts the settlement with respect to all the above captioned lawsuits as set out in the stipulation of settlement dated July 11, 1990.

I. Background

On January 9, 1985, plaintiff New York Hotel and Motel Trades Council, AFL- CIO (the "union") brought all the instant consolidated class actions except 85 Civ. 9925 on behalf of its members against defendants Hotel Association of New York City (the "association") and certain member hotels:

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the Dorset Hotel, New York Helmsley Hotel, Helmsley Palace Hotel, Essex House Hotel or Marriott's Essex House Hotel (the "Essex House"), New York Hilton Hotel, Helmsley Park Lane Hotel, Sheraton Centre Hotel, St. Moritz Hotel, St. Regis Hotel, Waldorf- Astoria Hotel, and the Helmsley Windsor Hotel (the "hotels") alleging violations of the Equal Pay Act, 29 U.S.C. § 206(d). Plaintiffs filed separate suits against each listed hotel. The firms of Solomon & Rosenbaum, Dreschler & Leff, and Seyfarth, Shaw, Fairweather & Geraldson represented all of the defendants ("defendants' counsel").

On December 18, 1985, plaintiffs instituted the class action lawsuit 85 Civ. 9925 against the association and all the hotels alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 by virtue of the greater compensation paid housekeeping attendants. On September 10, 1986, this Court approved the stipulation of class certification for all the suits. In sum, the suits sought (1) to equalize the pay rate between housekeeping attendants and day or night room and bath attendants, (2) back pay, (3) a permanent injunction enjoining the hotels from requiring room attendants to clean up to three additional rooms per week above pre-established quotas without compensation, and (4) attorney's fees.

After years of litigation, possible settlement of the instant suits arose in connection with extending the then-existing industry-wide collective bargaining agreement between the union and the association on behalf of its member hotels (the "existing collective bargaining agreement"). The existing collective bargaining agreement, entered into on June 28, 1985, was due to expire on June 26, 1990, and the union sought an early opening of the new contract negotiations. At a meeting held on September 26, 1989, the association informed the union that settlement of the instant suits was a condition precedent to any such contract negotiations.

After negotiations during the fall and winter of 1989, the parties agreed on an extension and modification of the existing collective bargaining agreement (the "extended collective bargaining agreement"). The provisions of the extended collective bargaining agreement were detailed in a memorandum of understanding between the association and the union, executed on January 30, 1990 (the "memorandum of understanding"). Among its other provisions, the memorandum of understanding incorporated the terms of settlement of the instant actions. These terms are in substance and effect the settlement presented to this Court, which provide (1) that all employees supervised by the housekeeping department whose base wage is the same as the housekeeping attendants shall continue at that equal base wage rate; (2) that effective August 1, 1990, the base wage rates of night room attendants and bath attendants shall be the same base wage rate as housekeeping attendants; (3) that effective August 1, 1990, room attendants shall no longer be assigned to make up extra rooms above pre- established quotas without being compensated at specified extra room rates. The settlement does not award back pay to the class; rather, all its terms are prospective. The parties further agreed to pay their own attorney's fees.

On November 12, 1985, Marriott Corporation ("Marriott") sold the Essex House to ***1076** Hotel Nikko of New York, Inc. ("Nikko"). On December 31, 1989, Nikko closed Essex House for renovations and withdrew from the association. As a result, a dispute arose between the union and the association as to whether Essex House would be covered by the settlement set out in the memorandum of understanding.

The gist of this disagreement was that since Essex House was no longer a member of the association and would not sign the collective bargaining agreement, Essex House was not legally bound to adhere to the prospective terms of the settlement. Marriott and the association argued that Essex House was covered by the settlement; the union disagreed.

On March 28, 1990, parties submitted this dispute over the status of the settlement with respect to Essex House to arbitration. At the arbitration hearing held on May 3, 1990, defendants' counsel represented the association, and Marriott was also represented by separate counsel, Proskauer, Rose, Goetz & Mendelsohn. The association and Marriott's positions were both the same. The arbitrator's decision indicates that defendants' counsel argued that the memorandum of understanding contemplated settlement of all of the litigation, including the actions involving Essex House. On May 10, 1990, the arbitrator ruled that the settlement as set out in the memorandum of understanding did not cover the Essex House.

The arbitrator reasoned that the settlement specified in the memorandum of understanding provided for

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EXHIBIT 4

EXHIBIT 4

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

FILED
SEP 25 2000
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

No. 00 CH 13859

ATTORNEY GENERAL'S COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, BREACH OF FIDUCIARY DUTY, REMOVAL, ACCOUNTING, RECEIVER AND APPOINTMENT OF NEW DIRECTORS

D.O.D.

NOW COMES the Plaintiff-Intervenor, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, and complains of Defendants JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, and states as follows:

1. This cause is brought for and on behalf of the PEOPLE OF THE STATE OF ILLINOIS by and through the Attorney General of Illinois pursuant to the Charitable Trust Act (760 ILCS 55/1 et seq. (1997), and his common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts.

2. Plaintiff-Intervenor is filing this complaint as an intervening party plaintiff, having received a Verified Complaint filed herein by Plaintiffs GIDWITZ and BUNTROCK, which set forth in verified facts allegation that they are directors of Terra Foundation, and that the Terra Foundation has been subjected to fiduciary breach and abuse by certain of its directors; that the assets of Terra Foundation have been misused:, that the assets of Terra Foundation are in jeopardy and danger; that certain directors have acted to cause the closing of the Terra Foundation facilities here in Illinois.

3. Plaintiff-Intervenor the PEOPLE OF STATE OF ILLINOIS, as the ultimate beneficiaries of all charitable trusts, brings this action to protect the Terra Foundation For The Arts (the "Terra Foundation") an Illinois charitable not for profit corporation located at 664 N. Michigan Ave., Chicago, Illinois.

4. The Attorney General was given notice of the instant proceedings on September 22, 2000, and was served with a copy of the Plaintiffs' Verified Complaint and Motion

for Temporary Restraining Order on that date.

5. Defendant the TERRA FOUNDATION FOR THE ARTS, an Illinois not-for-profit corporation (hereinafter "the FOUNDATION"), was incorporated on December 13, 1978, and was created specifically as an Illinois charitable trust with certain obligations and commitments to the ultimate beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS (Attached hereto and incorporated herein by reference as Group Exhibit "A" is a copy of the FOUNDATION's original Articles of Incorporation). Said FOUNDATION currently holds net assets worth approximately $450 million, and is registered and reports to the Illinois Attorney General under the Illinois Charitable Trust Act.

6. The FOUNDATION's specific charitable purpose is to preserve, promote and exhibit collections of American art, and to expand the artistic horizons of the public through educational art programs.

7. In furtherance of its charitable purpose and obligations to the PEOPLE OF THE STATE OF ILLINOIS, the FOUNDATION owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Avenue, Chicago, Illinois.

7. Defendant JUDITH TERRA is a Director of the FOUNDATION, and is the widow of Daniel Terra, one of the founding Trustees of the FOUNDATION, who at all relevant times, is a resident of Washington D.C., and is a member of the FOUNDATION's Executive Committee.

8. Defendant PAUL HAYES TUCKER is the Chairman and President of the FOUNDATION.

9. Defendant PAUL HAYES TUCKER and Defendant ALAN K. SIMPSON are each Directors of the FOUNDATION, and are each members of the FOUNDATION's Executive

Committee.

10. Defendants, by serving as Directors of the FOUNDATION, have each become a trustee and fiduciary at common law over the charitable assets held by the FOUNDATION and, as such, each owes a fiduciary duty to the PEOPLE OF THE STATE OF ILLINOIS to deal fairly, faithfully and loyally with said assets, to devote them to the proper charitable purposes without waste or self-dealing.

11. At all relevant times, there was in existence and effect an Illinois statute governing the holding of charitable assets in the State of Illinois, namely the Charitable Trust Act, 760 ILCS 55/1 et seq. (1997) (hereinafter the "Trust Act").

12. Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, and the FOUNDATION are each a charitable "trustee" as that term is defined in Section 3 of the Trust Act, which Section provides:

> *"Sec. 3. "Trustee" means any person, individual, group of individuals, association, corporation, not-for-profit corporation, estate representative, or other legal entity holding property for or solicited for any charitable purpose; or any chief operating officer, director, executive director or owner of a corporation soliciting or holding property for a charitable purpose."*

(760 ILCS 55/3 (1997).)

13. As charitable trustees, Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, and the FOUNDATION each owe fiduciary duties to the charitable trust beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS.

14. Sec 15 of the Trust Act recites fiduciary duties and responsibilities imposed upon persons collecting and holding assets for charitable purposes and states as follows:

> *"Sec. 15. (a) Charitable trustees are subject to certain duties otherwise defined in Illinois statutes and case law, which include but are not limited to the following:*

(1) To avoid "self-dealing" and conflicts of interests;
(2) To avoid wasting charitable assets;
(3) To avoid incurring penalties, fines, and unnecessary taxes;
(4) To adhere and conform the charitable organization to its charitable purpose;
(5) To not make non-program loans, gifts, or advances to any person, except as allowed by the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.];
(6) To utilize the trust in conformity with its purposes for the best interest of the beneficiaries;
(7) To timely file registration and financial reports required by this Act; and
(8) To comply and to cause the charitable organization to comply with this Act and, if incorporated, the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.].

(760 ILCS 55/15(a) (1997).)

15. Daniel Terra, a successful Chicago area businessman established the FOUNDATION in December 1978 under the Illinois General Not For Profit Corporation Act. The FOUNDATION's first board was Daniel Terra, his son James Terra and Robert Sugrue.

16. From the time of its inception the FOUNDATION has had as its central and core purpose the establishment of an art museum in the Chicagoland area, specializing in bringing American art to the public and the People of the State of Illinois. It was Daniel Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art and, Daniel Terra publicly stated that the FOUNDATION was committed to building and operating a world class museum in the Chicagoland area.

17. From its inception the FOUNDATION was substantially funded by Daniel Terra who contributed hundreds of millions of dollars to and for the Terra Museum.

18. As a result of the foregoing others became supportive of said charitable purpose and made contributions to the Terra Museum and the FOUNDATION.

19. Daniel Terra died on June 28, 1996.

20. The FOUNDATION is an Illinois not for profit corporation, which under its by-laws is governed and controlled by a board of directors, each of whom are elected to serve a term of one year, and chosen and elected by the sitting directors in office at the time of election. The board of directors is the ultimate corporate authority controlling the FOUNDATION.

21. From the time of the FOUNDATION's inception through Daniel Terra's death on June 28, 1996, the FOUNDATION had been controlled by a small board of directors of no more than six, whose members were substantially influenced by Daniel Terra.

22. Subsequent to Daniel Terra's death, the Board of Directors of the FOUNDATION substantially changed, and the FOUNDATION currently has eleven directors which includes JUDITH TERRA, RONALD GIDWITZ, DEAN BUNTROCK, PAUL HAYES TUCKER, ALAN L. SIMPSON, Margaret Daley, Arthur A. Hartman, Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Attached hereto and incorporated herein by reference as Exhibit "B" is a schedule showing the names of the Board of Directors of Terra Foundation from 1993 through the present.

23. Plaintiffs GIDWITZ and BUNTROCK, who are current directors of the FOUNDATION, have alleged and verified that certain and several directors of the board of directors of the FOUNDATION, including Defendants JUDITH TERRA, PAUL HAYES TUCKER, and ALAN L. SIMPSON, have and are engaging in actions ultra vires and against the interest and purposes of the FOUNDATION, alleging said Directors are:

a) Attempting to cause the closing of the FOUNDATION's operations in Illinois contrary to the long standing promise of its founder that such would be an institution for the public here in Illinois.

b) Attempting to gain position and self recognition in a Washington DC charitable organization in exchange for the delivery of the assets of the FOUNDATION, the termination of operations in Chicago and the end of a Terra museum in the United States.

c) Attempting to cause the closing of the FOUNDATION's operations in Illinois contrary to Dan Terra's intentions and suggesting a use of its assets contrary to the use Dan Terra intended.

d) Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

e) Caused the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, which jeopardizes the security of the $100 million of art displayed and collected at Terra Museum;

f) Permitted a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

g) Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in operating Terra Foundation.

j) Wastefully incurring excessive legal fees by retaining duplicative counsel in replacement of Terra Foundation's long-standing counsel; and

k) Misusing the art collection of Terra Foundation and allowing Judith Terra to personally possess and use museum art items and in a manner that placed the collection in danger and jeopardy.

25. Plaintiffs GIDWITZ and BUNTROCK have verified the allegations of their complaint filed of record here, as summarized in Paragraph 24 herein, and Plaintiff-Intervenor, the PEOPLE OF ILLINOIS, now incorporates by reference, as though fully set forth herein, the factual allegations made and verified by Directors GIDWITZ and BUNTROCK.

26. The allegations set forth in Plaintiff GIDWITZ's and Plaintiff BUNTROCK's Verified Complaint, and incorporated herein by reference as though fully set forth herein, show that the Defendant members of the Board of Directors of the FOUNDATION have been acting towards, or have been otherwise distracted by, self interest matters and have ignored and/or have permitted the Terra Museum in Chicago to lose its key staff and to jeopardize its charitable purposes and to place the organization in jeopardy without proper security for the collection and without sufficient historical institutional knowledge to assure the assets are safe and accounted for.

DEFENDANT JUDITH TERRA

27. Shortly after the creation of the FOUNDATION in 1978 as aforesaid, Daniel Terra's first wife, Adeline, died. Daniel Terra subsequently married Defendant JUDITH TERRA on June 28, 1986.

28. In a prenuptial agreement signed by Defendant JUDITH TERRA prior to her marriage to Daniel Terra, Defendant JUDITH TERRA acknowledged that she fully understood that the bulk of Daniel Terra's estate would go to the FOUNDATION in the event of his predeceasing

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her, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the said prenuptial agreement. (Attached hereto and incorporated herein by reference as Exhibit "C" is a copy of the said prenuptial agreement entered into between Daniel Terra and Defendant JUDITH TERRA.)

29. Under the aforesaid prenuptial agreement, Defendant JUDITH TERRA agreed she would receive only a fixed amount of money and assets upon Daniel Terra's death, and that the bulk of his estate would go to the FOUNDATION. The said prenuptial agreement provided that if the parties remained married, JUDITH TERRA would receive $1.5 million from Daniel Terra's estate if he died prior to the 5th anniversary date of their marriage; or $ 3 million if his death was between the 5th and 10th date of their marriage; or $4.5 million if his death occurred after the 10th anniversary date of their marriage. (See Exhibit "C", prenuptial agreement page 6.)

30. Several days prior to his death on June 28, 1996, Daniel Terra was confined to a hospital, his life being sustained by the use of life supporting devices. Shortly after midnight on June 28, 1996, the tenth anniversary date of his marriage to JUDITH TERRA, the life supporting devices employed to keep Daniel Terra alive were ceased. Technically Daniel Terra lived past the ten year anniversary of his marriage to JUDITH TERRA, and Defendant JUDITH TERRA sought and received from Dan Terra's estate $4.5 million pursuant to the terms of the aforesaid prenuptial agreement.

31. The Prenuptial agreement also provided that while Daniel Terra was alive, JUDITH TERRA would not agree to be a member of the board of directors of the FOUNDATION.

32. Defendant Judith Terra was not a member of the FOUNDATION's Board of Directors until Daniel Terra's aforesaid illness and death in 1996.

33. In January 1997, Defendant JUDITH TERRA filed four further and

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additional claims against Dan Terra's estate despite the express terms of her Prenuptial agreement with Daniel Terra, and amounts paid thereunder, and in said claims, Defendant JUDITH TERRA sought certain art work and cash in excess of $42 million, which art work and cash would otherwise pass as a bequest to the FOUNDATION.

34. James Terra, Daniel Terra's son, and a founding Director of the FOUNDATION, was named as the Executor of the Daniel Terra Estate. James Terra was represented by Bell, Boyd and Lloyd as counsel to the Executor, and in that capacity both James Terra and Bell, Boyd and Lloyd denied JUDITH TERRA's claims against the Estate and defended and litigated her $ 42 million in claims, asserting that none of her claims had any merit. At the time of said litigation, James Terra was a Director of the FOUNDATION, and Bell, Boyd and Lloyd was the FOUNDATION's regular counsel and had been so for many years prior.

35. The Daniel Terra Estate, at date of Daniel Terra's death was valued in excess of $450 million, but in early 1997 Mercury Finance Co. lost most of its value and the Terra estate suffered a devaluation of $150 million. The Estate owed in excess of $90 million in debts and the lenders were uncertain of renewal given the stock devaluation. This caused the Estate certain jeopardy and a settlement amount of $ 1 million was paid to JUDITH TERRA to resolve her $42 million in claims against the Estate of Daniel Terra.

36. The funds paid to JUDITH TERRA under the prenuptial and the $1 million to settle her claimed amount of $42 million would otherwise have passed to the FOUNDATION.

37. JUDITH TERRA's actions in filing $42 million in claims was against the interest of the FOUNDATION.

38. After resolving her claims against the estate of Dan Terra, Judith Terra became a director again, and subsequent thereto the law firm of Bell, Boyd and Lloyd after 20 years

of service to the FOUNDATION has been terminated as regular counsel to the FOUNDATION.

39. The final accounting of the Daniel Terra Estate has been presented by James Terra and Bell, Boyd and Lloyd , it has been reviewed and approved by the FOUNDATION's special counsel Mayer, Brown and Platt and the Illinois Attorney General's office, both of whom participated in the many aspects of the estate matters. Despite Mayer, Brown & Platt's approval the FOUNDATION now has undertaken to hire yet another set of attorneys to review the actions of James Terra and Bell, Boyd and Lloyd, and the FOUNDATION is bearing the cost of such.

40. Upon information and belief, the aforesaid termination of Bell. Boyd and Lloyd and review of the actions of James Terra and Bell, Boyd and Lloyd were done at the behest of Defendants out of retaliation for the adverse position James Terra and Bell Boyd and Lloyd took against Defendant JUDITH TERRA in the aforesaid litigation of the $42 million in claims against the Estate of Daniel Terra.

41. In addition to the foregoing, based on the verified allegations set forth in Director GIDWITZ's and Director BUNTROCK's Verified Complaint, and incorporated herein by reference as though fully set forth herein, Defendant JUDITH TERRA with the aid of Defendant Tucker has caused works of art of the FOUNDATION to be brought to her home, over objection from Museum staff.

42. Furthermore, Defendant Judith Terra has engaged in discussions with defendant Director PAUL HAYES TUCKER to have the FOUNDATION close the Terra Museum in Chicago and move its operation to Washington D.C., where JUDITH TERRA resides, and /or to cause the FOUNDATION to merge with another institution in Washington D.C., which intended acts are contrary to Daniel Terra's intent and the mission to maintain a museum in Chicago.

DEFENDANT PAUL HAYES TUCKER

43. Defendant Tucker has sent the attached " A Vision for The Future" white paper to the FOUNDATION's Board of Directors, a copy attached as exhibit "D", which contains his vision for the future of the FOUNDATION. Defendant Tucker's vision is not that of Daniel Terra. Defendant TUCKER vision statement shows he seeks to close the Terra Museum in Chicago and to move the FOUNDATION and its art collection to Washington D.C., give its collections to the National Gallery and set up an educational facility in Washington D.C., or as Defendants GIDWITZ and BUNTROCK state in their verified Complaint, Defendants TUCKER and JUDITH TERRA seek to merge the FOUNDATION into the "Corcoran Gallery of Art in Washington".

44. The FOUNDATION Board of Directors met on August 24, 2000 and at that meeting Defendant PAUL HAYES TUCKER made remarks suggesting that the FOUNDATION move to Washington D.C. and that it should close down the Terra Museum in Chicago, a copy of the August 24, 2000 FOUNDATION's Board meeting minutes is attached as Exhibit "E".

45. Defendant PAUL HAYES TUCKER, is the Chairman and President of the FOUNDATION, and is responsible for its safety, yet he has allowed and/or caused the FOUNDATION's staff to be depleted of long term staff, has allowed and/or caused the FOUNDATION's long term security personnel to quit, has allowed and/or caused its executive director to quit, and according to the verified allegations of Directors GIDWITZ and BUNTROCK, incorporated in this Complaint, Defendant PAUL HAYES TUCKER directed that art belonging to the FOUNDATION be delivered from France to Defendant JUDITH TERRA's home.

DEFENDANT ALAN K. SIMPSON

46. Directors GIDWITZ and BUNTROCK, in their Verified Complaint, establish

that Defendant JUDITH TERRA set upon a course of conduct and convinced other directors to join her in her efforts to promote her self interests, close the Terra Museum in Chicago, and move the FOUNDATION to Washington D.C. where she lives to effect self interests. In addition certain acts of the board now appear to be designed to punish those that had opposed her acts of self interest as aforesaid.

47. As related by directors GIDWITZ and BUNTROCK in their verified statements, Defendant ALAN K. SIMPSON announced when he joined the FOUNDATION Board of Directors that he was there only "to protect Judith Terra.." As a consequence, Defendant ALAN K. SIMPSON, by his own admission was not there to do the acts required of an independent Director. Defendant ALAN K. SIMPSON's comment to the board is most significant in light of the fact that Director ALAN K. SIMPSON joined the Board of the FOUNDATION in fiscal year end 1999, at a time when the only issues concerning JUDITH TERRA was her personal need to seek revenge upon those that had opposed her before.

48. The totality of the issues presented here in this Complaint establish that the FOUNDATION is a charitable trust in jeopardy, whose long term institutional employees have quit, whose controlling number of Board members are more interested in their own vision, self interest, and/or personal goals of promoting their status in society, than in properly safeguarding the FOUNDATIONS mission. A small group of Directors, loyal to the announced purposes of the organizations principal benefactor, Daniel Terra, are being subjected to retaliation, removal or neutralization.

49. There is no doubt that Daniel Terra expected the Terra Museum to remain in Chicago and there is no doubt that the other donors over the years relied upon the institutional nature of the FOUNDATION as an Illinois-based charity, expecting it to be rooted here and to remain in

Chicago, Illinois. (Attached hereto and incorporated herein by reference as Exhibit "F" is the 1994 list of donors who have contributed to the FOUNDATION.)

50. A charitable trust is a precious gift that belongs to the PEOPLE, which is not the property of the fiduciaries that are privileged to the stewardship of such, and the Defendant members of the Board of Directors of the FOUNDATION are for the most part relatively new and acting in a manner that in endangering the trust's assets.

51. The totality of the equities here show that new fiduciaries are needed here to protect this trust from the self interest and improper action of the aforesaid Defendant Board members of the FOUNDATION.

52. An interim receiver is needed to take swift action to secure the assets and make an accounting to determine if assets are missing or if some are in private homes or in private hands.

53. The permanent appointment and addition of seven to nine additional board members, chosen from the ranks of retired judges, current local museum fiduciaries and respected members of our business community is needed to effect, install and provide the necessary impartial stewardship that such an institution as the FOUNDATION requires, and which the current Board under the aforesaid circumstances can not provide.

54. By way of the foregoing, Defendants JUDITH TERRA, PAUL HAYES TUCKER, ALAN L. SIMPSON, and the FOUNDATION have breached their fiduciary duties to the FOUNDATION as aforesaid, and as a consequence, the FOUNDATION is in need of protection from Defendants.

55. Section 16(b) of the Trust Act provides:

"Sec. 16 (b) Upon application to a court of competent jurisdiction, in which the Attorney

General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and he seeks injunctive relief and removal of such trustees, the Court may, as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest."

(760 ILCS 55/16(b) (1997).)

56. As alleged by directors GIDWITZ and BUNTROCK , the defendants opposed the election and actions of GIDWITZ and BUNTROCK to further their improper actions as aforesaid.

57. By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Alan Simpson and Mr. Tucker owed fiduciary duties to the People of Illinois to act in the Peoples interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago and supported and funded by him and others through his death in 1996.

58. Defendants Judith Terra, Alan Simpson and Mr. Tucker by the foregoing breached their fiduciary duties by acting in a manner that was intended to further personal interests to the detriment of the People of the State of Illinois, the ultimate beneficiaries of each and every charitable trust within the state.

59. As aforesaid, improper conduct here included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals;

c. Attempting to remove employees and directors of the Museum that opposed the self interested acts aforesaid and to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law;

d. Endangering the assets of the Terra Foundation

60. The foregoing breaches of fiduciary duty have caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the People of the State of Illinois, as the beneficiaries of said trust , for which no remedy at law is sufficient.

61. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created the Terra Foundation for the benefit of the People of the State of Illinois;

(2) The intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the FOUNDATION intended and expected the Museum to remain in Chicagoland;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art to Washington, D.C. or any other location outside of Illinois;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to any location outside of Illinois would violate the charitable trust establish by the operation of the Terra Foundation to date , the intent of Dan Terra, the common law, the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Alan Simpson and Paul Tucker have breached their fiduciary duty to Terra Foundation and the People of the State of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the People of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties and permitted to remain in control of the subject Foundation;

(7) Defendants have acted improperly and breached their fiduciary duty and the equities require that the court exercise supervisory authority over the charitable trust at issue here and appoint receivers and additional fiduciaries and directors to protect the Terra Foundation;

B. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding any further meetings of the Foundation's Board of Directors, until a new board is constituted by this court;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

(5) Transferring, moving, disbursing, selling or exchanging any assets of the Terra Foundation.

C. The appointment of a receiver to operate and maintain Terra Foundation pursuant to: the Court's equitable powers, the common law, the Charitable Trust Act and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

D. Appoint a Receiver to conduct an accounting of all assets of the Terra Museum and Terra Foundation and determine and locate all assets of the Foundation

E Remove Judith Terra, Alan Simpson and Paul Tucker as directors and officers of the Terra Foundation.

F Appoint and add to the directors of the board of directors of the Terra Foundation at least nine additional directors to protect said Foundation to effect necessary stewardship and fiduciary oversight.

G.. And such additional relief as the Court deems just and equitable.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN, Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
BARRY GOLDBERG
Assistant Attorney General
Bureau of Charitable Trusts and Solicitations
100 West Randolph St., 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

16di-000951

Certificate 38125

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, *Articles of Incorporation duly signed and verified of*

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 13th *day of* December *A. D. 1978 as provided by the* "GENERAL NOT FOR PROFIT CORPORATION ACT" *of Illinois, approved July 17, 1943, in force January 1, A. D. 1944.*

Now Therefore I, ALAN J. DIXON, *Secretary of State of the State of Illinois, by virtue of the powers vested in me by law do hereby issue this Certificate of Incorporation and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.*

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois*

Done at the City of Springfield this 13th *day of* December *A.D. 19* 78 *and of the Independence of the United States the two hundred and* 3rd

(SEAL)

Alan J. Dixon

[redacted]

FORM MF-29

ARTICLES OF INCORPORATION
UNDER THE
GENERAL NOT FOR PROFIT CORPORATION ACT

(These Articles Must Be Filed in Duplicate)

(Do Not Write in This Space)
Date Paid 12/13/78
Filing Fee $ 25.00
Clerk

Secretary of State, Springfield, Illinois.

We, the undersigned,

(Not less than three)

Name	Address: Number	Street	City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

being natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of forming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

1. The name of the corporation is: FOUNDATION FOR THE DANIEL J. TERRA MUSEUM
2. The period of duration of the corporation is: Perpetual
(Please state "perpetual" or a certain number of years)
3. The address of its initial Registered Office in the State of Illinois is: 2600 Central Park
Street in the City of Evanston (60201) County of Cook and
(Zip Code)
the name of its initial Registered Agent at said Address is: Daniel J. Terra
4. The first Board of Directors shall be three in number, their names and addresses being as follows:
(Not less than three)

Name	Address: Number	Street	City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

(47)

5. The purpose or purposes for which the corporation is organized are: This corporation is organized exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, or the corresponding provisions of any subsequent Federal tax laws ("Code"). Within the foregoing, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions engage in any and all oter activities and exhibitions; engage in any and ll other activities and promote any and all other purposes permitted ay law to such a not-for-profit corporation.

[redacted] no part of the net earnings of the corporation shall inure to the benefit of or be distributable to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 5 hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributions of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

7. Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

NOTE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)

Daniel J. Terra
James D. Terra
Robert J. Sugrue
Incorporators

ACKNOWLEDGMENT

STATE OF ILLINOIS,
County of Cook } ss.

I, Margaret Solyomi, a Notary Public do hereby certify that on the 11th day of December, 19 78, Daniel J. Terra, James D. Terra, and Robert J. Sugrue (Names of Incorporators)

personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE (NOTARIAL SEAL) HERE

Margaret Solyomi
Notary Public

PAID
DEC 13 1978
ALAN J. DIXON
Secretary of State

FILED
DEC 13 [illegible]

Commissioner

SECRETARY OF STATE
CORPORATION DEPARTMENT
TELEPHONE: (217) 782-7880

(Three Articles Must Be Executed and Filed in Duplicate)

Filing Fee $50.00

FO P-39

ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT
CORPORATION ACT
of

16di-000954

LIST OF DIRECTORS
TERRA FOUNDATION
BY FISCAL YEAR
AS REPORTED ON 990

NAMES	FYE 2000	FYE 99	FYE 98	FYE 97	FYE 96	FYE 95	FYE 94	FYE 93
DANIEL TERRA					X (1)	X	X	X
JAMES TERRA			X	X	X	X	X	X
BENNETT ARCHAMBAULT						X	X	X
WILLIAM P. CLARK						X	X	X
ROBERT G. DONNELLEY							X	X
ARTHUR A. HARTMAN	X	X	X	X	X	X	X	X
HELENE AHRWEILER	X	X	X	X	X	X	X	X
JUDITH TERRA	X	X	X	X (3)	X (2)			
DORANCE H. HAMILTON			X	X	X			
PETER SOLMSSEN				X	X			
CHARLES MOFFETT			X	X				
DEAN BUNTROCK	X	X	X					
MARGARET DALEY	X	X	X					
RONALD GIDWITZ	X	X	X					
STEPHANIE PACE MARSHALL	X	X	X					
THEODORE E. STEBBINS, JR.	X	X	X					
JACQUES ANDREANI	X	X						
PAUL H. TUCKER	X	X						
ALAN SIMPSON	X	X						

*1 Dan Terra died on June 28, 1996
*2 Judith Terra first on board in year of Dan's death
*3 Judith Terra withdraws from board and files personal claims in Dan's estate

[redacted]

JUN 27 '01 (WED) 18:1 2 BELLOWS&BELLOWS 312 332 1190 PAGE 23

ANTENUPTIAL AGREEMENT

This ANTENUPTIAL AGREEMENT made and entered into this 24th day of June, 1986, by and between DANIEL J. TERRA, of Kenilworth, Illinois, hereinafter called the "first party", and JUDITH F. BANKS, of Washington, D.C., hereinafter called the "second party".

WHEREAS, the parties hereto intend to be married to each other in the near future; and

WHEREAS, each of the parties has heretofore been married, but not to each other, and DANIEL J. TERRA has one child from his former marriage and JUDITH F. BANKS has no children; and each of the parties has property and an estate and they desire, in contemplation of entering into said marriage, to settle and adjust all property rights that each may have or claim in the property and estate of the other and to determine and declare what rights, if any, each of them shall have in the property and estate of the other upon their entering into such marriage; and

WHEREAS, each of the parties desires to retain and reserve full and complete right, power and authority, to the extent permitted by law, to manage, control, use, sell, lease, mortgage, pledge, encumber and otherwise dispose of his or her respective property and estate in any and every manner or way, including gifts, in trust or otherwise of his or her respective property and estate in any and every manner or way, including gifts, in trust or otherwise, during his or her lifetime and by will or other testamentary disposition

[redacted]

upon his or her death or to have his or her property and estate pass to and be distributed to his or her descendants, relatives or other beneficiaries, as he or she sees fit, all as if such marriage had not taken place; and each party respects the wishes and desires of the other party with regard to the foregoing matters and is agreeable thereof; and

WHEREAS, each of the parties desires to maintain their respective properties for the benefit of themselves and families and for their individual well-being and for the benefit of TERRA MUSEUM OF AMERICAN ART; an Illinois not-for-profit corporation; and

WHEREAS, the parties desire that such marriage shall not in any way change their existing or future legal rights or the existing or future legal rights of their respective heirs, beneficiaries, executors, administrators, or assigns, in the property and estate of each of them, except as herein otherwise provided; and

WHEREAS, each of the parties hereto has been fully advised and informed of the property and estate of the other as well as the prospects of the other, and the parties hereto have been fully advised and informed of all rights and interests which, except for the execution and delivery of this Agreement, would be conferred upon or vested in each of them by law with respect to the property and estate of the other upon entering into said marriage; and

WHEREAS, both parties hereto have been advised by legal counsel concerning this Agreement, their respective rights hereunder and their prospective rights and obligations as husband and wife under the laws of the State of Illinois;

NOW, THEREFORE, in consideration of the premises, and the covenants and agreements hereinafter set forth, and in further consideration of the sum of ONE DOLLAR ($1.00), each to the other in hand paid, receipt whereof is hereby acknowledged, it is covenanted and agreed by and between the parties as follows:

FIRST: Each of the parties hereto has made to the other party a complete statement of such party's present assets and liabilities, which has been fully examined and investigated by the other party and their respective legal counsel, and each party nereby acknowledges, certifies, and declares that he or she has been fully informed and knows the nature, extent, and value of the property and estate, both real, personal, and mixed, of the other party. Each of the parties covenants and agrees that this Antenuptial Agreement shall, when properly signed by the parties and upon the consummation of the marriage between the parties, become equally binding upon them and shall be valid in all respects.

SECOND: The first party hereby covenants and agrees that he will, upon the consummation of the marriage between the parties hereto, assume from his own personal estate the necessary expense of the support and maintenance of the second party during the period of marriage to each other.

THIRD: The first party hereby covenants and agrees to pay, to the second party during their marriage, in addition to ordinary support and maintenance provided for in ARTICLE SECOND of this Agreement, the following sums for her sole and individual use including for all of her clothing and otherwise as she may see fit:

16di-000958

(a) $5,000 per month prior to the first anniversary date of their marriage;

(b) $7,500 per month thereafter prior to the second anniversary date of their marriage;

(c) $10,000 per month thereafter prior to the third anniversary date of their marriage;

(d) $12,500 per month thereafter prior to the fourth anniversary date of their marriage; and

(e) $15,000 per month thereafter during the course of their marriage.

It is understood between the parties that upon (1) the filing by either party for a Decree of Dissolution of Marriage or Separate Maintenance, or (2) the parties living apart in excess of four months, payments otherwise due hereunder shall thereupon cease.

FOURTH: The first party hereby covenants and agrees to release, waive, and disclaim all right, title, and interest in and to any and all of the real and personal property owned or possessed by the second party, at the time of their marriage, or any property owned or possessed by the second party during her lifetime, or on her death (except the household furniture and fixtures) should such death occur before his. The first party further covenants and agrees that he will not take, claim, demand or receive any right whatsoever in any property which the second party might own, but that she, the second party, shall retain her property free and clear of any right of the first party to dower, curtesy, homestead, or any rights of surviving spouse, heir-at-law, or distributee, with her full power and authority to sell, encumber, convey, or dispose of her property, by will or otherwise, as she may deem proper.

FIFTH: If the second party is alive at the death of the first party and at the time of his death the parties were married to each other without either having filed for a Decree of Dissolution of Marriage or Separate Maintenance, the second party agrees that her claim upon the estate of the first party shall be limited to (1) sole exclusive legal title to the parties' principal marital residence and to all furniture, antiques, and other household personal property located there, specifically excluding, however, works of art whether foreign or American; and (2) a monetary amount determined as follows:

(a) One and one half Million Dollars ($1,500,000) if the first party dies prior to the fifth anniversary date of their marriage;

(b) Three Million Dollars ($3,000,000) if the first party dies after the fifth anniversary date, but prior to the tenth anniversary date, of their marriage; and

(c) Four and one half Million Dollars ($4,500,000) if the first party dies after the tenth anniversary date of their marriage.

SIXTH: The rights granted to second party pursuant to ARTICLE FIFTH of this Agreement shall be in full satisfaction of any and all claims and demands of every kind and character which the second party may have against the estate of the first party, and in consideration of such rights granted to her the second party hereby covenants and agrees to release, waive, and disclaim all other right, title, and interest in and to any and all of the real and personal property owned or possessed by the first party, at the time of their marriage, or any property owned or possessed by the first

party during his lifetime, or on his death should such death occur before hers. The second party further covenants and agrees that she will not take, claim, demand or receive any right whatsoever in any property which the first party might own, other than her rights pursuant to ARTICLE FIFTH of this Agreement, and that except as herein set forth, the first party shall retain his property free and clear of any right of the second party to dower, curtesy, or homestead, or any rights of surviving spouse, heir-at-law, or distributee, with his full power and authority to sell, encumber, convey, or dispose of his property, by will or otherwise, as he may deem proper.

SEVENTH: It is understood and agreed by the parties that in the event that a filing for a Decree of Dissolution of Marriage or Separate Maintenance shall be made, then upon entry of such a Decree in a proceeding between them, the first party may have an obligation to pay reasonable maintenance or support to second party and to grant to second party certain property rights in marital property. In the event a Decree so provides, or after such a filing if the first party shall die prior to entry of such a Decree, it is agreed that the first party shall pay to second party as and for an equitable settlement of her rights, if any, of dower, homestead, inheritance and all and every other such right which may have arisen as a result of their marriage, an amount equal to One Million Dollars ($1,000,000), payable in five (5) equal annual installments, without interest.

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EIGHTH: It is further understood and agreed by the parties that, at the request of either party, the other party shall execute, sign, seal, acknowledge, and deliver any deed or deeds or other documents thought necessary by counsel to convey property of the other, or to extinguish any right of dower, curtesy, homestead, or of inheritance in each other's estate.

NINTH: The purpose of this agreement is to define and limit the claims and demands which each of the parties shall have against the estate of the other and to promote marital harmony and to discourage either party from seeking a monetary benefit by instituting divorce proceedings.

Should either party die during the pendency of this contract the claims herein stipulated and defined shall be the limit which either party may have against his or her estate. It is understood that the first party is a widower and has one child surviving that marriage. The second party is fully aware that under the present laws of the State of Illinois she would be entitled to one-half (1/2) of the net estate by intestacy if the first party died before second party while married or one-third (1/3) of the net estate by exercising her right of renunciation of his will, if it were not for this agreement. First party is fully aware that he would have similar rights in that he would be entitled to all of the second party's net estate if she died while married by intestacy or one-half (1/2) by exercising his rights by renunciation since she has no descendants.

The parties fully understand and are aware of the rights and obligations of the parties in the event a Decree of Dissolution of Marriage or Separate Maintenance is entered by a court in the State of Illinois. Second party is aware that a court may grant her additional rights and entitlements. However, she expressly waives and releases any rights, entitlements and interest in the event of a dissolution of marriage or the entry of an order granting separate maintenance it being her express purpose pursuant to this Agreement to limit her rights to those set forth in ARTICLE SEVENTH of this Agreement.

TENTH: The second party understands and ackwowledges that the bulk of the estate of first party has been bequeathed to Terra Museum of American Art. The second party also fully understands that Terra Museum of American Art is a tax-exempt organization governed and managed by an independent Board of Directors, which may or may not select her as a Director, as the Board in its discretion shall determine; provided, however, that while first party is alive she will not agree to be a member of the Board of Directors.

ELEVENTH: This Agreement shall be binding on the parties hereto, and their respective heirs, executors, administrators, and assigns.

TWELFTH: This Agreement shall become effective only if the contemplated marriage between the parties is actually solemnized. If the marriage is not solemnized, this Agreement shall be and become wholly null and void.

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THIRTEENTH: No amendment or waiver of any of the provisions of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement. No waiver of any breach or default hereunder shall be deemed a waiver of subsequent breach of the same or similar nature.

FOURTEENTH: All matters affecting the interpretation of this Agreement and the rights of the respective parties hereunder shall be governed by the laws of the State of Illinois.

This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the said parties have hereunto interchangably set their hands and seals at Chicago, Illinois, the day and year first above written.

Daniel J. Terra

Witness

Witness, Attorney for First Party

Daniel J. Terra, being first duly sworn on oath, deposes and says that he has read the above and foregoing Antenuptial Agreement by him subscribed and that he knows the contents thereof and that the same is true.

Daniel J. Terra

Subscribed and Sworn to
before me this 24 day
of June, 1986.

Notary Public

My Commission Expires: 7/27/87

Witness

Judith F. Banks

Witness, Attorney for Second Party

Judith F. Banks, being first duly sworn on oath, deposes and says that she has read the above and foregoing Antenuptial Agreement by her subscribed, and that she knows the contents thereof and that the same is true.

Judith F. Banks

Subscribed and Sworn to before me this 24th day of January, 1986.

Notary Public

My Commission Expires: My Commission Expires October 31, 1989

16di-000965

A Vision for the Future

From the lengthy strategic planning discussions that we have had as a Board over the last ten months, I believe we have all come to recognize that we are at a critical point in the history of the Foundation. I also believe that we will have the opportunity at our Board meeting in Giverny to make some of the most important decisions about our future since Dan Terra began his quest to establish American art as one of the preeminent achievements of Western culture.

From my conversations with you, I know that we all understand the weight of our responsibilities and the concurrent seriousness of our deliberations. We occupy a position of enormous privilege that will probably not be reclaimed in our lifetime, at least not within the art world. The art world also recognizes how significant our decisions will be, which should encourage us to sharpen our focus and enhance our sense of purpose. I believe, as I have from the beginning, that we are poised for greatness and that the decisions we are about to take will have lasting impact.

Given these unique circumstances, and several recent developments that I will review in greater detail in Giverny, I thought I should share with you my sense of how we should proceed. I do so having spent many hours with each of our potential suitors and an equal amount of time mulling over the possibilities that lie in front of us. I also have the added advantage of having curated exhibitions for each of the institutions, which has afforded me an insider's understanding of their operations. I know the collections of each institution well, am friends with the directors and their staffs, and count many of the curators, conservators, exhibition planners, and educators as some of my closest colleagues. In addition, I have a sense of the culture of each institution and how we would fit, or not fit, as the case may be.

That said, let me begin this white paper by sketching my vision for Giverny. I then will speak about the future of the Foundation and end with a suggestion for a strategic alliance.

[redacted]

GIVERNY AS AN ARTISTS' COLONY

As Monet and his American counterparts understood, Giverny is fundamentally a retreat, a place of great beauty and repose, where one can recover a sense of one's self and emerge renewed. I do not see the town and our property there as an extension of Paris or as a satellite of any specific institution, regardless of our eventual strategic partnership. Unlike what the Monet house and gardens initiated a number of years ago, I likewise do not see Giverny as a place where artists would come to recover lost vestiges of the American Impressionists' past. Instead, I envision it as a site that would welcome a diverse group of people--painters, poets, musicians, writers, landscape architects etc.--who would come and work there as modern practitioners of their craft.

The closest model for this vision is Yaddo, the "artists'" retreat in Saratoga Springs, founded one hundred years ago. Yaddo consists of a large, stately mansion that sits on beautiful grounds with various outbuildings that are used for studios and housing. (The estate was the property of the Trask family.) Individuals apply for "fellowships" which tend to be for anywhere from two weeks to two months throughout the year. They are given housing and three meals a day. They are not given a stipend and only occasionally are awarded travel funds or monies for equipment. According to the present director, the operating budget for this program is approximately $2,000,000, with expenses for each fellow running about $5,000 per month. (Leonard Bernstein, Truman Capote, Saul Bellows, Sylvia Plath, and George Rickey some of the more celebrated people who have worked at Yaddo.)

There are other models for Giverny that I considered but rejected--the American Academy in Rome, for example, which gives fellowships to thirty individuals, half artists, half academics. According to the present director, each fellow costs the Academy approximately $80,000. The Getty has a study center, as does the Clark Art Institute and the National Gallery. Although they vary slightly, these three centers are strictly academic. Scholars come from around the world to be in residence, do research, give lectures, and conduct symposia. Another model is Skowhegan, an artists' colony in Maine. This is expressly for art students who come during the summer to work and take classes from leading contemporary artists.

I think Yaddo is the best model for us because it maximizes what Giverny offers, it takes advantage of our housing stock and acreage, and it is both different from and yet related to what goes on at the museum. Equally important, it keeps costs down as I envision it to be a relatively inexpensive program, with perhaps no more than ten fellows.

I think it would be inappropriate to try to make Giverny into an academic center linked to a college or university and awarding academic credit. First and foremost, such an initiative would be frightfully expensive. It would also be an administrative nightmare. I think we should be engaged in various educational initiatives in Giverny. We might consider having the director or the curator of MAAG teach in one of the programs in Paris, for example. We also should encourage those institutions to come to Giverny for lectures, symposia, and workshops. But I do not believe we should convert Giverny into an academic outpost. (The American Academy in Rome spends $500,000 a year just on its library.)

This is not to say that we should not have a core library in Giverny for the use of our fellows and museum personnel. But once again, I do not think we should try to imitate or equal collections available elsewhere. (To jump start the process of building a library, I think we should purchase the libraries of two recently retired art historians of American art--Elizabeth [illegible]hns and William Gerts--both of whom had extensive holdings.)

By having a wide range of fellows at Giverny, we could provide a rich supplement to MAAG'S educational programs. And we could distinguish ourselves as the only such program in Europe. I believe it would be highly sought after and a significant contribution to our mission of propagating American art in the broadest possible terms.

TERRA FOUNDATION CENTER FOR THE STUDY OF AMERICAN ART

I believe we should establish a center for the study and propagation of American art here in the United States. This center should be completely independent of any other institution, should bear the Terra name, and should be located in a city that would have the best resources for the understanding and advancement of American art. While several cities could make a claim to being the most appropriate site for this center, I believe there is really only one that would serve the center's needs in the fullest, most effective manner. That is Washington, D.C.

Washington is home to the richest trove of material that would support this center: the Library of Congress, the National Archives, the Archives of American Art, the National Museum of [illegible]rican Art, the Center for Advanced Study of the Visual Arts at the National Gallery, and the Smithsonian, to name only the most prominent. No other city can imitate this concentration of resources. No other city is also such a center of political

power. There is no reason why we should not be able to obtain support for our center and its programs from the Federal government. To do that most effectivaly, we would need to be in Washington.

To maximize our presence there and to draw attention to our programs, I think that we should establish this center in the American Pharmaceutical Building presently for sale on the Mall. It is a building of enormous distinction, in the very heart of the capital. It would be a magnet for scholarship and education, and the hub for the study of American art here and abroad.

I envision the building housing a host of scholars, curators, and other educators who would be Terra Fellows and who would be selected to come to the center by a panel of their peers (on which Terra Board members would serve), much like the Luce or College Art Association reviews. They would conduct their own research or writings on American art, but they would also contribute to the intellectual life of the center by delivering public lectures, participating in symposia, and being engaged with group activities that the center would initiate.

I think that this center should concentrate on issues or problems relevant to the propagation of American art at all levels of education--elementary through university, and that it be home to scholars who could advance this mission in the most creative ways possible. That means it would attract art historians who work in fields beyond American art when their expertise enhanced our mission. It also would appeal to American historians, film historian, cultural anthropologists, architects, and landscape designers interested in pursuing intellectual activities. (The practical arm of the Foundation's support for these fields would be in Giverny.) I also see individuals engaged in the development of curriculum and the writing of textbooks as Fellows at the center, just as museum educators would find it a haven for personal and professional development.

The Pharmaceutical Building would be an ideal site for these varied activities for several reasons. In addition to being able to draw on the resources of the capital, it already has a space, on the ground floor, devoted to a library. There are rooms that could be converted into lecture or symposia rooms, and there is plenty of office space. In fact, there is presently more office space than we could use at the moment, which would allow us to rent out space to other scholarly organizations, such as the Center for Advanced Visual Studies at the National Gallery and the Smithsonian. That would permit an even greater fertilization of the site and the opportunity for unprecedented contact among the occupants.

The Pharmaceutical Building could also be a place to stage small exhibitions of the Terra Collection or boutique shows related to works in the collection that would draw on other collections in Washington or beyond. Being adjacent to the State Department, the building would afford the Foundation ample opportunity to extend its influence and activities outside the Mall and the Beltway.

THE FUTURE OF THE TERRA FOUNDATION COLLECTION

I am completely convinced that the Terra Foundation collection should be in the same city as the Foundation itself. It would be foolish to have it any other way, especially if the Foundation is to be more than a grant-making organization. It therefore follows that the collection should be housed in Washington, with a sizable part of the collection designated to be exhibited in Giverny.

I believe that it would be wisest to strike a strategic partnership with the National Gallery. The Gallery is the preeminent museum in the city, and the most respected in the art world internationally. It has the most fire power when it comes to loans from museums here and abroad, it has the most secure financing, and it has the strongest educational component of any of our present suitors.

The Terra Collection would join some of the most important and historically heralded collections ever formed by Americans, the two most notable being the Samuel Kress Collection and the Chester Dale. The Terra Collection would also be a superb complement to the Gallery's rich holdings of American art, while the Gallery's larger collection would be an undeniable asset to exhibitions that we would want to mount in Giverny and perhaps send to other European venues.

The Kress and the Chester Dale collections were not outright gifts to the Gallery. They remained on long-term loan for up to twenty years. The Gallery is therefore accustomed to a prolonged engagement period and would not be pressuring us to make a commitment at any time soon.

The Terra Foundation would also not have to make any financial contribution to the Gallery for this relationship.

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Finally, as Rusty Powell from the National Gallery points out in his letter to me, Dan Terra had represented the State Department on the Board of the National Gallery for many years. For his collection to hang in its original West wing, designed by the same John Pope who designed the Pharmaceutical Building would be an honor that I suspect Dan would find more than fitting. It is an opportunity that I believe we should seize and celebrate.

I look forward to reviewing all of this with you in Giverny.

Terra Foundation
Board Meeting
Minutes
August 24, 2000

In attendance by Conference Call:

Dr. Paul Tucker, Chair
Hon. Jacques Andreani
Mr. Dean Buntrock
Mrs. Margaret Daley
Senator Alan Simpson
Dr. Theodore Stebbins, Jr.
Dr. Stephanie Pace Marshall
Mrs. Judith Terra

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner

Staff:

Mr. Donald Ratner

By Invitation:

Dr. Derrick Cartwright
Dr. John Hallmark Neff

The meeting was called to order at 1:08 PM. Dr. Tucker indicated that the purpose was to review the four proposals and detailed data we had received from our four potential partners allow us to be better prepared for the September meeting. The minutes from the August 7, 2000 Strategic Plan meeting were reviewed and unanimously approved by the Strategic Planning Committee.

There were significant discussions around whether Giverny was "central" to the focus of the Foundation's mission. A decision was made to examine this question at the Board meeting in September.

Dr. Stebbins suggested that we had already decided on the central importance of Giverny.

Dr. Tucker reviewed the background that resulted in the decision of making Giverny central. Mr. Buntrock indicated that he saw that there is a difference between the importance of Giverny and making it central. Dr. Marshall discussed alternatives at this point:

1. Agree that there are unresolved issues and put them aside and then look at the proposals in front of us; or
2. Focus on the issues and then refer them back to a small group to make a presentation at the next meeting and end the call now.

[redacted]

Dr. Marshall agreed that we had not discussed the centrality of Giverny as a Board but had discussed it in Strategic Plan Committee meetings and that Committee has come to the conclusion of Giverny as being central.

Dr. Marshall also suggested we ask Helene to write "her perception of Dan's vision of Giverny". In other words, what is the purpose of Giverny?

Dr. Cartwright indicated that he has Helene's paper and will send it out as soon as Helene reviews it.

The Board asked Dr. Cartwright to write his view of Giverny's future relating to education.

Mrs. Daly said that she did not recall that we had discussed "abandoning" Chicago.

Dr. Tucker indicated that the thinking had gone along these lines:

- The Chicago facility needs a great deal of money to be brought up to par with other museums;
- There are problems with the Chicago museum's configuration;
- We have a problem attracting attendance in Chicago;
- There is considerable cost involved in supporting the Chicago museum;
- The collection is not adequate to be split between two institutions;
- Therefore, the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

Mr. Buntrock said that we had never discussed this at the Board level.

Dr. Tucker agreed but noted that it was a conclusion of the Strategic Planning Committee and that they were going to make a recommendation to the Board.

Dr. Marshall said that we could make a decision on this call if we so chose. She further indicated that we should make sure that there are two issues on the agenda at the September meeting:

- Giverny as being central;
- Closing Chicago

Dr. Tucker suggested that we definitely make a decision in September.

Dr. Marshall suggested we change the order of the agenda to go through Ralph's contract. Mr. Andreani indicated that two of the proposals need more detail. Mr. Lerner then discussed the strategic alliance contract. One premise of his draft was that there would be no museum in the U.S. and that would relieve us of the administrative burden of running that museum. He also indicated that the education portion had not yet been sufficiently developed. And the final premise was that we would ultimately turn the works of art over to the new/aligned institution.

Mr. Lerner walked the Board through each part of the draft contract. From that review there emerged the following items:

1. Ownership of the collection. Would it be donated and who holds title.
2. Where the collection would be housed, how much would be exhibited and for how long.
3. The question of a study center.
4. The question of office space.
5. Whether we should contribute money for construction or a naming opportunity.
6. Who would curate the collection and who that person would work for.
7. On what subjects the aligned institution would have to consult with the Terra Board.
8. What works should never be sold.
9. Issues regarding exhibitions, publications, etc. resulting from the possible alliance.
10. How the acquisition fund should be handled and who should maintain control of it.
11. Educational issues.
12. The status of the art at Giverny and what needs to stay there permanently versus what might rotate.

The Board concluded that it will have to address the above 12 issues as well as the issue of determining a strategic partner.

Mr. Ratner was asked to finalize the above list and send it out with the minutes by the end of next week.

At the September meeting, we need to be prepared to discuss what qualities of the educational programs we want to have included in this plan.

Dr. Marshall asked if we should send out an RFP to all four suitors on education. Senator Simpson suggested that we need to decide what we want as opposed to what they're going to give us.

Dr. Tucker suggested that the next step should be the following:

1. Get proposals on education from the four institutions as to how they would see working with the Foundation.
2. Equalize the general portion of the proposals on affiliation from all four institutions.

3. Get more information on the existing educational programs of the four institutions.

4. Reduce the four institutions to two or three and then focus on those and discuss.

In September we will need:

1. White papers on education from any Board member who would like to prepare one.

2. Educational information.

The meeting was adjourned at 4:00 PM.

Respectively submitted,

Donald H. Ratner

TERRA FOUNDATION FOR THE ARTS

STATEMENT 1

FORM 990PF, PART I - CONTRIBUTIONS, GIFTS AND GRANTS RECEIVED

NAME AND ADDRESS	
MR. DANIEL J. TERRA - FOUNDER 520 ROSLYN ROAD KENILWORTH, ILLINOIS 60043	38,400,000.
BELL, BOYD & LLOYD 70 WEST MADISON CHICAGO, IL. 60602	6,000.
DONNELLEY FOUNDATION CHICAGO, ILLINOIS	35,000.
MISCELLANEOUS CONTRIBUTIONS	2,884.
MCMASTER CARR ELMHURST, ILLINOIS	2,000.
MACARTHUR FOUNDATION CHICAGO, ILLINOIS	33,200.
[redacted]	

STATEMENT 1

STATEMENT 2

TERRA FOUNDATION FOR THE ARTS

FORM 990PF, PART I - CONTRIBUTIONS, GIFTS AND GRANTS RECEIVED

NAME AND ADDRESS		
M. COORS		1,000.
FIRST CHICAGO		
CHICAGO, ILLINOIS		2,000.
TOTAL CONTRIBUTION AMOUNTS		38,482,864.

STATEMENT 2

16di-000978

EXHIBIT 5

EXHIBIT 5

WEBER-FAX
RECYCLED
80000 SERIES
30% P.C.W.

File Number _____

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

Whereas, ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF

TERRA FOUNDATION FOR THE ARTS

INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE GENERAL NOT FOR PROFIT CORPORATION ACT OF ILLINOIS, IN FORCE JANUARY 1, A.D. 1987;

Now Therefore, I, George H. Ryan, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the Application of the aforesaid corporation.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, at the City of Springfield, this* 26TH *day of* AUGUST *A.D. 19* 94 *and of the Independence of the United States the two hundred and* 19TH.

George H Ryan

SECRETARY OF STATE

C-218.1

NFP-110.30
(Rev. Jan. 1987)

Submit in Duplicate

Remit payment in Check or Money Order, payable to "Secretary of State."

DO NOT SEND CASH!

GEORGE H. RYAN
Secretary of State
State of Illinois

PAID
AUG 29 1994

File # 5162-635-4

This Space For Use By Secretary of State
Date 8-26-94
Filing Fee 25
Approved

ARTICLES OF AMENDMENT
under the
GENERAL NOT FOR PROFIT CORPORATION ACT

Pursuant to the provisions of "The General Not For Profit Corporation Act of 1986," the undersigned corporation hereby adopts these Articles of Amendment to its Articles of Incorporation.

ARTICLE ONE The name of the corporation is Terra Foundation For The Arts *(Note 1)*

ARTICLE TWO The following amendment to the Articles of Incorporation was adopted on July 18, 19 94 in the manner indicated below *("X" one box only.)*

☒ By the affirmative vote of a majority of the directors in office, at a meeting of the board of directors, in accordance with Section 110.15. *(Note 2)*

☐ By written consent, signed by all the directors in office, in compliance with Sections 110.15 and 108.45 of this Act. *(Note 3)*

☐ By the members at a meeting of members entitled to vote by the affirmative vote of the members having not less than the minimum number of votes necessary to adopt such amendment, as provided by this Act, the articles of incorporation or the bylaws, in accordance with Section 110.20. (Note 4)

☐ By written consent signed by members entitled to vote having not less than the minimum number of votes necessary to adopt such amendment, as provided by this Act, the articles of incorporation, or the bylaws, in compliance with Sections 107.10 and 110.20 of this Act. *(Note 4)*

(INSERT RESOLUTION)

See attachment.

Attachment
Articles of Amendment
Terra Foundation For The Arts

RESOLVED, that the first paragraph of Article V of the articles of incorporation of the corporation be amended to read as follows:

> The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

RESOLVED, that the officers of the corporation are authorized to execute such documents and take such actions they deem necessary or advisable to effect the foregoing resolutions.

(If space is insufficient, attach additional pages size 8 1/2 x 11)

The undersigned corporation has caused these articles to be signed by its duly authorized officers, each of whom affirm, under penalties of perjury, that the facts stated herein are true.

Dated 18, 19 94

attested by
(Signature of Secretary or Assistant Secretary)
James Collins, Secretary
(Type or Print Name and Title)

Terra Foundation For The Arts
(Exact Name of Corporation)

by
(Signature of President or Vice President)
Daniel J. Terra, Chairman
(Type or Print Name and Title)

NOTES AND INSTUCTIONS

NOTE 1: State the true exact corporate name as it appears on the records of the Office of the Secretary of State, **BEFORE** any amendments herein reported.

NOTE 2: Directors may adopt amendments without member approval only when the corporation has no members, or no members entitled to vote.

NOTE 3: Director approval may be (1) by vote at a director's meeting *(either annual or special)* or (2) consent, in writing, without a meeting.

NOTE 4: All amendments not accepted under Sec. 110.15 require (1) that the board of directors adopt a resolution setting forth the proposed amendment and (2) that the members approve the amendment.

Member approval may be (1) by vote at a members meeting *(either annual or special)* or (2) by consent, in writing, without a meeting.

To be adopted, the amendment must receive the affirmative vote or consent of the holders of at least 2/3 of the outstanding members entitled to vote on the amendment, *(but if class voting applies, then also at least a 2/3 vote within each class is required)*.

The articles of incorporation may supersede the 2/3 vote requirement by specifying any smaller or larger vote requirement not less than a majority of the outstanding votes of such members entitled to vote and not less than a majority within each when class voting applies. *(Sec. 110.20)*

NOTE 5: When a member approval is by written consent, all members must be given notice of the proposed amendment at least 5 days before the consent is signed. If the amendment is adopted, members who have not signed the consent must be promptly notified of the passage of the amendment. *(Sec. 107.10 & 110.20)*

FORM NFP-110.30

File No. _____

ARTICLES OF AMENDMENT
under the
GENERAL NOT FOR PROFIT
CORPORATION ACT

Filing Fee $25

Filing Fee for Re-Stated Articles $100

FILED
AUG 26 1994
GEORGE H. RYAN
SECRETARY OF STATE

RETURN TO:

Department of Business Services
Secretary of State
Springfield, Illinois 62756
Telephone (217) 782-1832

C1304

EXHIBIT 6

16di-000985

EXHIBIT 6

MEER-FAX
RECYCLED
80000 SERIES
30% P.C.W.

RESTATED BYLAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these bylaws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess business holdings, as defined in Section 4943(c), from making any investments in such manner as to

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The bylaws of the corporation were restated on July 18, 1994, amended on August 17, 1996 and amended on January 27, 1998.

subject the foundation to tax under Section 4944, and from making any taxable expenditures, as defined in Section 4945(d), all Sections being of the Code.

Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

The corporation shall have such powers as are authorized by law and in general, subject to such limitations and conditions as are or may be prescribed by law, to exercise such other powers which now are or hereafter may be conferred by law upon a corporation organized for the purposes hereinabove set forth, or necessary or incidental to the powers so conferred, or conducive to the attainment of the purposes of the corporation, subject to the further limitation and condition that only such powers shall be exercised as are in furtherance of the exempt purposes of the organization set forth in Section 501(c)(3) of the Code and its Regulations as they now exist or as they may hereafter be amended.

The corporation also has such powers as are now or may hereafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

ARTICLE II

Offices

The corporation shall have and continuously maintain in this state a registered office and a registered agent whose office is identical with such registered office, and may have such other offices within or without the State of Illinois as the Board of Directors may from time to time determine.

ARTICLE III

Board of Directors

Section 1. General Powers. The affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications.

(a) The number of directors elected by the Board of Directors shall be no less than seven and no more than eleven. The number of directors may be fixed or changed from time to time, within this minimum and maximum, without further amendment to these bylaws. Each elected director shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been elected and qualified.

(b) Directors need not be residents of Illinois.

Section 3. Regular Meetings. A regular annual meeting shall be held during the month of September of each year, for the purposes of electing directors and officers and for the transaction of such other business as may properly come before the meeting. If the election of directors and officers shall not be held at such meeting, the board of directors shall cause the election to be held at a meeting of the board of directors as soon thereafter as conveniently may be. The Board of Directors shall provide by resolution the time and place, either within or without the State of Illinois, for the holding of the regular annual meeting and additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two directors. The person or persons authorized to call special meetings of the board may fix any reasonable place, either within or without the State of Illinois, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any meeting of the Board of Directors shall be given at least five days previously thereto by written notice delivered personally or sent by mail or telegram to each director at his address as shown by the records of the corporation. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail in a sealed envelope so addressed, with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of waiver of notice of such meeting, unless specifically required by law or by these Bylaws.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the board, except that if less than a majority of the directors are present at such meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these Bylaws.

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors.

Section 9. Informal Action by Directors. Unless specifically prohibited by the articles of incorporation or bylaws, any action required to be taken at a meeting of the board of directors, or any other action which may be taken at a meeting of the board of directors or any committee thereof, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the directors entitled to vote with respect to the subject matter thereof, or by all the members of such committee, as the case may be. Any such consent signed by all the directors or all the members of the committee shall have the same effect as a unanimous vote, and may be stated as such in any document filed with the Secretary of State.

Section 10. Participation by Telecommunications Equipment. Directors or nondirector committee members may participate in and act at any meeting of the board or committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can communicate with each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

Section 11. Executive Committee. The board of directors may, by resolution passed by a majority of the whole board, designate an executive committee consisting of two or more of the directors of the corporation. The executive committee shall have and may exercise all the authority of the board of directors in the management of the corporation between meetings of the board of directors, provided the committee shall not have the authority of the board of directors in reference to (a) amending the articles of incorporation, (b) adopting a plan of merger or adopting a plan of consolidation with another corporation or corporations, (c) authorizing the sale, lease, exchange or mortgage of all or substantially all of the property and assets of the corporation, (d) authorizing the voluntary dissolution of the corporation or revoking proceedings therefor, (e) adopting a plan for the distribution of the assets of the corporation, (f) amending, altering or repealing the bylaws of the corporation, (g) electing, appointing or removing any director or officer of the corporation or any member of the executive committee or (h) amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by the executive committee. The executive committee shall keep minutes of each of its meetings and report the same at the next meeting of the board of directors.

Section 12. Other Committees. The board of directors may from time to time establish other committees and specify the scope of their authority.

Section 13. Compensation. Directors as such shall not receive any stated salaries for their services, but by resolution of the Board of Directors, a fixed sum may, and expenses of attendance, if any, shall be allowed for attendance at each regular or special meeting of the Board or committee thereof; except that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

ARTICLE IV

Officers

Section 1. Officers. The officers of the corporation shall be a chairman, one or more vice chairmen, a president, one or more vice presidents, a secretary and a treasurer. The Board of Directors may appoint such other officers, including one or more assistant secretaries and one or more assistant treasurers as it shall deem desirable, such appointed officers to have the authority to perform the duties prescribed from time to time by the Board of Directors. Any two or more offices may be held by the same person, except the offices of president and secretary.

Section 2. Election and Term of Office. The officers of the corporation shall be elected by the Board of Directors at its regular annual meeting. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be.

Vacancies may be filled and new offices created and filled at any meeting of the Board of Directors. Each elected officer shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been duly elected and shall have qualified. Election or appointment of an officer or agent shall not of itself create contract rights.

Section 3. Removal. Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed.

Section 4. Chairman. The chairman shall be the chief executive officer of the corporation and shall in general supervise and control all of the affairs of the corporation. He shall preside at all meetings of the Board of Directors. He shall have the power to execute all documents that the board of directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the board of directors or by these bylaws to some other officer or agent of the corporation, or shall be required by law to be otherwise signed or executed, and in general shall perform all duties incident to the office of chairman and such other duties as the board of directors may from time to time prescribe.

Section 5. Vice Chairman. In the absence of the chairman or in the event of his inability or refusal to act, the vice chairman, or in the event there is more than one in the order designated by the Board of Directors (or if none, in the order of election), shall perform the duties of the chairman and when so acting shall have all the powers of the chairman. These duties shall not include the duty to preside at meetings of the Board of Directors in the event of the absence, inability or refusal to act of the chairman, which is expressly granted to the president. Each vice chairman shall perform such other duties as from time to time may be assigned to him by the chairman or the Board of Directors.

Section 6. President. The president shall be the principal operating officer of the corporation and shall in general supervise and control all the day-to-day business and affairs of the corporation. In the absence of the chairman or in the event of his inability or refusal to

preside at any meeting of the Board of Directors, the president shall preside at such meeting or meetings of the Board of Directors. He may sign, with the secretary or any other proper officer of the corporation authorized by the Board of Directors, any deed, mortgages, bonds, contracts, or other instruments which the Board of Directors have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these Bylaws or by statute to some other officer or agent of the corporation; and in general shall perform all duties incident to the office of president and such other duties as may be prescribed by the Board of Directors from time to time.

Section 7. Vice Presidents. In the absence of the president or in the event of the inability or refusal to act of the president, the vice presidents in the order designated by the Board of Directors (or if none, in the order of election) shall perform the duties of the president, and when so acting shall have all the powers of the president. Each vice president shall perform such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 8. Treasurer. If required by the Board of Directors, the treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety or sureties as the Board of Directors shall determine. He shall have charge and custody of and be responsible for all funds and securities of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of the corporation and in such banks, trust companies or other depositories as shall be selected in accordance with the provisions of ARTICLE V of these Bylaws; and in general perform all the duties incident to the office of treasurer and such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 9. Secretary. The secretary shall keep minutes of the meetings of the Board of Directors in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law; be custodian of the corporate records and of the seal of the corporation and see that the seal of the corporation is affixed to all documents, the execution of which on behalf of the corporation under its seal is duly authorized in accordance with the provisions of these Bylaws; and in general perform all duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 10. Assistant Treasurers and Assistant Secretaries. If required by the Board of Directors, the assistant treasurers shall give bonds for the faithful discharge of their duties in such sums and with such sureties as the Board of Directors shall determine. The assistant treasurers and assistant secretaries, in general, shall perform such duties as shall be assigned to them by the treasurer or the secretary, as the case may be, or by the president or the Board of Directors.

ARTICLE V

Contracts, Checks, Deposits and Funds

Section 1. Contracts. The Board of Directors may authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these Bylaws, to

enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors. In the absence of such determination by the Board of Directors, such instruments shall be signed by any two elected officers of the corporation.

Section 3. Deposits. All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select.

Section 4. Gifts. The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the corporation.

Section 5. Loans. No loan of money shall be contracted on behalf of the corporation and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. Such authority may be general or confined to specific instances.

ARTICLE VI

Books and Records

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board of Directors and its committees.

ARTICLE VII

Fiscal Year

The fiscal year of the corporation shall begin on July 1 of each year and end on June 30 of the succeeding year.

ARTICLE VIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the form of a circle and shall have inscribed thereon the name of the corporation and the words "Corporate Seal, Illinois".

ARTICLE IX

Waiver of Notice

Whenever any notice whatever is required to be given under the provisions of the General Not For Profit Corporation Act of Illinois or under the provisions of the Articles of Incorporation or the Bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE X

Indemnification

(a) The corporation shall indemnify any and all of its directors or officers or the directors or members of the boards or committees of the constituent museums or schools of the corporation or any person who may have served at its request or by its election as a director or officer of another corporation (an "indemnified person") against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties, or a party, by reason of being or having been an indemnified person except in relation to matters as to which any such indemnified person shall be adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicted on the existence of such liability.

(b) Except as provided in paragraph (a) above, the termination of any litigation by judgment, settlement, conviction or upon a plea of *nolo contendre*, or its equivalent, shall not create a presumption that the person seeking indemnification did not meet the applicable indemnification standard as set forth in paragraph (a) above.

(c) Advances may be made by the corporation against costs, expenses and fees arising out of, or in connection with, such litigation at the discretion of, and upon such terms (but always subject to the final determination of a person's right to indemnification) as may be determined by the Board of Directors.

(d) The right of indemnification provided hereunder shall not be deemed exclusive of any other right to which any person may be entitled, or of any other indemnification which may lawfully be granted to any person in addition to the indemnification provided hereunder. Indemnification provided hereunder shall, in the case of the death of the person entitled to indemnification, inure to the benefit of his heirs, executors or other lawful representative.

(e) The corporation may purchase and maintain insurance on behalf of any and all of its indemnified persons against any liability, incurred by them by reason of being or having been an indemnified person, whether or not the corporation would have the power to indemnify them against such liability or settlement under the provisions of this ARTICLE X.

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to Bylaws

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a majority of the directors then in office and present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new Bylaws at such meeting.

16di-000996

EXHIBIT 7

EXHIBIT 7

KLEEN-FAX RECYCLED
80000 SERIES
30% P.C.W.

INTERVIEW OF FLOYD D. PERKINS
ASSISTANT ATTORNEY GENERAL OF ILLINOIS
BUREAU OF CHARITABLE TRUSTS AND SOLICITATIONS
July 16, 2001

Present:

Floyd Perkins
Tom Iopollo
Therese Harris
Attorney General's Office

K. Chris Todd
John H. Longwell
Kellogg, Huber, Hansen, Todd & Evans

Laurel Bellows
Bellows & Bellows
For Defendants Judith Terra, Paul Tucker, Alan Simpson

Jim Carroll
John Kennedy
Quinlan & Crisham
For Plaintiffs Ronald Gidwitz and Dean Buntrock

Scott Zsala
Winston & Strawn

Susan Stone
Sidley Austin
For Defendant Terra Foundation for the Arts

KCT: We have asked that you reconsider our request to conduct this interview under oath and on the record. Do you still decline?

FP: Yes, at the advice of my lawyer.

TI: This is not a deposition, not an interrogation.

KCT: Will you reconsider at least putting this on the record?

FP: No.

KCT: What is your job title?

FP: Assistant Attorney General, Chief of Charitable Trust Bureau.

KCT: How long have you held that position.

FP: 10 years.

KCT: You seem young. Do you mind if I ask how old you are?

FP: Almost 50.

KCT: Showing **EXHIBIT FP-11**. (The witness indicated that he was at the hearing of which the exhibit is a transcript. KCT read from page 19, line 1 of the exhibit regarding founder's intent to keep the Terra Foundation in Illinois. FP acknowledged that he said that. KCT read from page 20, line 14, regarding Terra's intent. FP acknowledged that intent is an important consideration in evaluating whether Atty Gen should intervene.)

Showing **EXHIBIT FP-9.** (KCT read from ¶ 42 of the complaint regarding founder's intent.)

TH: The judge has said donor's intent is not going to be an issue.

KCT: Showing **EXHIBITS FP 2-7.** At the time of the filing of your complaint, were you aware of the facts [regarding Mr. Terra's intent] contained in these exhibits?

FP: We have a case here that we've settled. The issues of intent are resolved. We spent thousands of hours dealing with this matter. The case has settled, so we are not going to spend time educating you on it. It doesn't matter at all.

KCT: I respectfully disagree. But under the circumstances, all I can do is ask these questions and you can answer them or, as you have, politely refuse to answer.

FP: This litigation has settled. The case is over and now you have made charges. We are here to talk about the validity of those charges. The facts of the case, why we took certain positions, is irrelevant. This case is over. Your clients had an opportunity to raise these issues, they should have dealt with it before. They suggested and urged mediation. They were the ones who said let's mediate; we were preparing to go to trial. We're not going to spend time answering questions for new counsel. Your clients were represented through this litigation. Go ask their counsel.

TH: (Reiterated concern that donor's intent is not in issue.)

FP: Let's be realistic. There were lawyers for your clients participating from Day One. The only issues in mediation were what restrictions, if any, the Foundation

would accept, how it would be governed. Everybody had various pieces of evidence. If there were things that your side had, they should have presented them during mediation. Your side lost their position in mediation.

KCT: (Repeating question whether FP knew of evidence reflected in Exhibits FP 2-7 regarding donor intent when filed complaint.)

FP: I'm not getting into that. This was a 4 month process. These affidavits did not exist in September 2000. Some of these affidavits are from people I never heard of. If there was evidence, where was it? That part of the case is resolved. I'm not going to spend time trying to convince you.

KCT: Were there any terms that the AG required as preconditions to entering mediation?

JK: The parties entered an agreement that the mediation remain confidential. I object to this line of questioning.

KCT: Does your objection include premediation documents?

JK: It would include any positions and assertions of the parties during mediation.

LB: Does the parties' agreement extend beyond the judge's order?

JK: The agreement was among the parties and provided that no statements made by the parties could be used. It goes beyond the order.

FP: We did sit down with counsel at the beginning of mediation, and said we could not imagine a scenario where we would agree to any settlement in which the Foundation would leave Illinois. This was no secret because it came up in meetings in chambers. We started mediation with that in mind.

KCT: So the AG's position was that mediation would begin from the point that the Foundation would not leave Illinois?

FP: Yes. And the defendants wanted a global release.

KCT: Showing **EXHIBIT FP-14.** What was the date of this filing?

FP: Late December.

KCT: And when were these conversations about mediation?

FP: The end of January, beginning of February.

KCT: In September 2000, when you appeared, had did you know this litigation had begun? You received notice of certain documents. But in addition, before you received copies of the pleadings, had you spoken with anyone?

FP: The first we knew of it was when we received copies of the filed pleadings.

KCT: You didn't speak to anyone prior to that?

FP: No. We were involved in the litigation over Dan Terra's estate, however. So we knew about the Foundation, but not this particular aspect.

KCT: What was your role in the litigation over Dan Terra's estate?

FP: The estate was left to the Terra Foundation. Jim Terra was executor. Judith Terra asserted claims against the estate. They were both directors of the Foundation at the time. The lawyers for the Foundation notified our office and identified directors taking positions. We were apprised as protectors of the People's interest.

KCT: Can you expand on that?

FP: There were inherent natural conflicts given the interrelations of various parties.

KCT: In the original complaint and subsequent complaint, there are allegations .... Was Ted Stebbins discussed initially during the AG's investigation?

FP: We didn't know anything of these matters or of Stebbins. We never heard of him before we got the plaintiffs' complaint.

KCT: So the first you heard of these allegations was when you got the complaint which was filed on September 22. You filed your complaint three days later. That's a lot of work in a short period of time.

FP: Yes it was.

KCT: Who did you talk to over the weekend. Did you talk to counsel for the plaintiffs?

FP: I do not believe we talked to plaintiffs lawyers or anyone at the Quinlan firm.

KCT: Between September 22 and 25, can you identify all the people you talked to regarding the allegations in the complaint?

FP: What does this have to do with the charges against me about intimidating people. How we did our investigation, why we did it is not relevant. Why don't we get into what we're here about? I'm not going to waste time. Your clients had lawyers from October 8 or 9 on.

KCT: Did you talk to the Attorney General, James Ryan?

TI: That is irrelevant.

FP: I'm not going to get into it. But no, I did not talk to Jim Ryan.

KCT: If I went down a list of all the people you might have talked to, you wouldn't answer any of those questions?

FP: No.

KCT: Did you talk to any members of the Board of Directors before filing?

FP: No.

KCT: Describe generally what you did in order to prepare and file your complaint.

TI: That is protected by the work product privilege.

KCT: Showing **EXHIBIT FP-9.** (KCT read passage in ¶ 49, "There is no doubt that Dan Terra expected the Terra Museum to remain in Chicago.") Showing **EXHIBIT 24.** Were you aware of this amendment to the Articles of Incorporation at the time you filed the complaint.

FP: I don't recall. Probably not. We attached the original Articles to the complaint, so if we were aware of the amendment we probably would have attached it.

KCT: Did you have any discussions with Jim Collins between September 2000 and the present?

FP: I have spoken to him several times, about this case and other matters.

KCT: Did you have conversations that would touch upon the allegations in your complaint?

JK: Objection. This is beyond the proper scope of questioning and protected by the work product privilege.

KCT: Is Mr. Kennedy representing you?

TI: I agree that this irrelevant and work product. What your getting at now is not going to lead to any sort of relevant evidence.

KCT: Are you instructing him not to answer?

TI: No, Floyd can take care of himself.

KCT: Did you talk to Jim Collins about the allegations in the two complaints?

FP: I'm not going to answer that. This is beyond the scope of the charges against me.

KCT: When dealing with counsel for Judith Terra, Paul Tucker and Alan Simpson, who were you talking to?

FP: Brian Crowe and Jim Wilson.

KCT: And they communicated to you that mediation was acceptable.

FP: Brian Crowe suggested mediation.

KCT: And they knew that the starting point was that the Foundation's assets would remain in Illinois?

FP: I remember we had a meeting on Lincoln's Birthday. It was a holiday for us, our office was closed but we worked. This was in early February, the mediation had just started.

KCT: And the AG position that the assets would have to remain in Illinois came up?

FP: Yes. And they wanted to make sure their client would get releases.

KCT: Are you under any time constraints today?

FP: No.

SS: I realize that I have no standing to say anything here. I am here because Floyd Perkins was kind enough to let me know this was going on. But the court limited this interview to the subject of duress and coercion, and that was the point of inquiry to be focused upon. I am concerned about questions going to the mediation because of the confidentiality agreement. I agree that the information cannot be used in litigation. The mediation was intended to be off the record and not used in subsequent litigation.

KCT: Why don't you ask him the questions you want me to ask, and we'll get the obvious answer -- no -- and then we can move on. You want me to ask him whether he intimidated anyone, and whether he's sure he didn't intimidate anyone.

SS: No, obviously you can go beyond that.

LB: It's difficult to determine the manner in which Mr. Perkins conducted the investigation if we can't learn what he relied upon in making his allegations.

KCT: Showing **EXHIBIT FP-21.** (Referring to Ted Stebbins statement on page 42, that he "aborr[ed]" the AG's threatening tactics.) Have you seen this?

FP: I listened to the tape.

KCT: Dr. Stebbins said he dislike the AG's threatening tactics. Do you agree that Dr. Stebbins believed that he had been threatened or intimidated?

SZ: I object. We know that despite his reservations, Mr. Stebbins voted for the settlement. There is probably some other way you can ask about this, but I object to the question as phrased.

TI: He also said he was voting his own conscience.

KCT: Did you employ any threatening tactics?

FP: No.

KCT: Showing **EXHIBIT FP-14.** Attached to this motion are notes from Mr. Neff. How did you get those notes?

TI: This question does not go to threatening or intimidating tactics.

FP: Someone gave them to us.

KCT: Who? What were the circumstances?

FP: I don't recall. They probably came from someone in the case. I don't see how this is relevant.

KCT: Was there any discovery going on at that time?

FP: Probably not.

KCT: When you filed your original complaint, FP-9, Dr. Stebbins was not a defendant. Why was he named as a defendant in the draft complaint you circulated in March 2001?

FP: We drafted the amended complaint to bring the pleadings in line with the proof. Documents that were filed in December and January contained new issues that we brought up as we became aware of them.

KCT: In the original complaint, there is an allegation in ¶ 23(f) that a director had a conflict of interest from representing multiple parties at art auctions. That director was Dr. Stebbins, correct? Was there any reason you did not name Dr. Stebbins at that time?

FP: As you will see at the beginning of the paragraph, those allegations were from the Gidwitz and Buntrock complaint. We were just repeating what they had alleged.

KCT: Do you remember why you didn't name Dr. Stebbins as a defendant in the original complaint?

FP: I don't remember. We probably didn't know. We filed our complaint based on what Gidwitz and Buntrock alleged.

KCT: What were the additional facts you learned about Dr. Stebbins?

FP: Those are set forth in our motion (FP-14).

KCT: You have the notes from Dr. Neff.

FP: We were just bringing our pleadings into conformity with what we had alleged in our motions.

KCT: Would you provide any internal documents and memoranda concerning the decision to add Stebbins as a defendant?

FP: No.

TI: Internal working papers are work product.

FP: We had two directors of the Foundation who had made allegations, verified, they were fiduciaries of the charity.

KCT: Did you do anything in addition to relying on the Gidwitz and Buntrock complaint?

TI: There was a time to litigate these issues.

FP: If you have charges against me, bring them on. If you don't know anything about the facts, try to figure it out.

LB: We can't figure them out because you say this is none of our business.

FP: This is none of your business.

KCT: Showing **EXHIBIT FP-20.** (FP acknowledged that he had seen Stephanie Marshall's letter sometime close to May 20, 2001.) Showing **EXHIBIT FP-21.** KCT read Marshall statement that AG was conducting fact-finding investigation. Did you know about these allegations on May 20-21.

FP: No.

KCT: Did you know IMSA was 95% funded by the State of Illinois.

FP: I read that somewhere in your materials. I knew it was a state school. I don't know whether it comes directly from the state.

KCT: You sent a notice of your investigation to IMSA on May 25?

FP: We wouldn't call it an investigation. When we are involved in making these inquiries, pursuant to an administrative subpoena, we are careful in how we characterize it because we don't want to damage anyone.

KCT: So it's not an investigation. What do you call it?

FP: An inquiry and review.

KCT: Do you have discretion as an assistant AG as to which cases to investigate, and when?

FP: The office enjoys some discretion in that regard.

KCT: Who decided to write to IMSA regarding your inquiry?

FP: I did.

KCT: Did you talk to anybody before you did this?

FP: Some staff members, but nobody above me.

KCT: Who?

FP: Some people in the office on the staff. Ms. Harris for example. But I made the decision. I did all of the sending.

KCT: Are there any writings which memorialize your thinking as to why you were inquiring of IMSA?

FP: I don't think so, no. Except for the subpoena.

KCT: May I request a copy of that?

TI: I don't see how that is relevant.

SS: Has anybody consulted with Marshall or IMSA about this? They may have privacy interests. I know I don't really have standing to be raising objections

about it. But they may have concerns about the content of the subpoena being revealed.

KCT: I understand that, and we don't want to do anything to harm IMSA. We will talk to their counsel before revealing any of the content.

FP: We don't have any secret with regard to it, except I don't know if we can release the document.

(KCT asked that he be allowed to request the subpoena after speaking with counsel for Ms. Marshall).

TI: I can't guarantee that we will have any more discussions about this.

KCT: Has your inquiry [of IMSA] been concluded.?

FP: Yes, long before June 19, 2001.

KCT: Were Dr. Marshall and IMSA informed that the inquiry had been concluded?

FP: The inquiry had two pieces. First, there was a statement on their website, which said she was president of the school, and had dual roles. This was an error. It was not true. That resolved that issue. The other issue was resolved by looking at one document.

KCT: Was this resolution communicated to Marshall before June 29, 2001?

FP: Probably not. In this case it was pretty self-evident that it was a narrowly-tailored inquiry that was resolved by looking at the document.

KCT: Is it a fair inference that you knew Marshall was associated with the Academy before June 29.

FP: We had learned about [the issues that were the subject of the inquiry] on May 23, 24, 25. We had met with IMSA's counsel around June 12-13 and he was able to inform us about the issues and they were resolved.

KCT: Despite this meeting, it's not your policy to say OK, everything's over with. It's resolved. So did the investigation remain open in this sense?

FP: We don't always send letters.

KCT: Who was the attorney for IMSA.

(General discussion among the group that attorney was Bill Roberts, of Henshaw & Culbertson's Springfield office, former US Atty for CD Ill).

(After brief recess, SZ stated that in further discussion, Mr. Perkins had stated that it was his impression that Mr. Roberts had realized that the investigation had been resolved with the discussion of the two issues. KCT asked Mr. Perkins whether he agreed with the statement that a US Atty is not a US Psychiatrist.)

KCT: Did Roberts say anything [indicating that he knew investigation was over]?

FP: Roberts left the meeting thinking that we had resolved the issues. We pretty much communicated that to him.

LB: I want to tie down dates. What was the date of the administrative subpoena?

FP: May 25, 2001. It went out in the mail to the Academy that day.

LB: How long had you had the information?

FP: A couple of days. After the May 11 mediation session, there was a lot of discussion that people were dissatisfied. I figured the mediation was over. And I feld that we had been snookered into not being ready to proceed with the litigation. We wanted to file an amended complaint and we were going to make it more focused. We wanted to put it in different shape. And we had become concerned that there were a lot of part-time managers of the Foundation. We focused on who the officers were and started looking at Stephanie Marshall, because she was the treasurer and we had some concerns about the financial dealings of the Foundation, like travel expenses. We were looking to see what we could allege about part-time officers of the Foundation. We knew that Marshall was on the Board of the Frye Foundation, we learned that from Scott McHue, who used to be counsel for the Foundation. So Marshall was a director of Frye and Terra; we were looking at what she was paid, to see if she was capable of doing both jobs [in addition to IMSA]. We were working with public records and filings from charities. We came across things that caused us to make inquiry of her Math Academy.

KCT: What is the Illinois practice -- is it permissible to have ex parte communications with the court?

FP/TI: No.

FP: With respect to the Math Academy, we have administrative subpoena power, there is no court proceeding involved at all. The judge would not have known about it.

JL: Did you have meetings with the mediator where counsel for other parties were not present?

FP: [Participated in the May 11 mediation at the request of the parties. JC noted that the court had instructed other counsel not to attend.]

SS asked a series of questions, which included the following responses:

FP stated that the primary thrust of the amended complaint was to restate the ultra vires claims, to plead around issues that had been raised in the motions for judgment on the pleadings.

FP stated that he was not oblivious to the impact that the IMSA subpoena would have on Dr. Marshall: "I knew she would get it. I knew she was going to be aggravated by it." FP stated that he had a job to do and could not help the timing.

LB: Are there other Illinois foundations about which the AG has filed to take the position that a majority of board members should be Illinois residents?

FP: Whenever there is a vacancy in a fiduciary role it is my recommendation that it be filled with an Illinois resident, because we have a lot more control, more authority over resident directors. It is helpful to us from that point of view. [FP explained that Illinois residents are more likely to direct charitable spending and grants to Illinois]

FP further explained that although he tries to keep Foundation assets in Illinois, this is only possible when the donor has provided that the charity shall not be moved from Illinois. Where founder expressed desire for money to go elsewhere, this is permissible.

16di-001010

EXHIBIT 8

16di-001011

EXHIBIT 8

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF PAUL HAYES TUCKER IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Paul H. Tucker swears under penalty of perjury as follows:

1. I am Chairman of the Board of Directors and President of the Terra Foundation for the Arts ("Foundation"), a plaintiff in the above-captioned action. I was elected to the Board of Directors of the Foundation ("Board") in October 1998 and became Chairman of the Board and President in 1999. I make this affidavit in support of plaintiffs' motion for a temporary restraining order.

2. I hold a Ph.D. in the History of Art from Yale University and am a chaired professor of Art History at the University of Massachusetts Boston. My primary area of study has been the life and work of Claude Monet. I first met Ambassador Daniel J. Terra (1911-1996) in 1990 in connection with my work on an exhibition of Monet's works held in Boston, Chicago and London.

3. The Foundation is a private Illinois not-for-profit corporation organized in 1978 by Mr. Terra to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Mr. Terra served as the Chairman of the Board and President of the Foundation from the date of its incorporation until his death in 1996. During this period the Foundation, in keeping with Mr. Terra's vision, took an extremely aggressive and committed view of its mission, as stated in the Articles of Incorporation, to "expand the artistic horizons of a growing art public." Indeed, this broad focus was made clear by the amendment of

Article V of the By-Laws in 1994 by Mr. Terra to emphasize that the Foundation's efforts should be prevalent "in the United States and abroad." The history of Mr. Terra's involvement with the Foundation is summarized in the attached reproduction of pertinent portions of the Foundation's website. Exh. A.

4. The Foundation's signature asset is the Terra Collection of American Art, one of the most important collections of American art in the world. The collection consists of roughly 900 paintings and other works from 1750 to 1950. It includes major works by some of the most significant artists in American art history, including John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe. The estimated market value of the Foundation's art holdings is around $100 million. It is unlikely, however, that a collection of comparable size and importance could be compiled in today's art market.

5. The Foundation's other assets include an investment portfolio worth approximately $220 million and real estate holdings of approximately $35 million.

6. In 1987, Mr. Terra built a multi-million dollar museum facility on North Michigan Avenue in Chicago to house the collection. Bolstered by a belief that American art and culture is underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France. Mr. Terra insisted that the American painters offered something new to the international art scene. Accordingly, he moved a substantial portion of his collection to Giverny every year from April to October.

7. By the mid-1990s, Mr. Terra contemplated another move. Disappointed by the attendance at the Chicago museum, he considered transferring his collection to Washington,

D.C., where he then resided. However, in June 1996, Mr. Terra suffered a stroke in his Washington residence and died. He bequeathed to the Foundation most of its current assets.

8. After Mr. Terra's death, the position of Chairman of the Board and President of the Foundation fell first to Helene Arhweiler, former president of the Center Georges Pompidou in Paris. She was succeeded by Arthur A. Hartman, former U.S. Ambassador to France and Russia, and then, in 1999, by myself. Other current members of the Board include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard University's John F. Kennedy School of Government; Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French ambassador to the United States; Theodore Stebbins, curator of American Art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive officer of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis.

9. I joined the Board in 1998 because I believed strongly in the Foundation's fundamental purpose, as expressed to me by Mr. Terra and others -- to propagate American art in the United States and abroad through public education. The establishment of a museum in France, among other things, convinced me of the broad scope of the Foundation's efforts. I viewed participation in the Foundation as an excellent opportunity to further the goals of my life's work in promoting public education in the arts on a national and international scale. Since becoming a Board member, I have supported its continued efforts to advance arts education inside and outside the Chicago area. Examples of major non-Chicago projects include the recent award of a $500,000 grant to a New York production company for a documentary on American

art and the sponsorship of a researcher for the Huntington Museum and Gardens in Pasadena, California.

10. In 1999, controversy arose among members of the Board as to how best to continue the efforts of the Foundation and preserve its founder's legacy which subsequently led two Board members, Messrs. Gidwitz and Buntrock, to engage in a campaign to gain control of the Foundation.

11. Under the chairmanship of Arthur Hartman, the Board twice sought a full-time president of the Foundation. The position was advertised at an annual salary of $250,000. However, the search efforts were unsuccessful. This experience led the Board to seek new leadership. It was proposed that Board member Stephanie Pace Marshall should become President. Dr. Marshall has been a member of the Board since prior to my election. She became involved in public education through her leadership of the Illinois Mathematics and Science Academy. She has an outstanding record of service and dedication to public education and is a person of the highest moral character. I believed that Dr. Marshall was an excellent choice for President of the Foundation. A majority of the Board supported her candidacy.

12. Mr. Gidwitz, however, did not share this view. He wrote a terse opposition to Dr. Marshall's candidacy, claiming that she could not conduct the business of the Foundation while maintaining her position as president of the Illinois Mathematics and Science Academy. He suggested that if she were to accept the presidency of the Foundation she would have to resign from the Academy. At the time Mr. Gidwitz made these objections, he was chairman of the Illinois State Board of Education. Exh. B. Dr. Marshall withdrew her name from consideration, to the dismay of her admiring colleagues on the Board.

13. I was then asked by various Board members to stand for election. I did so after giving due notice to Mr. Hartman and despite his objections was elected by a majority of the Board. Mr. Hartman expressed anger over his ouster. He eventually joined forces with Mr. Gidwitz, Mr. Buntrock and Mrs. Daley in opposition to efforts by the Foundation to maintain its independence and chart its own course for the future.

14. Despite the maneuvers of Messrs. Gidwitz and Buntrock, the majority of the Board remained committed to the Foundation's broader purpose and interests. Like most other Board members, I believed that the Foundation needed to conduct a thorough reassessment of its assets and endeavors and to explore all possible options to arrive at a strategic plan for the future. As part of this effort, at my insistence in early 2000 the Foundation began to consider various opportunities including offers of cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. I believed that consideration of all possible options -- in effect, a fully competitive bidding process -- was clearly in the best interests of the Foundation.

15. In preparation for the Board's September 2000 meeting in Giverny, I asked members to focus on long-term planning options. I proposed that each member should circulate a position paper, setting out his or her ideas and proposals. Thereafter I circulated a memorandum, entitled "A Vision for the Future," in which I argued, among other things, that a collaboration with the National Gallery in Washington, D.C., would be in the best interests of the Foundation. My paper was designed to stimulate debate and further deliberation. In addition, I discussed with several Board members whether Buntrock, who had repeatedly expressed impatience with the work of the Board, should choose not to stand for reelection at the upcoming

meeting. I expected that these issues would be the subject of full and frank discussion by the Board, which would take action only in accordance with its Articles and By-Laws.

16. Messrs. Gidwitz and Buntrock were unwilling to engage in the ordinary advocacy of competing ideas within the framework of Board deliberations that are the hallmark of institutional management. In order to abort the strategic planning process, they filed suit in the Chancery Division of the Circuit Court of Cook County, Illinois, Buntrock v. Terra, No. 00 CH 13859, charging me and other directors with mismanagement of the Foundation. The complaint alleges a conspiracy among the Board to relocate the collection to Washington, D.C., in violation of alleged fiduciary duties to the people of Illinois. The complaint asserts, without support from the Foundation's governing instruments, that Mr. Terra intended "to provide a Museum in the Chicago area." It also misleadingly characterizes the Foundation as a repository of "the charitable assets of the people of the State of Illinois." In order to prevent further debate and decisions by the Board that Messrs. Gidwitz and Buntrock feared might be adverse, they sought and received a temporary restraining order barring regularly scheduled meetings of the Board.

17. Messrs. Gidwitz and Buntrock convinced James E. Ryan, the Attorney General of the State of Illinois, to intervene in the litigation on a theory of the Foundation as a charitable trust for the benefit of the people of Illinois, rather than the public at large. This was crucial to the efforts of Messrs. Gidwitz and Buntrock, because through their alliance with the Attorney General they were able to exert pressure on Board members through threats of investigation and potential legal action.

18. Messrs. Gidwitz and Buntrock, now acting in concert with the Attorney General and Assistant Attorney General Floyd Perkins, used a combination of the litigation and illegal

threats to peel away layers of resistance to their takeover of the Foundation. They had already garnered the support of Mrs. Daley and Mr. Hartman. On an 11-member Board, they needed two additional votes to gain control. They targeted Dr. Stebbins and Dr. Marshall.

19. In March 2001, the Attorney General drafted a complaint seeking appointment of a receiver for the Foundation and removal of several directors, including myself and Dr. Stebbins. The draft complaint named Dr. Stebbins as a defendant for the first time in the litigation. It included exaggerated and false allegations of impropriety against Dr. Stebbins, including alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions. The Attorney General successfully used this complaint to cause Dr. Stebbins to threaten to resign and eventually align with Messrs. Gidwitz and Buntrock.

20. Meanwhile, as the litigation proceeded to mediation, Mr. Gidwitz, Mr. Buntrock and the Attorney General sought a settlement proposal that would achieve their objectives of anchoring the Foundation to Chicago and ensuring local control. By May of 2001, a draft "settlement" was presented for consideration by the parties. The "settlement" forces the Foundation to "maintain and exhibit" its collection in Illinois for 50 years and to negotiate a relationship with another Chicago institution with the goal of ceasing operations as a stand-alone museum. Most tellingly, the "settlement" radically changes the Foundation's corporate governance structure to make the State of Illinois the dominant force. The size of the Board will be increased to 15 members, with no less than eight of the directors to be Illinois residents.

21. In late May of 2001, the Attorney General's office informed Dr. Marshall that it was considering an investigation of the Illinois Academy of Mathematics and Science. Dr. Marshall has now reportedly decided to support the substance of the "settlement," with serious

reservations about certain provisions.

22. I believe this "settlement" represents a usurpation of the role of an independent Board and a patently unreasonable restriction on the right of the Foundation to exhibit its works when and where it deems it most appropriate and effective. If indeed it is approved by the Board, such majority approval will have been achieved through improper means by a minority of the Board acting in concert with the Attorney General.

16di-001019

23. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of June, 2001

Paul Hayes Tucker

EXHIBIT 9

16di-001023

EXHIBIT 9

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16di-001024

16di-001025

TERRA

About Daniel J. Terra

Daniel J. Terra (1911-1996) was an energetic blend of scientist, businessman, and art lover. With a chemical engineering degree from Pennsylvania State University, the child of Italian immigrants founded Lawter Chemicals in Chicago in 1940. The success of Terra's globally-based enterprise gave him the means to further his interest in culture by collecting works of art and by becoming involved in several Chicago arts institutions. When President Ronald Reagan appointed Terra to the post of Ambassador-at-large for Cultural Affairs, an appointment he held from 1980 to 1988, Terra's enthusiasm for promoting American art expanded to a national and international audience. At one time, President Reagan lauded Terra for "doing more for American art than any other man in the history of the country." The entrepreneurial scientist's irrepressible desire to share his ardor for American art resulted in the founding of two new American art museums. Initiating an American art museum in Evanston, Illinois in 1980--the only one in a 400-mile radius of Chicago at that time--was a notable accomplishment. Its later relocation in 1987 to Chicago's Magnificent Mile with a collection that was increased ten times was even bolder. Establishing a museum of American art in France was courageous. Terra's desire to share with diverse audiences his enthusiasm for American art not only introduced a significant collection to America's heartland and to Europe but also realized his vision of establishing a forum celebrating the cultural and patriotic value of American art. The critical mission for Terra's museums is arts education with a focus on both public instruction and scholarly research.

About Daniel J. Terra

Visiting the Museum

The Library

Terra's personal collection was first exhibited at the Palmer Museum of Art on the campus of his alma mater, Pennsylvania State University in 1977. When Terra Museum of American Art officially opened in Evanston, the uniquely American theme of a prized painting, George Caleb Bingham's *The Jolly Flatboatmen*, 1877-78, represented the founder's idea of art as an expression of national identity. After relocating the museum to Chicago, Terra unabashedly stated, "We read so much about our industrial and economic

[redacted] development over the last 150 years, but I think our cultural development is just as great." Bolstered by this belief, Terra founded a second museum of American art, Musée d'Art Américain, Giverny. Giverny is famous as the rural home of the nineteenth-century French artist Claude Monet and the location of an artists' colony where many American Impressionists, such as Theodore Robinson, Lilla Cabot Perry and Theodore Earl Butler, found inspiration. Terra's celebratory vision of America's artistic heritage is also a complement to his neighbors. He congratulated the French for their influence on American art. Yet, Terra subtly insisted that the American painters, whom he honored in the museum, offered something new to the international art scene.

top of page

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16di-001029

Press Releases

FOR IMMEDIATE RELEASE
April 15, 1999

GIDWITZ NAMED STATE BOARD OF EDUCATION CHAIR

SPRINGFIELD – Governor George H. Ryan today announced the appointment of Chicago businessman Ronald J. Gidwitz as the chair of the Illinois State Board of Education.

Gidwitz replaces retiring Board Chair Louis Mervis of Danville, who is retiring after 15 years of service to the State Board of Education. Gidwitz, 54, is a partner of GCG Partners, a private investment firm.

"Ron Gidwitz shares my belief that Illinois schools should be among the best in the nation when it comes to preparing children and young adults for life and opportunity," Ryan said. "He is committed to improving the use of technology in our schools, expanding workforce training efforts and making sure that educational opportunities are equal for all children in Illinois."

Gidwitz's appointment requires confirmation by the Illinois Senate.

EXHIBIT 10

16di-001033

EXHIBIT 10

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF DAVID LEVY IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

David Levy swears under penalty of perjury as follows:

1. I am President, Director and Chief Executive Officer of the Corcoran Gallery of Art, the oldest museum of art in Washington, D.C.

2. In 1991 Daniel Terra contacted me and sought my advice on his plan to share his collection, housed in Chicago, and his estate (via his foundation) with independent art museums across the nation, both to provide greater exposure to his collection of historical American art and to support museums with an interest in this subject through the distribution of his wealth through his foundation. Mr. Terra told me he was concerned about the viability of the Chicago Museum.

3. Subsequently, in 1991 and 1992, we discussed an alternative approach, which would involve the creation of a Terra Museum Trust to be guided by an independent Board of Trustees drawn from the Whitney Museum of American Art in New York, the Corcoran Museum in Washington and the museums operated by Terra in Chicago and Giverny. Mr. Terra approved the proposal and he, I, and Robin Martin, then Chairman of the Corcoran Board of Trustees, thereafter engaged in discussions with Leonard Lauder and David Ross, respectively the Chairman of the Board and the Director of the Whitney Museum. These discussions centered on placing the American collections of these museums under a common curatorial management arrangement so as to provide national and international exposure to the combined collections. After extended discussions with the Whitney, the proposal did not materialize because issues of control of the collection, raised by the Whitney, could not be satisfactorily resolved.

Dated: June 22, 2001

EXHIBIT 11

16di-001037

EXHIBIT 11

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF PETER SOLMSSEN IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Peter Solmssen swears under penalty of perjury as follows:

1. I am president emeritus of the University of the Arts, located in Philadelphia, Pennsylvania.

2. Daniel Terra and I were close friends and colleagues dating back to the early 1980's, when he was appointed ambassador-at-large for cultural affairs by President Reagan.

3. Starting around 1990, Daniel Terra and I had a number of conversations in which he told me that he expected that the Terra Foundation would close the Terra Museum in Chicago and sell the real estate. Among other proposals, we discussed the possibility of moving the art collection to the Pennsylvania Academy of Fine Arts in Philadelphia and establishing a different kind of charitable activity in Chicago.

4. I introduced Ambassador Terra to the leaders of the Pennsylvania Academy and he entered into lengthy conversations with them about bringing the collection housed at the museum in Chicago to Philadelphia. In his negotiations with the Pennsylvania Academy, Ambassador Terra was prepared to provide significant funds in addition to his collection, but because he believed that the Terra Foundation should have ownership of his collection as well as the Academy's collection, negotiations with the Academy did not result in an agreement.

5. Ambassador Terra was particularly interested in Philadelphia because he had grown up there. He told me how he had walked past the Academy every day on his way to high school.

6. Ambassador Terra and I also engaged in discussions about a collaboration between the Terra Foundation and the University of the Arts, of which he was a trustee. We discussed

the possibility that the Terra Foundation would purchase all of the real estate belonging to the University and lease it back in perpetuity, but this proposal was never finalized. In 1995, the Terra Foundation and the University of the Arts entered into a preliminary agreement, under which the Foundation made grants to the University of $3 million and provided for matching grants potentially totaling $22 million.

7. During 1996, Ambassador Terra and I talked at length about his desire to move the Foundation to Washington, D.C., where he had purchased two properties for that purpose. He said that he intended to relocate the headquarters of the Foundation in one of the buildings and conduct activities or possibly house part of the collection in the other.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2001

Peter Solmssen

Peter Solmssen

EXHIBIT 12

EXHIBIT 12

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16di-001041

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF JOSEPH ZORC IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Joseph Zorc swears under penalty of perjury as follows:

1. I am a real estate agent with the firm Pardoe real estate ERA in Washington D.C. specializing in commercial real estate.

2. In the Spring of 1996, Daniel Terra came to me and said he wanted to locate and buy property for the purpose of moving the headquarters of the Terra Foundation from Chicago to Washington D.C. .

3. During 1996, I showed him a number of properties, and assisted him in his purchase of 1072 Thomas Jefferson, in the Georgetown area of Washington, D.C. to be used to house the temporary headquarters of the Terra Foundation. Copies of documentation regarding 1072 Thomas Jefferson are attached as Exhibit B to this declaration.

4. At one time I had listed a piece of property on Connecticut Avenue, at Calvert Street that Mr. Terra had initially intended to sell. However, after six months, Mr. Terra rescinded our listing agreement and told me that he wished to use the property as a museum.

5. Mr. Terra told me that his intention was to create an institute of American Art and expressed the desire to look at additional properties that would be suitable for a building of a minimum of one million square feet. Based on his intentions, we had discussed a helicopter tour of a number of larger spaces offered by the Department of the Interior about which Mr. Terra had express strong interest.

6. We also looked at several other commercial sites including a site directly adjacent to George Washington University, owned by the University, a second site just east of

Washington Harbor on the waterfront, and a third site on the 1700 block of Eye Street. However, we were not able to complete these plans because of Mr. Terra's death in June of 1996.

7. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2001

Joseph Zorc 6/27/01

EXHIBIT 13

16di-001045

EXHIBIT 13

80000 SERIES
30% P.C.W.
MEER-FAX RECYCLED

16di-001047

BELL, BOYD & LLOYD

WASHINGTON OFFICE
202 466-6300
FAX 202 463-0678

THREE FIRST NATIONAL PLAZA
70 WEST MADISON STREET, SUITE 3200
CHICAGO, ILLINOIS 60602-4207
312 372-1121
FAX 312 372-2098

OAK BROOK OFFICE
312 573-1999
FAX 312 573-2563

December 6, 1989

CONFIDENTIAL

Hon. Daniel J. Terra, Chairman
TERRA MUSEUM OF AMERICAN ART
c/o LAWTER INTERNATIONAL, INC.
990 Skokie Boulevard
Northbrook, Illinois 60062

Re: Pending Issues

Dear Dan:

Over the past year, I have given alot of thought to a number of issues which I believe have to be addressed regarding Terra Museum of American Art. Perhaps the Sun-Times article caused me to crystalize my thinking further. I hope the following is helpful to you in contemplation of the various upcoming Board of Trustees meetings. I believe it will help you focus on a number of issues that will or should be raised at the board meetings in connection with decisions regarding the future operations of the Museum in the United States and the decision to build a museum in France. In that regard, I will address each of the issues, including consideration of various options and possible solutions thereto.

I. Terra Museum/Chicago

The Museum is now completing its third year of operation on Michigan Avenue. Obviously, considerable expense was incurred in rehabilitating the space for use as a museum. The former director incurred considerable unanticipated expenses in staffing and other costs, which Harold O'Connell has finally brought under control. The reality is that we are sitting on a piece of property having a value of at least $42 million. At present, the Museum is drawing approximately 125,000 people per year. The Art Institute draws around one million. In New York, the Metropolitan draws approximately six million; MOMA draws around three million; and the Whitney draws around 600,000. To place it all in perspective, our ratio of attendance to the Art Institute is about the same as the Whitney is to the Metropolitan. The reality is, however, that Chicago does not seem to support museums such as Terra to the extent it should. There are probably better markets to showcase American Art, namely, New York, Washington, Los Angeles, San Francisco, Minneapolis/St. Paul, Boston, Philadelphia, and perhaps even Atlanta. We are well aware of the strengths of our present institution. Its collection, coupled with the Daniel J. Terra Collection, represents perhaps the finest collection of 19th Century American impressionist art; yet, economic reality is in the forefront of what we can do in the future and that reality is that the bulk of the support for this institution is from the Terra family now and for the future. Thus, a number of issues:

A. Is it time to enlarge the size and change the composition of Terra Museum's board?

B. Should there be in writing a long-range plan regarding the Museum's future and its direction? That report should address a number of issues, including:

1. Does the Museum stay in Chicago? If it stays in Chicago, does it stay on Michigan Avenue? And if it stays on Michigan Avenue, should it have a different overall physical makeup; namely, should the process begin of putting the site to its highest and best use, including development of the site for maximum commercial use including space for the Museum?

2. Should the Museum leave Michigan Avenue and move to a new site? In so doing, the Michigan Avenue property would produce an estimated sale proceeds of approximately $42 million, thus placing the Foundation in a strong financial position to consider and implement a number of other options. If the Museum is to remain in the Chicagoland area, the possible sites include:

a) The Chicago Cultural Center, Randolph and Michigan — This option is viable; it is estimated that the cost to rehab the South 42% of the building would be in the neighborhood of $8-1 million. In that regard, we would then be, in essence, in a joint venture with the City of Chicago, negotiating a long-term lease with the City and working out a joint use agreement for certain other parts of the Cultural Center which, from time to time, would be needed. Obviously, in occupying the Cultural Center, the Museum would take on a more public stature, and it would be clearly necessary to change the composition of the Board.

b) Evanston, Central Street -- Does the Museum move back to Evanston having in hand a healthy endowment and permitting the Museum to continue selected exhibitions; continue attracting a core of contributors and permitting enlargement of the collection; and enlargement of our educational programs and implementation of a scholarship program?

c) Other Possible Sites — Do we attempt to find other sites in Chicago? Some that come to mind are the Playboy Mansion. There are a number of other sites near Michigan Avenue, as well as on South Michigan Avenue, which we can consider and discuss.

d) Other Options —

i) **Whitney Museum** — One option that should be given serious consideration is the possibility of merging Terra Museum with the Whitney in New York. At the present time, the Whitney is experiencing some financial strain. It has a very strong 20th Century collection, but does not have a 19th Century collection. If Terra Museum, along with the Daniel J. Terra Collection, were to be merged into the Whitney, together with an endowment of $50-60 million, this would permit both institutions to thrive and would give the Whitney a truly significant status as one of the fine museums in the United States. Hopefully, it would increase its attendance record to at least one million per year.

ii) **Art Institute** — Does Terra Museum negotiate with the Art Institute for transfer of the Museum's collection, together with its operating funds, to the Art Institute to buttress up the newly constructed American wing? The down side to this, of course, is that we would not be in a position to direct and control the use of those funds.

iii) **Washington, D.C.** — Do we consider moving to Washington or merging with an institution in Washington?

e) Additional options — Do we close down the operation of the physical facilities in Chicago and not relocate to another site; rather, we take the Museum's collection, together with the Daniel J. Terra Collection, and place them into the Foundation supported by $50-75 million in funds, and permit those collections to be shown throughout the world, implemented together with scholarship programs and the operation of a Museum in Giverny? The reality is that, with the exception of the Smithsonian and perhaps the Whitney, it is very difficult for a museum devoted exclusively to American Art to be viable and attractive in the United States without a considerable expenditure of funds and a very large endowment.

II. Terra Museum/France

I believe that Terra Museum/France is interwoven with whatever decisions are made regarding Terra Museum/Chicago. I sincerely believe that we have to give consideration to the short and long-range plan for Terra Museum/Chicago before we finalize Terra Museum/France. In any event, with regard to Terra Museum/France, a number of isues come to the forefront. They are:

A. What is the status with the officials in Giverny?

1. Has the citizenry reviewed and accepted the plan for the facility?

2. What is the attitude of the Monet Museum?

3. Does the Museum have the full cooperation and blessing of Giverny and Monet?

B. What is the attitude of the French government?

1. Do we have its support?

2. Do we have the support of the French Governing Board regarding the creation and operation of the Museum?

C. What will be the attitude of the French and American artistic community regarding this venture?

D. What are the programs to be instituted at the Museum when it commences operation? Do we have a schedule for at least the next three years? We should have available for review at a board meeting in the near future, in writing, an outline containing programs, costs, funding and staffing.

E. Have we prepared a financial proforma for operating the Museum for at least three years? Included in that proforma should be an outline of income sources and a listing of expenses, including staff, operations, and if there is a deficit, what is the source of contributions to make up that deficit?

F. Have we prepared a detailed construction budget?

G. What is the commitment of Ambassador Terra and the members of the Terra family to this venture?

H. Finally, is it better to restore the gardens and the attendant buildings first, announcing scholarships for a select group of United States students to study and have smaller exhibitions to begin the process?

III. Terra Museum 1990–1993

Irrespective of which of the above options are implemented, it is clear that, at least in the near future, the Museum will be operating out of its present Michigan Avenue site. In that regard, the Board should be presented as soon as possible with an operating budget for the years 1990 and 1991. I think it is extremely important that positive public relations b

continued, that we attempt to get as much media and other focus on the Museum and its programs, and that we attempt, if at all possible, to enlarge our teacher programs and our educational programs.

IV. Status of Audit; Attorney General Inquiry/IRS Inquiry

The audit will be ready on or about December 20, 1989. Ernst & Young is in the process of working on it. The tax return will be prepared immediately thereafter. In addition, amended returns will be filed for the excess holding issues for 1986-87 regarding First Illinois, as well as the so-called "self-dealing" regarding the art shown in Washington in an effort to raise contributions to the Museum in the United States and the possible museum in France.

Dan, I could go on with a number of other thoughts, but I think this is kind of a thumbnail sketch which will assist all of us in focusing on these issues. If you want, I can sit down with you and we can plan to enlarge a presentation. I await your instructions.

Very truly yours,

BELL, BOYD & LLOYD

James W. Collins

JWC/sg

16di-001053

16di-001055

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AFFIDAVIT OF JOHN H. LONGWELL IN SUPPORT OF
DEFENDANTS' OBJECTIONS TO PROPOSED SETTLEMENT

The undersigned, upon oath, does hereby depose and state as follows:

1. I, John H. Longwell, am an associate at the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC. The firm represents defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson in Buntrock v. Terra, Case No. 00 CH 13859.

2. On July 16, 2001, I attended an interview of Assistant Attorney General Floyd D. Perkins, chief, Bureau of Charitable Trusts and Solicitations, at the Office of the Attorney General on West Randolph Street in Chicago, Illinois. The interview was scheduled at the suggestion of the Court and upon request of our firm. Mr. Perkins declined our initial request to conduct the interview under oath and on the record. We asked Mr. Perkins to reconsider recording the interview, dispensing with the oath, and he again declined. Therefore, K. Chris Todd, a partner in our firm who conducted the interview, asked me to accompany him to take notes. During the interview, I attempted to record questions and answers in as much detail as possible. Upon my return to Washington, D.C., I typed these notes to create an informal record of the interview in question and answer format. However, I was not able to produce a verbatim record.

3. The statements in this affidavit are based on my notes and recollections of the interview. The full text of my notes is attached at Exhibit A to this affidavit.

4. Mr. Perkins stated that he believes it is his job to ensure that not-for-profit and other charitable institutions based in Illinois utilize their assets in Illinois. Whenever possible, Mr. Perkins attempts to ensure that fiduciary vacancies at such institutions are

filled with Illinois residents. Mr. Perkins accomplishes this through court proceedings. Mr. Perkins acknowledged that his authority to intervene is circumscribed by the mission of the institution and the donor's intent. For example, Mr. Perkins stated that would not have the authority to seek Illinois restrictions on an institution organized for national or international charity.

5. Mr. Perkins generally refused to discuss matters concerning his conduct of the Terra litigation, including his sources of information and the scope of his investigation. In particular, Mr. Perkins would not discuss the basis for his assertions of Mr. Terra's intent, nor whether at the time Mr. Perkins filed his original complaint he knew of evidence showing that Mr. Terra did not intend the Foundation to remain in Chicago. Mr. Perkins stated that at the time of his original complaint, he probably did not know that Mr. Terra had amended the Articles of Incorporation of the Foundation in 1994 to include the phrase "in the United States and abroad."

6. Mr. Perkins also refused to provide a detailed explanation or produce documents regarding the circumstances surrounding his allegations against Theodore Stebbins. On this subject, my notes reflect the following exchange among Mr. Perkins, Mr. Todd, Tom Ioppolo of the Attorney General's office and Laurel Bellows, an attorney for the defendants:

KCT: Would you provide any internal documents and memoranda concerning the decision to add Stebbins as a defendant?

FP: No.

TI: Internal working papers are work product.

FP: We had two directors of the Foundation who had made allegations, verified, they were fiduciaries of the charity.

KCT: Did you do anything in addition to relying on the Gidwitz and Buntrock complaint?

TI: There was a time to litigate these issues.

FP: If you have charges against me, bring them on. If you don't know anything about the facts, try to figure it out.

LB: We can't figure them out because you say this is none of our business.

FP: This is none of your business.

7. Mr. Perkins also stated that he possessed discretion in determining the target, subject matter and timing of any investigations.

8. In response to questions about Stephanie Pace Marshall, Mr. Perkins stated that after a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins acknowledged that he was aware of a letter dated May 20, 2001, in which Dr. Marshall criticized the attorney general's role in mediation and rejected Mr. Perkins proposals. Mr. Perkins believed that he had been "snookered" into going along with mediation and had lost valuable time preparing for litigation. Mr. Perkins stated that he was concerned about the management of the finances of the Foundation and the fact that there were too many "part-time officers." He began to investigate Stephanie Pace Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He became aware of these issues and considered them for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr.

Perkins stated that he knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

9. Mr. Perkins stated the issues relating to the administrative subpoena had been resolved at a meeting with counsel for the Academy on June 12-13. Mr. Perkins never communicated this to Dr. Marshall or her counsel, but he surmised that they understood that the investigation was closed.

10. Under penalties as provided by law pursuant to Section 1-108 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this affidavit are true and correct.

Executed by me this 18th day of July, 2001.

John H. Longwell

16di-001060

EXHIBIT 14

EXHIBIT 14

80000 SERIES
30% P.C.W.
RECYCLED
16di-001061

New Mailing Address

Terra Foundation for the Arts
1072 Thomas Jefferson Street
Washington, D.C. 20007
Tel. 202/337-1777
Fax. 202/337-2366 Stored as #
11
for [illegible]

6/19/96

Stuart:
All Terra and Terra Foundation mail should be directed to above address. Please change all your records -
DJT

Please take care of enclosed bill in proper manner
DJT

16di-001062

16di-001064

EXHIBIT 15

EXHIBIT 15

80000 SERIES
30% P.C.W.
RECYCLED
MUELLER-MAX

16di-001065

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

THE TERRA FOUNDATION FOR THE ARTS An Illinois Not-For-Profit Corporation ALAN K. SIMPSON, Director, The Terra Foundation for the Arts JUDITH TERRA, Director, The Terra Foundation for the Arts PAUL HAYES TUCKER, Director, Chairman and President, The Terra Foundation For the Arts, Plaintiffs v. JAMES E. RYAN, Attorney General, State of Illinois FLOYD PERKINS, Assistant Attorney General State of Illinois RONDALD GIDWITZ, Chairman of the Illinois State Board of Education Defendants	)

DECLARATION OF ALAN K. SIMPSON IN SUPPORT OF THE PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER

Alan K. Simpson swears under penalty of perjury as follows:

1. I am a plaintiff in this cause of action and I am a Director of the Terra Foundation for the Arts. From 1979 until 1997, I served in the United States Senate from the State of Wyoming. Among other numerous activities, I have served as a member of the Board of Regents of the Smithsonian Institution, a member of the Folger Shakespeare Library Committee, a member of the Board of Trustees of the Kennedy Center, Chairman of the Board of Trustees of the Buffalo Bill Historical Center, Chairman of the Capital Campaign for Distinction of the University of Wyoming and as Director of the Institute of Politics at Harvard University. I currently serve as a member of the Independent Board of Directors of the IDS

American Express Company. On a part time basis I serve as a visiting professor at the University of Wyoming. I make this declaration in full support of the plaintiffs' motion for a temporary restraining order.

2. I first met Daniel J. Terra, the founder of the Terra Foundation for the Arts, when President Ronald Reagan appointed Mr. Terra to the post of Ambassador-at-large for the Arts. Until his untimely death in about 1996, Dan Terra and I were friendly and had many conversations. Toward the end of his life, Dan Terra informed me that he had become disenchanted with the lack of support that the public had given the Terra Museum located on N. Michigan Avenue in Chicago. He was frustrated at the poor attendance at the Terra Museum. Indeed, he often confided to me that he felt that the Chicago Museum was simply under appreciated by the people of Chicagoland. For these reasons and others, Dan Terra talked about relocating his art collection.

3. Dan Terra never expressed to me any intent or desire to isolate his art collection in any one state or location. To the contrary, Dan Terra was a true man of the world and wished that his art would serve to educate people throughout the world. The by-laws of the Terra Foundation drafted while Dan Terra was living, state that the Terra Foundation is to "operate museums and schools, both in the United States and abroad." Indeed, a substantial part of Dan Terra's art collection was and is located in France in a museum he founded and constructed (The Museé Americain at Giverny).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of June 2001.

Alan K. Simpson

EXHIBIT 16

16di-001069

EXHIBIT 16

WEEKMAX
RECYCLED
80000 SERIES
30% P.C.W.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF BELINDA REEDER IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Belinda Reeder swears under penalty of perjury as follows:

1. I am an architect with the firm Archetype located in the Adams Morgan area of Washington, D.C.

2. Sometime during the spring of 1996, I was commissioned by Daniel Terra to draw plans for a building in Washington, D.C. at what is now 2519 Connecticut Avenue, at the corner of Calvert Street.

3. I spoke with Daniel Terra at that time and he told me he intended to use the location to house the Terra Foundation's headquarters, part of the collection of art from the Terra Museum in Chicago and an extensive sculpture garden.

4. He told me that he intended to use the facility for elaborate events and fundraising for the Terra Foundation.

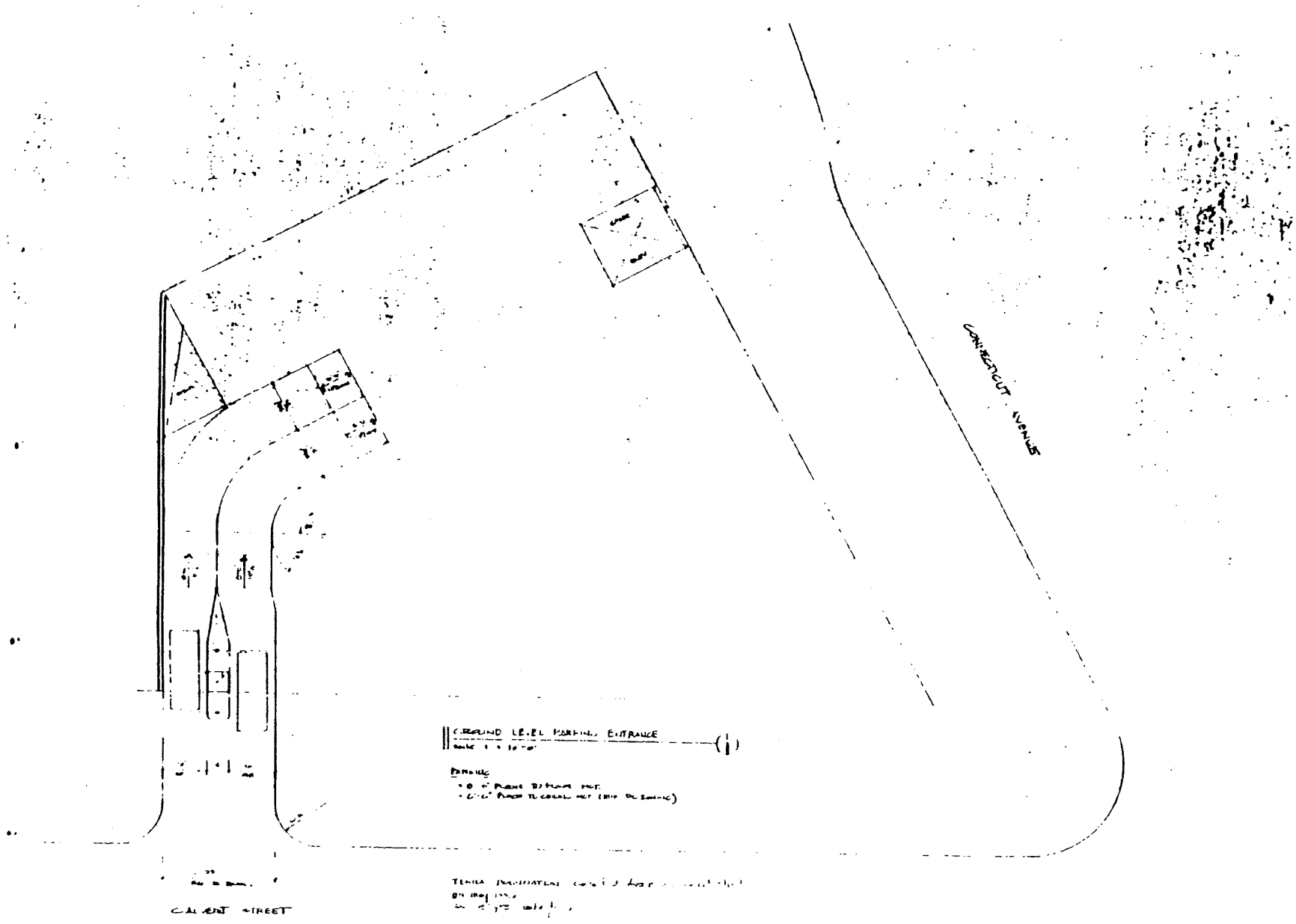
5. In May of 1996, I completed the schematic plans for the building and presented them to Mr. Terra. Copies of the plans that I drew for Daniel Terra are attached as Exhibit A to this declaration.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2001

Belinda Reeder

DISTRICT OF COLUMBIA
BELINDA C. REEDER
No. 39506
REGISTERED
ARCHITECT


CONNECTICUT AVENUE
GROUND LEVEL PARKING ENTRANCE
CALVERT STREET

16di-001072

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF BELINDA REEDER IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Belinda Reeder swears under penalty of perjury as follows:

1. I am an architect with the firm Archetype located in the Adams Morgan area of Washington, D.C.

2. Sometime during the spring of 1996, I was commissioned by Daniel Terra to draw plans for a building in Washington, D.C. at what is now 2519 Connecticut Avenue, at the corner of Calvert Street.

3. I spoke with Daniel Terra at that time and he told me he intended to use the location to house the Terra Foundation's headquarters, part of the collection of art from the Terra Museum in Chicago and an extensive sculpture garden.

4. He told me that he intended to use the facility for elaborate events and fundraising for the Terra Foundation.

5. In May of 1996, I completed the schematic plans for the building and presented them to Mr. Terra. Copies of the plans that I drew for Daniel Terra are attached as Exhibit A to this declaration.

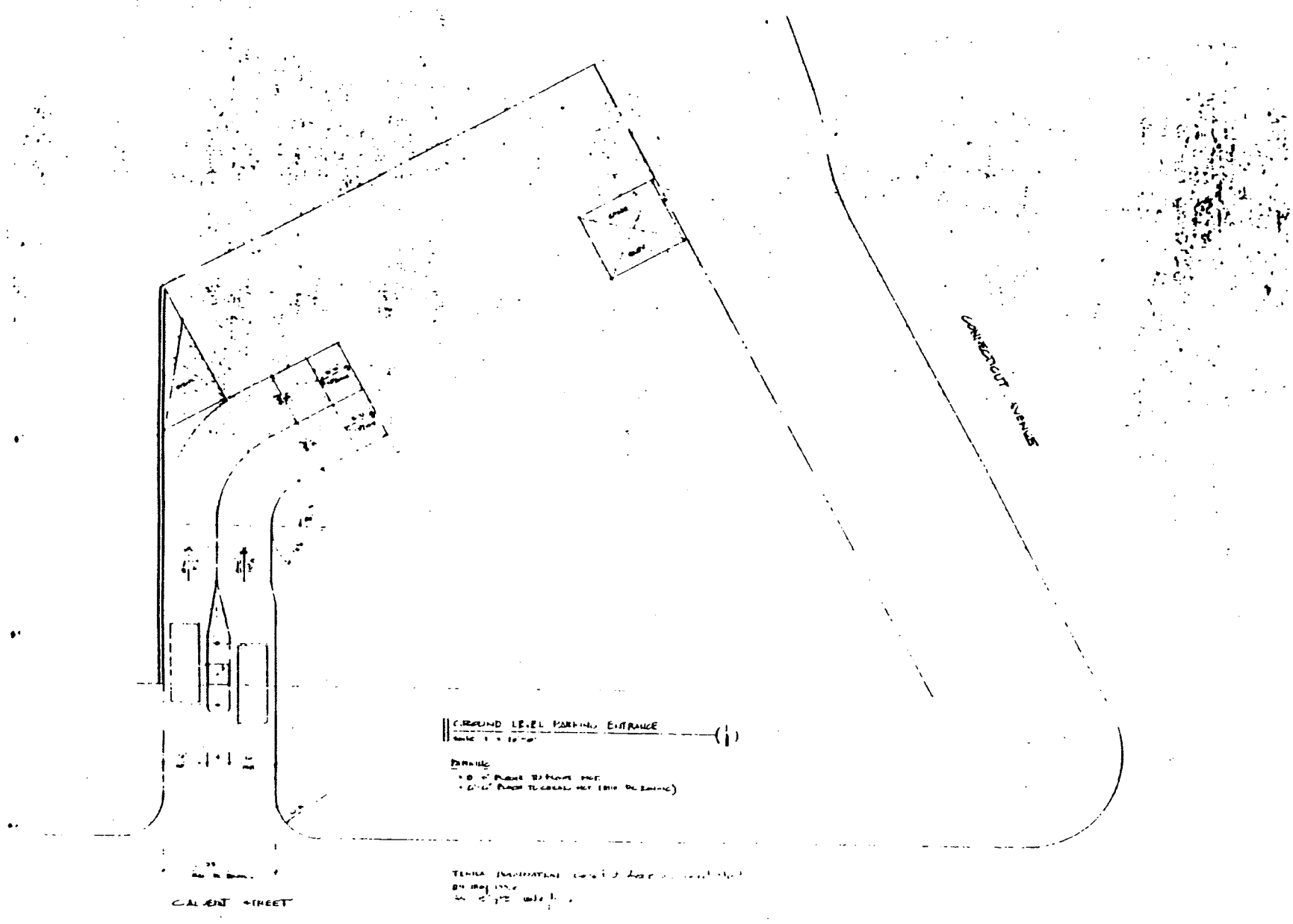
6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2001

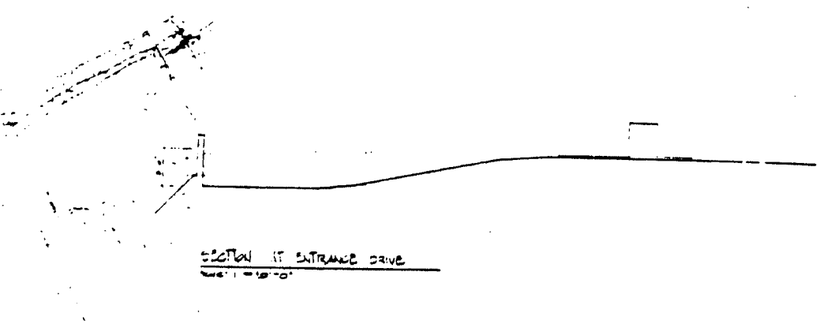
Belinda Reeder

DISTRICT OF COLUMBIA
BELINDA C. REEDER
No. 39506
REGISTERED
ARCHITECT

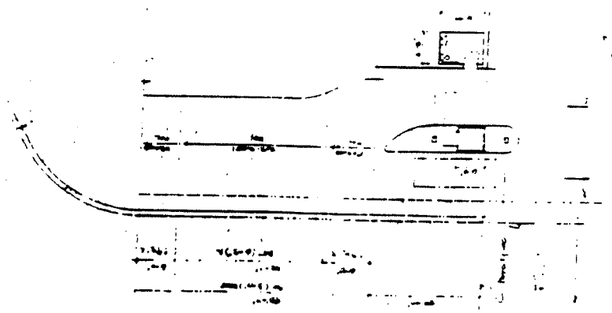
THE TERRA FOUNDATION
WASHINGTON, D.C.


CONNECTICUT AVENUE
GROUND LEVEL PARKING ENTRANCE
CALVERT STREET

16di-001076

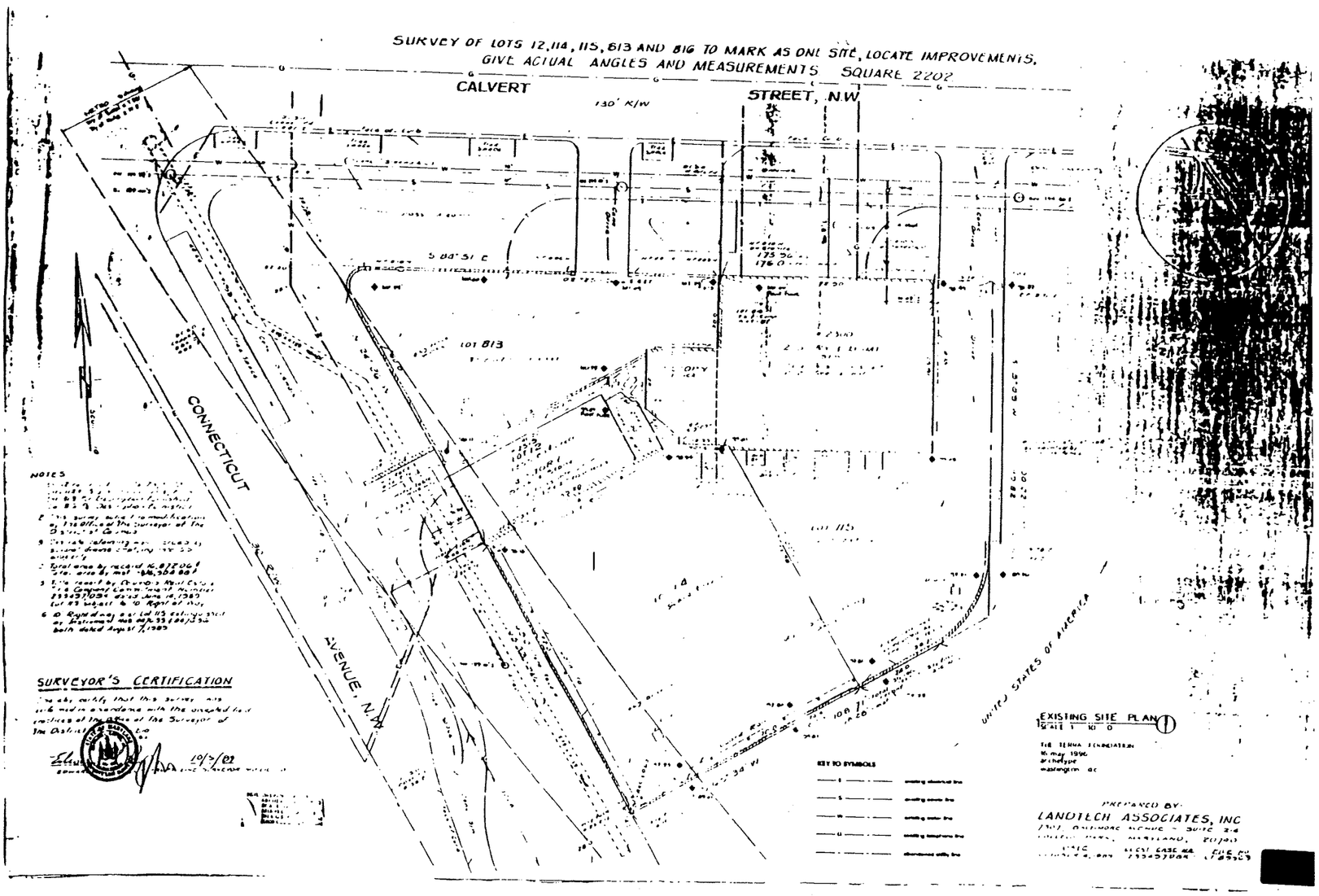


SECTION "I" ENTRANCE DRIVE



PLAN "I" ENTRANCE DRIVE

16di-001078

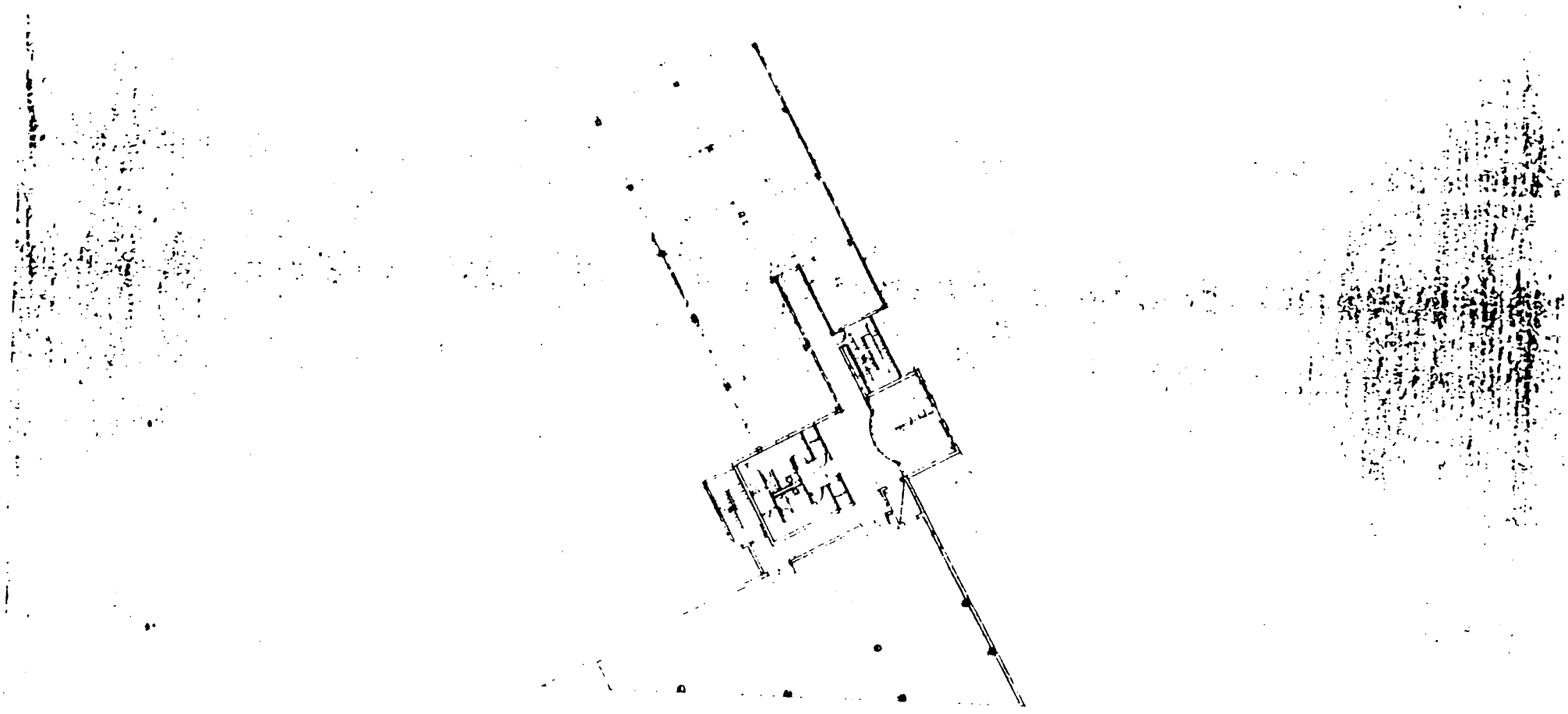

SURVEY OF LOTS 12, 114, 115, 813 AND 816 TO MARK AS ONE SITE, LOCATE IMPROVEMENTS, GIVE ACTUAL ANGLES AND MEASUREMENTS SQUARE 2202
CALVERT
STREET, N.W.
130' R/W
CONNECTICUT
AVENUE, N.W.
LOT 813
LOT 115
UNITED STATES OF AMERICA
NOTES
SURVEYOR'S CERTIFICATION
EXISTING SITE PLAN
KEY TO SYMBOLS
PREPARED BY:
LANDTECH ASSOCIATES, INC.

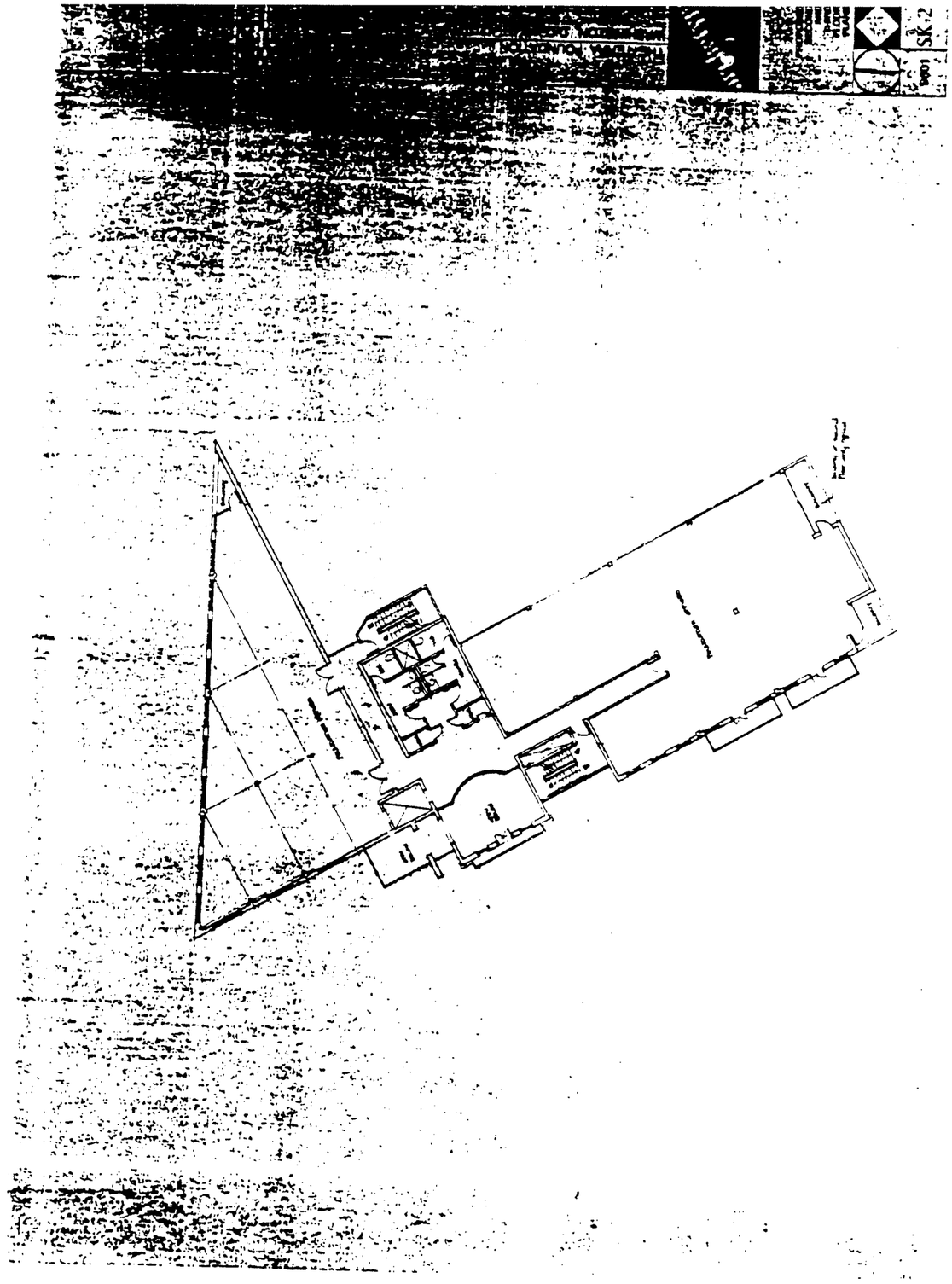
THE TERRA FOUNDATION
WASHINGTON, D.C.

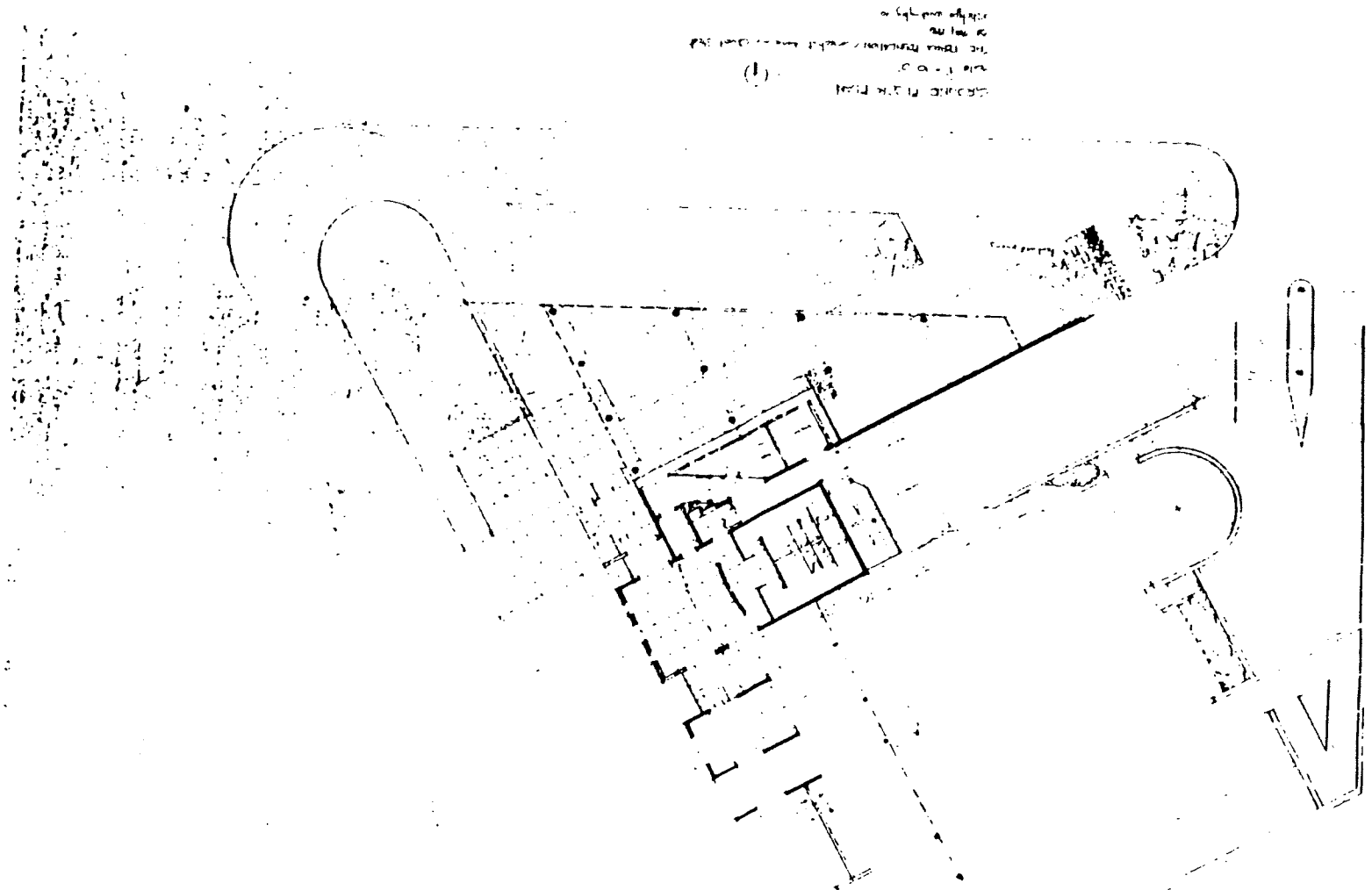
EXISTING ELEVATION

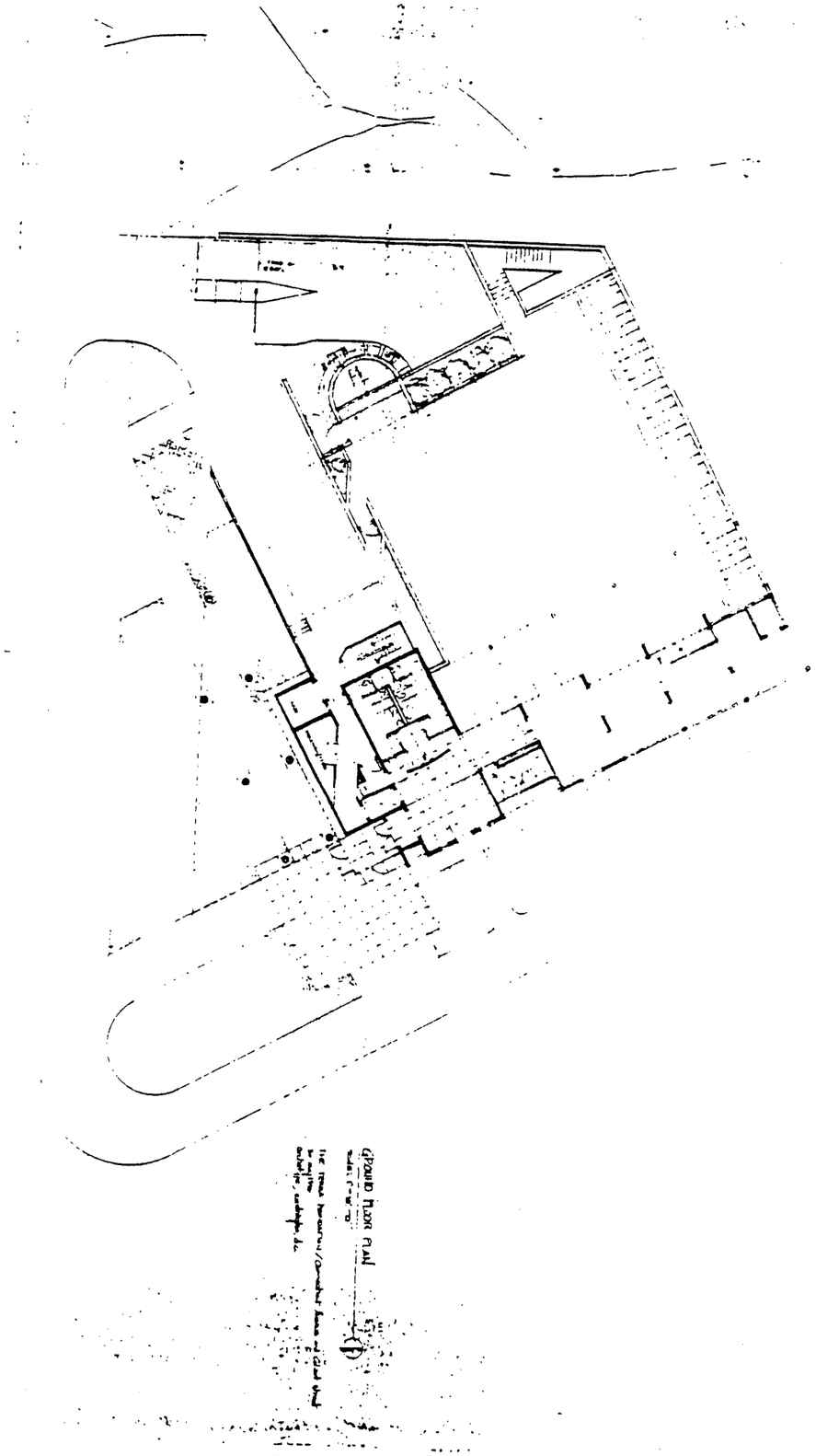
EX-1

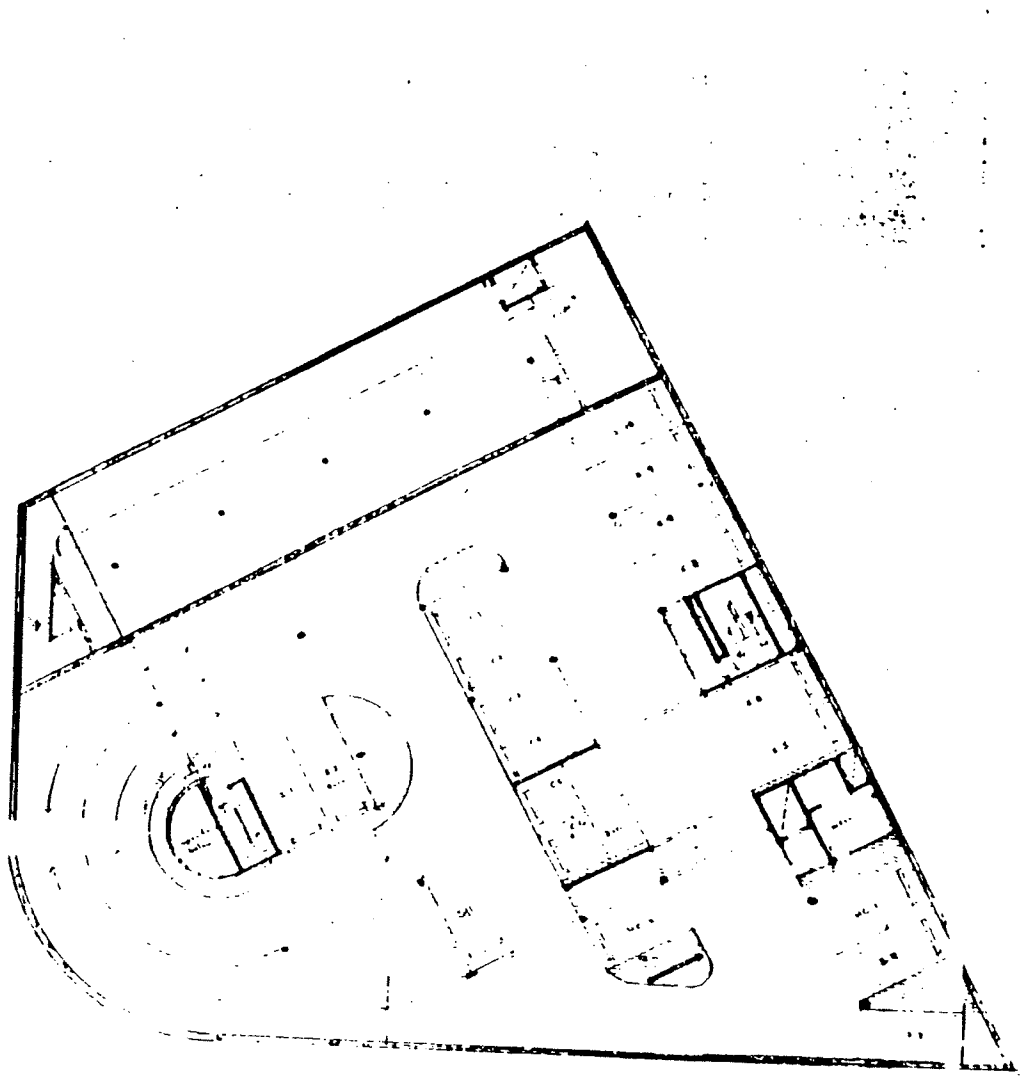
16di-001079



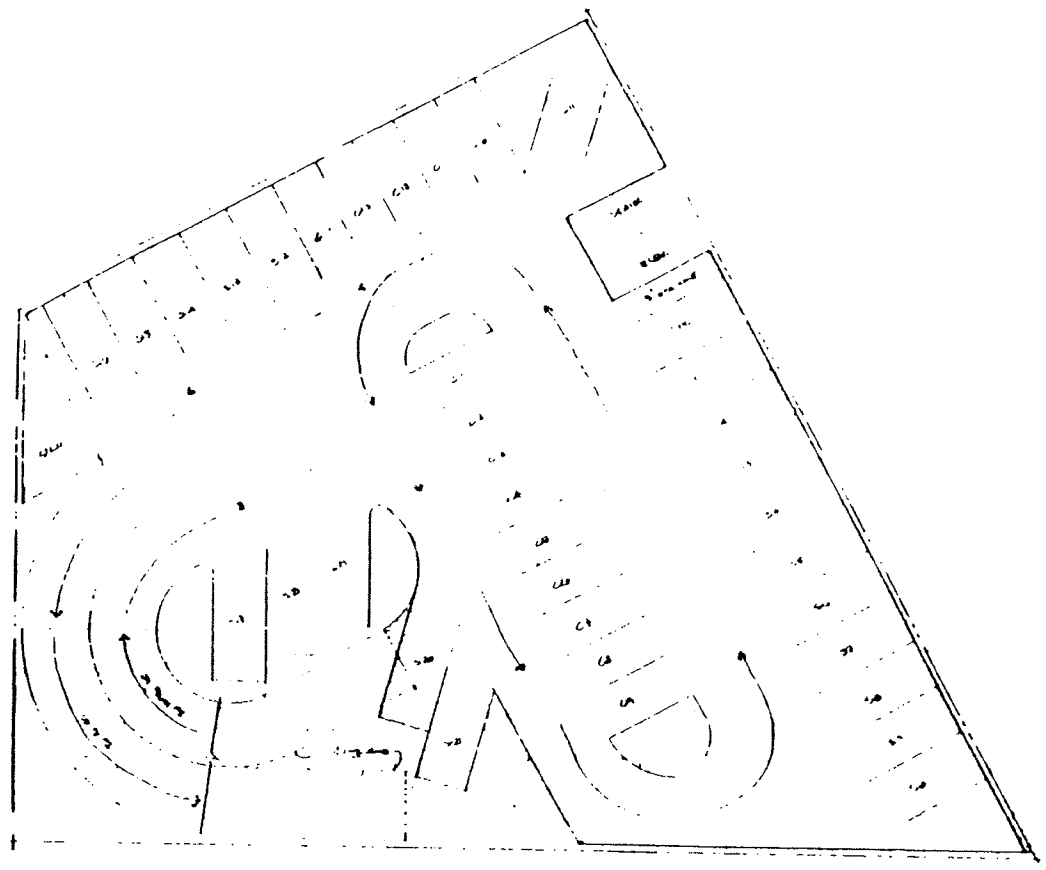





GROUND FLOOR PLAN



16di-001084



LOWER LEVEL PARKING - P3

PARKING SPACES - P3

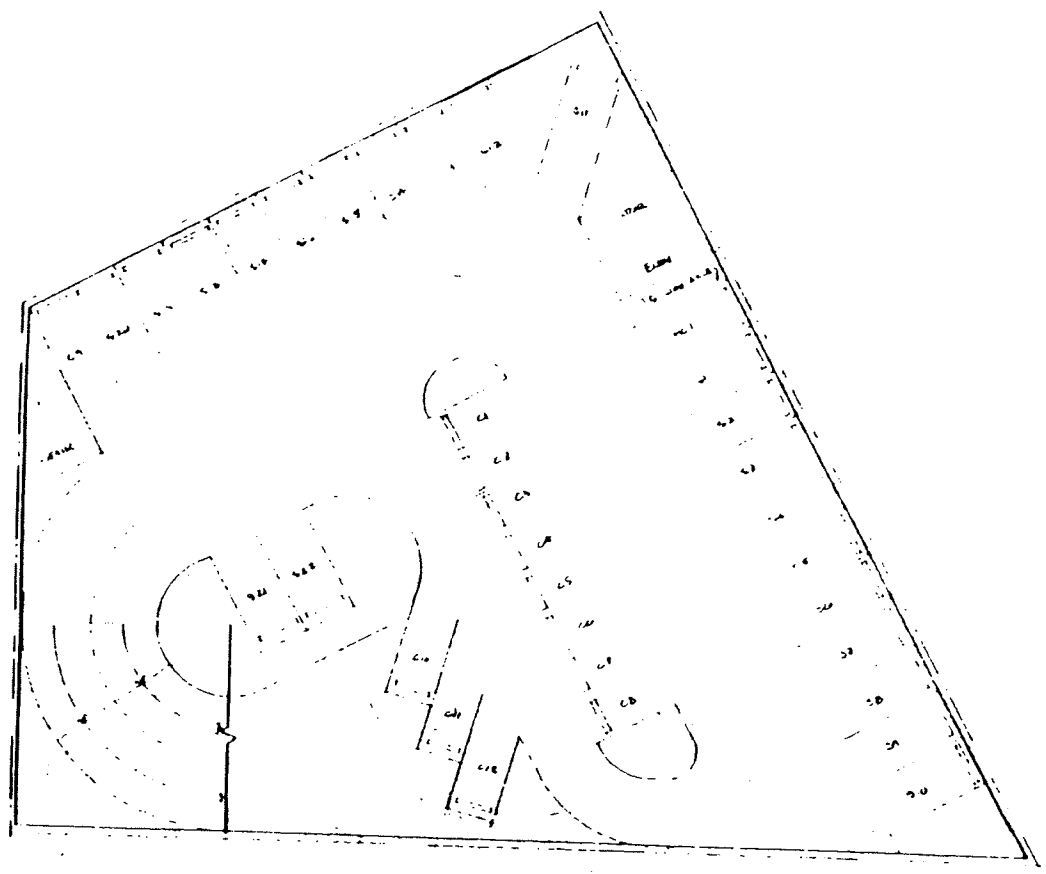
Temple Foundation / Connecticut Avenue and Court Street
30 May 1996
Architect, Washington DC

NORTH / SOUTH SECTION AT PARKING GARAGE
scale 1" = 10'-0"

EAST / WEST SECTION AT PARKING GARAGE
scale: 1" = 10'-0"

TERRA FOUNDATION / Connecticut Avenue and Calvert street
no. may 1992
ARCHETYPE, washington, dc

16di-001086



SCALE: A LOWER LEVEL PARKING - P3
SCALE: 1" = 16'-0"

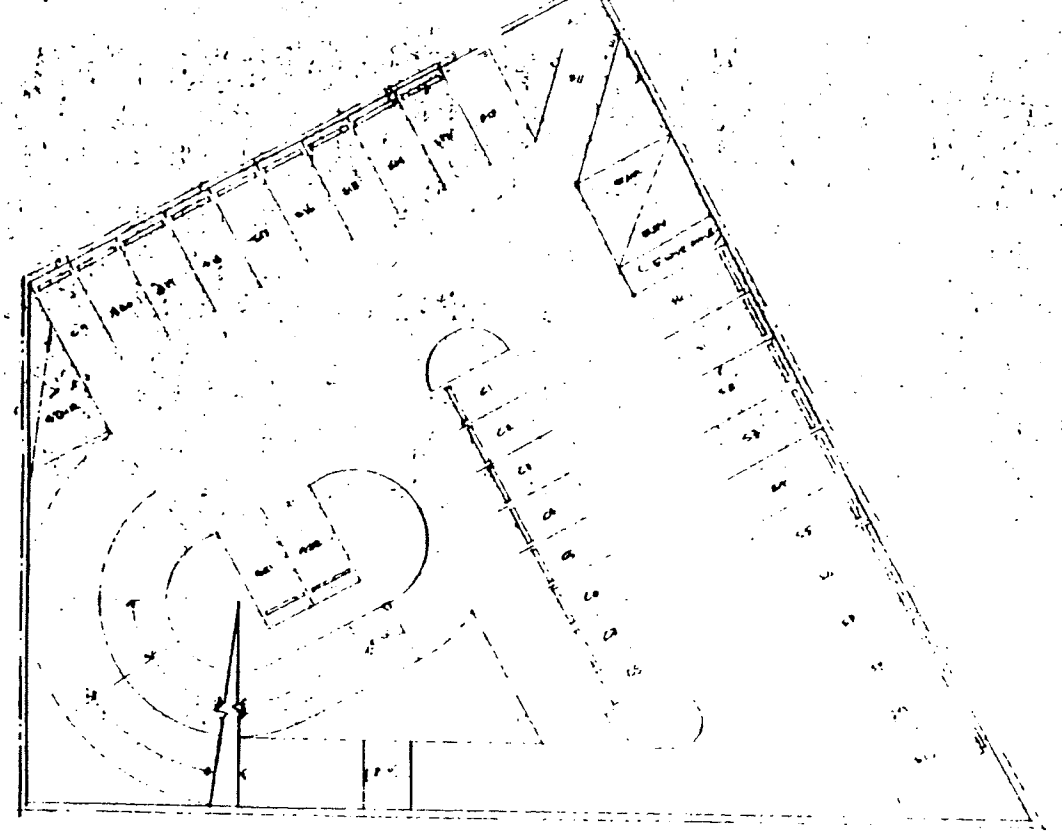
PARKING SPACES P3
STANDARD
HANDICAP
COMPACT
TOTAL

TERRA FOUNDATION

D | LOWER LEVEL PARKING - P2
scale 1" = 10'-0"

PARKING SPACES - P2.
1 HANDICAP [illegible]
20 STANDARD [illegible]
[illegible] COMPACT [illegible]
[illegible] REAL

TERRA FOUNDATION / [illegible] [illegible] [illegible] [illegible]
30 May 1996
[illegible]



A LOWER LEVEL PARKING - P2

PARKING SPACES P2
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85 STANDARD
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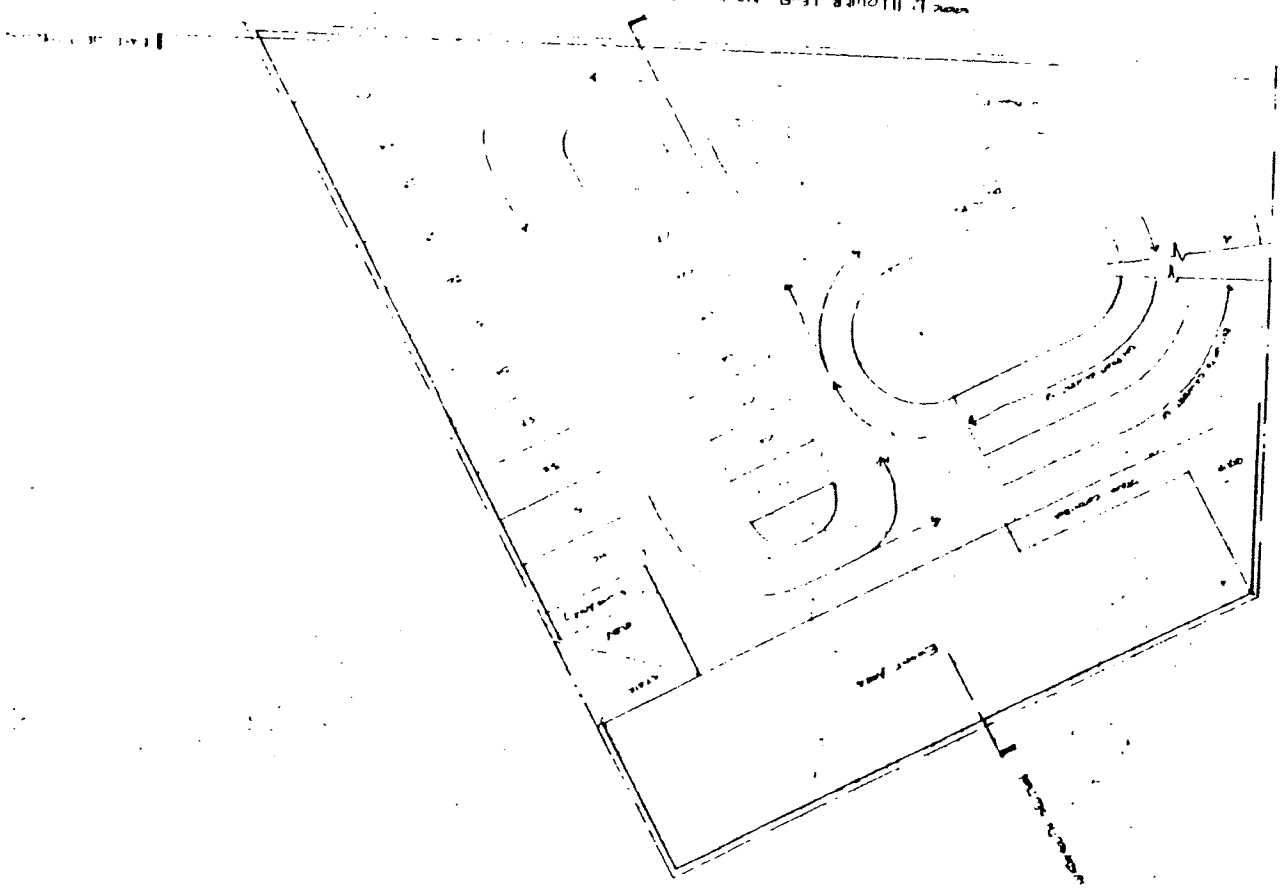
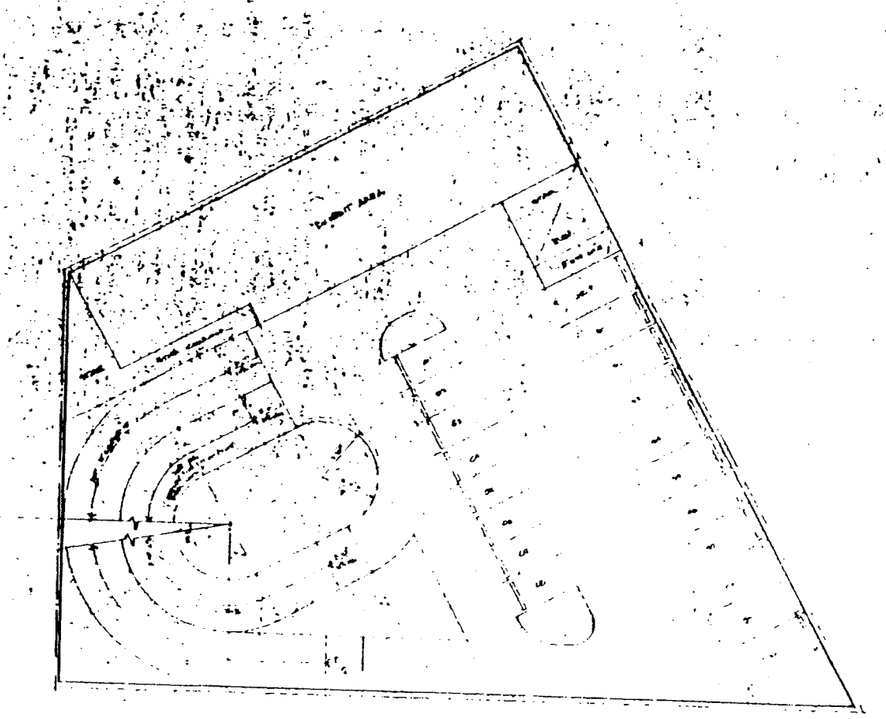
86 TOTAL

TERRA PANORAMA





A1 LOWER LEVEL PARKING P1

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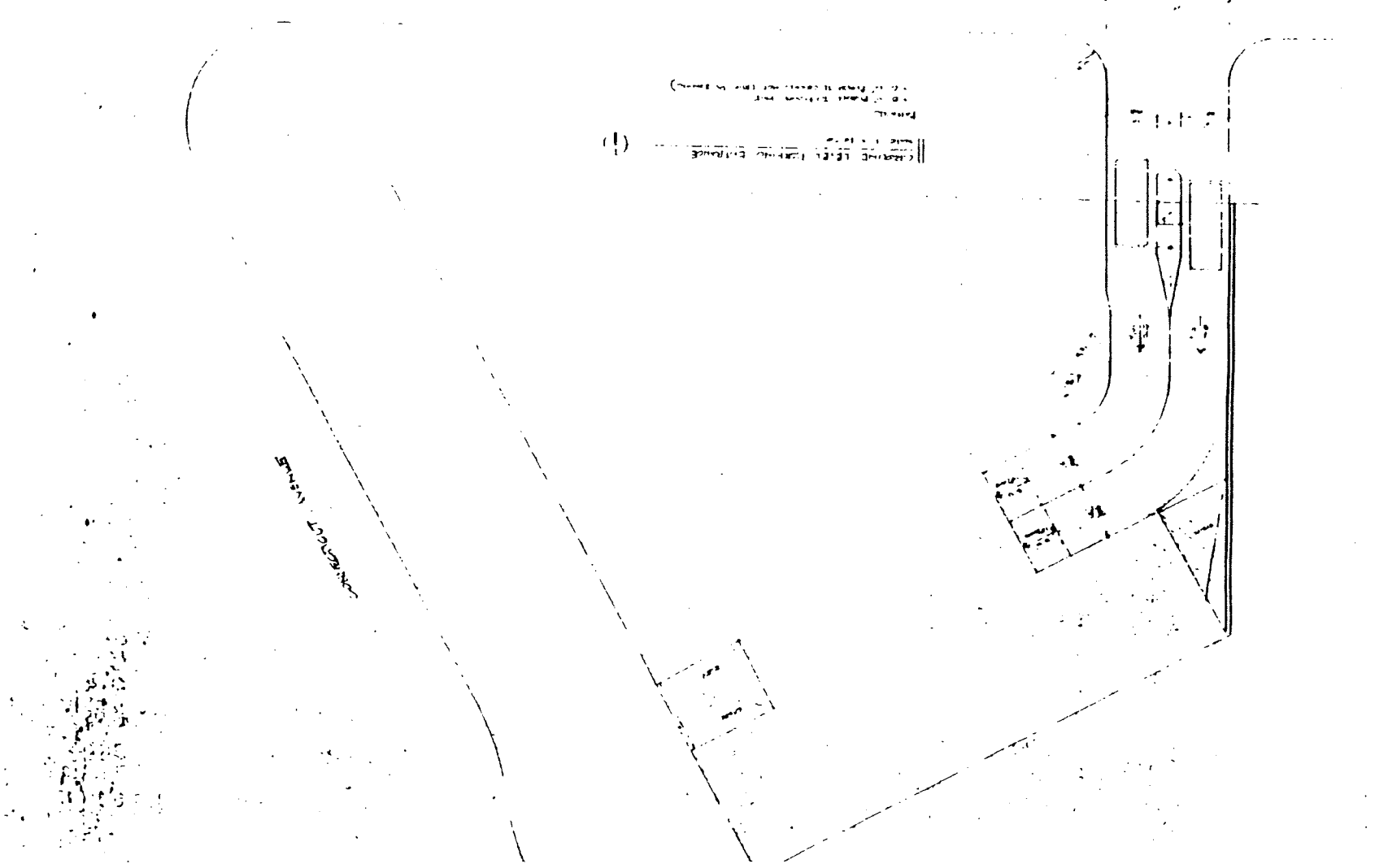

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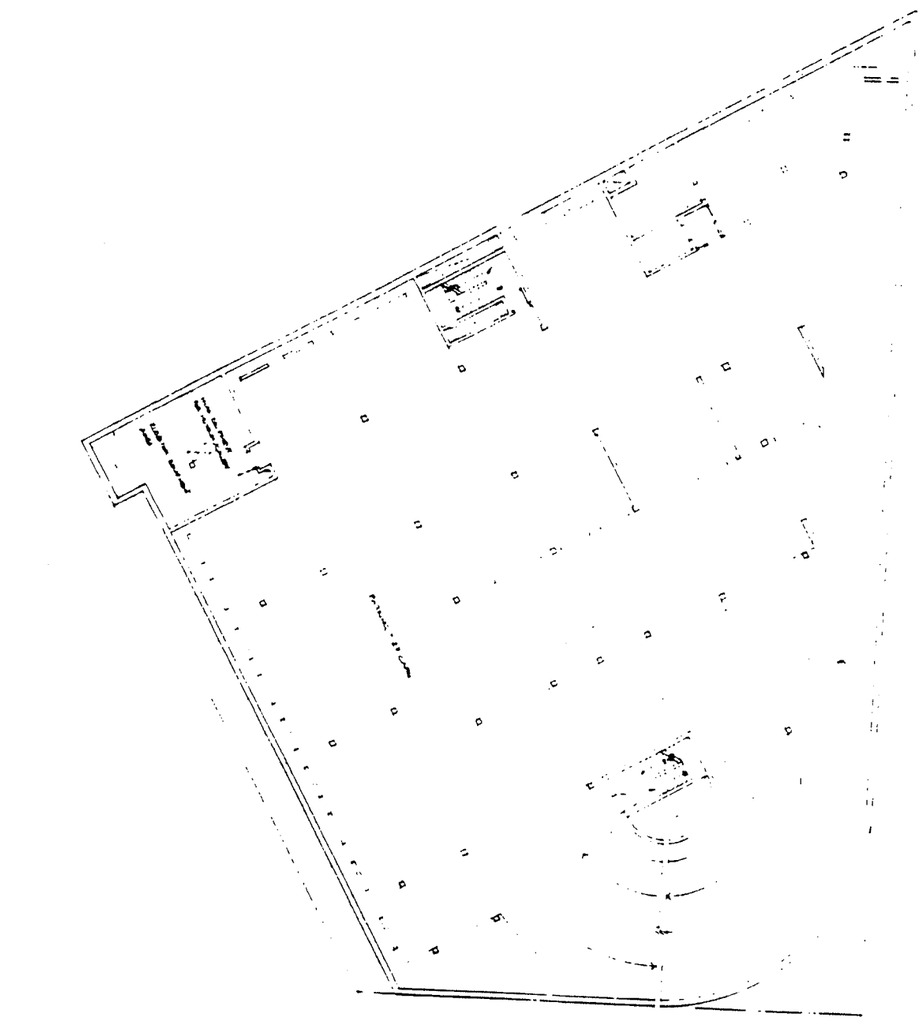

THE TERRA FOUNDATION
WASHINGTON, D.C.

SK-4

1996

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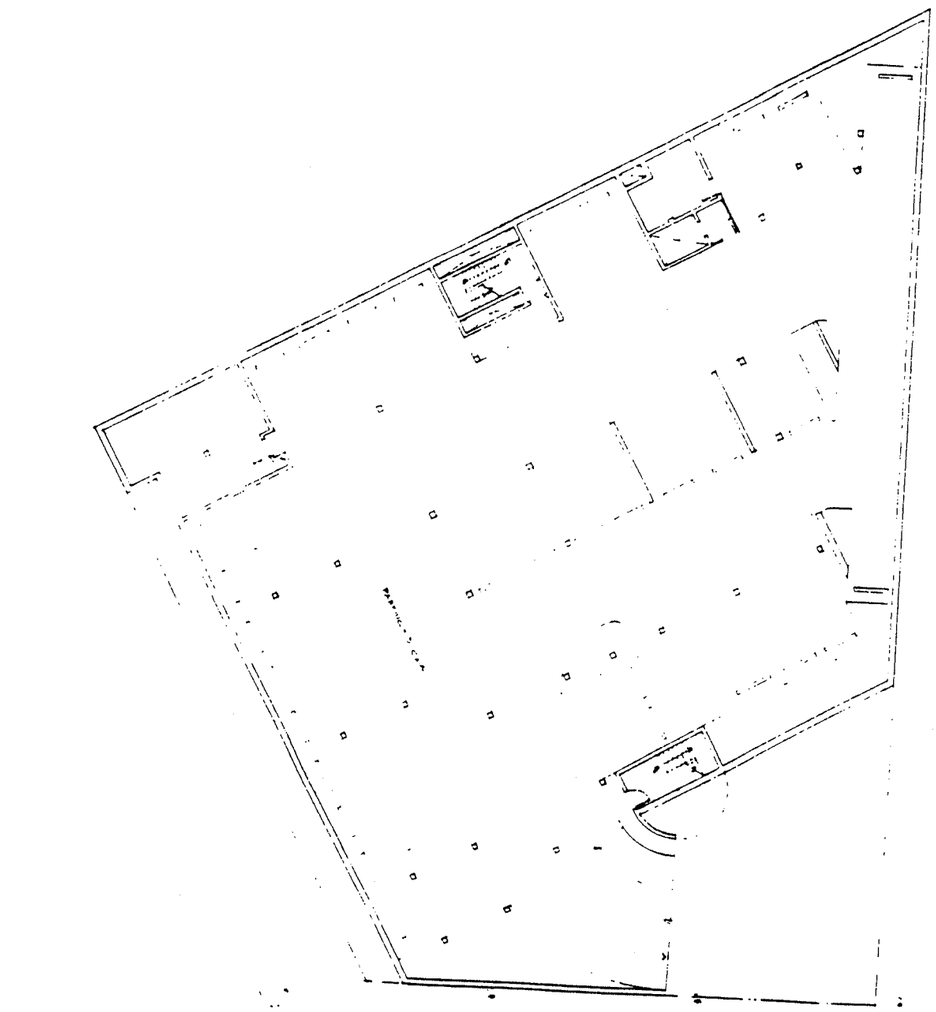
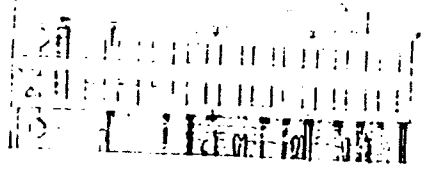
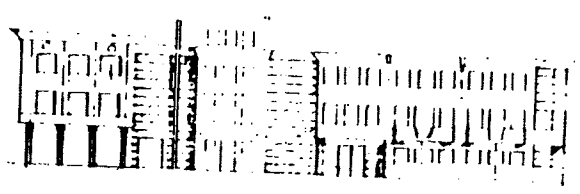


THE TERRA FOUNDATION
WASHINGTON, D.C.





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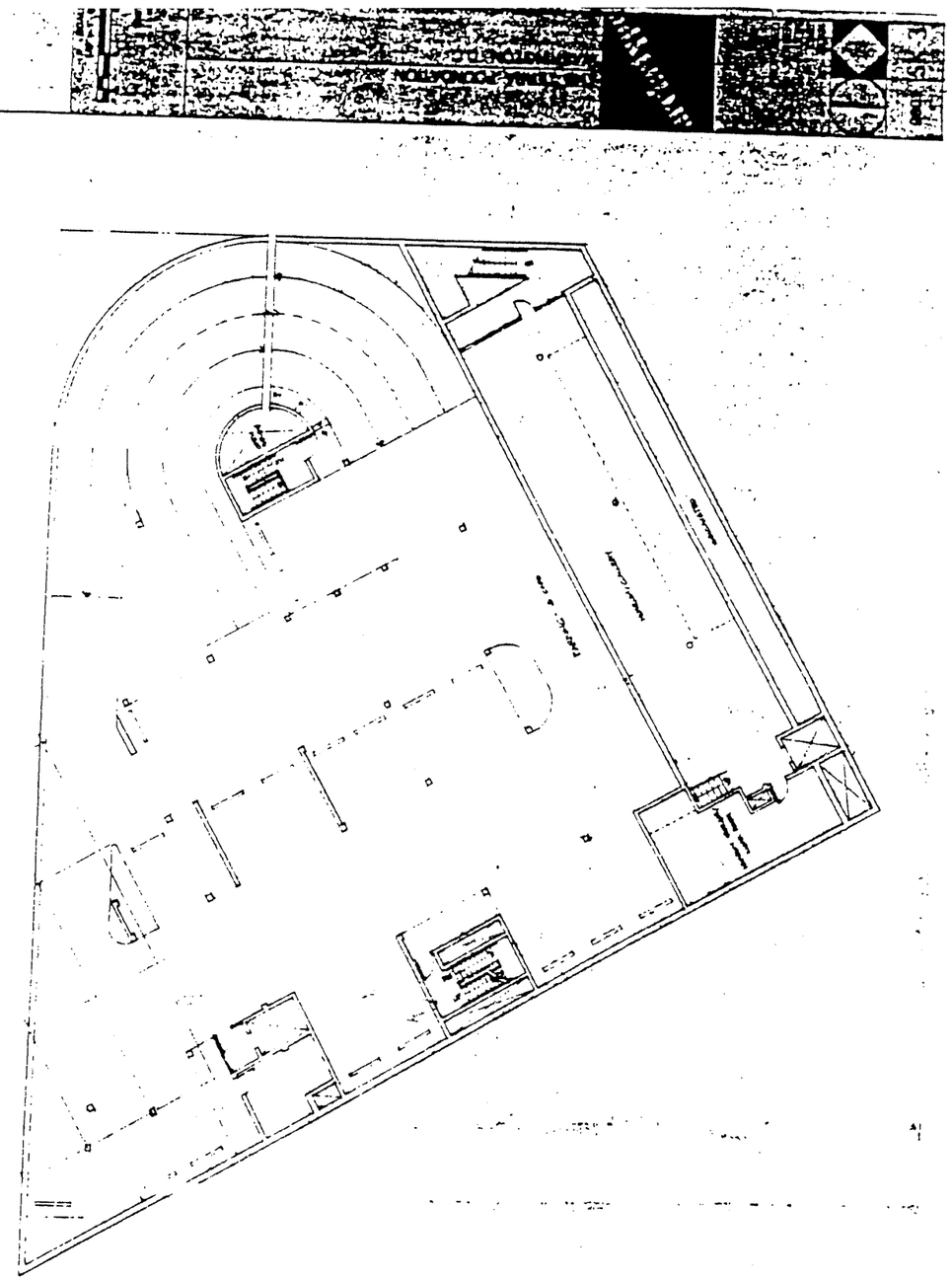

16di-001098

ATTORNEY GENERAL'S DRAFT TERMS

prepared: February 15, 2001

This proposal is in draft form and does not constitute an offer. It was developed by the Attorney General's staff from a review of the previous written proposals between the Art Institute and the Terra Foundation without discussion with the Art Institute or others.

Further this was produced at the urging of the Terra Foundation as to the specific terms for placing the Terra collections with the Art Institute.

This is prepared for settlement purposes only. Nothing in this proposal shall be used in any court proceeding and does not constitute an admission or concession. Nothing in this proposal shall be deemed a concession or binding until such is reduced to a complete and full writing and signed and agreed to by all parties.

Draft Proposal

That the Terra Foundation enter into an agreement and partnership arrangement with the Art Institute of Chicago similar in nature to the proposal discussed between said institutions as found in the several documents made by the Art Institute in June 2000 and thereafter, and specifically as provided herein.

The Terra Foundation's art collection to be gifted to the Art Institute in trust, said trust to be held by the Art Institute in perpetuity to be displayed and known at all times as the Daniel Terra Museum collection, with restrictions that such be used to develop and promote the appreciation of American artists;

That three representatives of the Terra Foundation be given positions on the Art Institute Board of trustees.

That three representatives of the Art Institute be added and given positions on the Terra Foundation Board of directors.

That the Attorney General of Illinois shall select three additional directors for the Board of directors of the Terra Foundation.

That Jim Terra shall be added as a director to the Board of directors of the Terra Foundation.

That the Terra Foundation negotiate to be given some office space for its Board and staff in the Art Institute, as well as, access to proper Board conference room facilities at the Art Institute and/or that appropriate office suite be maintained near the Art Institute

by the Foundation to allow it to maintain its staff , records and function, with appropriate access by the Terra Board to conference facilities at the Art Institute.

That the Terra's real estate on Michigan Avenue would be sold and the proceeds given to the Art Institute to fund part of the construction of the new wing building at the Art Institute, which wing will be the new east entry to the Art Institute and in exchange the new wing would bear the name of Daniel Terra .

That the Terra Foundation irrevocably agree that at all times it shall maintain its principal place of business in Chicago , Illinois.

That the Terra Foundation funds be used in part each year to pay an appropriate amount to the Art Institute toward the security, care and display of the collection.

That the Terra Foundation's restricted endowment for art acquisition be governed in its use by the a special committee for the Terra collection composed of equal members from the Art Institute and the Terra Foundation, and all acquisitions and deaccessions to be controlled pursuant to the code of ethics for American Art Museums.

That the Foundation retain its ownership and operation of the Giverny Museum , that a commitment and agreement be obtained from/with the Art institute that the Terra Foundation's Giverny Museum receive biennially or triennially , a traveling exhibition of works with art from the Terra collection and the Art institute collection, featuring the relationship between French and American art, as well as , other appropriate topics . Also a continuing loan program would be establish by the Art Institute to allow the display of Art Institute works at Giverny , including works by Monet and other Impressionists. That both the Art Institute and the Terra Foundation would pursue to develop additional relationships with other French museums to strengthen cultural relations.

That the Terra Foundation would in part fund and develop an education program under The Terra Institute for American Art in conjunction with the Art Institute's School which would involve student training in Giverny and Chicago, using school faculty, museum curators and staff. Particular emphasis would be given to the Terra Foundation's Giverny location and facilities.

That the Terra Foundation's restricted education endowment fund would be used to continue museum education programs for young children to visit the museum in Chicago and establish Terra scholarships to the Art Institute school. The use of this fund to be decided by a committee composed of both Art Institute and Terra Foundation members.

That the Terra Foundation's remaining funds be governed in its use toward acquisitions of art by the special committee for the Terra collection (composed of equal members from the Art Institute and the Terra Foundation) and be controlled

pursuant to the code ethics for American Art Museums.

That the Terra Foundation's remaining funds be governed in its use by the Terra Foundation Board in performing the above and further limited to its activities to use in Chicago and governed and controlled pursuant to the code ethics for American Art Museums.

That appropriate arrangements be made for Terra employees , including employment at the Art Institute.

That appropriate arrangements be made for the Terra members to continue to benefit from the Terra collections.

That directors Paul Tucker, Ted Stebbins and Judith Terra shall resign from the Board of directors of the Terra Foundation, and upon their forming a 501 c(3 charitable organization which shall bear the name "Terra" and which is restricted to support public education of American art, display of such and/or assist in the development of American artists by grants and/or scholarships and/or other public education efforts which is in support of American art, said organization shall then be funded with $ 10 million from the Terra Foundation, and control and use of said funds will be, except as restricted as provided herein, at the discretion of its fiduciaries. It may operate in any location.

That the Plaintiffs and the Illinois Attorney General agree to dismiss the complaints herein against all defendants with prejudice.

That reasonable attorney fees be paid for all parties to the litigation by the Foundation

That appropriate agreements to enforce the foregoing be made and agreed to by the Foundation in exchange for said dismissal.

16di-001104

EXHIBIT 17

16di-001105

EXHIBIT 17

MEER-CAT
RECYCLED
80000 SERIES
30% P.C.W.

MODIFIED 5/17/01

by: Floyd Perkins, AAG
Therese Harris. AAG

This is the Attorney General's second modified redlined version of the Settlement Proposal circulated by the mediator. This is a settlement document, it is intended for settlement discussion purposes only and can not be used for any other purpose. We have attempted to correct and or fill in details where we thought the draft was lacking. In addition, as was stated at the mediation discussions this office would not agree to a settlement until the identity of the new directors was in cement and the directors were acceptable to this Office. The changes we suggested also attempt to use the framework suggested by the mediator and which would allow a settlement to be reached prior to an actual election taking place.

Proposed Draft MEDIATED SETTLEMENT AGREEMENT

This agreement is made between the parties in the foregoing captioned matter who are identified as signatories hereto and it shall be adopted as the terms and provisions of a Consent Decree. The agreement and undertakings herein made by the Terra Foundation For The Arts (Foundation) by its acts by and through its board of directors , are agreed herein, to constitute and be deemed to be, resolved actions of the Board of Directors of the Foundation, and the terms of this agreement related to the Foundation are hereby adopted and made a part of the Foundation's corporate records and resolutions. The parties hereto in exchange for good and valuable consideration acknowledged received, agree to be bound by the terms and provisions and agree as follows:

A. THE FOUNDATION

1. The Foundation shall maintain its principal office in, and administer its operations from, Illinois. The Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois.

2. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with the undertakings of this agreement. The Foundation remains free to determine how best to achieve its goals, including where and to whom to make grants.

3. For at least fifty years, the Foundation shall maintain and exhibit the Terra Collection of American Art in Chicago. Thereafter, the Foundation shall continue to maintain and exhibit the Terra Collection of American Art in Chicago unless and until otherwise

authorized by the Attorney General of Illinois.

B. THE BOARD AND OFFICERS

1. Written settlement agreement to be approved by the parties shall identify five new Board members and new officers and committee chairs to be elected at a special election in mid-June, 2001, as well as other specific changes intended to improve the ability of the Board to achieve its goals, as follows:

a. Sen. Alan Simpson shall resign immediately from the Board and not thereafter stand for reelection. Dean Buntrock, Ron Gidwitz, Theodore Stebbins and Paul Tucker shall be re-elected for and serve a one-year term, ending September 2002, and not thereafter stand for re-election; except that, at any time, any or all of these four directors shall immediately resign from the Board if requested to do so by the Chairman of the Board.

b. The Board shall amend its By-Laws to:

i. expand the Board immediately to include fifteen members;

ii. institute staggered terms and term limits of one, two, three or four years for all Directors, with a full term to be four years and with no member serving more than eight years, except Judith Terra who shall be re-elected for and serve a one year term which shall expire ending September 2002 ; each of the new five directors to be elected to a four year term, and the remaining Board members to be elected to terms of two, three, or four years as the Board determines appropriate for each Director elected;

iii. reserve a majority of Board positions be held by disinterested residents of Illinois.

c. By May 25, 2001, the members of the Board shall nominate candidates to fill five vacancies on the Board at a special election to be held by mid-June 2001. Nominations shall be coordinated with the directors and the Attorney-General of Illinois by Messrs. Tucker, Stebbins, Buntrock, Gidwitz, and Hilliard and should be sent to Mr. Hilliard. Each nomination shall be accompanied by the candidate's resume, and the person proposing each candidate shall first have ascertained the candidate's willingness to serve on the Board, if elected. It is agreed that upon completion of the new Board's election in Mid-June 2001 the Attorney General will have the right to determine in his sole discretion whether he believes the majority of the Board to be pro-Illinois and to decide and advise them whether he will agree to a settlement of his lawsuit.

d. As a part of this mediated settlement, it is resolved and agreed that notice of elections of officers is hereby provided and agreed sufficient; that after the election of the new board, at the special meeting if the five new board members are present; or if not present, at a second special board meeting hereby set to be conducted by telephone as soon as possible after the election of the new board, provided each of the new board members can participate, new officers and committee heads shall be elected as a part of this mediated settlement, and the new Executive Committee shall be composed of these officers and committee heads. The Strategic Planning Committee shall includes Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall negotiate a partnership with another Chicago institution with the goal of ceasing to operate a stand-alone museum in Chicago.

e. The new Chairman of the Board shall be chosen from the new five Directors.

f. By entering into this agreement the Foundation agrees that the terms of this agreement are adopted as provisions of purpose and governance for the Foundation and can not be modified by the Foundation or its Board.

2. Decisions on new Directors shall be guided by a commitment to add to the Board persons possessing one or more of the following qualities:

a.c. history of civic and/or business leadership;

b.e. experience serving on museum or not-for-profit board of directors;

c.d. background or expertise in education;

d.a. expertise in American art; and

e.b. persons of national and international stature who have demonstrated interest and involvement in the arts.

C. OTHER

1. The individual plaintiff directors ~~This lawsuit shall be dismissed~~ in exchange for and pursuant to a Consent Decree adopting the terms of this agreement as herein provided. The Consent decree shall incorporate the terms of this settlement, the further actions and acts required by the terms hereof, subject to it's terms being binding upon all of the parties to the subject lawsuits and with the court vested with retained jurisdiction to enforce the terms of this settlement. The dismissal shall, subject to the foregoing, be made with prejudice, with full and

complete mutual releases given by the individual plaintiffs and defendants to each other, to the Foundation, and its officers and directors without any admission of wrongdoing or liability. It is expressly understood that the lawsuit by the People of the State of Illinois shall remaining pending and unaffected by this settlement, except that it is agreed that upon completion of the new Board's election in Mid-June 2001 the Attorney General will have the right to determine in his sole discretion whether he believes the majority of the Board to be pro-Illinois and to decide and advise then whether he will agree to a settlement of his lawsuit.

2. Reasonable attorneys' fees of plaintiff-directors and individual defendants shall be paid by the Foundation, as determined by the Court.

3. A mutually-acceptable press release shall be worked out among the parties.

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EXHIBIT 18

16di-001111

EXHIBIT 18

KLEER-FAX
RECYCLED
80000 SERIES
30% P.C.W.

Museum
of Fine Arts
Boston

465 Huntington
Avenue

Boston
Massachusetts
02115

phone
617.267.9300

February 11, 1997

Mr. James W. Collins
Bell, Boyd & Lloyd
70 West Madison Street
Suite 3300
Chicago, IL 60602-4207

Dear Jim,

I am pleased to enclose the report which the trustees of the Terra Foundation for the Arts have asked Charles Moffett, John Wilmerding, and myself to prepare. We are glad to be of help, and we hope that our report will be found both thoughtful and useful. Needless to say, each of us stands ready to elaborate on the report at a meeting with the trustees, and we are ready also to work with trustees if we can be helpful in the future in implementing some of our suggestions.

With best wishes,

Yours sincerely,

Ted

Theodore E. Stebbins, Jr.
John Moors Cabot Curator of American Paintings

ext: 3406
fax: 617-247-3728
e-mail: jmccarthy@mfa.org

Report to the Trustees of the Terra Foundation for the Arts

INTRODUCTION

The death of Daniel J. Terra in 1996 left the Trustees of the Terra Foundation for the Arts with the enormous responsibility of determining the future of the Foundation, whose assets include (a) a large, important collection of American art, (b) financial assets in excess of several hundred million dollars, (c) a building now devoted to the Terra Museum of American Art, Chicago and adjoining properties, and (d) the Museum of American Art of Giverny, as well extensive properties in the Giverny area.

It is clear that the Terra Foundation is to be devoted to American art. In the words of the mission statement, this includes the "acquisition, preservation, exhibition, interpretation, and research and scholarship of original works of American art." It is clear from the mission statement that the Foundation has the obligation not only to hold and exhibit excellent works of art, but also aims to make its collection broadly accessible, both through educational outreach and through distinguished scholarship.

At this time the Foundation implements its program through maintaining the collection in two museum buildings, one in Chicago and one in France, at Giverny. The latter site is dedicated to the "understanding of the interrelationship of French art with American art", and to strengthening the bonds of friendship and understanding between France and America.

The Trustees of the Foundation have asked the undersigned Advisory Committee to evaluate the collection and both museum buildings in light of their suitability in implementing the Foundation's mission. We have also been asked to suggest possible routes for the Foundation to take in the near future and over a longer term. Therefore, after analyzing the collection and the two museum buildings, we have suggested three possible long-term strategies for the Foundation. We believe that the future success of the Terra Foundation will depend on thoughtfully developing and defining its mission, and then implementing it with an excellent professional staff.

I. THE COLLECTION

Through his extraordinary energy and his great passion for American art, Daniel J. Terra was able to form a collection of American paintings in less than twenty years time that now ranks among the top twenty-five museum collections of this material. The collection does not rank in the top tier of museum holdings, but it does fall comfortably into the second

rank, along with such venerable institutions as the Clark Art Institute, the National Museum of American Art, and the museums at Saint Louis, Cincinnati, and Worchester (see attached list). The Terra Collection is a specialized one, with impressive, deep holdings in the works of the American Impressionists. In the American Impressionist field alone, it would rank among the top three or four holdings in the nation. Both major and minor figures are richly represented (with the caveat that several minor figures are too richly represented), and there is great depth and strength in the works of Chase, Cassatt, Sargent, Whistler, Prendergast, Tarbell, Hassam, Theodore Robinson, and Twachtman, as well as excellent related works by Curran, Bunker, Metcalf, Wendel, Frieseke, Miller, and other American painters who went to Giverny. There are, however, two weaknesses in the Impressionist collection: first, while there are extensive holdings in Whistler and Sargent, there are no major works by either painter; once the Foundation has been stabilized and program developed, at least one major work by each painter should be sought. Secondly, many of the works in the Impressionist collection are on paper (prints, drawings, and watercolors), and these must not be on view for more than a short period in any given year, for conservation reasons; as a result, much of the collection must necessarily remain in storage much of the time.

The remainder of the collection includes many outstanding works, but lacks enough strength or balance to make the collection as a whole a fine, or even satisfactory survey of American painting from Colonial times to 1940.

1.) The holdings in American Modernism would rank next in terms of quality; there are fine works by Bellows, Hopper, Stuart Davis, Dove, Sheeler, O'Keeffe, and Hartley. This area is sufficiently good for survey purposes.

2.) However, the work of The Eight, the American Realists who followed Impressionism and preceded Modernism (roughly speaking) is not well represented, except for works by John Sloan and Robert Henri. This is a gap which should be filled.

3.) Hudson River School. This part of the collection is fairly good with fine examples by Church (a tiny work), Fitz Hugh Lane, Sanford Gifford, Thomas Cole, William Bradford, George Inness, and others by Whittredge, Silva, and Britcher. With some weeding out and some additions, this could become a distinguished part of the collection. Major works are needed by Church, Bierstadt, Durand, and others.

4.) Genre Painting. Overall, a weak area, though distinguished by a fine group of works by Winslow Homer (albeit without a major late work of the kind which would now be very difficult to obtain), and good paintings by Bingham, Mount, J.G. Brown, and others.

5.) Folk Painting. There is a beginning of a nice collection here, with a good *Peaceable Kingdom*, by Edward Hicks, two fine works by Ammi Phillips, and a handful of others.

6.) 18th-century and Federal. Here, there is one great, landmark painting, *The Gallery of the Louvre* by Samuel F.B. Morse, but it is surrounded by very little of the supporting material which one would want in order for the collection to be an adequate survey. There is a good Rembrandt Peale *Washington*, a poor Copley, and virtually nothing by Washington Allston, Gilbert Stuart, John Vanderlyn, John Trumbull, Benjamin West, and the like.

7.) Still-life. Another weak area, with nothing at all by most of the major masters of American still-life painting, including Harnett, Peto, the Peale family, John F. Francis, Martin J. Heade, or the like. There are good examples by Joseph Decker, Dunning, and W.S. Mount. This is an area where very fine examples can still be purchased, and consideration should be given to building this part of the collection.

SUMMARY

The Terra Collection is outstanding in one area, that of American Impressionism. The addition of several major works in this field could make it an even more distinguished holding.

In other fields of American art, there is a mixture of strong and weak paintings. In order to make the collection a truly fine survey of American painting from Colonial times to 1940, an aggressive program of purchases and weeding out would need to occur under expert guidance. Significant results could be accomplished with a budget of $50,000,000 to $100,000,000 over a three year period. However, it should be noted that truly fine American paintings are becoming more and more difficult to obtain, and major works by some of the most important American painters (such as Eakins or Homer) are virtually impossible to obtain.

Finally, it should be noted that virtually nothing should be done in terms of building or refining the collection until the Foundation's mission, purpose, and location have been agreed upon.

II.) THE TWO BUILDINGS AND THEIR PROGRAMS

A.) Chicago. We feel strongly that the present building in Chicago is inappropriate as a museum. Although is has been effectively retrofitted, and though many fine exhibitions have been seen in it, it will never be a wholly satisfactory museum space, and its location in a retail area seems not the best use of the real estate. The building should be sold, and the collection moved to a more appropriate space.

The program in Chicago up to this time has had good and bad features. The education program, with good professional leadership and effective use of volunteers, has been successful. The exhibition and publication programs, on the other hand, have suffered from being understaffed professionally and have not reached the level of consistent quality that one would expect from an institution with the Terra's financial and artistic resources. There have been a number of beautiful exhibitions, some organized by the Terra and some taken on a touring basis, but there has rarely been a Terra publication of outstanding scholarly quality or importance. In general, however, visitors to the Terra Museum in Chicago have been treated to well installed, pleasing, educational exhibitions of American art, drawn both from the permanent collection and borrowed from other institutions.

B.) Giverny. The Terra Foundation has built a handsome, unobtrusive structure in the town of Giverny, one that is well designed and well suited for its function as a small gallery or museum. However, there are some major problems with the Giverny program, in our opinion. If this museum is to be "dedicated to the understanding of the interrelationship of French art with American art," as suggested by the mission statement, it is accomplishing only a fraction of what it might. One problem is that Giverny has only a seasonal (April - October) audience, one that consists largely of American, Japanese, and European tourists. Monet's gardens draw around 500,000 visitors annually, but the Museum of American Art has so far been able to draw only a fifth of this number at best. We feel strongly that a better program in Giverny, with broader efforts to promote it, could result in a considerably larger audience for the Terra program.

The collection in Giverny, consisting largely of works by Americans who worked in France, is of very mixed quality, and seems an inappropriate vehicle for persuading the French or European audience that America produced good art. The fact is that many of the American painters in Giverny were mediocre painters, many of

whose works are boring and derivative. Overall, the part of the Terra Collection presently in Giverny, though it includes a number of fine works, seems less than ideal as a means of presenting, promoting, and encouraging the study of American art.

III.) DEFINING THE MISSION

The highest priority for the Foundation is for the trustees, together with professional staff of high quality, to define the mission of the Foundation. There are a number of possible alternative scenarios:

1.) Continue to maintain free-standing museums in both Chicago and Giverny. We believe that that collection as it is now constituted is inadequate to serve both the Chicago and Giverny audiences well. The collection is simply not large enough or strong enough to be able to fill two separate museums with works of superior quality. If the trustees wish to continue to have a museum in Chicago and one in Giverny, consideration should be given to merging the Terra Collection into either the Art Institute of Chicago (whose collection of American paintings would be highly complimentary to the Terra, and which would together combine to make an American collection of first rank) or with Northwestern University (in which case the Terra would become a scholarly university museum, along the lines of the Harvard Museums or the Yale University Art Gallery). As part of either the Art Institute or Northwestern, the Terra staff could administer the Giverny program, sending better works from the permanent collection along with improved annual summer exhibitions there.

2.) Concentrate on the French/American connection. If this is the Foundation's primary aim, then it would follow that an important exhibition and study program be based in Paris, given Giverny's seasonal, tourist audience. The Foundation could acquire a *hotel de ville* of the size of the Picasso Museum in Paris, to house a new *Terra Center for American Art and American Studies* in Paris. Such a center could mount exhibitions, while also perhaps providing works on loan to French museums, granting fellowships for French and American artists, graduate students, and scholars to study in each other's countries, presenting courses for the study of American art in Paris, and giving scholarly consideration to American and French culture and their interrelationships. Given the assets of the Terra Foundation, this could be a truly significant and successful undertaking. The best American art from the collection would be shown in Paris, and temporary shows could still be sent to the adjunct museum in Giverny. Under this plan, the Chicago museum would be eliminated.

3.) Emphasize the Terra Collection as a complete, excellent survey of American art in the United States. Under this option the trustees would build and weed the collection in order to make it a free-standing museum of American paintings, with appropriately high quality exhibitions, publications, and educational programs. They would consider keeping the collection in Chicago (while perhaps considering a merger with the Art Institute or Northwestern), or moving it to another city with a complimentary collection with whom either a merger or a cooperative relationship could be considered (the Corcoran or the National Museum of American Art in Washington, the Pennsylvania Academy in Philadelphia, or the like). Alternatively, they might also consider moving the Foundation to a city with a fine museum that lacks American art, such as Denver, Seattle, or Los Angeles.

IV.) RECOMMENDATIONS

1.) We strongly recommend that the Foundation trustees immediately begin a search for a highly qualified executive director or president of the Foundation. The ideal founding director would be a nationally recognized senior figure, whose appointment could lend much needed credibility to the Terra program as it evolves. Ideally, the executive director would be both a senior expert and scholar in American art and someone with extensive museum and administrative experience. If such a person could be found, even for a one or two year term, he or she could work with the trustees to plan the program and the future of the Foundation, and would set both the direction and the standards for future excellence. The Foundation would have to be prepared to pay competitively in terms of salary and support, as the right candidate would have to be lured from another position or from retirement, and the salary of $200,000 to $250,000 would have to be paid. A distinguished appointment could help enormously to win credibility for the Foundation and its program.

The new executive director or president would then hire a curator and other such positions as are deemed necessary.

2.) The board should be expanded and strengthened, with the addition of four or five outstanding representatives of the museum, academic, and foundation professions. The Amon Carter Museum in Ft. Worth, Texas, for example, has profited from such representation on its board.

3.) In the meantime, the collection must not be allowed to languish. We understand that at the moment letters are not being answered, no loans are being made, and credibility is being lost. We recommend that a curatorial advisor or a part-time curator be hired immediately in order to oversee the rudiments of collection care, as well as loans and the current educational and exhibition program. There are several free-lance curators who might take this on on a short-term basis.

CONCLUSION

The Terra Foundation for the Arts is an institution with enormous wealth, both in terms of its financial assets and its art collection. It has the potential for contributing very significantly to the understanding of American art, both in the US and in Europe. Given the recent death of its founder, it is essentially a brand new organization, one that must define itself and its mission in a realistic way, and which must then proceed to find highly qualified staff who will produce a program of true excellence.

Respectfully submitted,

Charles Moffett
Theodore E. Stebbins, Jr., Chairman
John Wilmerding

February 11, 1997

Leading Collections of American Paintings of the Period 1670 to 1940

Metropolitan Museum of Art, New York
Museum of Fine Arts, Boston
National Gallery of Art, Washington, DC

Yale University Art Gallery, New Haven, CT
New-York Historical Society
Philadelphia Museum of Art
Fine Arts Museums of San Francisco
Cleveland Museum of Art
Detroit Institute of Arts
Wadsworth Atheneum, Hartford, CT
Pennsylvania Academy of the Fine Arts, Philadelphia, PA
Corcoran Gallery of Art, Washington, DC
Brooklyn Museum

National Museum of American Art, Washington, DC
Sterling and Francine Clark Art Institute, Williamstown, MA
Art Institute of Chicago
Toledo Museum of Art
Addison Gallery of American Art, Andover, MA
Amon Carter Museum, Fort Worth, TX
Harvard University Art Museums, Cambridge, MA
Whitney Museum of American Art, New York
Terra Foundation of American Art (Chicago & Giverny)
Saint Louis Art Museum
Cincinnati Art Museum
Worcester Art Museum
Freer Gallery of Art, Washington, DC
The Phillips Collection, Washington, DC

Munson-Williams-Proctor Institute Museum of Art, Utica, NY
Nelson-Atkins Museum of Art, Kansas City, MO
Abby Aldrich Rockefeller Folk Art Center, Williamsburg, VA
Bowdoin College Museum of Art, Brunswick, ME
Newark Museum
Carnegie Museum of Art, Pittsburgh, PA
Reynolda House, Museum of American Art, Winston-Salem, NC
Museum of Fine Arts, Springfield, MA
Museum of Art, Rhode Island School of Design, Providence, RI
Dallas Museum of Art
New York State Historical Association, Cooperstown, NY
Mead Art Museum, Amherst, MA
Hirshhorn Museum, Washington, DC
Chrysler Museum, Norfolk, VA
Butler Institute of American Art, Youngstown, OH
Baltimore Museum of Art

Columbus Museum of Art
Maier Museum of Art, Randolph-Macon Women's College, Lynchburg, VA
Isabella Stewart Gardner Museum, Boston, MA
Thyssen Collection, Madrid
Timken Museum of Art, San Diego, CA
Los Angeles County Museum of Art
Gilcrease Museum, Tulsa, OK
Montclair Art Museum, Montclair, NJ
Cape Ann Historical Museum, Gloucester, MA
Jefferson Medical College, Philadelphia
Santa Barbara Museum of Art, Santa Barbara, CA
New Britain Museum of American Art, New Britain, CT
Huntington Library, Art Collections and Botanical Gardens, San Marino, CA
National Portrait Gallery, Washington, DC
Colby College Museum of Art, Waterville, ME

February 3, 1997

16di-001122

EXHIBIT 19

EXHIBIT 19

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16di-001123

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AFFIDAVIT OF PAUL HAYES TUCKER IN SUPPORT OF
DEFENDANTS' OBJECTIONS TO PROPOSED SETTLEMENT

The undersigned, upon oath, does hereby depose and state as follows:

1. I am Chairman of the Board of Directors and President of the Terra Foundation for the Arts ("Foundation"), a defendant in Buntrock v. Terra, Case No. 00 CH 13859. I was elected to the Board of Directors of the Foundation ("Board") in October 1998 and became Chairman of the Board and President in 1999. I make this declaration in support of defendants' objections to entry of the proposed Consent Judgment and Order in this litigation.

2. On June 29, 2001, six members of the Board purported to approve a proposed settlement that would destroy the vision of Daniel Terra by crippling his Foundation in its mission to propagate American art in the United States and abroad. I voted against the settlement because that was the only action I could take consistent with my fiduciary duties to the Foundation.

3. The provisions of the settlement that restrict the Terra Collection to Chicago for 50 years and install an Illinois majority on the Board of the Foundation are plainly antithetical to the purposes of the Foundation. The charter, the By-Laws, and the well-documented evidence of Daniel Terra's intent to propagate American art worldwide render preposterous any claim that the Illinois-centric provisions adhere to the Foundation's purpose. Just days before Daniel Terra opened the Terra Museum in Chicago, he was in Giverny, France, negotiating the purchase of a piece of property with the intention of establishing a foreign outpost.

4. The proposed settlement wastes what is perhaps the Foundation's most valuable intangible asset – its bargaining power. Since the Board began its strategic planning, which included among other options partnership with another art institution, interest from other institutions has been intense. The Terra Collection would vault any one of several highly competitive art museums into sole possession of the undisputed best American art collection. This heated competition was a great boon to the Foundation, which could play its suitors off one another and hold out for the best partnership terms. The proposed settlement sacrifices this and all but hands the collection meekly to the Art Institute of Chicago.

5. The settlement also constitutes a waste of Foundation assets by squandering the Foundation's best and most creative opportunity to enhance its visibility worldwide. Such international visibility was central to Mr. Terra's mission, as the Giverny museum illustrates. But because of the size of the Terra Collection and the Foundation's resources, it is not feasible for the Foundation to finance, supply and operate new museums abroad while maintaining a significant United States presence. However, as several pioneering institutions have shown, it is possible—with a very limited investment—to establish permanent exhibition spaces in far-reaching locations by taking advantage of corporate and government sponsorship. For example, the Guggenheim's museum in Bilbao and its exhibition space in Berlin were largely financed by entities in the host countries. By supplying a limited number of works from its collection, the Guggenheim reaps tremendous rewards in name recognition and exposure in Europe as well as here in the United States. Other museums, such as Boston's Museum of Fine Arts, have followed this model with great success. Similar relationships were a promising option for the Terra Foundation in pursuing its quest to enhance appreciation of American art. The proposed settlement wastes this important opportunity.

6. The tactics of Assistant Attorney General Floyd D. Perkins throughout the course of this litigation have been repugnant in many respects. First, it has been clear to me that Mr. Perkins does not respect the mission of the Foundation, as set forth in its charter and By-Laws, to propagate American art in the United States and abroad. His only desire has been to capture the Foundation's assets in the State of Illinois and to make the Foundation "parochial," as he himself has stated.

7. Second, it is obvious that Mr. Perkins has been willing to use the power of his office to intimidate Board members and make personal attacks that inhibit their ability to act in the best interests of the Foundation. This was particularly evident in the cases of Stephanie Pace Marshall and Theodore Stebbins.

8. Dr. Stebbins has long been a supporter of considering all options, within and without Chicago, that will best achieve the Foundation's goals for the future. Starting with his first report to the Board as an advisor in 1997, through strategic planning sessions in 2000, Dr. Stebbins encouraged review of both in-state and out-of-state options. He has been an especially strong advocate of maintaining a stand-alone museum. However, when the plaintiffs and Mr. Perkins turned the focus of the litigation upon him and threatened to sully his well-deserved reputation with exaggerated and unfounded charges of impropriety, Dr. Stebbins was pressured to avoid further litigation. He therefore spearheaded the idea of mediation and—after Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant—urged acceptance of a settlement that is in serious tension with his long-stated views about the Foundation's best interests.

9. Dr. Marshall was also the subject of a highly inappropriate use of prosecutorial power that resulted in a clear conflict of interest. I believe that it was inappropriate

for Stephanie Pace Marshall and Theodore Stebbins to vote on the proposed settlement under the circumstances.

10. Under penalties as provided by law pursuant to Section 1-108 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this affidavit are true and correct.

Executed this 18th day of July, 2001

Paul Hayes Tucker

EXHIBIT 20

16di-001128

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EXHIBIT 20

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46di-001129

Terra Foundation
Strategic Planning Committee
Minutes
May 10, 2000

In attendance:

M. Daley
J. Terra
P. Tucker
D. Ratner, staff

By phone:

S. Pace Marshall
T. Stebbins

By Invitation

S. Weil

The meeting was called to order at 11:15 AM at Floor, 664 N. Michigan, TFA Offices.

Paul Tucker introduced Steve Weil, a consultant from the Hershhorn.

Steve began by indicating that the 1st question that need to be answered was "who is it that TFA intends to benefit, i.e., who is the primary beneficiary. He asked if there was consensus on this question. The discussion indicated the following:

- National and International Art Scholars (scholarship)
- General Public, national and international (US and Europe)
  - All ages from kindergarten to the grave
- Publics' awareness of American art, including understanding and appreciation

Is the status quo doing that? Paul Tucker suggested that the museums are not attracting large enough numbers and that the education is not at a high enough level.

Stephanie Pace Marshall indicated that we needed more leverage, power to influence and visibility.

Paul Tucker noted that:

- We don't have a premiere collection which could attract the numbers needed
- We don't have the "chits" with other museums to attract exhibits
- We don't have the clout with other museums to attract exhibits

Ted Stebbins asked if we could maximize the status quo. Steve Weil noted that we seemed to have good public programming but nothing has been happening. He asked, Why? And suggested that we just don't have enough "weight".

Stephanie Pace Marshall asked if we could align with another institution that could give us the weight we require.

Steve asked the cost of running TMAA. Donald Ratner indicated this as follows:

- Annual net cost of $3 million
- $30 million value of Chicago property
- The endowment tied up to finance the Chicago property could be calculated by capitalizing the $3 million at, say, 5% which amounts to $60 million.
- Therefore the dollar amount of assets "tied up" in Chicago is $90 million ($30 million property + $60 million endowment)

Ted Stebbins suggested that we could affect people in other ways than a museum.

Stephanie Pace Marshall asked if the primary beneficiary is the general public, do we need a museum?

Ted Stebbins noted that scholarship tends to filter down and does benefit the general public.

Paul Tucker noted that we could sell the collection and generate an additional $200 million; not that he was suggesting that, but just pointing out that there are limits on how to get additional funds. He further noted, however, that we do have continuing responsibilities for the collection. He mentioned that one alternative would be to put all the major art in Giverny, sell the Chicago building and use the money to enhance programs.

Steve Weil indicated that the collection has a greater value as a "group" than as individual paintings.

Paul Tucker noted that we're in the secondary group for exhibits, so we would probably need to align with bigger players to get the better exhibits.

There are two ways of looking at Giverny:

1. Use Chicago money to maintain independence
2. Become a branch of another institution

Paul Tucker agreed that our collection cannot support two museums and that Giverny should be central

Ted Stebbins asked that we flesh out two models: non partnership and partnership.

Paul Tucker said we could generate national and international shows.

Steve reminded us that there were issues of collection maintenance. He further suggested that art needs to be accessible, we need to maximize accessibility, and other programs need to be responsive to public needs.

Margaret Daley asked if the French taxes (which tax us if the art is permanently residing in France) was a consideration.

Steve Weil said that when the collection is in Giverny, it is in "exile". Therefore, this would lead us to the conclusion that the collection needs to be housed somewhere else, if we are responsive to the needs of the art.

A "non-partnership" model would not work if we used Giverny as the only location.

Judith Terra suggested that we have not really gotten to a way to make American Art more accessible. Discussion then ensued around the Chicago property.

The committee asked Donald Ratner to summarize the multiple options and issues that need to be addressed. They then discussed what needs to be reviewed at the June board meeting. Steve Weil said that if we reached consensus that Paul Tucker should go to the Board and indicate what the consensus position was and see if the Board concurs.

Paul Tucker said that we agreed on the following:

- Mission Statement
- Status quo is not acceptable
- Non partnership with the collection going to Giverny is not acceptable
- Partnership seems the only way to go

Paul Tucker suggested that the partnership issues need to be explored. He also said we need to review how well Giverny is used. He then asked if we need to consider the question of opening up our collection to more contemporary art.

The concept of a decision matrix arose again. The committee discussed the need to decide which partnership gives Giverny the best access to shows. We need to evaluate all suitors and need to do a review to rank the suitors.

Margaret Daley asked how we would do a SWOT analysis. Steve Weil suggested that with only one museum, we would not have the clout to generate significant exhibits on its own, but that it needed a partner. At 12:30 Stephanie Pace Marshall had to leave the call. Ted Stebbins again asked which partner would be better to help Terra fulfil its mission

and which could best support a loan program in Giverny. Ted Stebbins also does not agree with including decorative arts in our collection.

Matrix issues include the following:

- Available art to loan
- Recognition for Dan Terra
- Reputation for exhibitions and leverage
- Dedication and scholarly commitment to American art (need to quantify the number of exhibits they have had)
- How much exhibition space they have and seriousness of intent
- Price
- Stability of Institution
- Timing

The Committee decided that a partnership is the way to proceed and now have to decide among them.

John Neff entered the meeting at this point. He asked if we had considered looking a multiple partners instead of just one.

Ted Stebbins suggested we might be able to "trade" some grants (say $250,000 each) for options to borrow from Institutions. He then suggested we might be able to do a combination with one museum housing and maintaining the collection and then doing grants to other museums for loans and traveling exhibitions.

There was agreement that we need to do a matrix giving the pros and cons for each potential partner and then need to quantify them.

Ted Stebbins asked who would own the collection. Donald Ratner was asked to look into the legal issue of who actually owns the art.

Paul Tucker suggested that after the June Board meeting, we need to begin our detail discussion of who to negotiate with. The list includes the Art Institute, the Whitney, the Corcoran, San Francisco, Brooklyn and Addison.

The meeting was adjourned at 1:15 PM.

Respectfully submitted
Donald H. Ratner
VP Finance & Administration

16di-001134

EXHIBIT 21

EXHIBIT 21

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STEPHANIE PACE MARSHALL, Ph. D.
15723 CARROL GATE ROAD
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IMSA PHONE: 630/907-5037
IMSA FAX 630/907-5062
marshall@imsa.edu

FAX COVER SHEET

CONFIDENTIAL

TO:	Mr. Steve Carlson	(312) 853-7036
	Dr. Paul Tucker	(617) 241-0150
	Mme. Helene Ahrweiler	011-33-1-45-44-46-49
	Mrs. Judith Terra	(202) 342-3162
	Mr. Dean Buntrock	(630) 990-1938
	Hon. Jacques Andreani	011-33-1-43-26-60-82
	Mrs. Margaret Daley	(312) 742-1088
	Mr. Ronald Gidwitz	(312) 541-0753
	Hon. Arthur Hartman	(202) 778-1050
	Senator Alan Simpson	(307) 527-6820
	Dr. Theodore Stebbins, Jr.	(617) 739-2975
	Mr. David Hilliard	(312) 554-8015

DATE: May 20, 2001

RE: Terra Foundation for the Arts

MESSAGE: Please review the accompanying information. Thank you.

No. of pages 4 (includes cover sheet)

IF YOU DO NOT RECIEVE ALL OF THE PAGES PLEASE CONTACT ME MONDAY AT (630) 907-5037.

To: Steve Carlson
From: Stephanie Pace Marshall
Subject: Response to your May 16, 2001 FAX
Date: May 20, 2001

As you requested, I have reviewed each of the two drafts of the mediated settlement agreement -- the 5-15-01 draft submitted by David Hilliard (which was in his words "based on notes taken during last Friday's session") and the "modified 5-15-01 version" submitted by the Attorney General's office (which is referred to as the "AG's modified version of the settlement proposal circulated by the mediator").

You requested that each director review the documents and inform you in writing if either of the documents is acceptable. You also requested that each director forward any comments he/she may have. My comments follow:

First, with respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

Second, with respect to the draft proposal prepared by David Hilliard, ("based on notes") there are several issues that must be revisited and/or clarified in writing before I can accept the agreement. (David's 5-15-01 memo to the Board underscored that the draft had not been "finalized").

It is my perception, that prior to receiving the AG's version of the proposed settlement, several Board members seemed to accept the principles of maintaining and exhibiting the Terra collection in Chicago for a significant period of time, changing Board composition, and maintaining a principal office in Illinois. Despite my desire for a just and timely resolution to the lawsuit, I cannot in good conscience, accept David's draft as it is currently written; therefore, using the outline of David's draft I have enumerated those issues that for me require written clarification, addition or deletion.

16di-001137

A. THE FOUNDATION

2. It is important that Giverny be named in the document. The current omission of the Terra Museum and other Terra properties and programs in Giverny, France, could be construed as a veiled intention to alter our commitment or presence there. While I believe the vast majority of Board members are committed to Giverny as an integral component of the Foundation's mission, it needs to be made explicit. In a previous iteration, dated May 11, 2001, the following statement was made: "the Foundation remains free to provide art for display in Giverny, and for special exhibits at approximately the same historical level." I suggest that this statement be added to the current draft.

In addition, in previous iterations of the agreement, the Foundation's freedom to continue to own, control and use its artistic, financial and real estate assets as it saw fit to achieve its goals, was explicitly stated (see 5-11-01 document, section B-1). Does the phrase in the Hilliard draft, "the Foundation remains free to determine how best to achieve its goals..." include our freedom to deploy our material and financial resources as the Board believes appropriate?

3. I could accept fifty years in the first sentence. I do not accept the second sentence, -- that the Foundation's freedom after fifty years is conditional on the authorization of the AG's office. After the stipulated period, it is the Board of the Foundation that must make decisions regarding the Foundation's future.

B. THE BOARD AND OFFICERS

1-a. I could accept the current scenario of B-1-a, however, I do not support the last sentence -- that it is the Board chairman acting as a sole agent who can affect an immediate resignation of Board members upon his/her request. Vesting this power in any one individual is both dangerous and irresponsible. The entire sentence should be struck or amended to state that is the majority of the Board and not the Chairman who can act.

1-b. (iii) Because of the Terra Foundation's intentional national and international outreach and presence (i.e. The Contested Ground project), I would like to reconsider the stipulation that a majority of the Board be reserved for Illinois residents. I do not believe any specifically defined constituency should hold a reserved majority. Also, the word disinterested should be struck. I do not consider any of the current Illinois directors as "disinterested."

1-c. I cannot support the timeline of the submission of nominees by May 25, 2001 (and I am personally having difficulty contacting potential candidates.) A decision of this magnitude and importance to the future of the Foundation requires ample time for all Board members to submit nominations. I am also most concerned about the lack of clarity with respect to the implementation of this provision. What does "coordination with the AG's office and the directors" mean? Within the parameters of any settlement agreement, the decision regarding new Board members must be a Board decision.

1-d. I do not accept the sentence regarding the strategic planning committee. It does not belong in the agreement for several reasons: we should not single out a specific committee and designate partial membership; it is premature and it is a Board decision once the new Board is constituted; we should not stipulate a specific charge and a required outcome to a committee. This totally erodes the Board's authority and fiduciary duty of diligence. Whether or not the Terra wishes to negotiate a partnership with another Chicago institution and whether or not the Terra wishes to "cease to operate a stand alone museum" is a Board decision.

For any agreement to usurp the Board's authority by stipulating the actions of a specific committee which would affect the entire future of the Foundation, is astounding. Surely, a newly constituted fifteen member Board with the kind of intellect, vision and savvy we envision, can be trusted to make responsible strategic decisions in the best interests of the Foundation.

Steve, I hope you, the other attorneys, David and Brett, can now, at the eleventh hour, bring reason, fairness, good faith and wisdom to these negotiations.

Personally, I am committed to maintaining and exhibiting the Terra Foundation's collection in Chicago and Giverny for a significant period of time. I also recognize and support the need for the Board to alter its composition. It appears that with the exception of the AG, the parties have moved closer to a possible agreement for settlement. However, I am concerned that the AG's position fractures an already fragile process. I am willing to continue to participate in the mediation process, if it is conducted in good faith. If you need to contact me, I will be in my office on Monday and Tuesday and early Wednesday morning of this week.

cc: David Hilliard
Terra Board Members

16di-001140

EXHIBIT 22

16di-001141

EXHIBIT 22

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	)	

ATTORNEY GENERAL'S MOTION TO ENJOIN THE TERRA FOUNDATION'S USE OF THE CURRENT SPECIAL LITIGATION COMMITTEE AND FOR APPOINTMENT OF A RECEIVER TO CONDUCT THE INDEPENDENT INVESTIGATION

NOW COMES the People of the State of Illinois by the Attorney General pursuant to §16(b) of the Charitable Trust Act and for reasons set forth herein, move the court to enjoin Defendant Terra Foundation from using the current Special Litigation Committee to direct

16di-001142

the instant investigation/litigation, and to appoint a receiver/custodian/or persons to act independently to investigate and direct the same. In support thereof the People state:

1) Because of the substantial charitable funds being used to pay for the litigation herein and the significant public issues raised in this case , the Attorney General is compelled to share with this court other and further matters which prevent the current special litigation committee from independently conducting an investigation free of conflicts. While the Attorney General has been unable to conduct discovery to date and has been unable to fully gather all of the facts, and thus has been reluctant to submit such before the court until all the facts could be fully developed, there are matters of which this court should be aware at this time to allow it a more complete understanding of the nature of conflicts in this matter and why the current special litigation committee cannot undertake an independent investigation.

2) As this court knows, the special litigation committee of the Terra Foundation was formed only after many court hearings and after order of court. After extensive efforts, the special litigation committee was formed composed of only two members. Director Ted Stebbins and Director Jacques Andreanni. The charge of the committee is to direct the Foundation's legal counsel and to independently investigate the charges in the subject litigation. It is this committee, as well as the law firm, that must conduct an independent investigation of the charges brought by Plaintiffs Gidwitz and Buntrock. Not only must counsel be independent, so must this committee. The co-plaintiffs explain in their motion how quickly the committee acted, without the benefit of sufficient information or investigation to purportedly ratify the litigation related public relations contract, to purportedly ratify payments to non-Foundation counsel for Defendants Terra, Simpson and Tucker and approve payments of legal fees to Sidley & Austin. All these actions were taken before the mandated independent investigation even began.

3) Director Andreanni lives in France. His inability to participate in a meaningful manner given the distance and time zone difference was made clear last week before the court , when it was explained by the Sidley firm that they had to allow days to communicate with Director Andreanni. It appears that Director Andreanni will be

severely limited in his ability to assist in directing the independent investigation. Thus, it appears the hands on direction will be left to Director Stebbins.

4) Most problematic, however, is the service of Director Stebbins on this special litigation committee. Certain allegations in the complaint concern his purported conflict of interest conduct in auction bidding on behalf of the Terra Foundation. The ability of the Attorney General to ascertain facts and make allegations has been limited because no discovery has yet been conducted. There are matters concerning Director Stebbins' conflicts which come directly from the Foundation's own records.

5) Attached hereto as Group Exhibit A are recent 1999 memos written by the Terra Museum's Chicago Director and curator John Neff, who raises concerns about conflicts concerning Director Ted Stebbins. Neff's memos disclose that Director Stebbins was representing others in reviewing, evaluating and bidding for art at auction, while at the same time doing such for the Terra Museum. In his memos, curator Neff explains that he was to control the bidding, yet Director Stebbins on more than one occasion acted for the Terra contrary to Neff's direction and in circumstances in conflict with his fiduciary duties to the Terra Foundation. The memos show that Neff shared these concerns with individual Defendant Director Tucker. These are curator Neff's contemporaneous notes as a record made as an employee of the Foundation The Attorney General has been unable to interview him or depose him, but his statements in Foundation records must be explored in an independent investigation. Clearly Director Stebbins cannot do so.

6) These matters are raised in the complaint without Stebbins being named, but he accepted the appointment to the special litigation committee knowing that these concerns were directed to his conduct and thus he has forced the details herein being set forth.

7) Defendant Tucker is the person who nominated Director Stebbins to the board. As the facts herein show, there are serious concerns about Stebbins' conduct, and it appears that after being informed of such, Tucker aided or allowed the conduct to continue. In these circumstances, it is unacceptable to allow Stebbins to control or serve upon the independent special litigation committee. Courts have found it

inappropriate in conditions as found here, to allow one insufficiently disinterested person to be the special litigation committee. Houle v. Low , 407 Mass. 810, 55(N.E.2d 51, 58 (1990).

8) On Friday December 15, 2000 Defendant Director Paul Tucker stated in a public radio broadcast that the Foundation has incurred litigation fees in excess of hundreds of thousands of dollars in this case. A transcript copy of the broadcast is attached as Exhibit B. Defendant Tucker in the interview states that the plans to move out of state were merely in the planning stage, but the Foundation board minutes of August 2000 and the Tucker white paper of September 2000 (both attached to the Attorney General's complaint) show the Board and Tucker were about to start to effect a move out of Chicago.

9) In the radio interview of December 15, 2000, Defendant Tucker admitted having entered into the $25,000 per month public relations contract with the Dilenschneider firm at the Foundation's expense. He explained it was done to refute in the press the plaintiffs' charges. The unusual public relations contract indicates it is to provide public relations work regarding the litigation and in part to promote the credentials of the Directors. While no benefit to the Foundation from that public relations contract was set forth by Tucker, and clearly none is ascertainable from its content, Tucker admitted that over $100,000 of charitable funds have been spent on this public relations contract to date. Clearly the $100,000 of public relations activities to date spent opposing the plaintiffs' charges have been done without the benefit of an independent investigation. The current special litigation committee attempted to ratify this contract and they, as well as Director Tucker (who was initially responsible for this public relations contract), lack authority to enter into such. This conduct further demonstrates that they are not capable of acting in an independent manner.

10) The special litigation committee composed of Directors Stebbins and Andreanni, without an investigation of any sort has attempted to authorize the payment of Foundation funds to the attorneys for the individual Defendants Terra, Tucker and Simpson. The by-laws require the full board to ratify such payments and the process requires that an independent investigation be conducted before consideration by the full board.

11) The factual allegations of the Plaintiffs against individual Directors named as Defendants require the special litigation committee to conduct an investigation. In addition to the issues regarding Director Stebbins presented by the Neff memos, Judith Terra did in fact have museum art taken from the Giverney museum and placed on display in her home in France. A film exists confirming such. Clearly even the temporary appropriation of the Foundation's property by an individual Director is a serious breach of fiduciary duty and must be independently investigated.

12) The case also involves the significant public policy concern that certain members of the Board of Directors are attempting to cause the Foundation to move its museum from Chicago. (See : attachments to the People's complaint, the August 2000 board minutes and Tucker's September 2000 white paper). Those seeking to move the museum now claim that the Terra museum is just not effective at its location. However, in a October 22, 1999 Report to the Board of Terra Foundation made by Terra Museum art Director John Neff, he observes " the Terra finished FY-99 with record attendance,... membership doubled ... and (there is) a growing awareness of and interest in the museum and its programs." This October 1999 report by John Neff explains expansive program development, commitments to Chicago based educational programs and a dedicated staff at the Terra. A copy of John Neff's October 22, 1999 Report to the Board is attached as Exhibit C.

13) Plaintiffs have alleged that those currently controlling the Foundation have mis-managed the operations causing a loss of staff in year 2000 and thus caused the current declines in the Terra museums attendance and function. Defendant Tucker was elected Chairman just last October 1999, just after the aforesaid Neff Report. In less than a year under his management many of the museum technical and professional staff are gone and he and certain board members are now claiming the museum is ineffective at its current location. The Plaintiffs' contentions regarding mis-management clearly require substantial independent investigation.

14) Section 16(b) of the Charitable Trust Act provides:

Sec. 16 (b) "Upon application to a court of competent jurisdiction, in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and he seeks injunctive relief and removal of such trustees, the Court may, as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, Directors and members from office and appoint replacements to protect the public interest." (760 ILCS 55/16(b) (1998).)

15) The Foundation is a charitable trust subject to chancery court protection and supervision. To date with its present fiduciaries divided and in conflict, the Foundation has been unable to act to protect the charitable assets it possesses. The court has given its time and direction in this matter and now three months after the filing of this lawsuit, instead of having an independent, objective and available litigation committee in place, with all of its members actively involved in conducting an independent investigation, the Foundation's board chose only two people for the special litigation committee, one of whom resides in France, and the other whose conduct is the subject of certain charges of conflict. That committee, without undertaking any investigation, approved the use of hundreds of thousands of dollars of charitable funds to defend the individual Defendant Directors by paying their attorneys and even attempting to provide them public relations assistance. Clearly, this charitable trust needs this court's protection and the remedy provided under the charitable trust act is a temporary receiver to conduct the independent investigation and to direct the litigation on the Foundation's behalf.

Wherefore plaintiff the Attorney General of Illinois prays that the court :

a) enjoin the Foundation's use of the current special litigation committee;

b) order a limited hearing on this matter;

c) allow limited discovery on these matters;

d) appoint a receiver to conduct the independent investigation and litigation on behalf of the Foundation.

e) enter such further relief that the court deems necessary and equitable under the circumstances.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

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16di-001148

EXHIBIT 23

16di-001151

EXHIBIT 23

MULTI-FAX RECYCLED
80000 SERIES
30% P.C.W.

- Not Filed

Draft

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, THEODORE E STEBBINS, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants	

ATTORNEY GENERAL'S FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, BREACH OF FIDUCIARY DUTY, REMOVAL, ACCOUNTING, RECEIVER AND APPOINTMENT OF NEW DIRECTORS

NOW COMES the Plaintiff-Intervenor, the PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, and complains of Defendants JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, THEODORE E. STEBBINS, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation and charitable trust, and states as follows:

1) This cause is brought for and on behalf of the PEOPLE OF THE STATE OF ILLINOIS by and through the Attorney General of Illinois pursuant to the common law and the Charitable Trust Act (760 ILCS 55/1 et seq (1999)), to protect the interests of the PEOPLE OF THE STATE OF ILLINOIS as the ultimate beneficiaries of each charitable trust within the State of Illinois and pursuant to statutory and the common law powers and duties of the Attorney General to protect the interests of the PEOPLE OF THE STATE OF ILLINOIS in matters pertaining to charitable assets and trusts.

2) Defendant TERRA FOUNDATION FOR THE ARTS is an Illinois not-for-profit corporation (hereinafter "the FOUNDATION"), that was incorporated on December 13, 1978. Attached hereto and incorporated herein by reference as Group Exhibit "A-1" is a copy of the FOUNDATION's original Articles of Incorporation, and attached hereto and incorporated herein by reference as Exhibit "A-2" is a copy of the FOUNDATION's current Articles of Incorporation.

3) Defendant FOUNDATION, as a corporation, is a separate legal person and currently

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holds legal title to assets worth in excess of $450 million, which assets are held exclusively and solely for charitable purposes.

4) The Illinois Constitution at Article 5, Section 15 adopts English common law as the law of Illinois, and under said common law a trust requires not only a trustee, but of necessity must have identifiable beneficiaries to be valid. Under the common law, the identifiable beneficiaries of a trust held by a trustee for charitable purposes are the People within the jurisdiction where the trust was made, and the People of said jurisdiction are the ultimate and sole beneficiaries of the charitable trust.

5) The Defendant FOUNDATION was created and exists as a charitable trust under Illinois law, and it received and accepted charitable gifts in trust while operating here in Illinois as gifts to be used for exclusively charitable purposes and the Defendant FOUNDATION is a common law trustee for all of the charitable assets which it holds.

6) Charitable trusts are unique trusts which are accorded special protections at common law such as being subject to protection by courts of chancery and being immune from the rule against perpetuities, precisely because their beneficiaries are deemed, as a matter of law, to be the People of the jurisdiction where the trust is made. The existence and creation of the Defendant FOUNDATION in Illinois and its acceptance of assets in trust in Illinois, by operation of law make the PEOPLE OF THE STATE OF ILLINOIS the sole and exclusive beneficiaries of the charitable assets held by the Defendant FOUNDATION. It is thus the PEOPLE OF THE STATE OF ILLINOIS who are the vested and rightful beneficiaries of all of the assets held in trust by

FOUNDATION for its exclusively charitable purpose.

7) Under the common law, the trustee of a charitable trust has no right to divest or remove the beneficiaries once the People have been made beneficiaries by operation of law. The FOUNDATION, as common law trustee, is but a steward who has a duty of absolute loyalty and good faith to the PEOPLE OF THE STATE OF ILLINOIS as sole and exclusive beneficiaries.

8) At common law the sovereign of the public beneficiaries was deemed the protector of the public interest in charitable trusts and, under Illinois law, the Illinois Attorney General is the protector of the PEOPLE's interest in all charitable trusts created in Illinois by virtue of the PEOPLE OF THE STATE OF ILLINOIS being the sole and exclusive beneficiaries.

9) The Charitable Trust Act defines a charitable "trustee", said Act providing:

> "Sec 3. "Trustee" means any person, individual, group of individuals, association, corporation, not-for-profit corporation, estate representative, or other legal entity holding property for or solicited for any charitable purpose; or any chief operating officer, director, executive director or owner of a corporation soliciting or holding property for a charitable purpose." (760 ILCS 55/3 (1999).)

10) The Defendant FOUNDATION is an Illinois charitable "trustee", and it has in the past acknowledged that it is an Illinois charitable trust and has registered and reported to the Illinois Attorney General under the Illinois Charitable Trust Act.

11) Plaintiff-Intervenor, the PEOPLE OF THE STATE OF ILLINOIS, files this complaint as an intervening but separate party plaintiff, in joinder with the Verified Complaint filed herein by

Plaintiffs GIDWITZ and BUNTROCK, which set forth in verified factual allegations that, GIDWITZ and BUNTROCK are directors of the FOUNDATION; that the Foundation has breached its fiduciary duty ; that certain of its directors have breached their fiduciary duties to the FOUNDATION and the PEOPLE; that the assets of the Foundation have been misused; that the assets of the Foundation are in jeopardy and danger; that certain directors have acted to cause the failure and closing of the FOUNDATION's charitable museum facilities here in Illinois; and that the Defendant FOUNDATION by and through the acts of certain of its directors was expending funds and planning to remove its assets from Illinois and was thereby using the charitable trust's funds to effect a divestment of the beneficial interest of the PEOPLE OF THE STATE OF ILLINOIS in the trust assets held by FOUNDATION. Plaintiff-Intervenors, the PEOPLE OF THE STATE OF ILLINOIS, hereby adopt and incorporate herein by reference the verified facts stated by Plaintiffs GIDWITZ and BUNTROCK in their complaint.

12) The Defendant FOUNDATION has its principal place of corporate business located at 664 N. Michigan Ave., Chicago, Illinois, and has at all times maintained its principal place of business within Cook County, Illinois, where it currently holds approximately $450 million of assets in trust for exclusively charitable purposes.

13) Defendant JUDITH TERRA is a Director of the FOUNDATION, and is the widow of Daniel Terra, one of the founding Trustees of the FOUNDATION. Defendant JUDITH TERRA is a resident of Washington D.C., and is a member of the FOUNDATION's Executive Committee.

14) Defendant PAUL HAYES TUCKER (hereinafter "TUCKER") is the Chairman and

President of the FOUNDATION, and is a resident of Massachusetts and is a member of the FOUNDATION's Executive Committee.

15) Defendant ALAN K. SIMPSON is a Director of the FOUNDATION and is a resident of Wyoming.

16) Defendant THEODORE STEBBINS is a Director of the FOUNDATION, and is a resident of Massachusetts and is the chair of the FOUNDATION's Independent Litigation Committee.

17) Defendants JUDITH TERRA, TUCKER, ALAN K. SIMPSON, and THEODORE STEBBINS are each a charitable "trustee" as that term is defined in Section 3 of the Trust Act, 760 ILCS 55/3 (1999), and by serving as Directors of the FOUNDATION, they have each become a trustee and fiduciary for the charitable assets held by the FOUNDATION.

18) As charitable trustees, Defendants JUDITH TERRA, TUCKER, ALAN K SIMPSON, THEODORE STEBBINS and the FOUNDATION each owe fiduciary duties to the charitable trust beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS, to deal fairly, faithfully and loyally with the FOUNDATION assets, and to devote them to the proper charitable purposes without waste or self-dealing.

19) At all relevant times, there was in existence and effect an Illinois statute governing the holding of charitable assets in the State of Illinois, namely the Charitable Trust Act, 760 ILCS 55/1

et seq. (1999) (hereinafter the "Trust Act"), Section 15 of which Act recites fiduciary duties and responsibilities imposed upon persons collecting and holding assets for charitable purposes and states as follows:

> "Sec. 15. *(a) Charitable trustees are subject to certain duties otherwise defined in Illinois statutes and case law, which include but are not limited to the following:*
>
> *(1) To avoid "self-dealing" and conflicts of interests;*
>
> *(2) To avoid wasting charitable assets;*
>
> *(3) To avoid incurring penalties, fines, and unnecessary taxes;*
>
> *(4) To adhere and conform the charitable organization to its charitable purpose;*
>
> *(5) To not make non-program loans, gifts, or advances to any person, except as allowed by the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.];*
>
> *(6) To utilize the trust in conformity with its purposes for the best interest of the beneficiaries;*
>
> *(7) To timely file registration and financial reports required by this Act; and*
>
> *(8) To comply and to cause the charitable organization to comply with this Act and, if incorporated, the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.].* (760 ILCS 55/15(a) (1999).)

:0) The Defendant FOUNDATION was incorporated by Daniel Terra, now deceased; James Terra, Daniel Terra's son; and Robert Sugrue. The FOUNDATION was established under the direction of Daniel Terra, a successful Chicago area businessman, and was established as a

philanthropic endeavor supported by Daniel Terra and his first wife, with the intention to establish a museum to promote, display and educate the public in the Chicago area about early American art. The FOUNDATION's first board was comprised of Daniel Terra, James Terra, and Robert Sugrue.

21) The FOUNDATION was established in December 1978 under the Illinois General Not For Profit Corporation Act under its original name " Foundation For The Daniel J. Terra Museum", and upon creation it established a museum facility in Evanston, Illinois. From its initial founding it received substantial funding and its assets from charitable gifts made by Daniel Terra, for the expressed purpose of and with the intention of operating a public museum for American art in the Chicagoland area.

22) The FOUNDATION at its inception, then the "Foundation For The Daniel J. Terra Museum", was not only a museum in name, but its specific charitable activity, conduct and operation was the establishment and the development of a charitable museum facility which acted to preserve, promote and exhibit art works of early American art to Chicagoland area residents from its Evanston, Illinois location.

23) For many years after its founding Daniel Terra and those controlling the FOUNDATION caused the FOUNDATION's assets to be used to operate a museum within the Chicagoland area, first in Evanston and then in Chicago, with activities and programs that displayed, promoted the appreciation of, and educated the general public and school children in the Chicago land area about early American art.

24) In the early 1990's the FOUNDATION moved from Evanston, and bought a building in Chicago at 644 North Michigan Avenue, specifically for the purpose of operating at said location a public museum which would display early American art and serve to educate the public about said art.

25) At all times since the purchase of the Michigan Avenue property, the FOUNDATION has operated a public museum at that location called the Terra Museum of American Art.

26) In furtherance of the FOUNDATION's public museum purposes, Daniel Terra over the years contributed hundreds of millions of dollars to the FOUNDATION and the FOUNDATION purchased numerous works of art for use in the public Terra museum. Daniel Terra personally participated in selecting most of the FOUNDATION's art collection. Pursuant to Illinois law, because it was an exclusively charitable organization operating exclusively for the benefit of its charitable beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS, the FOUNDATION was exempted from Illinois sale/use taxes and real estate taxes for all its purchases and operation of museum real estate over the years, and the FOUNDATION was benefitted directly by said special laws enacted in Illinois to benefit Illinois charities.

27) Daniel Terra died in June 1996, but while alive he dominated the direction and control of the FOUNDATION and he controlled its development of a museum facility within Illinois, and it was Daniel J Terra's express desire and intent when he made donations of millions of dollars to the FOUNDATION that it operate a public museum in and serving the Chicagoland area. In fact, during the entire period the FOUNDATION was under the direction and control of Daniel Terra, the

Defendant FOUNDATION did operate a public museum promoting early American art in the Chicagoland area.

28) During his lifetime Daniel Terra stated that the FOUNDATION was established here in Chicagoland to bring a public museum to Chicago to develop an appreciation for early American art, and he and the Defendant FOUNDATION over the years from its inception represented to the public that it was a public museum here in Cook County, Illinois dedicated to enhancing art appreciation and education for the citizens of Illinois, and in response to and reliance on the representations so made, Illinois businesses and citizens have donated substantial sums in contributions and membership dues to the FOUNDATION to specifically support the operation of the FOUNDATION's museum here in the Chicagoland area.

29) From the time of its inception, the FOUNDATION has had as its central and core purpose the establishment of an art museum in the Chicagoland area, specializing in bringing American art to the area's public and the PEOPLE OF THE STATE OF ILLINOIS. It was Daniel Terra's expressed intent at the time of making gifts to the FOUNDATION that it hold such in trust to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public on American art. Further, both Daniel Terra and the Defendant FOUNDATION, by and through the actions of Daniel Terra, publicly stated that the FOUNDATION was committed to building and operating a world class art museum in the Chicagoland area and in fact by actions the FOUNDATION represented its purposes as a Chicago area museum.

30) The FOUNDATION in addition to being a charitable trustee is an Illinois not for profit

corporation, and under and pursuant to its by-laws :

a) Is generally governed by a board of directors, each of whom is elected to serve a term of one year and is chosen and elected by the sitting directors in office at the time of election;

b) The board of directors is the group of persons responsible for the general acts of the FOUNDATION;

c) The authority of a director of the FOUNDATION is to serve as part of the body of directors, making decisions for the FOUNDATION as a body, the Board controls overall direction of the FOUNDATION;

d) Individual directors, in their capacity as directors, have no authority or right to become involved in operational affairs of the FOUNDATION, by and through their individual acts, but rather act and have authority only as a participant in the body of the Board. unless given expressed delegated authority by the Board;

e) Day to day operational affairs of the FOUNDATION are controlled by the FOUNDATION's president, who is charged to carry-out the Board's decisions;

f) The president of the FOUNDATION is the person responsible for operating the day to day affairs of the FOUNDATION, its museums and its activities, under the direction set by the Board; and

g) The Board of directors is charged with the responsibility of choosing and installing and insuring that a corporate president is in place at the FOUNDATION and the Board has the responsibility to engage in oversight and insure that the president is properly managing the FOUNDATION's affairs.

31) From the time of the FOUNDATION's inception through Daniel Terra's death on June 28, 1996, the FOUNDATION was controlled by a small board of directors of no more than six, whose members were substantially influenced by Daniel Terra..

32) Subsequent to Daniel Terra's death, the Board of Directors of the FOUNDATION has substantially changed. The FOUNDATION currently has eleven directors who include JUDITH TERRA, RONALD GIDWITZ, DEAN BUNTROCK, TUCKER, ALAN L. SIMPSON, THEODORE STEBBINS, Margaret Daley, Arthur A. Hartman, Helene Ahrweiler, Jacques Andreani, and Stephanie Marshall. Many of these current directors have served less than three years. Attached hereto and incorporated herein by reference as Exhibit "B" is a schedule showing the names of the Board of Directors of Terra Foundation from 1993 through the present and indicating the time each director has served on the Board.

33) Plaintiffs GIDWITZ and BUNTROCK are current directors of the FOUNDATION who have alleged and verified in their Complaint filed in this action that certain and several directors of the board of directors of the FOUNDATION, including Defendants JUDITH TERRA, TUCKER, and ALAN L. SIMPSON, have engaged and are engaging in actions ultra vires and actions against the interest and charitable purposes of the FOUNDATION.

34) The Defendant FOUNDATION by and through certain of its officers and directors, including the actions of Defendant TUCKER, has acted during the year 1999 and 2000 to engage in the following

a) Attempting to, effect and cause the closing of the FOUNDATION's Terra Museum

operations in Illinois, contrary to the intent and long-standing promise and representations made by the FOUNDATION and its founder Daniel Terra to the PEOPLE OF THE STATE OF ILLINOIS and donating public, which representations were made to the donors to the FOUNDATION that the FOUNDATION would be an institution and charitable trust operating an American art museum for the public here in Illinois;

b) Attempting to effect and cause the FOUNDATION to move from the State of Illinois, and/or to substantially remove the Terra museum from Illinois and place the FOUNDATION's assets outside of Illinois for the benefit of beneficiaries other than the PEOPLE OF THE STATE OF ILLINOIS, and specifically has acted to expend and waste substantial charitable funds of the FOUNDATION to explore moving the FOUNDATION and its assets outside of Illinois to Washington DC or to another state or outside the United States, and thereby has attempted to disenfranchise and divest the PEOPLE OF THE STATE OF ILLINOIS of their vested beneficial interest in the charitable trust estate held by Defendant FOUNDATION;

c) Attempting to effect and cause the closing of the FOUNDATION's operations in Illinois contrary to the terms of endowed restricted gift provisions of Daniel Terra, and to effect a use of assets contrary to the use Daniel Terra intended in restricted gifts he made to the FOUNDATION and contrary to the representations made to donors to the FOUNDATION;

d) Grossly mismanaging Terra Museum and undermined operations at the Illinois museum in a manner that has resulted in the loss or turnover of almost half the

employees, including most key persons responsible for the Terra Museum's day-to-day operations and continued success, thereby adversely effecting its ability to provide sufficient and proper FOUNDATION mission/program services;

e) Permitted and allowed the gross mismanagement of the museum to undermine the confidence of the remaining staff and caused the primary individuals in charge of security, curatorial care, and collection management at Terra Museum to quit or be terminated, causing the museum to be understaffed and a new unfamiliar staff to be in charge of security, curatorial care, and collection management, all of which jeopardizes the security of the $170 million of art displayed and collected at Terra Museum and which has prevented the FOUNDATION from being able to perform its programs effectively and has resulted in a gap in long-term staff planning and operations, creating a false appearance that the Chicago museum programs are not effective ;

f) Permitted, and failed, after being informed of such to prevent, Defendant THEODORE STEBBINS from acting to obtain, by virtue of his position as a director of the Foundation, confidential Terra Foundation art auction acquisition information during the same period in which he was an employee of another competing museum responsible for directing the acquisition of American art for that museum; and further permitted (and failing after being informed of such to prevent) THEODORE STEBBINS sharing such confidential Terra curatorial auction acquisition plans with the staff of that competing museum and thus breaching the confidential nature of the Terra's curatorial acquisition planning by using his role as a director to interject himself at the art auctions and cause the Terra art director/curators to discuss Terra

auction plans with or in the presence of agents of other competing potential collectors at the auctions, all of which has endangered the assets of the FOUNDATION and/or subjected the FOUNDATION to potential additional costs of acquiring works of art above and beyond what it should have faced;

g) Expending significant monies on purchases of art without obtaining requisite professional and impartial advice, as well as failing to have any comprehensive plan in handling and acquiring art or obtaining the approval of an informed Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art handling and acquisition, and specifically, engaged in discussions of moving the entire museum and collection to be placed with a partnering museum, which as a matter of practicality and reality would mean that its art collection would then be subject to modification and change in consultation with its new partner, the Defendants caused the FOUNDATION to purchase a $ 4 million painting in mid-2000 which required the FOUNDATION to obtain a bank loan of $ 4 million and the incurrance of interest expense to purchase same, and the defendants have caused during 2000 the FOUNDATION to sell many of its works of art collected by the founder Daniel Terra, and the FOUNDATION after losing its Giverney based curator in the fall of 2000, in December 2000 terminated its remaining art director/curator John Neff, who had been with the FOUNDATION for several years, thus leaving the FOUNDATION with no curator; all done while the use of the collection and or its merger with other institutions was under discussion, showing that there was no overall or comprehensive planning in the handling of the millions of dollars of art in this collection.

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in strategic decision making for the Chicago museum by engaging agents to discuss and plan to relocate the Chicago museum to Washington D.C., not only contrary to charitable trust law but without full disclosure and participation by the Board..

j) Wastefully incurring excessive legal fees by retaining duplicative counsel to re-investigate and review the same matters which had already been reviewed and otherwise incurring unnecessary legal expense, allowing excessive travel expenses for directors, and using FOUNDATION funds to hire a public relations firm for promotion of the directors;

k) Replaced the Terra Foundation's long-standing counsel after statements were made at a Board meeting that Defendant director Judith Terra needed to be protected from said counsel, when in fact that counsel had previously on behalf of the Daniel Terra estate opposed Judith Terra's claims of $43 million made against Daniel Terra's estate which estate was otherwise bequeathed to the FOUNDATION, and which $43 million in claims was settled for $ 1 million from that estate which $ 1 million otherwise would have been paid to the FOUNDATION.

l) Misusing the art collection of Terra Foundation by allowing Judith Terra to personally take, possess and use museum art items in her home and in a manner that placed the collection in danger and jeopardy, and which was an act of self dealing by an interest person contrary to the Internal Revenue Code and the Illinois Not For Profit Corporation Act which adopts said prohibited code sections as part of said

Act, and which impermissible personal use of said FOUNDATION's art in the 1980's had previously been the subject of an investigation of the FOUNDATION by the Illinois Attorney General; and

m) Operating the FOUNDATION without a full-time corporate president and/or sufficient corporate oversight.

35) The several Defendants JUDITH TERRA, TUCKER, SIMPSON, and STEBBINS have acted as aforesaid and/or have caused or otherwise permitted or acted to cause the FOUNDATION to act as aforesaid, and said Defendant directors have by such engaged in actions ultra vires and against the interest and charitable trust purposes of the FOUNDATION, and said Directors have by such acted or permitted the foregoing wrongful actions of the FOUNDATION, said defendant directors having done as part of a plan to close the FOUNDATION and its museum in Illinois, to move the FOUNDATION from Illinois to Washington D C. or other non-Illinois location, and to obtain for certain of themselves positions and/or recognition in a Washington D.C. charitable organization or other non-Illinois entity in exchange for the delivery of the assets of the FOUNDATION. Said plan to move the FOUNDATION has not been undertaken in the best interest of the FOUNDATION and the PEOPLE, but rather where the best terms or advantages for certain of the individual Defendant directors could be obtained.

36) The allegations set forth in Plaintiff GIDWITZ's and Plaintiff BUNTROCK's Verified Complaint, and incorporated herein by reference, and those allegations set forth above, show that the Defendant members of the Board of Directors of the FOUNDATION have been acting towards, or have been otherwise distracted by, matters of self-interest and have ignored and/or have permitted

the Terra Museum in Chicago to lose its key staff and to jeopardize its charitable purposes and to place the assets of the organization in jeopardy without proper security and administration for the collection and without sufficient historical institutional knowledge to ensure that the assets are accounted for and safe.

37) The FOUNDATION through the actions of the individual Defendant directors, has chosen to spend funds wastefully to duplicate a review of legal services to see if it can find wrongdoing by the former counsel who acted to defend the Estate of Daniel Terra against the claims of Defendant JUDITH TERRA. Individual Defendant directors have caused the Defendant FOUNDATION to spend $300,000 on public relations costs to promote the Defendants in this action. Individual Defendant directors have caused the termination of Mr. Neff, a long-time employee curator at the end of December 2000, at a time when long-term staff were in short supply at the FOUNDATION, and have replaced him with a $1,000 a day, parttime curator, who is new to the FOUNDATION and lives in New York and who is also paid reimbursement for her travel and lodging to go to the museum facilities in Chicago, Illinois and Giverny, France owned by the FOUNDATION Additionally, the Defendant directors have also caused the Foundation to spend considerable time and FOUNDATION funds to plan, and to hire attorneys and others to discuss and plan a move of the FOUNDATION's Chicago museum elsewhere, yet the several I Defendant Directors now after suit was filed claim that they have no plans to move.

38) Despite the pressing and troubling administrative issues for the FOUNDATION as set forth above, and despite the fact that the FOUNDATION president is the person who must operate and control the FOUNDATION's affairs day to day, the FOUNDATION and specifically the

Defendant directors acted to install and maintain Defendant TUCKER as a part-time president for the FOUNDATION, knowing that Defendant TUCKER also has a full time position in Boston, Massachusetts and can only devote a limited amount of time to the FOUNDATION, and despite the many administrative problems, failures and issues facing the FOUNDATION as aforesaid, the Defendant directors have grossly mismanaged the FOUNDATION by failing to assure proper management of its affairs and by failing to appoint a full-time president to serve as chief executive officer of the FOUNDATION.

39) Shortly after the creation of the FOUNDATION in 1978 as aforesaid, Daniel Terra's first wife, Adeline, died. Daniel Terra subsequently married Defendant JUDITH TERRA on June 28, 1986.

40) In a Antenuptial Agreement signed by Defendant JUDITH TERRA prior to her marriage to Daniel Terra, JUDITH TERRA acknowledged that she fully understood that the bulk of Daniel Terra's estate would upon his death go to the FOUNDATION, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the said Antenuptial Agreement. (Attached hereto and incorporated herein by reference as Exhibit "C" is a copy of the said Antenuptial Agreement entered into between Daniel Terra and Defendant JUDITH TERRA..)

41) Under the aforesaid Antenuptial Agreement, Defendant JUDITH TERRA agreed she would receive only a fixed amount of money and assets upon Daniel Terra's death, and that the bulk of his estate would go to the FOUNDATION The said Antenuptial Agreement provided that if the

parties remained married, JUDITH TERRA would receive $1.5 million from Daniel Terra's Estate if he died prior to the 5th anniversary date of their marriage, or $ 3 million if his death was between the 5th and 10th date of their marriage; or $4.5 million if his death occurred after the 10th anniversary date of their marriage. (See Exhibit "C", Antenuptial Agreement at page 6.)

42) Several days prior to his death on June 28, 1996, Daniel Terra was confined to a hospital, his life being sustained by the use of life-supporting devices. On June 28, 1996, the tenth anniversary date of his marriage to JUDITH TERRA, the life-supporting devices employed to keep Daniel Terra alive were ceased. Technically Daniel Terra lived past the tenth anniversary of his marriage to JUDITH TERRA, and Defendant JUDITH TERRA sought and received from Daniel Terra's Estate $4.5 million pursuant to the terms of the aforesaid Antenuptial Agreement.

43) In November-December 1996, Defendant JUDITH TERRA, while a director of the FOUNDATION filed four claims against Daniel Terra's Estate despite and in violation of the express terms of her Antenuptial Agreement with Daniel Terra.

44) JUDITH TERRA asserted in her claims that Daniel Terra had breached certain promises to her and she sought by said claims certain art work and cash in excess of $43 million from his Estate.

45) The assets sought by Defendant JUDITH TERRA were art works and funds otherwise bequeathed to the FOUNDATION and would otherwise pass as a bequest to the FOUNDATION.

46) James Terra, Daniel Terra's son, and a founding Director of the FOUNDATION, was named as the Executor of the Daniel Terra Estate, and as executor was represented by Bell, Boyd & Lloyd. In that capacity both James Terra and Bell, Boyd & Lloyd denied JUDITH TERRA's claims against the Estate and defended and litigated against her $43 million in claims, asserting that none of her claims had any merit.

47) At the time said claims were filed, James Terra was a Director of the FOUNDATION, and Bell, Boyd & Lloyd was the FOUNDATION's regular corporate counsel and had been so for many years prior while Daniel Terra was living.

48) At Daniel Terra's date of death his estate was valued in excess of $450 million, but in early 1997 the Estate's holdings in Mercury Finance Co. lost most of their value and the Terra Estate suffered a devaluation in excess of $150 million. The Estate also owed in excess of $90 million in bank debts which the lenders were uncertain of extension of credit given the stock devaluation By filing her claims against the Estate of Daniel Terra, JUDITH TERRA created a substantial risk, causing certain lenders to threaten to foreclose upon the Estate and thus, by her actions; JUDITH TERRA endangered the economic value and stability of both the estate and the bequest therein to the FOUNDATION.

49) JUDITH TERRA's claims themselves were without merit, but because of the financial pressures of the combined bank debt of the Estate and JUDITH TERRA's claims, the Daniel Terra Estate was compelled to settle and pay $1 million to JUDITH TERRA to resolve her $43 million in claims against the Estate.

50) The Estate funds paid to JUDITH TERRA of $1 million paid to settle her $43 million on claims against the Estate would otherwise have passed to the FOUNDATION

51) JUDITH TERRA's actions in filing $43 million in claims against her husband's Estate were against the interest of the FOUNDATION, while at all times JUDITH TERRA, from the time of first asserting said claims against the Estate to obtaining the settlement, remained a director of the FOUNDATION, and although she purportedly took a leave of absence for a portion of the time her claims against the Estate were pending, she was not on such leave for the entire period, and was active throughout in negotiating and trying to compel the Estate to turn over Estate assets to settlement of her claims

52) The law firm of Bell, Boyd & Lloyd opposed and acted to defeat JUDITH TERRA's attempt to move the Estate from Illinois. With the help of the several Defendant directors herein, JUDITH TERRA acted to cause the FOUNDATION to terminate the law firm of Bell, Boyd & Lloyd as counsel to the FOUNDATION after 20 years of service to the FOUNDATION and, upon information and belief, as retribution for defeating her personal claims against the Daniel Terra Estate.

53) The final accounting of the Daniel Terra Estate has been presented by James Terra and Bell, Boyd & Lloyd and it has been reviewed and approved by the FOUNDATION's special counsel Mayer, Brown & Platt and the Illinois Attorney General's Office, both of whom participated in the many aspects of the estate matters. Despite Mayer, Brown & Platt's review and approval of such, the FOUNDATION without an articulated reason has undertaken to hire yet another set of

attorneys to review the actions of the executor, James Terra, and Bell, Boyd & Lloyd, relative to the Daniel Terra Estate. The FOUNDATION is bearing the cost of such in the tens of thousands of dollars, including an additional review of the Estate's handling of Mercury Finance Co. stock holdings, after such was once reviewed and approved by Mayer, Brown & Platt, as special additional counsel for that very review and purpose, and despite the fact that the FOUNDATION itself had sold hundreds of millions of dollars of Mercury Finance Co. stock in the several years prior to Daniel Terra's death, and further, despite the fact that the FOUNDATION had a substantial holding in Mercury Finance Co. stock at the time of the devaluation and itself lost over $50 million on devalued Mercury Finance Co. stock.

54) The FOUNDATION is bearing the costs of this further review by additional law firms and such is a further waste of charitable funds.

55) Upon information and belief, the aforesaid termination of Bell, Boyd & Lloyd and hiring additional counsel to conduct a duplicative review of the actions of James Terra and Bell, Boyd & Lloyd were done at the behest of the Defendants out of retaliation for the adverse position James Terra and Bell, Boyd & Lloyd took against Defendant JUDITH TERRA in the aforesaid litigation of the $43 million in claims against the Estate of Daniel Terra, and as such constitutes a waste of charitable assets and a gross breach of fiduciary duty in assisting in using the FOUNDATION's assets for the personal purposes of JUDITH TERRA.

56) In addition to the foregoing, based on the verified factual allegations set forth in Director GIDWITZ's and Director BUNTROCK's Verified Complaint and incorporated herein by

reference as though fully set forth herein, Defendant JUDITH TERRA with the aid of Defendant TUCKER has caused works of art of the FOUNDATION to be brought to her home for display, over the objection of museum staff and contrary to all reasonable museum and corporate practices, and such being done for self dealing and personal self-aggrandizement of JUDITH TERRA.

57) Defendant JUDITH TERRA caused FOUNDATION art work to be displayed in her private residence with full knowledge that the FOUNDATION had previously been subject to IRS and Attorney General investigation for allowing its works of art to be displayed in the marital home of Daniel and JUDITH TERRA in the past.

58) Furthermore, Defendant JUDITH TERRA has engaged in discussions with Defendant Director TUCKER and the other Defendant directors to cause and have the FOUNDATION close the Terra Museum in Chicago and move its operation to Washington D.C., where JUDITH TERRA resides, and /or to cause the FOUNDATION to merge with another institution in Washington D.C., which intended acts are contrary to Daniel Terra's intent and the charitable trust purposes of the FOUNDATION to maintain a museum in Chicago for the benefit of its beneficiaries the PEOPLE OF THE STATE OF ILLINOIS.

59) Upon information and belief, in seeking to place the FOUNDATION's art collection outside of Illinois and at another museum Defendant JUDITH TERRA and certain of the other Defendant directors have sought director positions on other insututions' boards of directors.

60) Defendant TUCKER has sent the attached "A Vision for The Future" white paper to the FOUNDATION's Board of Directors, a copy of which is attached hereto and incorporated herein as Exhibit "D", which contains his vision for the future of the FOUNDATION. Defendant TUCKER's vision is not that of Daniel Terra nor is it in keeping with the charitable trust purposes of the FOUNDATION, nor does it support the vested interest of the FOUNDATION's ultimate beneficiaries the PEOPLE OF THE STATE OF ILLINOIS.

61) Defendant TUCKER's vision statement shows he seeks to close the Terra Museum in Chicago and to move the FOUNDATION and its art collection to Washington D.C., give its collections to the National Gallery of Art in Washington D.C. and set up an educational facility in Washington D.C., or, as Plaintiffs GIDWITZ and BUNTROCK state in their Verified Complaint, Defendants TUCKER and JUDITH TERRA seek to merge the FOUNDATION into the "Corcoran Gallery of Art in Washington", all of which serve to remove the charitable trust held by FOUNDATION from the PEOPLE OF ILLINOIS.

62) The FOUNDATION's Board of Directors met on August 24, 2000 and at that meeting Defendant TUCKER made remarks suggesting that the FOUNDATION move to Washington D.C. and close down the Terra Museum in Chicago. At said meeting it was revealed that lawyers had been hired to consider moving the FOUNDATION from Illinois and that plans had been drafted to effect and move the FOUNDATION from Illinois. A copy of the August 24, 2000 FOUNDATION's Board meeting minutes is attached hereto and incorporated herein as Exhibit "E".

63) Defendant TUCKER is the Chairman and President of the FOUNDATION, and is

responsible for its operations, yet he has allowed and/or caused the FOUNDATION's staff to be depleted of long-term staff, has allowed and/or caused the FOUNDATION's long-term security personnel to quit, has allowed and/or caused its executive director to quit, and according to the verified allegations of Directors GIDWITZ and BUNTROCK, incorporated in this Complaint, Defendant TUCKER has directed that art belonging to the FOUNDATION be delivered from France to Defendant JUDITH TERRA's home, and has permitted Defendant STEBBINS to interfere with the confidential curator auction activities of the FOUNDATION as aforesaid and to gain confidential information thereon and share it with competitors while in his position with another museum which conflicted with his duty of loyalty to the FOUNDATION and placed him in a conflict of interest. Furthermore, Defendant TUCKER has held the office of FOUNDATION president knowing that in that position he is responsible for the day to day management of the FOUNDATION, its many staff, programs and two museums in different cities on different continents, despite the fact that he works full time as a professor in Boston, Massachusetts, and is unable to attend to the many and varied duties as president of the FOUNDATION

64) While unable to discharge his duties and obligations as FOUNDATION president as aforesaid, Defendant TUCKER, who has been with the FOUNDATION less than three years hired New York legal counsel, Ralph Lerner, and directed him to cause the expenditure of time, resources and funds of the FOUNDATION on efforts to move the Chicago museum to Washington D.C. and /or otherwise from Illinois.

65) Directors GIDWITZ and BUNTROCK in their Verified Complaint state, and the PEOPLE adopt their allegations herein, that Defendant JUDITH TERRA set upon a course of

conduct and convinced other directors to join her in her efforts to promote her self interests, close the Terra Museum in Chicago, and move the FOUNDATION to Washington D.C. where she lives to effect her own personal interests, and in addition, upon information and belief, the FOUNDATION's Board acted to punish those who had opposed her acts of self-interest including her claims against the Estate of Daniel Terra.

66) As related by directors GIDWITZ and BUNTROCK in their verified statements, Defendant SIMPSON announced when he joined the FOUNDATION Board of Directors at his first meeting in October 1999 that he was there only "to protect JUDITH TERRA." As a consequence, Defendant SIMPSON, by his own admission was not on the FOUNDATION's board to discharge his directors duties and did not demonstrate the requisite loyalty to the Trust beneficiaries which is required of a Director and fiduciary of the FOUNDATION. A copy of the Board minutes of October 1999 are attached hereto in relevant part as Exhibit H and incorporated herein by reference.

67) Defendant SIMPSON's comment to the Board is significant in light of the fact that Defendant SIMPSON joined the Board of the FOUNDATION in fiscal year end 1999, at the recommendation of JUDITH TERRA, at a time years after JUDITH TERRA's claims against the Estate of Daniel Terra had been settled. Thereafter JUDITH TERRA's desire was to assume control over the FOUNDATION's assets and eliminate from the FOUNDATION those who had opposed her claims including the law firm of Bell, Boyd and Lloyd. At the FOUNDATION Board meeting of October 1999 Defendant SIMPSON attending his first meeting accused counsel for Bell, Boyd & Lloyd of working against JUDITH TERRA, and thereafter the Defendants caused the

FOUNDATION to discharge Bell, Boyd & Lloyd and hire new counsel. At that time the only interest of JUDITH TERRA to protect was her personal need to seek revenge upon those who had opposed her claims against the Estate of Daniel Terra.

68) Defendant STEBBINS engaged in conflicts of interest and breaches of fiduciary duty, which compromised confidential information of the Terra Museum and which were contrary to the Museum's interest and to the established code of ethics for the Association of Art Museums.

69) Defendant STEBBINS was a paid employee of the Museum of Fine Arts in Boston (MFA), and served as the curator for its collection of American Art during the years 1998 until some time in 2000, and in such capacity, he provided advice about acquisition of American art to the MFA, and in that regard he owed the MFA a duty of absolute loyalty.

70) During 1999 Defendant STEBBINS, by his position on the FOUNDATION's board, obtained confidential information about the Terra acquisition strategy to be applied at various art auctions where the FOUNDATION's curators/art directors planned to bid for and attempt to purchase art for the collection, and in this regard Defendant STEBBINS obtained confidential information about the Terra Museum's art acquisition priorities.

71) Defendant STEBBINS owed a duty of absolute loyalty to the FOUNDATION and, while he was an MFA employee with obligations to the MFA to assist it in acquiring the same type of art, he knowingly placed and injected himself in a position and at places wherein his duty to the MFA conflicted directly with his duty of loyalty to the FOUNDATION and whereby, using his position

as a director of the FOUNDATION, he acquired detailed knowledge of the FOUNDATION's acquisition plans and required the FOUNDATION curators to share confidential information with him.

72) Defendant STEBBINS shared the confidential acquisition plans of the FOUNDATION which he thus acquired with at least one other MFA employee, a Mr. Jim Wright, who was head of Painting Conservation at the MFA.

73) At art auctions Defendant STEBBINS injected himself into the activities of the FOUNDATION's curators, engaging in discussions of art in the presence of outsiders and otherwise jeopardizing the confidentiality of the intentions of the FOUNDATION's staff.

74) Defendant STEBBINS also shared his art expertise and knowledge and advice on American art with friends and others despite his duties of loyalty to the FOUNDATION, which duties included a duty to respect and preserve its confidences.

75) The "Association of Art Museum Directors", Code of Ethics for Professional Practices in Art Museums, a copy of which is attached hereto and incorporated herein as Exhibit "G", provides in pertinent part that:

a) The Director and Curator are to identify acquisitions and no object may be considered for acquisition without the recommendation of the Director (#15);

b) Private collecting by the Director, staff, or other person employed or closely connected with the Museum is appropriate. However, no collecting can be tolerated if, in fact or appearance, it conflicts with the interest of the Museum and its collecting programs. The Museum always must be given the first opportunity to purchase any work of art,. (#25);

c) The Director is to reach a clear understanding of the policies as approved by the Board. The Director must be the one individual answerable to the Board for carrying out and conforming the policy (#61); and

d) It is reasonable for the Director to expect the full support of the Board. Every effort should be made to resolve differences (#63).

76) The ethics code for "Appraisal Pracuce ", a copy of which is attached hereto and incorporated herein as Exhibit "H", provides: "Where two or more potential clients seek an appraiser's service with respect to the same property. . the appraiser may not properly serve more than one, except with the consent of all parties."

77) The art acquisition plan of the Terra Museum, regarding its acquisition strategy at auction for specific pieces of art and price ranges constitutes important and confidential proprietary information and the directors of the FOUNDATION have a fiduciary obligation to assure that the strategy remains confidential and not revealed to outsiders or otherwise compromised. Members of the board of Directors can not share it with outsiders much less a competitor.

78) Upon information and belief, Mr. Neff, the Director and Curator of the Terra Museum's art here in Chicago, made Defendant STEBBINS' aforesaid actions and conflict of interest known to both Defendant JUDITH TERRA and Defendant TUCKER, and in fact Mr. Neff shared written memos with Defendant TUCKER, but no one took action to prevent the compromise of confidential FOUNDATION information as aforesaid until this lawsuit herein was filed.

79) The FOUNDATION's confidential art acquisition information has not only been compromised but some of the FOUNDATION acquisition activities appear to be suspect, as the Terra's minutes of October 1999 disclose. Said minutes relate a discussion about seeking to acquire a particular painting through an art dealer, Michael Altman & Co. Inc., and reflect that although the original asking price of the painting was $35,000, the dealer, Altman, claimed to have received a $75,000 offer, and that the Terra committee decided to authorize a bid of $50,000 for the painting. The minutes fail to explain why a lesser bid of $50,000 would be made with a pending offer to purchase standing at $75,000. A copy of the October 1999 Board minutes is attached hereto and incorporated herein by reference as Exhibit "H".

80) Defendant STEBBINS is now the Curator for the Fogg Museum of Art in Cambridge, Massachusetts, with direction to purchase early American art for the Fogg, and thus he has the same conflict of interest with the FOUNDATION through his role at the Fogg as he did during his employment with the MFA.

81) Daniel Terra established the Terra Museum in the Chicago area and supported and funded the Chicago operation without interruption from its inception through the date of his death

in 1996 and in this way and in other ways expressed his charitable intent to benefit the PEOPLE OF THE STATE OF ILLINOIS. There is no doubt that the other donors over the years relied upon the institutional nature of the FOUNDATION as an Illinois-based public museum, relying and expecting said museum to remain a Chicago, Illinois institution, because the unique nature of a museum's charitable mission is tied to the location where it is established. Further, it is the type of charitable activity whose location and service area are an integral part of its charitable purpose and mission, which here is clearly to serve the Chicagoland area. (Attached hereto and incorporated herein by reference as Exhibit "I" is the 1994 list of donors who have contributed to the FOUNDATION.)

82) The removal of the FOUNDATION and its assets to a location outside of Illinois is not permitted at common law or in equity because to do so would place the subject trust outside of the jurisdiction of Illinois and divest the PEOPLE OF THE STATE OF ILLINOIS of their common law beneficial interest in said trust. The PEOPLE OF ILLINOIS have no right to the beneficial interest of a charitable trust outside its jurisdiction and moving a trust to another jurisdiction would work an impermissibly divestiture of their beneficial rights.

83) The removal of the FOUNDATION and its assets to Washington D.C., Boston or anywhere outside of Illinois under the unique elements and consequences of the making of a charitable trust under common law would have the effect of divesting the PEOPLE OF ILLINOIS of their beneficial interest, and at common law there is no right or provision that permits a trustee of a charitable trust to act to divest or change the identity of the charitable trust's beneficiary.

84) The Defendant FOUNDATION is a charitable trustee under the common law and its sole

and exclusive beneficiaries are the PEOPLE OF THE STATE OF ILLINOIS. Under the common law the charitable trustee has no right to divest or alter the beneficial ownership of a charitable trust and the Defendants are without legal power or right to divest, move or alter the beneficial ownership of the assets held in trust by the Defendant FOUNDATION, and Defendants are without legal right to seek to move the FOUNDATION from Illinois.

85) The actions of Defendant FOUNDATION and the Defendant Directors in seeking to remove the FOUNDATION from Illinois are acts in breach of their trust and an attempt to unlawfully and without authority divest the PEOPLE OF THE STATE OF ILLINOIS of their beneficial rights and interests in said charitable trust.

86) Section 16(b) of the Trust Act provides:

"Sec. 16 (b) Upon application to a court of competent jurisdiction, in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and he seeks injunctive relief and removal of such trustees, the Court may, as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest." (760 ILCS 55/16(b) (1999))

87) As alleged by Directors GIDWITZ and BUNTROCK, the Defendants opposed the election and actions of GIDWITZ and BUNTROCK in order to further their improper actions as aforesaid and insulate them from criticism from within the FOUNDATION's Board.

88) By virtue of their positions as directors and/or officers of the FOUNDATION, Defendants JUDITH TERRA, SIMPSON, STEBBINS and TUCKER owed fiduciary duties to the PEOPLE OF THE STATE OF ILLINOIS to act in the best interest of the PEOPLE by furthering the FOUNDATION's charitable purpose, not in their own self-interest, and they were bound to fulfill the museum mission started by Daniel Terra and the FOUNDATION more than twenty years ago in and for the benefit of the Chicagoland area which was supported and funded by him without interruption through his death in 1996.

89) The Defendants, by the foregoing alleged actions, breached their fiduciary duties by acting in a manner that was detrimental to the interest of the PEOPLE OF THE STATE OF ILLINOIS, who are the ultimate beneficiaries of this Trust and of each and every charitable trust within the State of Illinois.

90) As aforesaid, improper conduct here included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago and creating the impression that the museum needs to be closed;

b Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois, and doing such to further private personal goals;

16di-001185

c. Attempting to remove employees, agents and directors of the Museum who opposed self-interested acts, in order to enable and effect the Defendants' plan of moving or transferring the Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law; and

d. Endangering the charitable status and assets of the TERRA FOUNDATION.

e. Expending substantial FOUNDATION funds to attempt to move the FOUNDATION and close the museum in Chicago.

91) The aforesaid establishes that the FOUNDATION is a charitable trust in jeopardy without proper accounting safeguards or appropriate personnel or a full-time chief executive officer in place, its long-term institutional employees having resigned or been fired, and its individual defendant Board members being more interested in their own vision, self-interest, and/or personal goals of promoting their status in society than in properly safeguarding the FOUNDATION's charitable mission. A small group of Directors, attorneys, and staff and former staff who were loyal to the charitable trust purposes of the FOUNDATION have been subjected to retaliation, removal or neutralization by the acts of the Defendants as aforesaid.

92) A charitable trust formed in Illinois is a precious gift that belongs to the PEOPLE OF THE STATE OF ILLINOIS, and is not the property of those persons acting as its stewards, trustees, directors or officers. The Defendant Directors here are not the founders of this FOUNDATION and are not substantial contributors to said FOUNDATION, and each of the Defendant Directors are relatively new to service with the FOUNDATION and, as aforesaid, they have acted against the best

interest of the FOUNDATION and the PEOPLE OF ILLINOIS and are endangering the trust's assets, and the removal of the Defendant Directors under these circumstances is required to protect the safety and integrity of this charitable trust.

93) The totality of the equities here show that removal of individual defendant directors and installation of new fiduciaries are needed here to protect this trust from the self-interest and improper actions of the aforesaid Defendant Board members of the FOUNDATION.

94) An immediate, interim and permanent receiver is needed to take swift action to secure the assets and conduct an accounting to determine if assets are missing or if have been misused.

95) To protect this charitable trust as aforesaid, the removal of the Defendant Directors and permanent appointment and addition of seven to nine additional board members is needed, to effect, install, and provide the necessary impartial stewardship that an institution such as the FOUNDATION requires, and which the current Board under the aforesaid circumstances cannot provide as aforesaid.

96) By way of the foregoing, Defendants have breached their fiduciary duties to the Plaintiff PEOPLE OF THE STATE OF ILLINOIS, and as a consequence, the PEOPLE's beneficial interest and the purposes of the FOUNDATION are in need of protection from Defendants, and malice is the gist of this action and an accounting is necessary.

97) The foregoing breaches of fiduciary duty have caused, and will continue to cause,

irreparable harm to the FOUNDATION, and irreparable harm to the PEOPLE OF THE STATE OF ILLINOIS as the beneficiaries of Illinois charitable truss, for which no remedy at law is sufficient.

98) Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created the TERRA FOUNDATION FOR THE ARTS for the benefit of the PEOPLE OF THE STATE OF ILLINOIS and as a charitable trust;

(2) The intent of Daniel Terra in creating the TERRA FOUNDATION FOR THE ARTS was to operate a museum of American art in the Chicago area for the benefit of the PEOPLE OF THE STATE OF ILLINOIS and that he and others who have donated to the TERRA FOUNDATION FOR THE ARTS intended and relied on the fact that the Museum would remain in the Chicagoland area;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art or the TERRA FOUNDATION FOR THE ARTS to Washington, D.C. or any other location outside of Illinois, as such is a charitable trust which is for the benefit of and subject to remaining within the jurisdiction of the PEOPLE OF THE STATE OF ILLINOIS;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to any location outside of Illinois would violate the charitable trust established by the creation and operation of the TERRA FOUNDATION FOR THE ARTS to date , the intent of Daniel Terra, the common law, the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq*. (West 1995));

(5) Defendants, the TERRA FOUNDATION FOR THE ARTS, JUDITH TERRA, ALAN K. SIMPSON, THEODORE STEBBINS and PAUL HAYES TUCKER, have each breached their fiduciary duty to the PEOPLE OF THE STATE OF ILLINOIS as the beneficiaries of TERRA FOUNDATION FOR THE ARTS, and the TERRA

FOUNDATION FOR THE ARTS needs to be protected;

(6) Irreparable injury will result to TERRA FOUNDATION FOR THE ARTS and the PEOPLE OF THE STATE OF ILLINOIS as the beneficiaries of TERRA FOUNDATION FOR THE ARTS if Defendants are permitted to continue breaching their fiduciary duties and permitted to remain in control of the subject TERRA FOUNDATION FOR THE ARTS; and

(7) The Defendants have acted improperly and breached their fiduciary duty, and the equities require that the Court exercise supervisory authority over the charitable trust at issue here and appoint receivers and additional fiduciaries and directors to protect the TERRA FOUNDATION FOR THE ARTS;

B. A temporary, preliminary and permanent injunction enjoining each and every Defendant from the following:

(1) Holding any further meetings of the TERRA FOUNDATION FOR THE ARTS' Board of Directors, until a new and impartial Board is constituted by this Court;

(2) Taking any action to elect or remove any member of the TERRA FOUNDATION FOR THE ARTS' Board of Directors or changing any committee assignment or governing instruments;

(3) Taking any action to close the Terra Museum in Chicago or to move TERRA FOUNDATION FOR THE ARTS or any of its assets outside the State of Illinois;

(4) Taking any other action contrary to the by-laws of the TERRA FOUNDATION FOR THE ARTS; and

(5) Transferring, moving, disbursing, selling, encumbering, or exchanging any assets of the TERRA FOUNDATION FOR THE ARTS;

C. The appointment of a receiver to operate and maintain TERRA FOUNDATION FOR THE ARTS pursuant to the Court's equitable powers, the common law, the Charitable Trust Act, and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995));

D. The appointment of a receiver to conduct an accounting of all assets of the Terra Museum and TERRA FOUNDATION FOR THE ARTS and to determine and locate all assets of the TERRA FOUNDATION FOR THE ARTS;

E Entry of an Order removing Defendants JUDITH TERRA, ALAN K. SIMPSON, THEODORE STEBBINS and PAUL HAYES TUCKER as directors and officers of the TERRA FOUNDATION FOR THE ARTS, and removing such other Directors as the equities require and as proves necessary to protect the TERRA FOUNDATION FOR THE ARTS;

F The appointment and addition to the Board of Directors of the TERRA FOUNDATION FOR THE ARTS of at least nine additional Directors to protect said FOUNDATION to effect the necessary stewardship and fiduciary oversight; and

G. Such additional relief as the Court deems just and equitable herein.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN, Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Bureau of Charitable Trusts and Solicitations
100 West Randolph St., 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

16di-001190

16di-001192

EXHIBIT 24

16di-001193

EXHIBIT 24

80000 SERIES
30% P.C.W.
RECYCLED
MEETS SAE

FAX TRANSMISSION

Charitable Trusts and Solicitations Bureau, 100 W. Randolph Street, 11th Floor, Chicago, IL 60601-3175
Phone: (312) 814-2595 Fax: (312) 814-2596

To: Brian Crowe/Jim Wilson
William Quinlan/James Carroll
Susan Stone/Stephen Carlson

Date: March 21, 2001

Fax #:

312-527-4011 J. Wilson
312-527-5921 Shefsky
312-263-5013 Quinlan
312-853-7036 Sidley

Pages: 40

From: Floyd Perkins

Subject: Terra Foundation for the Arts

COMMENTS: Attached is the Attorney General's draft First Amended Complaint. It is a draft, it is not being filed, but rather supplied to set forth the issues and causes that the Attorney Genral believes are at issue and which are being discussed in settlement.

This FAX may contain attorney-client, attorney work product or other privileged and/or confidential information. This FAX is intended only for the use of the individual for whom or entity to which it is addressed. If you have received this FAX in error, please notify the sender at the above telephone number and destroy this FAX. If you are not the intended recipient, you are hereby notified that any retention or dissemination of this FAX and/or the information it contains is strictly prohibited.

ORIGINAL (check one) __X__ WILL _____ WILL NOT BE SENT BY MAIL

16di-001196

EXHIBIT 25

16di-001197

EXHIBIT 25

KLEERFAX
RECYCLED
80000 SERIES
30% P.C.W.

Theodore E. Stebbins, Jr. 84 Upland Road Brookline, MA 02445

FACSIMILE TRANSMITTAL

TO: Steve Callson, Susan Stone DATE: 4/2/01

FAX: 312-853-7036

FROM: TED STEBBINS

TEL: 617-739-1393
FAX: 617-739-2975

Number of pages to follow: 3
If you have any difficulty with the reception of this fax, please call 617-739-1393.

MESSAGE

Hi Steve & Susan:

Yesterday's version had a serious typo! Here's the latest (4/2/01).

Ted

Jacques Andreani
40 rue Bonaparte
75006 Paris

Theodore E. Stebbins, Jr.
84 Upland Road
Brookline, Ma. 02445

April 2, 2001

Mr. David C. Hilliard
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson
311 South Wacker Drive, suite 5000
Chicago, Ill. 60605

Dear Mr. Hilliard:

Thank you for your letter of March 30, 2001. We are pleased to learn that the next – and, we hope, final- mediation session will be rescheduled for a time convenient to all. Equally, we are glad to know that the Attorney General or his representative will attend.

We are enclosing a settlement proposal. It is one we have discussed with a few members of the Foundation board; we believe that many members might approve it, although of course we cannot speak for the board. As you will see, it follows the outline of the proposal you sent us, which was dated 3-21-01.

We believe that the board would like to have the mediation result in success, as significant costs will surely result from going back to court. We are confident that the foundation would prevail in the end. Nonetheless, in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago. This alone should end the lawsuit. We are willing to make other concessions as well, as you will see. However, the board has, we believe, a fiduciary duty not to give away the foundation's major assets, including the endowment funds, real estate, and the art collection. Similarly, while we would like the Attorney General and the plaintiffs to be as comfortable as possible with the board nomination and election process, it would set an unacceptable precedent for the board to give over control of this process to non-members, no matter how estimable. Finally, it would seem entirely unreasonable for the foundation to bear the cost of the plaintiffs' unduly harsh, personalized, money-wasting suit; they could have sought the same end through a suit strictly on the merits of their two major complaints.

If we can proceed on these matters, then we believe we may find common ground and bring this unfortunate dispute to an end.

Yours sincerely,

Hon. Jacques Andreani

Dr. Theodore E. Stebbins, Jr.

Draft 4-2-01

Buntrock, et al. And State of Illinois v. Terra Foundation, et al.
Foundation's Mediation Proposal

A. ART

1. For at least fifty years, the Foundation to maintain and exhibit the Terra Collection of American Art in Chicago. Foundation pledges to negotiate a working partnership with the Art Institute of Chicago (AIC) for 10 year trial period. Goal is to create a great combined resource for American art in Chicago with improved artistic and educational programming in Chicago, Giverny and elsewhere.

2. New joint Foundation/AIC planning committee to be formed, comprised of equal number of Foundation directors and AIC trustees, to work out the terms of the partnership, including issues of curatorship, acquisitions, loan policies, insurance, and the like.

B. OTHER ASSETS OF FOUNDATION

1. Funds A-1, B-2 and D-4, the art collection, and any proceeds from the sale of the Michigan Avenue museum buildings or other Foundation property to remain under the ownership and control of the Foundation.

2. Foundation to allocate $10MM, income from which to fund development, delivery, and evaluation of innovative urban educational programming in American art, with the goal of creating in Chicago a model program that may be replicated elsewhere.

C. FOUNDATION

1. Foundation to remain an Illinois not-for-profit corporation, with a registered office in Illinois. The Foundation shall maintain books and records in Illinois which shall be available to the Illinois Attorney General.

2. Foundation to conduct its affairs in accordance with its Articles of Incorporation, By-laws, and the Illinois General Not for Profit Corporation Act including promoting American art and culture in U.S. and abroad, and remains free to determine how best to achieve its goals, including, but not limited to determining how to maximize effectiveness of programming in Giverny and elsewhere; deciding where to meet, operate, and conduct its affairs; and acquiring buildings and other property in any location.

D. BOARD

1. Dean Buntrock, Ron Gidwitz, Alan Simpson, and to resign from the Board immediately.

2. Board to decide how best to implement staggered terms of Directors and term limits for all Directors, with no current Director to remain on Board more than eight years from September 2001.

3. Board to elect six new directors, three from Illinois and three from outside Illinois to raise the total number of Board members to 13. David Hilliard as consultant to Board to work with Board Nominating Committee (Marshall, Daley, and) to provide list of candidates from which first six new directors to be chosen by the Board.

4. Each Director to provide name and CV of candidates after having contacted each candidate and ascertained the willingness of each such candidate to serve.

5. Decisions on new Directors to be guided by desire to add to the Board the following qualities:

a) expertise in American art;
b) important Chicago area collectors of American art;
c) persons of international stature who have demonstrated interest and involvement in the arts;
d) history of civic and/or business leadership;
e) background or expertise in education; and
f) experience serving on museum or charitable boards.

E. OTHER

1. Lawsuits of Attorney General and Buntrock/Gidwitz to be dismissed with prejudice; full and complete releases by all plaintiffs to Foundation and its officers and directors; settlement does not constitute any admission of wrongdoing or liability.

2. Reasonable attorneys fees of plaintiff directors and individual defendants to be paid by Foundation, as determined by the Court. In case of the plaintiffs, "reasonable" to mean cost of a normal, non-punitive suit brought solely to determine merits of the case.

3. A mutually acceptable press release to be worked out among the parties.

16di-001202

EXHIBIT 26

16di-001203

EXHIBIT 26

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Terra Foundation for the Arts

Board Meeting/Conference Call

June 29,,2001

12:30 p.m.

RONALD GIDWITZ: Hello?

MALE VOICE: Hello.

RONALD GIDWITZ: Hello?

STEPHANIE MARSHALL: Yes, who's – is that Ron?

RON GIDWITZ: Yes.

STEPHANIE MARSHALL: Ron, good afternoon. Stephanie.

RON GIDWITZ: Hi, Stephanie.

STEPHANIE MARSHALL: Is there anyone else on the line?

ARTHUR HARTMAN: Yes, Art Hartman is on.

STEPHANIE MARSHALL: Good afternoon, Arthur. Where are you?

ARTHUR HARTMAN: I'm just in from Moscow and France.

STEPHANIE MARSHALL: So you're home?

ARTHUR HARTMAN: In France, yes.

STEPHANIE MARSHALL: Oh, you're in France. Okay. Okay. Well, we're just – just gathering.

ARTHUR HARTMAN: Where are you, Stephanie?

STEPHANIE MARSHALL: I'm at my office.

ARTHUR HARTMAN: Okay.

STEPHANIE MARSHALL: And I think people will be calling in from all over. I think Ron, you're in the Foundation offices?

RON GIDWITZ: No, actually, I'm in my office.

STEPHANIE MARSHALL: You're in your office, okay. I think Maggie and Dean may be in the Foundation offices.

RON GIDWITZ: The food will probably be better there than it is here.

STEPHANIE MARSHALL: Anyone else join the line?

(Pause)

RON GIDWITZ: Arthur, how's the weather over there?

ARTHUR HARTMAN: It's just perfectly beautiful. You wouldn't believe it. The sky is blue; no wind. Nice and warm. It was lovely in Moscow, too.

STEPHANIE MARSHALL: Who has – someone has just joined us?

THEODORE STEBBINS, JR: It's Ted.

STEPHANIE MARSHALL: Good afternoon, Ted.

THEODORE STEBBINS, JR: Hi, Stephanie.

STEPHANIE MARSHALL: I'm going to turn the volume up here.

ARTHUR HARTMAN: Hi, Ted. Arthur.

THEODORE STEBBINS, JR: Hi, Arthur.

STEPHANIE MARSHALL: Ted, I don't hear you very loudly, so we may ask you to talk a little bit more – louder.

THEODORE STEBBINS, JR: Can you hear me now?

STEPHANIE MARSHALL: Yeah, that's better.

THEODORE STEBBINS, JR: Okay. Arthur is very clear. Where are you, Arthur?

ARTHUR HARTMAN: I'm in France.

THEODORE STEBBINS, JR: Good. Who else have we got here?

STEPHANIE MARSHALL: Ron is in his office and that's all of us so far.

RON GIDWITZ: Yeah, Ted, I'm here.

THEODORE STEBBINS, JR: Okay, Ron, hi.

RON GIDWITZ: Hi. Are you out on the Cape? Ted?

THEODORE STEBBINS, JR: No, I'm at home in Brooklyn.

RON GIDWITZ: Ah, there you go.

STEPHANIE MARSHALL: Welcome, whoever has joined us. Who has joined us? Hello? Anyone join us? Ted, are you still there?

THEODORE STEBBINS, JR: I'm here.

STEPHANIE MARSHALL: All right. Everybody still there?

RON GIDWITZ: Yep.

STEPHANIE MARSHALL: Okay.

ARTHUR HARTMAN: Here.

STEPHANIE MARSHALL: Okay. Hello, has anyone just joined us? Hm, okay.

FEMALE VOICE: There are people on.

MALE VOICE: Don't tie up this line.

FEMALE VOICE: Okay.

STEPHANIE MARSHALL: Don, do I hear your voice?

FEMALE VOICE: How do I put this on the speaker? Okay.

DON RATNER: Hello? Hello?

STEPHANIE MARSHALL: Yes, Don, is that you?

DON RATNER: Stephanie, hi. It's Don. Maggie and Dean are here.

STEPHANIE MARSHALL: Okay.

DON RATNER: Mark Heatwall and Steve Carlson.

STEPHANIE MARSHALL: Okay, very good.

DON RATNER: And we're waiting for the others to call in and get hold of people, and this may take a few minutes to –

STEPHANIE MARSHALL: We have, um, we have Ron and Arthur and Ted and I so far. So we're still waiting for Jacques and Alan, Judith and Paul.

DON RATNER: All right. Ron's on the phone?

STEPHANIE MARSHALL: Correct.

RON GIDWITZ: I am on the phone. I am from my office.

DON RATNER: Okay. I thought you were going to be over here. Oh, I'm sorry.

RON GIDWITZ: Well, that's an extra sandwich for you to eat.

ARTHUR HARTMAN: Don't make me hungry.

MARGARET DALEY: Hello, everyone.

STEPHANIE MARSHALL: Maggie?

MARGARET DALEY: Yes.

STEPHANIE MARSHALL: Good afternoon.

MARGARET DALEY: Yes, nice to talk to you, Stephanie. Have you walked past the Taste of Chicago yet?

STEPHANIE MARSHALL: No, but I've been waiting in traffic. (Laughing)

ARTHUR HARTMAN: What's that?

MARGARET DALEY: Oh, the Taste of Chicago?

ARTHUR HARTMAN: Yeah.

STEPHANIE MARSHALL: It's a huge gastronomical extravaganza where all the restaurants in Chicago, or at least the better ones, sort of lay out their wares along the Lake. It's terrific.

ARTHUR HARTMAN: Ah-ha.

STEPHANIE MARSHALL: And you sample your way to high cholesterol levels.

ARTHUR HARTMAN: (Laughing)

MALE VOICE: (Inaudible)

STEPHANIE MARSHALL: I understand they will have Lipitor salesmen standing by.

ARTHUR HARTMAN: (Laughing) I can tell you that Mevacor works.

STEPHANIE MARSHALL: (Laughing) Don, have you heard from anyone? We know Helene will not be on the call, but have you heard from Judith or Paul or Alan?

DON RATNER: Expected to be on the call, so we're just sort of waiting for them all to –

RON GIDWITZ: And we're expecting Jacques?

DON RATNER: Yes.

STEPHANIE MARSHALL: We are, right. I know Paul is in Italy. I don't know where Judith or Alan are.

DON RATNER: In Washington, Alan's in Russia, and Arthur is in –

STEPHANIE MARSHALL: Arthur's here.

DON RATNER: Arthur's already there.

STEPHANIE MARSHALL: Hello. Hello? Who has joined us now? Have Judith or Paul joined us yet?

DON RATNER: No.

STEPHANIE MARSHALL: Okay. We're hearing beeps sometimes, and you assume that someone has joined the call when you hear that.

JEFF: And what lawyers are present?

DON RATNER: Here, Mark Heatwall and Steve Carlson.

JEFF: Okay. Hi, Steve.

STEVE CARLSON: Hi, Jeff.

SUSAN STONE: Susan Stone from Sidley, Austin, Brown & Wood here with Stephanie.

JOHN SABL: Also John Sabl from Sidley, Austin, Brown & Wood out here with Susan and Stephanie.

MALE VOICE: I'm sorry, who are all the lawyers? I didn't catch them all.

STEPHANIE MARSHALL: We have Susan Stone, Steve Carlson, John Sabl, and my understand is that Mark Heatwall is in Chicago. Let me ask anyone else. Are there – is there any other legal counsel present with anyone?

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Yes, Judith, good afternoon.

JUDITH TERRA: Hi, I've been on the line a minute. I just didn't want to interrupt. Ah, have you started things?

STEPHANIE MARSHALL: No, not at all. We're still waiting for – well, we were waiting for you and for Paul and for Alan, and Jacques. Everyone else is here, except Helene who was not going to be on the call.

JUDITH TERRA: Okay.

STEPHANIE MARSHALL: So, no, we've not started anything.

JUDITH TERRA: Okay. So who is "we" – who is –

STEPHANIE MARSHALL: We have just – we have just – ah, the question was asked who are the legal counsel present, and we have Mark Heatwall, who is in Chicago at the Foundation office, as the regular Foundation counsel. And we have Susan Stone and John Sabl, who are here with me in Aurora, and Steve Carlson who is in the Foundation office, all representing Sidley Austin. I was just asking every other Board member on the line are there any other legal counsel present.

ARTHUR HARTMAN: Not here in France.

STEPHANIE MARSHALL: Anyone else? Ron?

RON GIDWITZ: No, I'm all by myself.

STEPHANIE MARSHALL: Judith?

MALE VOICE: Susan Stone and who?

MALE VOICE: John Sabl. S-A-B-L. He is a partner – and is the lawyer who drafted the (inaudible).

STEPHANIE MARSHALL: Has anyone joined the call? Jacques or Alan or Paul?

DON RATNER: We're calling both of them.

MALE VOICE: S-A-B-L. (Inaudible)

(Background conversation; inaudible)

STEPHANIE MARSHALL: Hello? Has anyone else joined the call? Alan, Paul, Jacques? Hello, has anyone else joined the call?

MALE VOICE: That's a lot of beeps on the phone, but –

STEPHANIE MARSHALL: Yeah, there are. (Laughing) There are. Well, at some point, we will make a decision to move forward, but I think, uh, I know Jacques is overseas and so is Alan, so we'll wait just a few more moments. But we are going to have to proceed relatively shortly.

THEODORE STEBBINS, JR: Stephanie, I assume you're chairing the meeting?

STEPHANIE MARSHALL: I am, Ted.

THEODORE STEBBINS, JR: And, uh, what does a quorum consist of?

MALE VOICE: A majority.

THEODORE STEBBINS, JR: Oh.

STEPHANIE MARSHALL: The majority of the meeting, but as you know, we need six people to amend the bylaws, so that's critical.

MALE VOICE: And a quorum is six and you also need six to amend the bylaws.

FEMALE VOICE: So right now, who's missing? Jacques, Helene –

MALE VOICE: Jacques, Helene and Paul – and Alan.

MALE VOICE: Have you tried to call them?

STEPHANIE MARSHALL: Don, is there any way we might call people to see if – if they are available? Were you able to get the faxes to everyone, as far as you know?

DON RATNER: I talked to everybody. Everybody said they were going to be on the call. If you've heard from Helene since, fine. I talked to Jacques, and he said Helene was going to be on the call.

STEPHANIE MARSHALL: Oh.

DON RATNER: I've talked to Andréani, I've talked to Paul, I've talked to Alan. Everybody –

STEPHANIE MARSHALL: Oh, okay. Has anyone joined us now?

MALE VOICE: It sounds like Don did a good job reaching everyone.

STEPHANIE MARSHALL: Yes. I mean, we do have a quorum now, but I think in fairness, we'll wait just a few more moments. Hello, has anyone joined us? Arthur, are there challenges when you call in from Russia?

ARTHUR HARTMAN: No.

STEPHANIE MARSHALL: No, okay. I know that's where Alan –

ARTHUR HARTMAN: Well, I'm calling from France.

STEPHANIE MARSHALL: I know you are, but Alan is in Russia, so I was just curious.

ARTHUR HARTMAN: No, the same system applies there.

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DON RATNER: Actually, Stephanie, we are trying to call him. He asked us to call him.

STEPHANIE MARSHALL: Oh.

DON RATNER: And we got a hold of his number, but there's nobody there. We get a voice mail. So he may have gotten delayed or something. Or he may be on the phone.

STEPHANIE MARSHALL: What time is it in Russia?

DON RATNER: Nine thirty.

ARTHUR HARTMAN: A lot of traffic there. What hotel is he at?

DON RATNER: I have no idea. If I give you the number, will you recognize it?

ARTHUR HARTMAN: No.

RON GIDWITZ: Arthur, you don't (inaudible) numbers?

ARTHUR HARTMAN: No. (Laughing)

STEPHANIE MARSHALL: Has anyone just joined us?

DON RATNER: Stephanie, apparently when Karen tries to call these people on the line, it beeps. That's what that beeping is all about.

STEPHANIE MARSHALL: Oh, I see. All right, thank you. I keep thinking somebody is joining the call. So, Don, you said you'd talked to Jacques Ahrweiler and Helene will be on the call?

DON RATNER: I talked to Jacques last weekend, and he said that he was going to get Helene on the call. But, you know, things –

STEPHANIE MARSHALL: Okay. Okay.

RON GIDWITZ: Could someone please share with me what happened – while we're waiting – in court today? What's all that about?

STEVE CARLSON: I guess I can. This is Steve Carlson from Sidley Austin.

STEPHANIE MARSHALL: Steve, could you speak up a little bit, please?

STEVE CARLSON: I'm speaking pretty loud for this room.

STEPHANIE MARSHALL: Oh, okay, I'm sorry.

STEVE CARLSON: (Inaudible) if I don't blow everybody out I'll keep speaking up. There was a motion filed by Mrs. Terra and Dr. Tucker and Senator Simpson for a temporary restraining order to try to stop this meeting from going ahead. I –

ARTHUR HARTMAN: What court was this in, Steve?

STEVE CARLSON: It was in the state court, in front of Judge Kinaird, who we've been in front of in the litigation (inaudible).

ARTHUR HARTMAN: Right.

RON GIDWITZ: Who were they representing? I mean, who – they filed it themselves, or was it – because yesterday, apparently, they filed on behalf of the Foundation. Were they doing that again today?

STEVE CARLSON: They had Joel Bellows from the firm of Bellows & Bellows, and Laurel Bellows was there as well. Leonard Garment, who's he –

MALE VOICE: (Inaudible)

STEVE CARLSON: (Inaudible) Todd. Basically the same people from yesterday in the Federal court, but today they were representing only the individual defendant directors in this main lawsuit. And they sought a TRO to block this meeting from going

forward, and made much the same argument that they made in the Federal court yesterday. And the Attorney General primarily responded to it. Judge Kinaird, I think, at the end of the day, was interested in what irreparable effect whatever happens at this meeting has. And I think at the end of the day she decided that since the draft resolutions that the Board was going to be considering appeared to say that whatever you all vote to do today does not become effective until the Consent Judgment and Order is entered by the court herself, she didn't need to enjoin this meeting at all, that she could give Senator Simpson's lawyers and Dr. Tucker's lawyers and Mrs. Terra's lawyers an opportunity to make whatever presentation they wanted to, to make whatever arguments they wanted to, about the propriety of the settlement when the Consent Judgment is presented to her at a later date, which may very well be Monday afternoon at 2:00.

RON GIDWITZ: And who's defending the Foundation? Are you?

STEVE CARLSON: I'm the Foundation's lawyer, yes.

RON GIDWITZ: And what kind of a defense did you put on today – aggressive?

STEVE CARLSON: I'm always aggressive.

RON GIDWITZ: That's what I've heard. I haven't seen you in action. I understand you are always aggressive. Were you aggressive today?

STEVE CARLSON: (Inaudible) properly noticed and called a Board meeting and that I'd argued that strenuously to the court on many occasions, and it was the Foundation's position that a properly noticed Board meeting should go ahead and should not be interfered with by disgruntled members of the Board or by the court or anybody else.

ARTHUR HARTMAN: Thank you.

RON GIDWITZ: Thank you.

STEPHANIE MARSHALL: Is there anyone else on the call? Jacques? Helene? Judith, you are on the call. Paul and Alan?

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Yes, Judith is that you?

JUDITH TERRA: Yes.

STEPHANIE MARSHALL: Yes. Yes, go ahead, Judith.

JUDITH TERRA: No, I was just responding. I had to step out. Emma came to get me.

STEPHANIE MARSHALL: Oh, yeah, we're still waiting for Jacques, Helene, Alan and Paul.

JUDITH TERRA: Right. There was a call on my other line.

MALE VOICE: Jacques, how are you? Tally?

MALE VOICE: You've got Tally, too? I'm sorry, I didn't hear an answer to that. Tally is on the call as well? That's a question.

STEPHANIE MARSHALL: Uh, it's not appropriate for anybody to be on the call other than the Directors and the legal counsel that we have so noted already.

MALE VOICE: Is Don there?

MALE VOICE: No, he just left.

FEMALE VOICE: Why is Tally talking to Don?

MALE VOICE: Tally called Don. He left.

FEMALE VOICE: Don left the room.

MALE VOICE: I think that's extremely inappropriate.

FEMALE VOICE: So do I.

STEPHANIE MARSHALL: We will not proceed until this is a meeting of the Directors and the legal counsel that we have already so noted. So, um, when everybody gets back, I will ask Tally to leave the call.

MALE VOICE: He's not on this call.

STEPHANIE MARSHALL: Excuse me? I really can't hear very well.

FEMALE VOICE: He's, uh – he called Don on his cell phone, and Don has left the room to talk to him.

STEPHANIE MARSHALL: Okay. That's fine.

FEMALE VOICE: I don't think that's appropriate in either case.

STEPHANIE MARSHALL: Has anyone else joined the call? Jacques, Helene, Alan or Paul?

RON GIDWITZ: How long do we expect to wait, out of curiosity?

STEPHANIE MARSHALL: Not – not very much longer, Ron. I think it's important that we proceed, and uh –

MALE VOICE: Don is – Don is –

STEPHANIE MARSHALL: – and move forward on this meeting as expeditiously as we are able to do.

DON RATNER: I called everybody. We've been calling everybody. We can't get a hold of anybody who is not on the call.

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STEPHANIE MARSHALL: Okay, then I think, uh – I think we will begin. As you all know, this is Stephanie, and I hereby call this meeting to order. Could we please have a roll call of all present? Jacques Andréani. Helene Arweiler. Dean Buntrock.

DEAN BUNTROCK: Present.

STEPHANIE MARSHALL: Maggie Daley.

MARGARET DALEY: Present.

STEPHANIE MARSHALL: Ron Gidwitz.

RON GIDWITZ: Present.

STEPHANIE MARSHALL: Arthur Hartman.

ARTHUR HARTMAN: Present.

STEPHANIE MARSHALL: Stephanie Marshall. Present. Alan Simpson. Ted Stebbins.

THEODORE STEBBINS, JR: Present.

STEPHANIE MARSHALL: Judith Terra.

JUDITH TERRA: Present.

STEPHANIE MARSHALL: Paul Tucker. As we know, also present are Don Ratner, Susan Stone, Steven Carlson, John Sabl, and Mark Heatwall..

MARK HEATWALL: Stephanie, Scott Sbla from my office, who was in court this morning observing the proceedings, has joined us. That's Scott S-B-L-A.

STEPHANIE MARSHALL: Scott is from Winston, Mark?

MARK HEATWALL: Yes, ma'am.

STEPHANIE MARSHALL: So he is regular Foundation counsel? All right. We are here today to consider, as you know, a proposed settlement of outstanding litigation in a number of matters closely related thereto. Dr. Stebbins?

THEODORE STEBBINS, JR: Yes, I'd like to make a motion. I hereby move the adoption of all the resolutions contained in the three pages of resolutions which the Foundation distributed, including without limitation the approval of the Consent Judgment and Order distributed by the Foundation with such resolutions, with James Donnelly, Marshall Fields V, Kathleen Foster, Robert Hamada, and Frederick Krabel being the five new Class 2 Directors. And in addition, I have a couple of minor changes –

MALE VOICE: Could you go through those five names one more time?

RON GIDWITZ: Read the list again, if you wouldn't mind, please.

THEODORE STEBBINS, JR: The list is James Donnelly.

RON GIDWITZ: Donnelly, okay.

THEODORE STEBBINS, JR: Marshall Fields V, Dr. Kathleen Foster, Dr. Robert Hamada, and Mr. Frederick Krabel.

STEPHANIE MARSHALL: And, Ted, you said you had some minor changes.

THEODORE STEBBINS, JR: And I have some minor changes which various people have suggested. Um, first in the draft resolution, paragraph 4, where it reads "further resolved that Sidley, Austin, Brown & Wood, the attorneys for the Foundation, are authorized and directed in the name and on behalf of the Foundation to file with the Circuit Court of Cook County the Consent Judgment if and when it has been executed by

or on behalf of Ms. Montrock and Gidwitz, and the Attorney General of the State of Illinois, and" – and from there on, I would suggest that we take out "any other document they believe necessary or advisable in connection with the settlement of the litigation." So consider that part of my resolution – amending that phrase.

FEMALE VOICE: What paragraph are you –

DON RATNER: We can't find it. Could you – this is on the first page of the resolution, or is it page 10 of your –

THEODORE STEBBINS, JR: Paragraph 4 –

DON RATNER: Wait a minute. Let me get my – page 10 of your fax.

PAUL TUCKER: Sorry, everyone, I've just finally made it through the Terrace Vidley to be here.

STEPHANIE MARSHALL: Oh, hi, Paul.

THEODORE STEBBINS, JR: That's all.

PAUL TUCKER: Hi, Steph. Hi, Ted.

STEPHANIE MARSHALL: Paul, Ted is – we have called the meeting to order and Ted is – Ted has almost concluded his resolution, and Don is helping people find the appropriate section.

DON RATNER: Page 10, first paragraph, Ted, I think it starts out "Further resolved."

THEODORE STEBBINS, JR: Further resolved.

DON RATNER: Okay. Now what do you want to change?

THEODORE STEBBINS, JR: I wanted to take out the last phrase, "any other document that they believe necessary or advisable in connection with the settlement of the litigation."

STEPHANIE MARSHALL: And you said you had another minor change?

THEODORE STEBBINS, JR: And – that's my only change in the resolutions. In the Consent Judgment and Order, under paragraph 2 –

DON RATNER: Wait a second. On what page is that?

THEODORE STEBBINS, JR: It's page –

DON RATNER: Five of the fax. Paragraph 2, "The parties hereto" –

THEODORE STEBBINS, JR: I'd like to say "The parties, including plaintiffs and defendants" –

STEPHANIE MARSHALL: No, Ted, you can't do that. The Foundation can't speak for defendants.

MALE VOICE: Well the original documents, Stephanie, if you'll recall spoke to the plaintiffs and the defendants. If you want to add people, that's fine, but you can't subtract.

STEPHANIE MARSHALL: Well, the Foundation – it is my understanding, and maybe legal counsel can speak to this, that this wording is the only wording that can – that can be in place because the Foundation cannot require the defendants to do anything against their will.

THEODORE STEBBINS, JR: Let a court of law decide that. What I'm concerned about with this language, if they understand, Stephanie, is, I don't want to be

set up to be sued. And this strikes me, the way that this has been drafted, that it – it doesn't release the defendants and therefore is permissive in terms of having them sue me.

STEPHANIE MARSHALL: I think –

THEODORE STEBBINS, JR: And I want protection.

MALE VOICE: Well, I'd like to –

STEPHANIE MARSHALL: I think, Ted, I think –

THEODORE STEBBINS, JR: Stephanie, why don't we ask legal counsel their opinion, because I'm –

MALE VOICE: Can you speak to as why you want to include this?

THEODORE STEBBINS, JR: I want to be accommodative –

STEPHANIE MARSHALL: May I – let me take the privilege of the Chair one moment. We are in the middle of a proposed resolution. I recommend that – or proposed motion. I recommend that Ted make his motion. I will see if there is a second. If there is not a second, the motion fails. There may be a second, and then we have discussion. In my view, it is not appropriate to argue the language or the merits of a motion until the motion is duly put on the table.

RON GIDWITZ: Absolutely. I will –

STEPHANIE MARSHALL: So, let's – Ted, it may be useful –

THEODORE STEBBINS, JR: Okay, my motion includes the slight change to the resoltuions. It includes in the Consent Order making it, "The parties, including plaintiffs and defendants, hereto desire." And it includes, under Section 7 of the same Consent

Judgment, it includes modifying the second phrase, and it should now read, "with the exception that until the 2002 annual meeting, or December 31, 2002, whichever occurs first, then 50 percent of such Board positions shall be held by Illinois residents." The purpose of this is to guarantee that it happens in case the annual meeting is delayed for some reason. And those are my – that's my – that's my resolution.

STEPHANIE MARSHALL: All right, we have a resolution, and since it was rather circuitous, I don't know if it is appropriate for me either to ask – I think it – maybe you should state it again so people are very clear what the resolution is.

THEODORE STEBBINS, JR: My resolution – I move adoption of the resolutions contained in the three pages of resolutions which we've distributed, including, without limitation, the approval of the Consent Judgment and Order, with James Donnelly, Marshall Fields V, Kathleen Foster, Robert Hamada, and Frederick Krabel being the five new Class 2 directors with the other three amendments that I mentioned.

STEPHANIE MARSHALL: Okay. We have a motion on the table. Is there a second?

RON GIDWITZ: I'll second it.

STEPHANIE MARSHALL: So that's moved by Ted, second by Ron. The motion has been moved and seconded.

RON GIDWITZ: I'd like to offer a –

STEPHANIE MARSHALL: Because it involves an amendment to the bylaws, its passage requires the affirmative action of at least six Directors. Now it's appropriate to call for any discussion. I think, Ron, if you would give me the privilege of the Chair, I

would like legal counsel to address one of the changes that Ted referred to, because I – although I want to be able to vote for this motion, I would not be able to do so with one of the changes that he's – he's suggested, because it's my understanding that it is simply not possible for the Foundation to make this judgment. So I would really like legal counsel, so that we're all clear, on exactly where we are and – where we are at this point in time. I personally don't have any problem with the other modifications that, Ted, you made. But I would not be able to support the motion as it presently.

THEODORE STEBBINS, JR: Let's try to let the lawyers lead us through this problem here.

STEPHANIE MARSHALL: Yes.

MALE VOICE: (Inaudible; whispering)

STEPHANIE MARSHALL: Yes, I've asked legal counsel to do that.

MALE VOICE: Do you have any preference as to who addresses it? Do you want Susan to address it, or John, or –

STEPHANIE MARSHALL: Susan can address it.

SUSAN STONE: I can address it. This is Susan Stone from Sidley, Austin, Brown & Wood. I understand, Stephanie, you would like guidance with respect to whether paragraph 2 of the proposed Consent Judgment and Order could be amended to change the description of the parties giving the relief to be a more general description, which would include all of the parties, including the plaintiffs and the individual defendant Directors. Is that correct?

STEPHANIE MARSHALL: That's correct.

SUSAN STONE: All right. It is my understanding that the individual Director defendants are not prepared, voluntarily, to enter into this proposed settlement. They are not agreeing to settle their litigation, and that therefore they are not voluntarily agreeing –

MALE VOICE: Susan, we don't – we don't know that until we've taken a vote, right?

SUSAN STONE: My understanding – that is correct. You don't know that categorically. It is my understanding from what was reported from the mediation session that the individual Director defendants are not prepared to voluntarily release. And I think the question being posed is whether or not the Foundation unilaterally can impose upon a non-consenting party an obligation that they release their legal rights. And I do not believe that the Foundation can do that, or even that if the Foundation purported to do it, that it would have any legal effect. You could, indeed, as Ted points out, query the individual Director defendants as to whether or not they will voluntarily agree to release, and then all of this is perhaps an unnecessary academic legal debate. That might be appropriate at this time.

RON GIDWITZ: Let me ask you a question before we ask that one, and that is, what is the effect of doing it and – I just heard you say, Susan, that it may not have any legal effect period. So what's the down side of just including them?

SUSAN STONE: You know, I'm saying that even if you purport – was that question from Mr. –

STEPHANIE MARSHALL: From Ron.

SUSAN STONE: From Ron. Ron, even if you purport to have the Foundation require the individual defendant Directors to release rights, that requirement may not be binding. In other words, it might not be a valid release, because –

RON GIDWITZ: I understand, but there's no damage done.

SUSAN STONE: Well, I do not believe that the Foundation can do this. I do not believe the Foundation can take away the legal rights of another party.

RON GIDWITZ: I understand that. But we have – what my concern is, Susan, is that we have a document that was written and agreed to by six Directors wherein if it doesn't materially affect the execution of the document, why are we making changes?

SUSAN STONE: No. The question is, what can the Foundation counsel put in front of the Board as a document which the Board could pass that has a possibility of standing up to judicial scrutiny, if the Board decides it wants to pass it. And I'm telling you that whatever six individual members of the Board might have done in the last mediation session, that was not an act of the Foundation. The Foundation is a corporation. It can only act through a majority vote of the Board of Directors at a duly called meeting. That has not happened until today. And so the question is, what can the Board do at this point in time. The Board of the Foundation, which is one party to this litigation, cannot unilaterally take away the rights of other parties to the litigation.

RON GIDWITZ: I keep hearing that, and frankly my counsel has also reported to me on numerous occasions that you have made the case that, unless we have a duly called meeting, there's a difference of opinion. And the real issue here, it seems to me, is we'd like to get – we'd like to get this litigation settled, and therefore we'd like to have a

document that we can go to the court with next week, which everybody can agree to. And if in fact I feel exposed, I will not agree. It's senseless – then going through this whole process is senseless.

STEPHANIE MARSHALL: Well, with –

MALE VOICE: Can we let Mark Heatwall respond to that? He wanted to say something. If you could let him talk.

MARK HEATWALL: Ron?

RON GIDWITZ: Yes, Mark.

MARK HEATWALL: (Inaudible) brought your action solely against the Terra Foundation.

RON GIDWITZ: Say again.

MARK HEATWALL: (Inaudible) brought this action solely against the Terra Foundation, you would be in a position today to settle this matter. But by naming three of the individuals, you – I believe Susan's position is right, that the agreement on behalf of the Board of the Foundation to settle this matter only will operate vis-à-vis the Foundation, and not as against the individuals and their rights. And that puts you at peril and Dean at peril in this sense. (Inaudible) settle on those same terms, then you could be in a position where you will have settled your claims against the Foundation, and, under this agreement, against those individuals land waived those rights, and those individuals may still have the ability to claim back against you. You can't force them to waive those rights through this settlement agreement, I don't believe.

MALE VOICE: That's fine, Mark. Ron's point is, which I agree, then it doesn't have to be taken out because the matter can be decided by the courts.

MARK HEATWALL: But if you vote in favor of it and Ron votes in favor of it, what I'm telling you is it would work to your detriment. And I'm not your lawyer –

MALE VOICE: No, I understand.

MARK HEATWALL: – but – but you've got a situation where the – everything I know about this situation tells me – force Paul, Judith and Alan to settle a case that they don't want to settle. And that means that this is a one-way – potentially a one-way settlement by you and Ron against them, and their not waiving rights against you.

MALE VOICE: Fine.

STEPHANIE MARSHALL: I – I have to say, just to weigh in on this personally, that I mean it's no secret that – that this motion and any changes in bylaws require the vote of at least Directors. And I cannot support the motion as it is currently stated with this amendment to number two. I can certainly support and will support the other changes, Ted, that you made, in both the resolution and the Consent Judgment Order. They seem reasonable. But I cannot and will not support this motion which frankly means you do not have six votes. So I came prepared, I read the motions, I read the Consent Judgment – I mean, I read the resolution, I read the Consent Judgment, I am prepared to support this, but this is a last-minute, 11th-hour change, and I cannot be more clear than I'm being right now. I cannot and will not support this change as it is currently stated.

MALE VOICE: Which change is that, Stephanie?

STEPHANIE MARSHALL: You can continue the conversation if you wish, or, Ted, you can amend your motion.

THEODORE STEBBINS, JR: Well, I knew this was of concern to Ron, that's the reason I suggested it, to hope the lawyers could work it out. But if it's a – if it's thought to be a legal impossibility, then I would go back to the original text as it was distributed, and leave out the amendment of section 2.

STEPHANIE MARSHALL: So you are accepting an amendment?

THEODORE STEBBINS, JR: Yes.

STEPHANIE MARSHALL: Okay.

DEAN BUNTROCK: Stephanie?

STEPHANIE MARSHALL: Yes, Dean.

DEAN BUNTROCK: Does Ron have to agree to that to make it legal – (inaudible)?

MALE VOICE: No, it's Ted's motion that –

STEPHANIE MARSHALL: Ted has a motion. He's accepted the amendment, which is keeping the first two changes he made and eliminating the change in the Consent Order paragraph 2.

MALE VOICE: He can – he can –

STEPHANIE MARSHALL: I guess the question is, is there any further discussion, or we have a properly made and seconded motion, and then we could proceed with the vote if we are ready to do so.

DEAN BUNTROCK: Stephanie, wait a minute. I think it bears more discussion.

STEPHANIE MARSHALL: That's fine.

MALE VOICE: Who's this speaking?

STEPHANIE MARSHALL: This is Dean.

MALE VOICE: Hi, Dean.

DEAN BUNTROCK: Hey. First of all, I'd like you to respond. You made your position very, very clear, but when counsel for the Foundation and counsel on the lawsuit have both said, as Susan has said, that you can't do it, what difference does it mean to leave the language in there? I cannot see why you take such a strong position.

STEPHANIE MARSHALL: I guess I take –

DEAN BUNTROCK: (Inaudible) out. Can you respond to that?

STEPHANIE MARSHALL: Yeah. It is my understanding – well, based on what legal counsel is saying, Dean, I would be voting for something which is – which is judged not to be legal and/or appropriate. I will not vote –

MALE VOICE: But no one – no one has said –

STEPHANIE MARSHALL: I will not vote to force anyone into a position that – that four attorneys are saying is inappropriate. The Foundation I don't think, or certainly I do not want to approve a settlement that contemplates a release that – that doesn't exist.

MALE VOICE: Stephanie, they haven't. All they've said is that you legally can't do that, so –

MALE VOICE: I appreciate the fact that –

MALE VOICE: If you can't do it, you can't do it. And I think changing – unnecessary.

STEVE CARLSON: Can I make a comment? I've got one more legal comment to make. This is Steve Carlson.

STEPHANIE MARSHALL: Yes, Steve, go ahead.

STEVE CARLSON: I think anybody who is interested in the possibility of a settlement accomplished and the Consent Judgment and Order being approved by the Foundation and entered by the court needs to consider, at least for a moment, the question of what happens when it's presented to the court if the Consent Judgment and Order presented to the court contains the questionable provision. You are concerned about the possibilities that there may be some members of the Board who will attack the Consent Judgment and Order as they have already tried to stop this meeting. I would, as counsel to the Foundation, say that you probably ought to think strongly about doing something that is as close as you can to being something that looks like it's appropriate and within the limits of what the corporation could truly do. I'm afraid you may be giving fuel to the fire that somehow the corporation has acted inappropriately, if it passes resolutions or consents to Consent Judgments and Orders that have clear legal defects in them.

SUSAN STONE: I would like to underscore that, and add that, although I was not in court today, it is my understanding that the judge has, in essence, invited the individual Director defendants' attorneys to raise any concerns they have when this Order is presented to her. So you know that this order and the procedure that led up to the Order – in fact you vote for the Order – will be under judicial scrutiny. And so I second what Steve says, that I think you want to err on the side of doing everything with scrupulous attention to detail, and keep your process as clean as possible.

STEPHANIE MARSHALL: And I really – I think, frankly, that, Dean, to your question, and Ron, that if you wanted a release from the defendants, then I think it was essential at the time we were in mediation that there was – there was another line or sentence or something that would have induced the individuals to settle. But that was not part of the mediated agreement. And as I said, at this point, I feel it's a highly significant 11-hour change, and I'll stand with what I said before. I came to this meeting as I trust we all did, in good faith. There were six people that signed off on an intention to ratify. There were some things we had to work out since the last mediated agreement, especially the slate of officers. And I think we were prepared, and I hope still are prepared to reach agreement. But if we hold – if some hold fast to this, then that is not going to be possible.

THEODORE STEBBINS, JR: I'm persuaded that I was in error, and that I think the attorneys' comments are appropriate and we need an agreement that will stand up under scrutiny.

RON GIDWITZ: Stephanie, I will back off – excuse me, I've got a little food in my mouth. But I will back off my objection, but I will just state for the record that the language that plaintiffs and defendants originally, that the Sidley & Austin attorneys had been moving to change it, I believe –

(End of Side 1)

– distributed version.

STEPHANIE MARSHALL: Okay. Thank you, Ron.

PAUL TUCKER: This is Paul. This is Paul. Am I coming though?

STEPHANIE MARSHALL: Yes you are, Paul. Go ahead.

PAUL TUCKER: I appreciate the fact that this will be dropped. But just for clarification, could I, since Ted, you had been the one who had proposed it, can you just speak a little bit more as to why, so it could be understood a little bit more clearly as to – I mean, we've spent so much time on this – as to why this really had been of concern.

THEODORE STEBBINS, JR: Paul, are you asking me?

PAUL TUCKER: Yeah.

THEODORE STEBBINS, JR: The – this is discussion section 2. Well, I think we've discussed it at length. It was written, as you know, in mediation to cover plaintiffs and defendants. And we're – we're hearing now that defendants can't be covered. And I was trying to make it broad enough to win everyone's acceptance, but I'm now persuaded, having heard the legal arguments, that that's not a good course. So that's why I'm going back to – to the original Sidley version.

PAUL TUCKER: Back to the original.

STEPHANIE MARSHALL: I am prepared to call for a vote on the question, but I don't want to terminate discussion prematurely. So is there any further discussion on the motion, which also has been seconded.

MARGARET DALEY: I'm not clear. I want to know exactly what we're talking about now in terms of changes. I'm – I'm personally not clear.

STEPHANIE MARSHALL: All right, Maggie, if I can try to summarize where we are. We had Ted's motion, which was to adopt the resolution that the Foundation had prepared, which is that three-page document that we all received. And he further modified his resolution motion to make a minor change on the resolution, which was page

1, paragraph 4, the last two sentences were eliminated. So in that paragraph, it ended "the Attorney General of the State of Illinois." And then we had also a minor revision on the Consent Agenda, paragraph or number 7, which added, after the 2002 annual meeting, "or until 12-31-02," since the date was not clear. So it was Ted's motion to approve the resolution, and then those two minor changes, one to the resolution and one to the Consent Judgment.

MALE VOICE: Right.

STEPHANIE MARSHALL: So unless there is further discussion, I guess the question is, are we –

DON RATNER: Just a second, Steph. I'm just going over with Mrs. Daley. This is where (inaudible)

ARTHUR HARTMAN: This is Arthur. I'm prepared to vote.

DON RATNER: Stephanie, one second. I'm going over this with Mrs. Daley.

STEPHANIE MARSHALL: Don, and I want to – I left out one part, as Ted was talking. It was "until 12-31-02 or whichever comes first."

DON RATNER: I'm just going over that all with Mrs. Daley. So just want to (inaudible)

STEPHANIE MARSHALL: Okay.

DEAN BUNTROCK: So the only changes are to paragraph 2 and paragraph 7, right?

STEPHANIE MARSHALL: Uh, the – on the resolution, Dean, there is a change eliminating the last two sentences on the fourth paragraph, and on the Consent Judgment, it's number 7 where we have inserted the date. There is no change to paragraph 2.

DON RATNER: Stephanie, let me, if I can, I've got the document here. Let me go through this with the pages so they can see what we're doing. Okay? Give me 30 seconds. Okay? Stephanie?

STEPHANIE MARSHALL: Sure. You have different page numbers than we do?

DON RATNER: Let me just show them, it's easier.

STEPHANIE MARSHALL: Okay.

DON RATNER: We're making – we're adding this December 31 date.

FEMALE VOICE: And we're on page 6 of the fax.

DON RATNER: Paragraph 7. Page 7. And we're adding the five Board members, okay. And then the only other thing we're doing is we're taking out this last line. This is on the resolution on page 10, and any other document.

MALE VOICE: That's the motion on the table. That's the motion on the table.

DON RATNER: Well, but you need – the motion on the table is to affect this and the settlement – mediation, so I had to go through the mediation pieces, too.

MALE VOICE: Sure.

JUDITH TERRA: Stephanie? Stephanie?

STEPHANIE MARSHALL: Yes, Maggie.

JUDITH TERRA: No. This is Judith.

STEPHANIE MARSHALL: Oh, Judith, I'm sorry. I can't hear you very well. Hello?

MALE VOICE: Just get closer to the phone.

JUDITH TERRA: Can you hear me now? Pardon?

STEPHANIE MARSHALL: Hello?

MALE VOICE: Closer to the phone.

JUDITH TERRA: I can't. I've got it right in my ear. Can you hear now?

STEPHANIE MARSHALL: Yes, we can. Not very well, but we can.

JUDITH TERRA: Okay. I just want to say that I am definitely going to object to any waiver of my legal action, and I think I would like to express a strong objection to the fact that Alan Simpson, Helene Ahrweiler, and Jacques Andréani are not on this – at this meeting. Not on this call.

STEPHANIE MARSHALL: Yeah, we will –

MALE VOICE: I couldn't hear a word of that, Stephanie.

STEPHANIE MARSHALL: She said that she would not agree to anything that waived her rights, and that she is voicing strong objection to the fact that Jacques and Helene and Alan were not on the call. And as Chair, I can just simply duly note that, but they were given every opportunity to be on the call. Don talked with –

ARTHUR HARTMAN: I had no trouble getting in from France.

STEPHANIE MARSHALL: And they said that they would be. So it is absolutely most unfortunate, but we really could not wait. So, Judith, we will note that for the

record. This is being taped, so that will be recorded. Don, have you concluded your review? We are –

DON RATNER: No, no, Dean is now talking to Mark and Scott. He's got a question about the last line that's being eliminated on the resolution, which is "and any other documents," so forth and so on, paragraph 4.

STEPHANIE MARSHALL: Correct.

DON RATNER: There is a question about that. Do you want to give it to everybody?

MARK HEATWALL: Actually, I didn't draft this. John Sabl did. But, John, maybe you would tell us why you would include something like that language in your resolutions. I said to Dean, I thought it was a catch-all in case there was anything else that Sidley needed to do in order to effectuate the settlement.

JOHN SABL: And that was why it was there, Mark. You're absolutely right. My understanding was that Ron had a concern as to whether it was too broad or seemed to contemplate going very far afield. We didn't think there was anything else that we'd need to file and anything that was ministerial, we think would have been – would be contemplated by – by the – by the general authorization at the end. So we think we'd be better to have it in, on the one hand, but we don't see a problem taking it out. I guess we didn't have a strong view either way. We have a mild preference to leave the language in, but since there was some feeling to the contrary, we didn't think it was particularly important.

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MARK HEATWALL: So if there was anything else that was required, we would have to come back to the Board and get approval to –

JOHN SABL: I don't think so. I think it would only be if it was something substantive, and, Ron, maybe you want to speak to what your concern was, since I heard this indirectly from Ted. This language was not intended to make – you know, to file, you know substantive changes. And we thought it was helpful from a catch-all. But what – what was your concern, Ron?

STEPHANIE MARSHALL: Ron, are you there?

RON GIDWITZ: I was knocked off somehow. I'm just coming back on.

JOHN SABL: Okay, Ron, the question was asked by – it's John Sabl. The question was asked by Mark Heatwall why we were taking out the catch-all language in the resolution, the one change that Ted made to the resolution that I understood he made at your request. And Mark said, "Isn't that sort of a catch-all if other things need to be filed, and would it be better to leave it in?"

RON GIDWITZ: And that's just the point where I – I heard that, and then I was knocked off the –

JOHN SABL: Okay, and I said that I think this – I thought this language was fine; as we drafted it, it was appropriate and the catch-all was just meant to be if other things needed to be – other things needed to be filed, that it might be better to specifically recognize that. I had understood, or I maybe theorized, that your concern was that language somehow was too broad.

RON GIDWITZ: That is correct.

JOHN SABL: Okay. I guess – I think in terms of anything else, if it's ministerial, and I think you'd agree if it's just ministerial filing something the second time or not making a substantive change, you don't have a problem with that and that even as the resolutions change, that really doesn't affect anything.

RON GIDWITZ: I guess my – my concern quite frankly is the things that Sidley has historically considered to be ministerial and insignificant, me and my counsel have not had the same level of lack of concern. So I just – maybe it's the result of this experience, but I am not particularly tolerant of things that I don't understand and don't now about.

JOHN SABL: Okay, well, Ron, I guess our point was we were – we're happy with the language either way, so –

RON GIDWITZ: Fine, well let's just strike it, and then I'll be happy.

JOHN SABL: Okay, good. Again, Mark, we don't believe that this would mean that anything else that was, you know, so clearly contemplated would be prohibited from us doing it. It was just I think something that Ron's concern that there shouldn't be substantive changes made.

MARK HEATWALL: I had no problem with taking it out. Dean raised the question with me as to whether or not there was an impact from that, and I was just trying to explain it.

JOHN SABL: I don't think there really is an impact. I think we don't –

RON GIDWITZ: I'm satisfied with my question, thank you.

JOHN SABL: Thank you.

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STEPHANIE MARSHALL: Don, have you – have you been able to clarify for Maggie and Dean exactly where the changes are? And then if so, everyone fully understanding what we – what they will be voting on, then I would then call for a vote on the question.

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Judith?

JUDITH TERRA: Yes. I would like to say a few words before the vote is taken.

STEPHANIE MARSHALL: Yes, please.

JUDITH TERRA: Can you hear me okay?

STEPHANIE MARSHALL: Yes, we can.

JUDITH TERRA: I'm on a different phone. I don't know what's –

DON RATNER: Let me just respond to Stephanie's question. I think Ms. Daley and Mr. Buntrock can respond to that better than I. I think I described it. And they're nodding that they understand all the –

STEPHANIE MARSHALL: Okay, fine. Thank you. Judith, go ahead.

JUDITH TERRA: Well, I just want to say before we take a vote on this motion that the outset, with all due respect to each of my fellow Board members, I think that the mediation result that we are being asked to endorse, and for which we really had high hopes in the beginning, has turned out to be something very different than what we anticipated. For me, it's a process which is distorted the consensual nature of what mediation really should be all about, as reflected in this document. And I think, as Paul Tucker, our Chairman, has already observed, the mediation proposal before us cannot be

approved consistent with our responsibilities as Terra Foundation trustees. And I think that this vote that we're about to take is a very momentous decision, because basically today we're going to determine whether we will allow the Terra Foundation to really be destroyed for all time in a process which I believe is oppressive and unlawful. And I think you've seen this reflected in my – in some of my memos to you. Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art, or at least he thought it was magnificent, and I would agree. And I think that the last thing we must really think about is that we will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of Illinois to really come in and run our Foundation, because this is basically the end result of this proposal, telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most – some of the most outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation. And so I'm asking each of you to use your best judgment and wisdom in upholding the principles of self-government that have really been the basic part of this Foundation since its inception in 1978. I hope, Stephanie, and all of you, that you will examine your conscience, your fiduciary duties, and please do not permit the Terra Foundation to be destroyed. So obviously I hope that each of you will join me in voting against this proposal. And I did say earlier, when you couldn't hear me well, that I

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think it's – I object strongly to the fact that Helene and Jacques Andréani and Alan Simpson were not on this call. Thank you.

ARTHUR HARTMAN: This is Arthur Hartman. We'll be taking a vote which will indicate what all of our views are. I couldn't disagree more with what Judith has said. I think the good of this Foundation has been found in this mediation, and it will carry on the kinds of things that Dan Terra was interested in. And that is my own personal position. Thank you.

STEPHANIE MARSHALL: I would just like to make a personal comment, too. And I also regret that Jacques and Alan and Helene are not on the call, because I think it would have been important for everyone to have had the opportunity to hear the conversation and to make a statement, if in fact they wished to do so. I sent a letter to David Hilliard dated June 17, where I was responding to the mediated settlement. And in that letter, I raised several concerns which were pretty consistent with concerns I had raised in the past. And then I did say in the letter, having said this, and verbalizing these concerns, that I could live with the substance of the settlement albeit with a heavy heart, and that I was prepared to ratify it at an authorized Board meeting. I also said in that letter that I believe in my heart that it does preserve the most fundamental dimensions of the Foundation's independence in determining the course of its own destiny, which I believe to be stated in the mediated agreement, although I do believe that unprecedented restrictions have been imposed on the Foundation as well. But I believe that a settlement, and not continued litigation, is in fact in the best interests of the Foundation. And I would hope that the 16 Board members for this year, and the 15 Board members in the future

would see the astounding opportunities that this Foundation has to make a mark, not only in this country but around the world. And I would hope that we would in fact commit to – to ensuring that the vision of Dan Terra remains not only alive, but burns very brightly. Are there any other – any other points of discussion?

MARK HEATWALL: Stephanie?

STEPHANIE MARSHALL: Yes.

MARK HEATWALL: Mark Heatwall. Just one last item before you vote, and I think this is important, and Judith touched on it and, Stephanie, you touched on it in your comments as well. In light of the allegations that have been brought forward in the Federal court yesterday, to a certain extent – I was not there, but I understand that sort of the same substantive comments were made in the Cook County courts this morning, about the coercion that some members of this Board may feel, or may not feel, from the actions of the Attorney General. I think it's important for each one of you to, I think, indicate before you take this vote that you are voting freely, and you are voting with your fiduciary obligations to this Board and this institution, and without that pressure. And if anyone feels they can't do that, I don't think you should vote. But if you are voting freely, and if you do not feel that compulsion, then I think you are free to vote. And I think the Board ought to be on record and everybody ought to be clear that this vote is being taken without that pressure and without – without that impediment.

STEPHANIE MARSHALL: Well, Mark, are you – are you asking then for a statement, or a comment, because I certainly can comment on what you just said.

MARK HEATWALL: I just -- the comment was directed really to you and Ted.

STEPHANIE MARSHALL: Okay.

MARK HEATWALL: But in a general way to everyone, because you do have fiduciary obligations to this institution, which transcend your obligations to other – other things. And each one of you should examine that. I think Judith brought that to the fore. Stephanie, you echoed it. But since the – the allegations have been made, I think it's important to be on the record. And if anyone feels that they can't vote that way, I think they should abstain. So, having said that, if you vote, I assume that means you are not doing so – so freely.

STEPHANIE MARSHALL: Well, I – let me just make a personal comment, just in response to what you just said, Mark. I – I have felt in the past that despite the desire of some Board members over the last year or so to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked my own path, and I have always spoken with my own voice, to represent the integrity of my own convictions. I have done it throughout this arduous process, and I do so now, with full knowledge of my fiduciary responsibilities. It is true that the Attorney General's office has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation. This has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation. Ted, I don't know if you want to make a comment as well.

THEODORE STEBBINS, JR: I'd like to just – I'd like to say that I came to the Board, like Stephanie and everyone else, as a volunteer. I came to the Board – I knew Dan Terra. I came to the Board at the request of Jim Collins and Judith Terra. I have served as Chair of the Collections Committee, and I think I've served effectively and have brought some wonderful new paintings – helped bring some wonderful new paintings to the Foundation collection. I've done this without any iota of a conflict of interest. I value my reputation, both as a scholar and as someone of complete integrity, very, very highly. And I think I'm well known for both those things. I've – last – when – I've always felt free to – to form my own judgments. Last either August or early September, when Paul Tucker told me first about his enthusiasm for the building in Washington and wanting to move there, I disagreed. I'd long argued to explore a variety of stand-alone options in Chicago. I was willing to consider, as part of the strategic planning, going elsewhere, but I've always been a defender of Chicago. Like Arthur, I've – at the Board member in Givencey in September 25, I guess it was, 2000, when we learned of the suit, I argued for a total Board replacement. At the same time, I abhor the personalized suit brought by the plaintiffs. Unnecessary. I feel very, very sympathetic for Judith Terra. I lament the behavior of Senator Simpson. I'm very saddened by the behavior of Paul Tucker. I abhor the threatening tactics of the Attorney General. But I am voting my own conscience, and for what I believe is the best interests of the Foundation for its future as an independent viable force in Chicago and in France for the promulgation of American Art.

STEPHANIE MARSHALL: Is there anyone else who has a statement to make? Otherwise, I will – I think it's appropriate that we now call the question.

PAUL TUCKER: I'd like to make a statement, Stephanie.

STEPHANIE MARSHALL: Paul, is that you?

PAUL TUCKER: It's me.

STEPHANIE MARSHALL: Okay.

PAUL TUCKER: It's painful to hear the comments that have been made in many quarters, although I admire the honesty about it all. I think it's very difficult to be able to predict the future in any form or fashion. None of us could have – thought we'd be at this particular juncture when we all joined the Board. Maybe some did, I don't know, but I certainly didn't, and I don't think Ted did, or Stephanie did. And I applaud their effort to try to be able to find the right way to act in these difficult causes. But what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview. The invasion of its independence, its privacy, by a public domain, i.e, the hand of the Attorney General, I find repugnant. I find it detrimental and offensive. I find it also counter to the very foundations on which foundations – and America as a whole – is supposed to be founded, which is why I protested this mediation, and will continue to do so. I also find it disturbing that the resolution calls for the continued presence of the Illinois factions, not that there are not wonderful people in Illinois, certainly more than enough to handle all of this. But I think that that should have been our choice, not somebody else's choice, and that compromise of our independence is something which I think, again, goes right to the heart of the

matter. I think that everybody's consciences have been articulated with grace and conviction, and I think that is appropriate. But I also believe, in the end, that there are serious principles, particularly that of the ways in which a foundation is supposed to operate, which are deeply compromised by this mediation and its process. I think that it is, in the end, a sad day for the Foundation, and that ultimately a sad day in the larger case for the ways in which a state interferes with private property.

STEPHANIE MARSHALL: Uh –

MALE VOICE: I really would like to make one further short comment, and that is that foundations are established under certain laws, and have to meet certain requirements. Their responsibilities are to the people of the jurisdiction that has permitted them to set up these tax-free organizations. Therefore, I do not see that an oversight by such authorities is out of order. Thank you.

STEPHANIE MARSHALL: I think it's time for us to call the question, so we will now proceed to a roll call on the motion. And I guess the question is – okay. Jacques, not here. Helene, not here. Dean.

DEAN BUNTROCK: I vote yes.

STEPHANIE MARSHALL: Maggie.

MARGARET DALEY: Yes.

STEPHANIE MARSHALL: Ron.

RON GIDWITZ: Yes.

STEPHANIE MARSHALL: Arthur.

ARTHUR HARTMAN: Yes.

16di-001247

STEPHANIE MARSHALL: Stephanie, yes. Alan. Ted.

THEODORE STEBBINS, JR: Yes.

STEPHANIE MARSHALL: Judith.

JUDITH TERRA: No.

STEPHANIE MARSHALL: Paul.

PAUL TUCKER: No.

STEPHANIE MARSHALL: Paul?

PAUL TUCKER: No, Steph.

STEPHANIE MARSHALL: Oh, I'm sorry. I didn't hear you, Paul.

PAUL TUCKER: Okay.

STEPHANIE MARSHALL: The motion has been passed by six Board members. We now need a motion for adjourn.

THEODORE STEBBINS, JR: I move to adjourn.

STEPHANIE MARSHALL: Oh, I'm sorry. Is there – the Agenda did say any new business. Is there any new business which needs to come before this Board at this time? Hearing none, we need a motion to adjourn.

THEODORE STEBBINS, JR: So moved.

STEPHANIE MARSHALL: Is that Ted?

ARTHUR HARTMAN: Second.

STEPHANIE MARSHALL: Second, I'm sorry, Dean.

DEAN BUNTROCK: No, that was Arthur.

STEPHANIE MARSHALL: Arthur.

ARTHUR HARTMAN: Yes.

STEPHANIE MARSHALL: Do we need a roll call. A roll call for the motion. Dean.

DEAN BUNTROCK: I move to – we adjourn – I vote to adjourn.

STEPHANIE MARSHALL: Okay, yes. Maggie.

MARGARET DALEY: Yes.

STEPHANIE MARSHALL: Ron.

RON GIDWITZ: Yes.

STEPHANIE MARSHALL: Arthur.

ARTHUR HARTMAN: Yes.

STEPHANIE MARSHALL: Stephanie, yes. Ted.

THEODORE STEBBINS, JR: Yes.

STEPHANIE MARSHALL: Judith.

JUDITH TERRA: Yes.

STEPHANIE MARSHALL: Paul.

PAUL TUCKER: Yes.

STEPHANIE MARSHALL: This meeting is adjourned. Thank you all, and bonne chance.

MALE VOICE: Thank you.

(End of tape)

16di-001249

CERTIFICATE OF TRANSCRIPTIONIST

I, Claudia Miller, do hereby certify that the above was transcribed by me from audiotape; that the transcript is a true transcription of the audiotape; that I am neither counsel for, related to, nor employed by any of the parties to which the proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Claudia Miller
Perfect Solution, Inc.
1299A Quaker Hill Drive
Alexandria, Virginia 22314
703/823-9017

Dated: July 7, 2001

16di-001252

EXHIBIT 27

16di-001253

EXHIBIT 27

WEBER-PAX
RECYCLED
80000 SERIES
30% P.C.W.

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

MOTION FOR ENTRY OF CONSENT JUDGMENT AND ORDER

COMES NOW the Terra Foundation for the Arts by and through its attorneys, Sidley Austin Brown & Wood, and hereby moves this Court for entry of the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B, and in support of said Motion states as follows:

1. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts met and by a vote of 6 to 2 passed the Resolutions attached hereto as Exhibit A. Among other things, said Resolutions authorized the Foundation to enter into the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B, and to file it with the Court.

2. Pursuant to the action of the Board of Directors of the Terra Foundation for the Arts on June 29, 2001, the Foundation hereby asks this Court to enter the Consent Judgment And Order, a copy of which is attached hereto as Exhibit B.

TERRA FOUNDATION FOR THE ARTS

By: _____
One of its Attorneys

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
Ten South Dearborn
Chicago, IL 60603
(312) 853-7000
Firm ID No. 38315

16di-001255

[Resolutions Relating to Special Meeting of Board of Directors
of the Terra Foundation of the Arts to be Held on June 29, 2001]

WHEREAS, the Foundation is a defendant in litigation (the "Litigation") entitled Dean L. Buntrock, a Director of the Terra Foundation for the Arts, and Ronald Gidwitz, a Director of the Terra Foundation for the Arts vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts and the Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation in the Circuit Court of Cook County, Illinois, County Department, Chancery Division (No. 00 CH 18359); and

WHEREAS, there has been presented a proposed settlement to the Litigation and this Board of Directors believes that it is in the best interests of the Foundation to accept the proposed settlement and take certain other action related thereto;

NOW, THEREFORE, BE IT RESOLVED THAT the form of Consent Judgment and Order (the "Consent Judgment") presented to this meeting hereby (a copy of which shall be attached to the minutes of this meeting as Exhibit A) is approved, ratified and confirmed and that the officers of the Foundation are, and each of them hereby is, authorized to execute and deliver, in the name and on behalf of the Foundation, the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois) substantially in the form presented to this meeting but with such changes therein as the officer executing the same shall approve (such approval to be conclusively evidenced by his or her execution thereof); and

FURTHER RESOLVED, that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized in the name and on behalf of the Foundation, to file with the Circuit Court of Cook County the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois); and

FURTHER RESOLVED, that Section 2 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the date the Consent Judgment shall be entered by the Circuit Court of Cook County, Illinois (the "Effective Date"), to read as follows:

Section 2. Number, Tenure, and Qualifications.

(a) Number. The number of directors elected by the Board of Directors shall

EXHIBIT A

be sixteen until the 2002 Annual Meeting of the Board of Directors (the "2002 Annual Meeting") and initially be fifteen thereafter.

(b) Board Classification. The Board of Directors shall be divided into two classes until the 2002 Annual Meeting, consisting of (I) eleven Class I Directors, who shall be elected for a term to expire at the 2002 Annual Meeting and (II) five Class II Directors who shall initially be elected for a term to expire at the 2005 Annual Meeting of Directors. At the 2002 Annual Meeting the Board of Directors shall be divided into four classes, consisting of (i) three Class I Directors, who shall initially be elected for a term to expire at the 2003 Annual Meeting of Directors, (ii) five Class II Directors (i.e., the Class II Directors elected as contemplated in clause (II) of the preceding sentence) whose term shall expire at the 2005 Annual Meeting of Directors, (iii) three Class III Directors, who shall initially be elected for a term to expire at the 2004 Annual Meeting of Directors, and (iv) four Class IV Directors, who shall initially be elected for a term to expire at the 2006 Annual Meeting of Directors. Thereafter each class of directors shall be elected for four-year terms.

(c) Tenure. No person shall serve as a member of the Board of Directors for a total of more than eight years following the date in June or July 2001 on which this Section 2(c) shall have first become effective (the "Effective Date"), and none of the persons elected as Class I Directors prior to the 2002 Annual Meeting as contemplated by clause (b)(I) of this Section 2 shall serve past the 2002 Annual Meeting or be eligible to stand for election to the Board of Directors at any time thereafter. Each elected director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.

(d) Residency. Prior to the 2002 Annual Meeting at least one-half of the elected directors shall be residents of the State of Illinois. Thereafter until at least 25 years after the Effective Date have elapsed, at least a majority of the elected directors shall be residents of the State of Illinois.

FURTHER RESOLVED, that Section 8 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the Effective Date, to read as follows:

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of such director's predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors at which the class of directors to which such new director has been designated pursuant to Section 2 of this Article III shall be standing for election.

FURTHER RESOLVED, that effective as of the Effective Date, the following persons shall be elected as the respective class of director indicated below to serve until their respective successors are elected and qualified or until their earlier resignation or removal:

Class I Directors (Term to Expire at 2002 Annual Meeting)	Class II Directors (Term to Expire at 2005 Annual Meeting)
Helene Ahrweiler	James R. Donnelley
Jacques Andréani	Marshall Field V
Dean L. Buntrock	Dr. Kathleen A. Foster
Margaret Daley	Prof. Robert S. Hamada
Ronald Gidwitz	Frederick A. Krehbiel
Arthur Hartman	
Stephanie Marshall	
Alan Simpson	
Theodore Stebbins, Jr.	
Judith Terra	
Paul Tucker	

FURTHER RESOLVED, that not later than August 1, 2001, this Board of Directors shall meet to (i) elect a new Chairman (who shall be chosen from among the Class II Directors elected pursuant to the preceding resolution), (ii) elect new officers and committee heads, (iii) elect a new Executive Committee composed of the newly elected officers that also are directors, and (iv) elect a new Strategic Planning Committee whose members shall include Mr. Ronald Gidwitz, Dr. Theodore Stebbins, Jr. and one or more Class II Directors; and

FURTHER RESOLVED, that the new Strategic Planning Committee, once elected, shall be authorized and directed to seek to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago, it being understood that the terms of any such partnership shall be subject to the approval of the Board of Directors; and

FURTHER RESOLVED, that the officers of the Corporation are authorized, in the name and on behalf of the Foundation, to execute such additional agreements, certificates or other documents, and to take such further actions (including, without limitation, the payment of expenses or other expenditures of money) as may be necessary or advisable to carry out the preceding resolutions.

16di-001258

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

EXHIBIT B

88236v2

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts having moved to dismiss Counts I and II of the Buntrock and Gidwitz Complaint, Paul Tucker having answered the Buntrock and Gidwitz Complaint and having denied its allegations, no other answer having been filed to either complaint and the parties having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. The parties hereto desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts ("the Foundation"), its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the

Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and not stand for re-election.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to

negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A. No other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: _____

_____
Judge Dorothy Kirie Kinnaird

16di-001262

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/02/01

Ronald L. Gidwitz

Date: 7/03/01

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: Floyd Perkins
Assistant Attorney General
State of Illinois (Title)

Print Name: _____

Date: FLOYD PERKINS
7/6/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its Treasurer and Secretary

Print Name: Stephanie Marshall

Date: July 6, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

CERTIFICATE OF SERVICE

I, Robert P. O'Keefe, one of the attorneys for defendant The Terra Foundation For The Arts, do hereby certify that I caused a true and correct copy of the attached Motion for Entry of Consent Judgment and Order to be served upon the following counsel by facsimile and messenger delivery to those located in Chicago and by facsimile and Federal Express to those located elsewhere before 5:00 p.m. this 6th day of July, 2001

William R. Quinlan, Esq.
James R. Carroll, Esq.
John F. Kennedy, Esq.
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602
Fax: 312/263-5013

Floyd Perkins, Esq.
Barry Goldberg, Esq.
Assistant Attorney Generals
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601
Fax: 312/814-2596

Laurel G. Bellows, Esq.
Bellows and Bellows, P.C.
79 West Monroe Street
Chicago, IL 60603
Fax: 312/332-1190

K. Chris Todd, Esq.
Neil M. Gorsuch, Esq.
John H. Longwell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
Fax: 202/326-7999

Leonard Garment, Esq.
Lawrence Levinson, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hard
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
Fax: 202/371-6279

Robert P. O'Keefe

16di-001267

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

NOTICE OF MOTION

TO: William R. Quinlan, Esq.
James R. Carroll, Esq.
John F. Kennedy, Esq.
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602

Laurel G. Bellows, Esq.
Bellows and Bellows, P.C.
79 West Monroe Street
Chicago, IL 60603

Leonard Garment, Esq.
Lawrence Levinson, Esq.
Verner, Liipfert, Bernhard,
McPherson & Hard
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Floyd Perkins, Esq.
Barry Goldberg, Esq.
Assistant Attorney Generals
Bureau of Charitable Trusts & Solicitations
100 W. Randolph Street
3rd Floor
Chicago, IL 60601

K. Chris Todd, Esq.
Neil M. Gorsuch, Esq.
John H. Longwell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036

PLEASE TAKE NOTICE that on _____, _____ __, 2001 at _____ _.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Dorothy Kirie Kinnaird in Courtroom 2302 at The Daley Center, Randolph and Dearborn Streets, Chicago, Illinois, and then and there present Terra Foundation's Motion for Entry of a Consent Judgement and Order, a copy of which is hereby served upon you.

Dated: July 6, 2001

Respectfully Submitted,

By:_____
One of the Attorneys for Defendant
The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser

16di-001269

SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
Ten South Dearborn
Chicago, IL 60603
(312) 853-7000
Firm ID No. 38315

CERTIFICATE OF SERVICE

I, Robert P. O'Keefe, one of the attorneys for defendant The Terra Foundation For The Arts, do hereby certify that I caused a true and correct copy of the attached Notice of Motion to be served upon all counsel of record listed above by facsimile and messenger delivery to those located in Chicago and by facsimile and Federal Express to those located elsewhere before 5:00 p.m. this 6th day of July, 2001.

Robert P. O'Keefe

16di-001272

EXHIBIT 28

16di-00127 3

EXHIBIT 28

WASTE-TAX RECYCLED
80000 SERIES
30% P.C.W.

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)
Plaintiffs,	) Case No.
vs.	) 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,	)
Defendants.	)

ORIGINAL

PROCEEDINGS JULY 2, 2001

(CAPTION CONTINUED)

----------)

THE PEOPLE OF THE STATE OF)

ILLINOIS ex rel., JAMES E. RYAN,)

Attorney General of Illinois,)

Plaintiff-Intervenor,)

vs.)

JUDITH TERRA, a Director of the)

Terra Foundation for the Arts,)

PAUL HAYES TUCKER, a Director of)

the Terra Foundation for the Arts,)

ALAN K. SIMPSON, a Director of)

the Terra Foundation for the Arts,)

and the TERRA FOUNDATION FOR THE)

ARTS, an Illinois Not-for-Profit)

Corporation,)

Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:

QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;

BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

VERNER, LIIPFERT, BERNHARD, McPHERSON &
HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named
Defendants;

APPEARANCES: (Continued)

KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
appeared on behalf of the named
Defendants;

SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant
Terra Foundation for the Arts;

APPEARANCES: (Continued)

HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, Charitable Trusts Bureau, and
MS. THERESE M. HARRIS, Assistant Attorney
General, Charitable Trusts Bureau,
appeared on behalf of the
Plaintiff-Intervenor;

ALSO PRESENT:

MR. HILLIARD.

REPORTED BY: KAY A. LEVINE, M.A., C.S.R., R.P.R.
Certificate No. 84-3654.

The public policy of the state, the public policy of the United States, the public policy of the United States expressed in the Arbitration Act are that these things are to be encouraged, not discouraged. That's exactly what they would have here. If they want to complain about this agreement, and if they want to complain about this process, they can say it was fraud, they can say it was duress. They can say those things, but they need evidence of proof that's clear and convincing.

There is nothing proffered anywhere here that even offers a scintilla of evidence that nobody agreed to this or it wasn't properly agreed to. In fact, the people that they allege that were somehow coerced are not here. They were not in the federal court. They don't file an affidavit. The very people who supposedly were intimidated or hurt not only do not file an affidavit or appear; in fact, they make a statement that their vote has nothing to do with it. That they were not coerced into making this vote. They make their vote because it's a hard question. And we think on a better analysis here,

about.

And if they want to say this was a coerced type of thing, it requires clear and convincing evidence. And that's after they admit there's an agreement; you must have to set it aside. There is no evidence of that at all. At all. All they have is affidavits of third parties, affidavits of an individual, Mr. Tucker, who himself can't testify to what these people feel or don't feel.

He said, I think they were coerced. They just told us they weren't. And in fact the federal court couldn't see any basis to this. Nothing's new. They filed the same things in the federal court. So there's nothing here in front of your Honor to warrant any kind of allowing them to file these matters or to be heard.

These are things that they are just dissatisfied with. Well, they're dissatisfied with a lot of things. Frankly, we're dissatisfied with a lot of things.

THE COURT: Do you believe that it would be different if they came forward with a motion that was seeking to have the Court not approve the

settlement because it was not a settlement, not agreed to, something wrong?

MR. QUINLAN: They showed that it had not been agreed or not settled to, and there was substantial evidence -- that is what the Illinois law requires is substantial evidence. It might require a hearing. But there's no substantial evidence of this. In fact, it's admitted.

THE COURT: What about an argument that perhaps there's something illegal about this settlement? I know there were some statements made about that the other day, but I don't really see that necessarily here in terms of something -- cases that are cited that says that there's some provision of this agreement that is contrary to Illinois law.

MR. QUINLAN: Well, if you notice in their pleading that they have filed -- actually it's a pleading, there's no complaint on file. There's actually nothing in front of your Honor other than a request to file a motion. So that there's no request to file a pleading. There's nothing that brings this case in front of the Court other than their motion.

proposed consent degree?

MR. BELLOWS: 21 days.

THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while -- perhaps while I was gone.

This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.

MR. BELLOWS: Are you ordering the Attorney General to submit himself -- or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.

THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

16di-001292

EXHIBIT 29

16di-001293

EXHIBIT 29

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

PLAINTIFFS' MOTION TO APPOINT AN INDEPENDENT LITIGATION COMMITTEE AND INDEPENDENT LITIGATION COUNSEL FOR THE TERRA FOUNDATION, AND/OR RECEIVER

Plaintiffs Dean L. Buntrock and Ronald Gidwitz, Directors of the Terra Foundation for the Arts ("Terra Foundation"), an Illinois not-for-profit corporation, (hereinafter collectively referred to as "Plaintiffs") respectfully move this Court to appoint an independent litigation committee and independent litigation counsel, and/or receiver for the Terra Foundation to represent its interests in this matter. In support of this motion, Plaintiffs state as follows:

INTRODUCTION

The defendants do not take seriously this Court's TRO and the tenor of this Court's ruling. Within 24 hours of the hearing before this Court and entry of the TRO on September 25,

2000, the defendants appointed Tucker as the "director" of litigation for the Terra Foundation to manage this litigation. Tucker simultaneously is engaged in a comprehensive scheme with Judith Terra and Alan Simpson and others to destroy the Terra Foundation. Tucker's interests are directly adverse to the interests of the Terra Foundation and, accordingly, he cannot serve as litigation director for the Terra Foundation, as a matter of law. The defendants also appointed Sidley & Austin as litigation counsel for the Terra Foundation – under the direction of Tucker. In accepting this retention, Sidley & Austin is in direct violation of Rule 1.7 of the Rules of Professional Conduct. Under the Rules of Professional Conduct, Sidley & Austin owes an absolute duty of loyalty to the Foundation. It cannot serve two masters. Tucker is directly adverse to the Foundation and Sidley & Austin cannot, therefore, represent the Foundation through Tucker.

In addition, Winston & Strawn must be removed as "corporate" counsel for the Foundation under Rule 1.7 because plaintiff Ronald Gidwitz is a current client of Winston & Strawn and the Foundation is a defendant in this action. Mr. Gidwitz has not waived the conflict. Further, during the recent board of directors meeting of the Foundation, counsel for Winston & Strawn failed to advise the board members of the direct conflict of interest between Tucker and the defendants on the one hand and the Foundation on the other. Winston & Strawn also failed to advise the board members of the ethical rules governing the appointment of Tucker as the Foundation's litigation director to direct Sidley & Austin.

Consequently, this Court should appoint a receiver to safeguard the Foundation and, at the very least, appoint an independent litigation committee for the Terra Foundation in this case and order the appointment of independent counsel to represent the Terra Foundation. Such

independence will be further assured through the appointment of a provisional receiver to implement the Court's order.

I. FACTUAL BACKGROUND.

Both the plaintiffs and the Illinois Attorney General's office have presented a verified complaint to this Court that the defendants, Paul Tucker, Judith Terra, Alan Simpson and others have caused, and intend to cause, irreparable harm to the Terra Foundation. Rather than safeguarding the Terra Foundation on behalf of the people of the State of Illinois, the defendants have embarked upon a scheme to close the Museum in Chicago and usurp the Art Work and assets of the Terra Foundation (valued in excess of $400 million) for their own purposes, in violation of the charitable trust established by Daniel Terra for the people of the State of Illinois.

A. Tucker, Terra, and Simpson Have Breached Their Fiduciary Duties to the Terra Foundation and Threaten to Destroy the Terra Foundation.

The evidence before this Court established that the Terra Foundation is a public trust, created for the benefit of the people of Illinois by Daniel Terra. The Terra Foundation is comprised of the Terra Museum in Chicago, substantial cash and real estate holdings, a multimillion dollar collection of American art, and a museum in Giverny, France. (See Plaintiffs' Verified Complaint and Illinois Attorney General's Complaint).

The plaintiffs and the Illinois Attorney General have submitted verified allegations that Tucker, Judith Terra, Simpson and others have engaged in serious waste and mismanagement of the Terra Foundation, and threaten imminent harm to the Terra Foundation, including the following:

- Grossly mismanaging the Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons

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responsible for the Terra Museum's day-to-day operations and continued success;

- Causing the primary individuals in charge of security at the Terra Museum to quit resulting in an inexperienced and understaffed security staff, and jeopardizing the security of the $100 million of art displayed and collected at the Terra Museum;

- Permitting a director of the Terra Foundation to engage in a conflict of interest in representing the Terra Foundation at art auctions while representing the interests of private clients at the same auction;

- Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

- Attempting to invade the D4 Endowment Fund, which is restricted to educational purposes, for the unauthorized purpose of acquiring art;

- Bypassing the lawfully elected Executive Committee operating the Terra Foundation and the Terra Museum;

- Wastefully incurring excessive legal fees by unnecessarily retaining counsel in replacement of the Terra Foundation's long-standing counsel;

- Misusing the art collection of the Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

- Allowing defendant Michaeli to participate in the management, control and operation of the Terra Foundation and the Terra Museum.

In addition, the verified pleadings submitted establish that Tucker, Judith Terra, Simpson and others have devised a scheme to close the Terra Museum in Chicago and relocate the priceless Art Work from Chicago, including the following:

- Tucker drafted a plan entitled "A Vision for The Future" which sets forth the defendants' intention to: (1) close the Terra Museum in Chicago; (2) move the Terra Foundation and its art collection to Washington, D.C.; (3) give its collections to the National Gallery

or Corcoran Gallery of Art in Washington, D.C.; and (4) set up an educational facility in Washington, D.C.

- The Terra Foundation's Board of Directors met on August 24, 2000. At that meeting Tucker pronounced that the Terra Foundation should move to Washington, D.C. and close the Terra Museum in Chicago.

- Tucker is both Chairman and President of the Terra Foundation and is responsible for its safety, yet he has allowed and/or caused the Terra Foundation to be depleted of long term staff, has allowed and/or caused the Terra Foundation's long term security personnel to quit, has allowed and/or caused its executive director to quit, and directed that art belonging to the Terra Foundation be delivered from France to Defendant Judith Terra's home.

Because Tucker, Judith Terra and Alan Simpson have displayed an utter disregard for the best interests of the of the Terra Foundation and its beneficiaries, the people of Illinois, the defendants should ultimately be removed as directors of the Board of Directors of the Terra Foundation.

B. This Court Found That a Fair Question Exists That Tucker, Terra and Simpson Threaten Irreparable Harm to the Terra Foundation.

On September 25, 2000, this Court conducted a hearing on the plaintiffs' and the Illinois Attorney General's Emergency Motion for Temporary Restraining Order. After the hearing, this Court found that Tucker, Judith Terra and Alan Simpson posed a genuine and immediate threat to the Terra Foundation and that an injunction was necessary to protect the Foundation and the public. This Court enjoined Tucker, Judith Terra, Simpson and others from removing plaintiffs from the board of directors and executive committee of the Terra Foundation, closing the Terra Museum, or relocating the Artwork outside of Illinois. A copy of the Order is attached as Exhibit A.[1] The tenor of the Court's ruling was to preserve the status quo and avoid actions by the

[1] The Affidavits of Plaintiffs Gidwitz and Buntrock are attached hereto as Exhibits B and C, respectively.

16di-001298

defendants against the plaintiffs "which could then be interpreted as a retaliation measure for this lawsuit." (Report of Proceedings, 9/25/00, pp. 70-71.)

C. **The Defendants Ignore this Court.**

The defendants persist in treating the Terra Foundation and its assets as their own. First, the defendants did not appoint an independent litigation committee to fairly and independently represent the interests of the Terra Foundation and its beneficiaries, the people of Illinois, as required by law. Second, on September 26, 2000, the defendants appointed Tucker as litigation director to oversee, direct and manage this litigation *on behalf of the Terra Foundation*. By reason of the allegations contained in the verified pleadings, Tucker is directly adverse and in conflict with the Foundation in this litigation and therefore, cannot simultaneously represent the interests in the Foundation. Third, the defendants have retained the law firm of Sidley & Austin ostensibly as counsel for the Terra Foundation in this litigation. This relationship violates Rule 1.7 of the Rules of Professional conduct because Sidley & Austin takes direction from Tucker, and not a disinterested representative of the Foundation. Tucker's conduct has been challenged in the verified pleadings of the plaintiffs and Illinois Attorney General as harmful to the Foundation and, under such circumstances, Tucker cannot possibly represent the Foundation.

Winston & Strawn is also in violation of Rule 1.7. On September 26, 2000, when the defendants engineered the selection of Tucker as director of litigation, counsel from the law firm of Winston & Strawn was present for the Terra Foundation. Counsel provided no advice or counsel to the board of directors as to the conflict of interest vis-a-vis Tucker and the Terra Foundation, nor the ethical conflict facing Sidley & Austin in such situations. Winston & Strawn

was obligated under the Rules of Professional Conduct as "corporate" counsel to advise the Foundation of the conflicts and the impropriety of such an arrangement. *See* R.P.C 1.7 and 1.13.

The conflict of interest is obvious and irreconcilable. As this Court found, Tucker's misconduct threatens to cause imminent and irreparable harm to the Terra Foundation. Tucker, therefore, cannot be the director of litigation on behalf of the Terra Foundation involving litigation against himself. *See* R.P.C. 1.7; *Lower v. Lanark Mutual Fire Insurance Co.*, 114 Ill. App.3d 462, 448 N.E.2d 940 (2d Dist. 1983). The best interest of the Terra Foundation is to investigate the allegations against Tucker, Judith Terra and Simpson. Moreover, Tucker has already demonstrated that his self interest is directly adverse to the best interests of the Terra Foundation. Thus, by unilaterally appointing Tucker as litigation director, the defendants have revealed their intention to use Sidley & Austin as their own counsel. No attorney has filed an appearance for any of the individual defendants in this case. Each of the defendants must have their own counsel to represent them in this case and not the Foundation's counsel. R.P.C. 1.7.

Under Illinois law, as well as authority from other jurisdictions, Tucker must be replaced as "litigation director" and an independent litigation committee and/or receiver must be appointed for the Terra Foundation to manage the litigation. Consequently, Sidley & Austin must be replaced and the independent litigation committee and/or receiver needs to select independent litigation counsel for the Terra Foundation to protect the trust established by Daniel Terra.

ARGUMENT

I. COUNSEL FOR THE TERRA FOUNDATION SHOULD BE APPOINTED BY AN INDEPENDENT LITIGATION COMMITTEE AND UNDER THE DIRECTION OF THAT COMMITTEE.

It is clear that the defendants' decision to appoint Tucker as litigation director cannot stand. The decision to retain counsel for the Terra Foundation and to direct the litigation on behalf of the Terra Foundation must be made by an independent entity or a receiver appointed by the court to preserve and protect the Foundation's independence during this litigation.

Fundamental principles of corporate law apply here. *Mile-O-Moe Fishing Club, Inc. v. Noble*, 62 Ill. App.2d 50, 57, 210 N.E.2d 12, 15 (5th Dist. 1965). The authority to retain corporate counsel on behalf of the corporation generally resides in the board of directors. Where, however, members of the board are accused of wrongdoing, the board may only act through special independent litigation committees comprised of disinterested independent individuals. *See Auerbach v. Bennet*, 393 N.E.2d 994, 1001 (N.Y. 1979) (board of directors retains control over litigation decisions, but where members of the board are accused of wrongdoing, the board must act through a special litigation committee composed of individuals who "possess a disinterested independence and do not stand in a dual relation which prevents an unprejudicial exercise of judgment"); *Zapata Corporation v. Maldonado*, 430 A.2d 779, 786-788 (Del. 1980) (board of directors retains power over litigation decisions, however, such decisions must be delegated to an independent special litigation committee when the board members are accused of wrongdoing).

It is well settled that a special litigation committee must be comprised of disinterested members. The selection of independent and disinterested members of a litigation committee is of paramount importance to ensure that the best interests of the entity, the Foundation, are served. *See* Jerold S. Solovy, Barry Levenstam, & Daniel S. Goldman, *The Role of Special Litigation Committees In Shareholder Derivative Litigation*, Tort & Insurance Law Journal 864, 875. As Mr. Solovy notes, factors that require the disqualification of a board member from service on a special litigation committee include whether it is alleged the director is subject to personal liability and therefore "interested" or whether the director authorized, approved, or benefitted from the transaction underlying the lawsuit. *Id.* at 875-76. Moreover, counsel chosen must be counsel not previously retained by the corporation and truly independent so as to ensure proper legal advice is provided. *Id.* ("Consultation with independent counsel has been considered very significant evidence of the special committee's independence.").

The structural bias inherent in the litigation committee context requires that interested directors be disqualified from serving on a litigation committee. *See* Meg Shevach, *Deciding Who Should Decide To Dismiss Derivative Suits*, 39 Emory L. J. 937, 958 (1990) (The independent litigation committee must be beyond reproach.)

An interested director must be disqualified from serving on a litigation committee, and as many courts have concluded, directors who are defendants in the litigation should also not be permitted to select the litigation committee's members. *See, e.g., Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W.2d 709 (1983) (interested directors should not vote for the selection of the members of the independent litigation committee.) Here, Tucker, as the litigation director is vested with the authority to make decisions that control Terra's role in the litigation. Tucker's

position goes even further than the principle established by the *Miller* court. Tucker is not simply selecting the litigation committee, but rather, Tucker is acting as the litigation committee.

Illinois law recognizes that directors and officers of a not for profit corporation, such as Tucker here, owe a fiduciary duty to the corporation and its beneficiaries to preserve the assets of the corporation for use exclusively in the stated mission of the corporation. *Mile-O-Moe Fishing Club, Inc. v. Noble*, 62 Ill. App. 2d 50, 57, 210 N.E.2d 12, 15 (5th Dist. 1965) (the officers and directors of a not for profit corporation are charged with the same degree of fidelity to the interests of the corporation as are the officers and directors of a business corporation.) Given Tucker's conflict of interest with the Terra Foundation by virtue of the numerous alleged acts of illegality and malfeasance, Tucker lacks the fidelity of interest to the Terra Foundation required under the law. Tucker cannot assume the position as "director" of litigation on behalf of the Terra Foundation.

Neither Tucker nor his co-defendants are disinterested directors. The plaintiffs and Illinois Attorney General have charged Tucker and the co-defendants with attempting to destroy the Terra Foundation and seize its precious art work, cash and real estate holdings for their own unauthorized purposes. This Court has already found there is a fair question that unless enjoined, Tucker, Judith Terra and Simpson will harm the Terra Foundation, as alleged. (See Exhibit A, Order). Thus, the record before this Court is crystal clear – Tucker, Judith Terra and Simpson are directly adverse to the best interests of the Terra Foundation, and cannot represent the Terra Foundation in this litigation.

Independent counsel cannot be independent if they report to parties with personal interests or exposure in this litigation. Yet, counsel must report to someone. Plaintiffs request

16di-001303

that this Court appoint a receiver and/or order that a special litigation committee be established to retain independent litigation counsel and direct the litigation on behalf of the Terra Foundation. This special litigation committee must be composed of independent and disinterested persons, possibly other members of the board of directors. *See Zapata*, 430 A.2d 788-89 (board of directors can appoint a special litigation committee to oversee litigation, but that committee must be independent); *Auerbach v. Bennett*, 393 N.E.2d at 1001 (directors selected for special litigation committee must be disinterested).

Who selects the independent board members, and how can the court and the parties be assured of true independence? In this case, resolving such an issue can result in costly collateral litigation. To avoid such collateral litigation and to ensure independent representation of the Terra Foundation, this Court should appoint a provisional receiver under the General Not For Profit Corporation Act of 1986 (805 ILCS 105/112.55) and the Court's inherent authority. *See e.g. People ex rel., Fahner v. Community Hospital of Evanston* (1st Dist. 1982). As requested in the verified pleadings of the Illinois Attorney General and plaintiffs, the receiver will be ideally equipped to investigate this matter and recommend to the Court the appropriate independent representation of the Foundation. There is no prejudice to any of the defendants, and the Foundation's best interests will be protected.

II. THE TERRA FOUNDATION MUST BE REPRESENTED BY INDEPENDENT LITIGATION COUNSEL.

It is equally clear that Sidley & Austin cannot represent the Terra Foundation under these circumstances. Tucker, Judith Terra and Simpson have compromised Sidley & Austin, and Sidley & Austin has violated Rule 1.7 of the Rules of Professional Conduct by accepting Tucker

as litigation director.[2] Under Illinois law, the Terra Foundation is entitled to independent counsel.

The Terra Foundation and its endowment is a charitable trust for the benefit of the people of Illinois. Any use of the foundation or its assets to the detriment of its beneficiaries is contrary to Illinois law. *People ex rel Scott v. George F. Harding Museum*, 58 Ill. App. 3d 408, 374 N.E.2d 756 (1st Dist. 1978). A charitable trust is defined as "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." Restatement (Second) Trust, Section 348, p. 210. Here, Sidley & Austin is not representing the Terra Foundation, is not protecting its assets for Daniel Terra's stated purpose, and is not discharging its fiduciary duties to the Foundation. Sidley & Austin is representing Tucker, Judith Terra and Simpson. Moreover, Tucker, Judith Terra and Simpson are improperly diverting funds from the Terra Foundation to pay for Sidley & Austin's services rendered on behalf of Tucker, Judith Terra and Simpson.

The Rules of Professional Conduct require Sidley & Austin's disqualification. Tucker's interest is directly adverse to the interests of the Terra Foundation and neither Tucker nor the other defendants may direct this litigation on their own behalf through Terra Foundation's "litigation" counsel. Rule 1.7 governs the very situation before the Court:

---

[2] This is not the first time Tucker and the co-defendants attempted to usurp the Terra Foundation's counsel as their own. Tucker directed Mayer Brown & Platt, the Terra Foundation's prior counsel, not to communicate with anyone on the Board but him, without his approval. Mayer Brown & Platt advised they represented the entire Foundation, and could not discharge its ethical obligations to the Terra Foundation under such circumstances. Mayer Brown & Platt resigned, accordingly.

16di-001305

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after disclosure.

(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Ill. R. P.C. 1.7. Here, Sidley & Austin cannot reasonably believe that its representation of the Terra Foundation under these circumstances will not constitute a violation of its responsibilities under Rule 1.7. Even the Terra Foundation's consent to the representation would not permit Sidley & Austin to continue its representation of the Terra Foundation because Sidley & Austin cannot establish that it would be "reasonable" to believe that it could represent the Terra Foundation without any adverse effect from its relationship with Paul Tucker. In addition, Sidley & Austin cannot undo the harm.

Similarly, Winston and Strawn cannot continue to represent the Foundation under Rule 1.7 because they have a direct conflict with a current client, plaintiff Gidwitz, and have not demonstrated the lack of independence necessary to represent the Foundation. When Tucker was appointed litigation director to direct Sidley & Austin, the Terra Foundation's attorney from

Winston & Strawn present at the meeting did not inform the board of directors of the ethical conflict arising from this arrangement, or give any advice or counsel to the Foundation to avoid these conflicts.

Illinois law recognizes the need for independent corporate counsel in situations like that here — where defendant directors are alleged to have engaged in serious misconduct against the organization. *See Lower v. Lanark Mutual Fire Insurance Co.*, 114 Ill. App. 3d 462, 448 N.E.2d 940 (2d Dist. 1983); *Cannon v. U.S. Acoustics Corporation*, 398 F. Supp. 209 (N.D. Ill. 1975) rev'd. on other grounds 532 F. 2d 1118 (7th Cir. 1976). As the Court stated in *Lower*:

> Even if no conflicts currently exist, the potential conflict cannot be ignored, and we must consider the serious hardship to the court and the parties that would ensue if new counsel is made necessary because a conflict does arise in the course of trial. On balance, the corporation must obtain independent counsel.

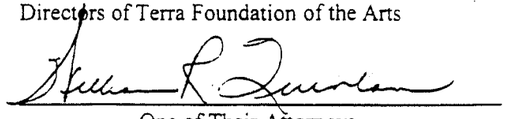
Lower, 114 Ill. App. 3d at 469, 448 N.E.2d 940. Here, the conflict is actual, not a potential conflict, as in *Lower*. The Foundation, therefore is entitled to independent counsel forthwith. Tucker's interests are adverse to the Terra Foundation. This Court should therefore order the appointment of a receiver, independent counsel for the Terra Foundation, and/or the creation of an independent litigation committee.

CONCLUSION

WHEREFORE, for all the foregoing reasons, plaintiffs respectfully request that this Court disqualify Sidley & Austin from representing the Terra Foundation in this action, disqualify Tucker as litigation director, appoint a receiver for the Foundation, appoint independent counsel for the Terra Foundation, and order the selection of an independent litigation committee for the Terra Foundation, and any other relief that this Court deems fair and just.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ,
Directors of Terra Foundation of the Arts

By: 
One of Their Attorneys

William R. Quinlan
James R. Carroll
John F. Kennedy
William J. Quinlan
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm I.D. # 33745

Exhibit A

16di-001309

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1 of 5

Dean L. Buntrock
et al
plaintiffs
v.
Judith Terra
et al
defendants

NO. 00 CH 13559

ORDER

This matter coming before on Plaintiffs' Emergency Motion for TRO, Plaintiffs' Motion to disqualify Sidley & Austin as counsel for Terra Foundation, Plaintiffs' Motion to file Corrected Emergency Motion for TRO and Plaintiffs Motion for Expedited Discovery, The Court being fully advised and counsel for Terra Foundation being present it is hereby ordered:

(1) Plaintiffs' Motion to Disqualify Sidley & Austin is denied without prejudice;
(2) Plaintiffs are granted leave to substitute a Corrected Emergency Motion for Temporary Restraining Order

Atty No. 33745
Name Quinlan & Crishan
Attorney for Plaintiffs
Address 30 N LaSalle #2500
City / Zip Chgo. IL 60602
Telephone (312) 263-0500

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420164)

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN L. BUNTROCK
et al
plaintiffs
v.
JUDITH TERRA,
et al.
defendants

2 of 5

NO. 00 CH 13859

PAGE TWO
ORDER

(3) Plaintiffs' Motion for Expedited Discovery is granted and Plaintiffs are granted leave to serve discovery upon defendants immediately; AND Defendants are given reciprocal

(4) The Emergency Motions for TRO filed by Plaintiffs and People of the State of Illinois by The Illinois Attorney General are granted with the Court making the following findings:

A. Plaintiffs have established a protectible right in need of protection

B. Plaintiffs have established that they and the public will suffer irreparable injury if injunctive relief is not granted

Atty No. 33745
Name QUINLAN & CRISHAM
Attorney for PLAINTIFFS
Address 30 N. LaSalle Street Suite 2510
City / Zip CHICAGO IL 60602
Telephone (312) 263-0900

ENTER:

Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420164)

16di-001311

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

[illegible]
Plaintiffs
v. NO. 00 Ch 12[illegible]
[illegible]
defendants

[illegible] 3 **ORDER**

C. Plaintiffs have established that There ~~no~~ is no adequate remedy at law if injunctive relief were not granted

D. Plaintiffs and The People of The State of Illinois have raised a fair question as to their likelihood of success on the merits

E. On a balance of hardship, The Court finds that Plaintiffs and The People of Illinois would be ~~more~~ harmed ~~by~~ if injunctive relief were not granted whereas any harm to defendants by the entry of a TRO is not as great

Atty No. [illegible]
Name [illegible]
Attorney for [illegible]
Address [illegible]
City / Zip [illegible]
Telephone [illegible]

ENTER:

______________________, ______
Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

4 of 5

v.

NO. 00 Ch 13 [illegible]

Dennis [illegible]

Pmt **ORDER**

(5) The Court therefore orders that defendants are enjoined from:

A. Taking any [redacted] action at the annual Board of Directors meeting scheduled for Tuesday September 26, 2000, to remove any member of the Board of Directors or the Executive Committee against their will [redacted];

B. Taking any final action to close the Terra Museum of American Art in Chicago and from taking any final action to remove or transfer the bulk of any assets or artwork of the Terra Museum or the Terra Foundation outside the State of Illinois [redacted]

Atty No. 33715

Name [illegible]

Attorney for Pmt

Address 30 [illegible] St. 2900

City / Zip [illegible]

Telephone [illegible]

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-001313

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

-1 of 5

5 of 5

Dian L Buntrock
et al

v.

Judith Terra
et al

NO. 00 CH 13859

Page 5 **ORDER**

~~Parties~~

(6) The temporary restraining order shall remain in effect until October 12, 2000 at 5:00 p.m. unless otherwise extended by the Court

(7) Bond is waived for good cause shown because of public interest is involved

(8) The matter is set for October 12, 2000 at 11:00 a.m. for the purpose of continuing the TRO, discussing dates for responses to discovery requests, set date for preliminary injunction hearing and for status on J. in Terra's ~~Motion~~ Petition to intervene

(9) THIS ORDER IS ENTERED September 25 2000 AT 3:16 P.M. CENTRAL DAYLIGHT TIME

Atty No. 33745
Name Quinlan & Crisham
Attorney for Plaintiffs
Address 30 N. LaSalle #2900
City / Zip Chgo, IL 60602
Telephone (312) 263-0900

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI

ENTER: SEP 25 2000

JUDGE DOROTHY ~~KINNARD~~ #278 **Judge's No.**

DEPUTY CLERK

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420164)

Exhibit B

16di-001315

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF RONALD GIDWITZ

The undersigned, upon oath, depose and state as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I am a member of the board of directors for the Terra Foundation for the Arts ("Terra Foundation").

3. On September 26, 2000, I attended the annual meeting of the board of directors for the Terra Foundation ("Board of Directors") in Giverny, France.

4. Prior to that meeting, I was a member of the Executive Committee, Chairman of the Strategic Planning Committee and a member of the Finance, Investment and Audit Committee of the Terra Foundation's Board of Directors.

5. The September 26, 2000 meeting was attended by the other members of the Terra Foundation's Board of Directors including Judith Terra and Paul Hayes Tucker, defendants in the case captioned *Buntrock, et al. v. Terra, et al.*, currently pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Number 00 CH 13859, the Honorable Judge Dorothy Kinnaird presiding (hereinafter the "action" or "pending litigation"). This meeting was also attended by Mark M. Heatwole, a partner in the law firm of Winston & Strawn, who was present as counsel for the Terra Foundation.

6. During the September 26, 2000 meeting, I was removed as Chairman of the Strategic Planning Committee, and as a member of the Finance, Investment, and Audit

Committee, as well as prevented from serving on any other committees because I was a plaintiff in this action.

7. Nevertheless, the defendants in the action, Judith Terra, Paul Hayes Tucker and Alan Simpson, retained their positions with the Terra Foundation as well as their assignments on committees of the Board of Directors. Also, Mr. Tucker, a defendant in this action, was appointed director of litigation for the Terra Foundation. As director of litigation, Mr. Tucker is responsible for the management and oversight of the pending litigation on behalf of the Terra Foundation. Mr. Tucker has been individually named as a defendant in the action charged with breaching his fiduciary duty to the Terra Foundation.

8. Also, at the September 26, 2000 meeting, the law firm of Sidley & Austin was appointed as litigation counsel for the Terra Foundation and is to report directly to Mr. Tucker as the director of litigation.

9. At no time during the meeting did counsel for the Terra Foundation, Mr. Heatwole, or anyone from the law firm of Winston & Strawn inform me or the Board of Directors that the appointment of Mr. Tucker as the director of litigation presented or could present a conflict of interest. At no time during the meeting did Mr. Heatwole advise me or the Board of Directors that the appointment of Sidley & Austin raised significant ethical considerations under the rules of professional conduct that govern lawyers licensed to practice law in the State of Illinois. Furthermore, at no time during the meeting, or any time thereafter, did Mr. Heatwole or his law firm provide me or the Board of Directors with an opinion that the selection of Mr. Tucker and the law firm of Sidley & Austin was appropriate.

10. The undersigned, under penalties as provided by law pursuant to Section 1-109 of

the Code of Civil Procedure, certifies that he has read this Verified Statement and that the statements set forth herein are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Ronald Gidwitz

Doc:58446

** TOTAL PAGE.24 **

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF DEAN L. BUNTROCK

The undersigned, upon oath, depose and state as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I am a member of the board of directors for the Terra Foundation for the Arts ("Terra Foundation").

3. On September 26, 2000, I attended the annual meeting of the Board of Directors of the Terra Foundation ("Board of Directors") in Giverny, France.

4. Prior to that meeting, I was the Treasurer of the Terra Foundation and Chairman of the Finance, Investment and Audit Committee as well as a member of the Executive Committee of the Terra Foundation's Board of Directors.

5. The September 26, 2000 meeting was attended by the other members of the Terra Foundation's Board of Directors including Judith Terra and Paul Hayes Tucker, defendants in the case captioned ***Buntrock, et al. v. Terra, et al.***, currently pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Number 00 CH 13859, the Honorable Judge Dorothy Kinnaird presiding (hereinafter the "action" or "pending litigation"). This meeting was also attended by Mark M. Heatwole, a partner in the law firm of Winston & Strawn, who was present as counsel for the Terra Foundation.

6. At the September 26, 2000 meeting, I was removed as an officer and Chair of Finance, Investment and Audit Committee as well as prevented from serving on any other

committees because I was a plaintiff in this action.

7. Nevertheless, the defendants in the action, Judith Terra, Paul Hayes Tucker and Alan Simpson, retained their positions with the Terra Foundation as well as their assignments on committees of the Board of Directors. Also, Mr. Tucker, a defendant in this action, was appointed director of litigation for the Terra Foundation. As director of litigation, Mr. Tucker is responsible for the management and oversight of the pending litigation on behalf of the Terra Foundation. Mr. Tucker has been individually named as a defendant in the action charged with breaching his fiduciary duty to the Terra Foundation.

8. Furthermore, the law firm of Sidley & Austin was appointed as litigation counsel for the Terra Foundation. Sidley & Austin is to report directly to Mr. Tucker as the director of litigation.

9. At no time during the meeting did counsel for the Terra Foundation, Mr. Heatwole, or anyone from the law firm of Winston & Strawn inform me or the Board of Directors that the appointment of Mr. Tucker as the director of litigation presented or could present a conflict of interest. At no time during the meeting did Mr. Heatwole advise me or the Board of Directors that the appointment of Sidley & Austin raised significant ethical considerations under the rules of professional conduct that govern lawyers licensed to practice law in the State of Illinois. Furthermore, at no time during the meeting, or any time thereafter, did Mr. Heatwole or his law firm provide me or the Board of Directors with an opinion that the selection of Mr. Tucker and the law firm of Sidley & Austin was appropriate.

10. The undersigned, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read this Verified Statement and that the

statements set forth herein are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Dean L. Buntrock

Doc-158445

EXHIBIT 30

16di-001325

EXHIBIT 30

80000 SERIES
30% P.C.W.
KLEER-FAX RECYCLED

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DECLARATION OF PROFESSOR EVELYN BRODY

1. My name is Evelyn Brody. My business address is Chicago-Kent College of Law, Illinois Institute of Technology, 565 West Adams Street, Chicago, Illinois 60661.

2. I am Professor of Law at the Chicago-Kent College of Law at the Illinois Institute of Technology, where I have been a faculty member since 1992. In the Fall semester 2001, I will be a visiting professor at Duke University School of Law. My research interests

16di-001326

encompass the tax, corporate, trust, property, and constitutional issues relating to nonprofit institutions. My scholarly publications have examined, among other topics, the economic and institutional similarities between nonprofit and for-profit organizations; charitable endowments; the direct and indirect effects of tax reform on charities; the limits of charity fiduciary law; and federal and State regulation of charities. My curriculum vitae is attached as Exhibit A.

3. I obtained my B.A. from Yale College and my J.D. from Georgetown University Law Center. I have been a lawyer for 20 years, having first practiced with Arnold & Porter in Washington, D.C. (1981-85), and then Michael, Best, and Friedrich in Madison, Wisconsin (1985-88), before working in the Office of Tax Policy at the U.S. Treasury Department (1988-92). Much of my time in both practice and the government was devoted to issues relating to tax-exempt organizations. I teach courses on the taxation of individuals and businesses, and recently taught a course on nonprofit law, and present my research at law school faculty workshops, professional conferences, and practitioner conferences around the country. I am also an associate scholar with The Urban Institute's Center on Nonprofits and Philanthropy. Active with the American Bar Association Tax Section, I am co-chair of the policy subcommittee of the Exempt Organizations Committee. I am also working with the ABA Business Law section on a revision to the Revised Model Nonprofit Corporation Act. I serve as a Council member of the Aspen Institute Nonprofit Sector Research Fund, and am an active member of the multi-disciplinary Association for Research on Nonprofit Organizations and Voluntary Action, currently running for the board.

PURPOSE OF DECLARATION

4. Until July 2001, my interest in the above-captioned dispute – while keen – was purely scholarly. I live in Chicago, and followed the news reports closely. Then the Defendants in this dispute – namely, the Terra Foundation (the "Foundation"), Paul Hayes Tucker, Alan K. Simpson, and Judith Terra (collectively, the "Defendants") – contacted me and retained me, as an expert on nonprofit organizations, to assess the implications on the operation of charities of the proposed settlement agreement that is pending before this Court (the "Proposed Settlement"). They provided me with court-filed documents for my review.

5. I have spent my academic career lamenting the twin weaknesses of the charitable sector: the lack of energy and initiative on the part of many nonprofit managers, and the lack of zeal in enforcing the public's interest on the part of many charity regulators. Here, though, was the reverse situation: It appeared to me that the State was weighing in on the side of the minority directors against the efforts of a majority of a board trying to use charitable assets in the most productive way possible consistent with the charitable mission.

6. The settlement agreement would "pack" the Foundation's board with Illinois residents for at least 25 years, and handicap the business judgment of the board with geographic restrictions for the next 50 years, without any support in the existing articles of incorporation or bylaws. The Attorney General cannot, under the law, compel this outcome. Only the courts can preserve the flexibility of this Foundation to operate as originally envisioned.

7. In this Declaration, I will discuss two issues: (I) the significance of the absence of a geographic restriction in the Foundation's organic documents; and (II) the proper role of the State attorney general in the oversight of charities.

I. THE ABSENCE OF A GEOGRAPHIC RESTRICTION IS AN IMPORTANT PART OF THE PURPOSES OF THE FOUNDATION

8. Private philanthropy and the nonprofit sector rest on the fundamental Constitutional guarantees of private property protected by due process, liberty of contract, and freedom of worship and expression. As long as the trust or corporation qualifies as charitable, no legislature, attorney general, or court may mandate a departure from its privately-determined purposes no matter how confident are the parties that a better social use could be made of the funds.

8. The inherent conservative nature of this legal structure has permitted numerous charitable trusts notorious for their founder's idiosyncracies. A donor might dictate a general geographic restriction – such as Buck Trust's limitation of the funds for the benefit of Marin County, California (one of the wealthiest counties in the country). A donor might dictate an even more specific use – such as the prohibition on moving displayed works of art under the trusts establishing the Barnes Foundation (outside Philadelphia), the Isabelle Stuart Gardner Museum (Boston), and the Frick Collection (New York City).

10. Yet just as honored under the law is a purpose clause *unrestricted* as to geographic use. Indeed, a donor or founder might draw upon the lessons of the Buck Trust and the museum foundations just described – that no mortal can predict the future, and the narrower the purpose, the sooner the charity is likely to outlive its usefulness. Thus, an enlightened founder could recognize that tying the hands of the trustees only invites wasteful benign neglect or wasteful resort to the courts for approval of a *cy pres* petition. Nor is there any guarantee of a trustee's success in a *cy pres* proceeding to reform a charitable trust, because relief will be granted only if the original restriction is impossible to carry out. The Buck Trust was prohibited from expending its resources to benefit those in the larger San Francisco area; and a Pennsylvania court recently rejected a thoughtful *cy pres* petition from the Hershey Trust, whose income from Hershey stock far exceeds its ability to spend, as designated, on students at the Hershey School. Even approval takes time and effort: A Pennsylvania court held a 3-day hearing prior to approving a one-time tour of the art collection of the Barnes Foundation, and the badly needed renovation

of the museum; another 3-day hearing (and more delay) was required before the judge approved an additional two sites for the tour. See *In re Barnes Foundation*, 684 A.2d 123, 443-45 (Pa. Super. 1996).

11. Like the purposes of a charitable trust, the purposes of a not-for-profit corporation are committed to the discretion of private parties. The United States Supreme Court held in the seminal 1819 case of *Dartmouth College v. Woodward*, 17 U.S. 518 (4 Wheat. 518) (1819), that a charitable not-for-profit corporation is a contract protected under the Contracts Clause of the U.S. Constitution against unilateral State legislative amendment of the corporation's governance structure. Writing for the Court, Chief Justice John Marshall observed: "It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable." 17 U.S. at 647. Rejecting the New Hampshire legislature's attempt to expand the number of directors of the college, and to convert it into a university, Justice Marshall declared: "This [act] may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given." 17 U.S. at 653. Not incidentally, Justice Marshall emphasized that "the objects of the contributors, and the incorporating act, were the same[:] the promotion of [C]hristianity, and of education generally, not the interests of New-Hampshire particularly." 17 U.S. at 640.

12. Accordingly, we should credit the *absence* of an explicit geographic restriction in the Foundation's organic documents as an important part of the founder's intent. Specifically, the articles of incorporation make no mention of any geographic limitation on its activities, either as originally filed in 1978 or as amended in 1994. Indeed, the 1994 amendment substitutes for "a museum" the phrase "museums and schools, both in the United States and abroad" – and was signed by founder Daniel Terra, as chairman. This language is reiterated verbatim in the bylaws. It is uncontested that the Foundation also has operated a museum in Giverny, France since the early 1990's.

II. THE ROLE OF THE STATE ATTORNEY GENERAL IS TO GUARD AGAINST CHARITY FIDUCIARIES' WRONGDOING, NOT TO INTERFERE IN DECISION-MAKING CARRIED OUT IN GOOD FAITH

13. As a basic premise, society relies on the boards, rather than the state, to govern charities. Within broadly bounded charitable purposes, and any restrictions in gifts, no laws tell the entity or its managers how to "do" charity.

14. The actions of the Terra Foundation board prior to the Attorney General's involvement indicate, to me, not mismanagement but rather its opposite – sustained efforts to ensure that the charitable assets continue to be productive. That the board considered conducting activities in another State does not give rise to a breach of fiduciary duty where the

articles of incorporation impose no geographic restriction. In the case of the Foundation, there has been no failure of its original purpose and so no amendment to the articles of incorporation would be necessary for the board to redeploy assets out of the State of Illinois.

15. State attorneys general have no necessary expertise, much less the resources, to address the myriad concerns of the hundreds of thousands of charities that function in the United States today. In particular, an attorney general is not equipped to set the policies and make the hard decisions required to operate a museum. The museum world of today is a complex web of block-buster tours; collaborations (such as this summer's first-time joint exhibit and marketing campaign in New York by the Whitney and the Museum of Modern Art); and cross-border allliances (the Tate Gallery in London and the Museum of Modern Art, while continuing plans collaborating on painting exhibitions, recently terminated their plans for a joint commercial website). Like the Terra Foundation, the Guggenheim operates or plans to operate museums at more than one location – eight, to be precise (two in New York City and one more on the way, plus Venice, Bilbao, Berlin, and sites planned for Las Vegas and Brazil). Among more traditional concerns, museum boards must worry about such issues as the tax consequences of corporate sponsorship arrangements; the intellectual property value of reproductions; and the price to charge for admission, given the competition for museum-goers' educational and entertainment budget.

16. A State attorney general has the obligation to provide oversight of the charitable sector. To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board. However, the attorney general is not a "super" member of the board. Where, as here, suit was brought against the board by a minority of the directors, the attorney general's involvement does not tip the weight of the vote in an area committed to the discretion of a majority of the board. Nor, as described above, does the attorney general have authority to impose changes in the purposes of a charity – in particular, a geographic restriction.

17. A regulator's enforcement activities always have policy implications, even if unintended. For example, when Manhattan District Attorney Robert Morganthau seized paintings loaned by a Viennese collector for an exhibit at the Museum of Modern Art – out of concern that they might have an illegal Nazi provenance – museums throughout New York feared for their ability to put together exhibitions requiring loans from nonresidents. See *In the Matter of the Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897, 901 (N.Y. 1999) (referring to the statute then in effect as intended, in part, "to protect State cultural institutions that depend upon the free flow of art for the benefit of the people of the State of New York").

18. Even charity regulators, understandably, have specific goals and priorities. An elected

State attorney general primarily seeks to further the interests of the electorate of his or her State. The risk of such an approach, of course, is that charitable activity in the United States could be viewed as a parochial, zero-sum game: As with business development efforts, one State's loss is another's gain. (Nor is it clear that Illinois – which just lured the Boeing headquarters – would lose on net from this mobility.) In terms of the national public interest, moreover, relocation could be a positive-sum game: A charity board might determine that the overall social benefit can be increased by moving the activities from a State with a low utility to a State with a higher one.

19. In the case of the Terra Foundation, the Attorney General seeks to read into the purposes of the corporation the desire to benefit primarily "the people of Illinois." The Attorney General has in one other recently publicly reported instance made the same demand. As the *Chicago Tribune* reported on the settlement reached with the Regenstein Foundation:

> The fact that the new directors lived elsewhere had concerned the state attorney general's office, which intervened in the case and insisted the settlement say that most of the money would be disbursed here.
>
> "We're happy to get it *locked in* for the Chicagoland area," said Assistant Atty. Gen. Floyd Perkins. He noted that his office has intervened in another case to prevent the Terra Museum of American Art on Michigan Avenue from moving out of town.

J. Linn Allen, "Foundation Truce a Boon for Charities," *Chicago Tribune*, April 28, 2001, at page 14 (emphasis added).

20. In addition, the Attorney General's conception of who are "the people of Illinois" overlooks perhaps the most important constituent of charity in this dispute: the donor. Those with significant assets to bestow on society keep a close eye on the regulatory environment. The position of the Attorney General that all charitable trusts in Illinois are, by law, established for the ultimate *enjoyment* of the people of Illinois raises two unhappy implications: First, that trust law applies across the board (and not just for registration purposes) for all charities, regardless of the founder's choice of the not-for-profit corporate form; and second, that no regulator exists whose interest it is to look out for the beneficiaries of a national or international charity. The next potential donor of an important art collection will think long and hard before subjecting it to Illinois jurisdiction.

21. The question of the "accountability" of charities is a hotly debated one in the philanthropic world today. Equally important, it seems to me, is the accountability of the regulator. "Who guards the guardian?" Lack of transparency in the regulation of charities makes it impossible to assess the regulators. Few cases involving nonprofit fiduciary issues have reached the courts – often because of the concerns of charity

fiduciaries as much as of the attorney general. Reform rather than punishment is generally the goal of the charity regulator, and board members as well prefer a chance to improve their behavior while avoiding embarrassment and personal liability. Closing agreements or settlements between the regulator and the charity to end an enforcement action can be quite detailed, often spelling out specific terms dealing with future structure and governance. Under these circumstances, however, the board of a charity is vulnerable to being strong-armed into assenting to an attorney general's demands.

23. Only a court decision stands between the Foundation's purpose and governance structure as they existed prior to the Attorney General's involvement, and a radical alteration of purpose and governance structure as described in the Consent Judgment and Order.

CONCLUSION

24. For all the reasons outlined above, the Attorney General's participation in and procurement of the Proposed Settlement – and anticipated future half-century involvement – are inconsistent with the legal framework for the operation of charitable not-for-profit corporations. The Attorney General's actions create an enormous disincentive for charities to locate or seek incorporation in the state of Illinois.

This concludes my Declaration:

Evelyn Brody
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology
565 West Adams Street
Chicago, Illinois

Dated: July 18, 2001

16di-001335

July 2001

EVELYN BRODY
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology
565 West Adams Street
Chicago, IL 60661
312-906-5276
ebrody@kentlaw.edu

PROFESSIONAL EXPERIENCE

ACADEMIC:

Professor of Law, **Chicago-Kent College of Law, Illinois Institute of Technology**. Associate Professor 1998-2001; Assistant Professor 1992-1998.

Courses: Corporate Tax, Partnership Tax, Taxation of Business Enterprises, Personal Income Tax, Taxation of Investments, and Nonprofit Law.

Visiting Professor, **New York University School of Law**, scheduled for Spring semester 2002: will teach Income Taxation and Tax Policy.

Visiting Professor, **Duke University School of Law**, scheduled for Fall semester 2001: will teach Federal Income Taxation and Partnership Taxation.

Visiting Assistant Professor, **University of Pennsylvania Law School**, Spring semester 1998: taught Federal Income Taxation and Partnership Taxation.

Lecturer, **University of Wisconsin Law School**, Spring semesters, 1985 through 1988: taught Taxation of Partnerships and S Corporations.

RESEARCH AFFILIATION:

Associate Scholar, **The Urban Institute, Center on Nonprofits and Philanthropy**, Washington, D.C., from 1998.

GOVERNMENT:

Prepared and taught a week-long program on *Taxation of Financial Products*, Public Finance Training Institute, **Taiwan Ministry of Finance**, July 4-8, 1994.

Staff member, **Clinton-Gore Transition**, Treasury Tax Policy and Internal Revenue Service Transition Team, December 1992.

Attorney/advisor to the Tax Legislative Counsel, in the **Office of Tax Policy, U.S. Treasury Department**, August 1988 - May 1992.

PRACTICE: *Admitted in the District of Columbia since 1981 (and in Wisconsin 1985-1990).*

Mar. 1985 - July 1988: Associate, **Michael, Best & Friedrich**, Madison, Wisconsin.
Sept. 1981 - Jan. 1985: Associate, **Arnold & Porter**, Washington, D.C.

EDUCATION

J.D., *magna cum laude*, **Georgetown University Law Center**, 1981.

Case & Notes Editor (1980-1981), THE TAX LAWYER (law journal of the American Bar Association Tax Section, edited at Georgetown)

B.A., **Yale College**, 1976 (Comparative Literature, with concentration in Russian and French 19th-century fiction); 1972-1974, **Massachusetts Institute of Technology**.

PUBLICATIONS

Troubling Lessons from the Bishop Estate Settlement for Administering the New Intermediate Sanctions Regime, 32 EXEMPT ORG. TAX REV. 431 (June 2001); reprinted as ***Administrative Troubles for Administering the Intermediate Sanctions Regime***, 92 TAX NOTES 423 (July 16, 2001).

A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?, 21 U. HAW. L. REV. 537 (1999) (Symposium Issue on the Bishop Estate Controversy); reprinted at 29 EXEMPT ORG. TAX REV. 397 (September 2000).

Charities in Tax Reform: Threats to Subsidies Overt and Covert, 66 TENN. L. REV. 687 (1999); reprinted at 27 EXEMPT ORG. TAX REV. 399 (March 2000).

Tax Treatment of Nonprofit Organizations: A Two-Edged Sword? (with Joseph Cordes), *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 141 (Elizabeth Boris and C. Eugene Steuerle eds., The Urban Institute Press, 1999).

"A Legal Scholar's Perspective," Book Review *of* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE, *in* 28 NONPROFIT AND VOLUNTARY SECTOR Q. 218 (1999) (symposium book review). Professor Hansmann's response, **"Nonprofit Organizations in Perspective,"** appears in 29 NONPROFIT AND VOLUNTARY SECTOR Q. 179 (2000).

The Modern Tax Treatment of Education Expenses, 3 COMMUNITY TAX L. REP. 1 (Fall 1999).

Introduction to the Nonprofit Symposium Issue, 23 J. CORP. L. 581 (1998).

Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption, in the Nonprofit

Symposium Issue, 23 J. CORP. L. 585 (1998); reprinted at 22 EXEMPT ORG. TAX REV. 421 (December 1998).

The Limits of Charity Fiduciary Law, 56 MD. L. REV. 1400 (1998). An earlier version is available as Working Paper No. 242, Program on Non-Profit Organizations, Yale University (June 1997), as part of a project on the changing dimensions of trusteeship, directed by historian Peter Dobkin Hall (Hauser Center for Nonprofit Organizations, John F. Kennedy School, Harvard University).

The Tax Treatment of Education After the Taxpayer Relief Act of 1997, 78 TAX NOTES 1514 (Mar. 23, 1998).

Hocking the Halo: Implications of the Charities' Winning Briefs in **Camps Newfound/ Owatonna, Inc.**, *in The Howard Oleck Memorial Nonprofit Symposium Issue,* 27 STETSON L. REV. 433 (1997), reprinted in 20 EXEMPT ORGANIZATION TAX REVIEW 31 (April 1998).

Charitable Endowments and the Democratization of Dynasty, 39 ARIZ. L. REV. 873 (1997).

Institutional Dissonance in the Nonprofit Sector, 41 VILL. L. REV. 433 (1996).

Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms, 40 N.Y. L. SCH. L. REV. 457 (1996), **cited at *Pegram v. Herdrich*, No. 98-1949, 120 S. Ct. 2143, 2157 n. 11 (June 12, 2000)** (HMO case).

Paying Back Your Country Through Income-Contingent Student Loans, 31 SAN DIEGO L. REV. 449 (1994).

EVELYN BRODY, BRUCE K. BENESH & M. KEVIN BRYANT, PARTNERSHIPS: COMPLETE TAX PRACTICE AND PLANNING GUIDE (1989, with annual updates through 1994).

Co-author, **A GUIDE FOR WISCONSIN NONPROFIT ORGANIZATIONS** (State Bar of Wisconsin; 1990, 1992, 1995 & 1998 updates) (chapter on the tax treatment of charities).

In Progress:

Editor and author, PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Urban Institute Press, forthcoming 2001). Having planned the coverage of legal, economic, historic and political issues, I recruited appropriate chapter authors. I am writing the ***Introduction*** and Chapter 6, ***Legal Theories of Property-Tax Exemption: Sovereignty Quasi and Real***; and co-authoring Chapter 9, ***State-Paid PILOTs for Nonprofit Property and Other Hartford, Connecticut Initiatives*** (with Nicholas R. Carbone). A book conference was held June 6-7, 2000 (see below). March 2001 drafts available.

The Legal Framework for Nonprofit Organizations, chapter for second edition of **THE NONPROFIT SECTOR: A RESEARCH HANDBOOK** (Walter W. Powell, ed., Yale University Press 1987), to be edited by Richard Steinberg and Walter W. Powell (Yale University Press, forthcoming 2001). December 2000 draft available.

Accountability and Public Trust, chapter in **THE STATE OF AMERICA'S NONPROFIT SECTOR**, to be edited by Lester Salamon (Nonprofit Sector and Philanthropy Program of the Aspen Institute, forthcoming 2001). January 2001 draft available.

Are Nonprofits Organisations Different?, chapter in THEORIES OF NONPROFIT ENTERPRISE (Helmut K. Anheier & Avner Ben-Ner, eds.) (Kluwer/Plenum, forthcoming 2001). February 2001 draft available.

Standing, chapter in **ACCOUNTABILITY**, NEW DIRECTIONS FOR PHILANTHROPIC FUNDRAISING, edited by Putnam Barber (Jossey-Bass Quarterly Sourcebook, forthcoming 2001).

Book Review of NORMAN I. SILBER, A CORPORATE FORM OF FREEDOM, 30 HOFSTRA L. REV. (forthcoming, Fall 2001) (in progress).

"Aggregate or Entity: A Constitutional View of Association and Group Speech." In progress.

ACADEMIC PRESENTATIONS AND PARTICIPATIONS

Presenter, **"Aggregate or Entity: A Constitutional View of Association and Group Speech"** at:

The **University of Southern California Law School**, faculty workshop (Los Angeles, scheduled for March 18, 2002).

The 30th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel on "Nonprofit Law in Historical Perspective" (Miami, to be scheduled during Nov. 29 - Dec. 1, 2001).

Presenter, ***Accountability and Public Trust***, at:

The **Canadian Law and Economics Association** Annual Meeting (Toronto, scheduled for September 28, 2001).

The 12th Annual Conference of the **National Council of Nonprofit Associations**, as part of a panel of draft chapters from the forthcoming volume THE STATE OF AMERICA'S NONPROFIT SECTOR (Albany, June 11, 2001).

The **Chicago Area Nonprofits Seminar Series**, Northwestern University (Evanston,

May 2, 2001) (Burton A. Weisbrod, organizer).

The 29th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel of draft chapters from the forthcoming volume THE STATE OF AMERICA'S NONPROFIT SECTOR (New Orleans, Nov. 18, 2000).

Presenter, ***The Legal Framework for Nonprofit Organizations***, at:

The Fall 2000 Nonprofit Sector Doctoral Workshop of the **Hauser Center for Nonprofit Organizations, John F. Kennedy School, Harvard University** (Cambridge, Nov. 29, 2000).

The 29th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel of draft chapters from the forthcoming second edition of THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (New Orleans, Nov. 18, 2000).

The Fall 2000 Seminar Series of the **Program on Non-Profit Organizations and the Institution for Social and Policy Studies, Yale University** (New Haven, Oct. 16, 2000).

Visitor, **Netanya Academic College, Israel**, where I gave a faculty lecture, taught in three classes, and spoke at a conference co-sponsored by the Israeli Center for Third Sector Research, all on topics of nonprofit law and policy (December 28-30, 1999).

Presenter, ***A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?***, at:

The **University of Illinois College of Law**, Faculty Workshop (Champaign-Urbana, Feb. 25, 2000).

The **Chicago Area Nonprofits Seminar Series**, Northwestern University (Evanston, Nov. 30, 1999) (Burton A. Weisbrod, organizer).

The 28th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel on "Stakeholders and the Flow of Revenues to Nonprofits" (Washington, D.C., Nov. 6, 1999).

Presenter, ***Charities in Tax Reform: Threats to Subsidies Overt and Covert***, at:

The **Nonprofit Forum** (New York City, Dec. 16, 1998).

The 27th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Associations** (Seattle, Washington, Nov. 5-7, 1998), as part of a panel on "Tax and Finance Issues Affecting Nonprofit Organizations."

The **Tax Policy Workshop, Georgetown University Law Center** (Washington, D.C., Oct. 9, 1998).

The **Tax Policy and Public Finance Colloquium, New York University School of Law**, Winter-Spring 1998 (New York City, Apr. 16, 1998).

The Spring 1998 **Nonprofit Seminar Series, Institute for Policy Studies, Johns Hopkins University** (Baltimore, Mar. 2, 1998).

Co-presenter (with Joseph Cordes), ***Tax Treatment of Nonprofit Organizations: A Two-Edged Sword?***, at the book conference on NONPROFITS AND GOVERNMENT, Center on Nonprofits and Philanthropy, **The Urban Institute** (Washington, D.C., June 8-9, 1998).

Presenter, **"The New Tax Incentives for Education,"** at the Tax and Social Policy Forum, **American Bar Association Tax Section**, Winter Meeting (San Antonio, Jan. 23, 1998).

Presenter, ***Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption***, as part of a panel of papers relating to "Property-Tax Exemption and Payments in Lieu of Taxes" at the 26th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action** (Indianapolis, Dec. 6, 1997).

Presenter, ***The Limits of Charity Fiduciary Law***, at:

A faculty workshop, **University of Iowa College School of Law** (Oct. 10, 1997).

The Legal Studies Workshop, **University of Virginia School of Law** (Oct. 3, 1997).

Presenter, ***Charitable Endowments and the Democratization of Dynasty***, at:

The **Institute for Policy Research, Northwestern University**, workshop series of the Program in Philanthropy, Voluntarism, and Nonprofit Organizations (Mar. 7, 1997).

George Mason University School of Law, Faculty Workshop (Dec. 3, 1996).

Discussant, on Michael Krashinsky, *Stakeholder Theories*, given as part of **"Economic Theories of Nonprofit Organizations,"** the 1995 Voluntas Symposium, held at the **Program on Non-Profit Organizations, Yale University** (Nov. 16-18, 1995).

URBAN INSTITUTE, CENTER ON NONPROFITS AND PHILANTHROPY, PROJECTS

1. **Property-Tax Exemption Book** (see also "Publications," above):

Organizer and presenter, **Conference on PROPERTY-TAX EXEMPTION FOR CHARITIES:**

MAPPING THE BATTLEFIELD, Center on Nonprofits and Philanthropy, The Urban Institute (Washington, D.C., June 6-7, 2000).

Presented **"The Current State of Tax Exemptions"** at the 20th Annual State and Local Taxation Conference, National Conference of State Tax Judges (Boston, Sept. 21, 2000).

Organizer and moderator of a panel on **The Charity Property-Tax Exemption**, National Tax Association Annual Meeting (Santa Fe, Nov. 10, 2000).

2. **Seminar Series on Nonprofit Advocacy and the Policy Process**:

With Professor Frances Hill, University of Miami School of Law, I am helping Center director Elizabeth Boris and staff organize a series of ten seminars in Washington, D.C., from February 2000 to December 2001, on the legal and regulatory framework for the advocacy activities of nonprofit organizations. The Center is commissioning papers for discussion and publication. I have been planning and moderating sessions, drafting and editing seminar summaries for publication and Web posting, and editing papers. In addition, I –

Presented **"The Elements of Advocacy"** at Seminar #1 – Nonprofit Advocacy: Practices and Perspectives (Washington, D.C., February 18, 2000).

Presented **"Accountability: To Whom, For What, and How?"** at Seminar #6 – Representation, Participation and Accountability (Washington, D.C. February 16, 2001).

Writing and will present **"Aggregate or Entity: A Constitutional View of Association and Group Speech"**, at Seminar #9 – Advocacy and Democracy: Rights, Theories and Practices (scheduled for Washington, D.C., September 21, 2001).

3. **Emerging Issues in Philanthropy Series**:

Member, planning group for a semi-annual series on **"Emerging Issues on Philanthropy,"** sponsored jointly by The **Urban Institute Center on Nonprofits and Philanthropy** and the **Harvard University Hauser Center for Nonprofit Organizations** (from 1999). (The other planners are, from the Urban Institute, Center director Elizabeth Boris and economists Eugene Steuerle and Joseph Cordes; and Marion Fremont-Smith, senior fellow at Hauser.) We have held programs on the efficiency of the charitable tax deduction, the unrelated business income tax, election-year issues in philanthropy, and the "related" activities of nonprofits carried out in for-profit form. In addition to helping to organize and moderate panels, I was a panelist for ***Has the Unrelated Business Income Tax Become a Voluntary Tax? Administrative and Design Issues***, at Conference on UBIT: THE DOG THAT DOESN'T BITE, Harvard University Hauser Center for Nonprofit Organizations (Cambridge, Nov. 11, 1999).

PRESENTATIONS TO PRACTITIONERS Recent presentations include –

Tax Topics:

Organized and moderated a panel on **"The Party Platforms: Tax Proposals Affecting Individuals,"** at the Individual Income Tax Committee, ABA Tax Section, Fall Meeting (Los Angeles, Oct. 14, 2000).

Faculty (with Charles R. Levun and Michael Cohen), ***Partnership, LLC & S Corporation Tax Planning Forum*** (with Commerce Clearing House) (in 1999: Boston, Sept. 16-17; Las Vegas, Sept. 23-24; Seattle, Sept. 30-Oct. 1, and Chicago, Oct. 28-29; in 1998: Nashville, Sept. 17-18; Boston, Sept. 24-25; Chicago, Oct. 29-30; in 1997: Boston, Sept. 18-19; Chicago, Oct. 23-24).

Lecturer, ***Tax Consequences of Choice of Business Entities***, "How to Form an Illinois Business Entity: Corporation and Its Alternatives," Chicago Bar Association (Oct. 13, 1999; Oct. 14, 1998; Oct. 15, 1997).

Nonprofit Law Topics:

Speaker, ***What Lessons Can Be Learned from the Bishop Estate Case?***, at the 20th Annual Conference on Not-for-Profit Organization, Chicago-Kent College of Law (Chicago, June 8, 2001).

Organizer and Moderator, **"The Treasury's Public Policy Power: Identity, Politics and Other Considerations,"** at the Exempt Organizations Committee, ABA Tax Section, Midyear Meeting (San Diego, Jan. 21, 2000).

Speaker, ***Qualified State Tuition Programs***, on panel on "Hot Issues in the Education World," Exempt Organizations Committee, ABA Tax Section, Midyear Meeting (Orlando, Jan. 15, 1999).

Lecturer, ***Rationale for the Nonprofit Sector II: Legal Philosophy***, and panelist (with Elizabeth Boris and Burton Weisbrod), *Case Studies: Applying the Concepts/Testing the Boundaries*, for the Aspen Institute's Nonprofit Sector Strategy Group (Aspen, Colo., June 10-14, 1998).

Panelist, ***Trustee Code of Ethics***, for the program "Legal Problems of Museum Administration," ALI-ABA (Chicago, Mar. 27, 1998).

PROFESSIONAL MEMBERSHIPS AND INVITATIONAL PARTICIPATIONS

Tax-Related:

American Bar Association, Section on Taxation (member since 1984):

> **Chair, *Individual Income Tax Committee*** (formerly "Individual Investments and Workouts"), two-year term beginning June 1999; previously vice chair. I have organized programs on the constructive sales of financial products; the increasingly complicated

capital gains rules; the use of equity-based compensation (stock and stock options); the distinction between investors, traders, and dealers; the political party platforms' 2000 tax proposals affecting individuals; and the income-tax consequences of possible gift-and-estate tax repeal.

Co-Chair, *Subcommittee on Policy Issues and Compliance, Exempt Organizations Committee* (from Spring 1997). In March 1999, I wrote a policy memorandum at the request of the ABA Tax Section on the Clinton administration's proposal to tax the investment income of trade associations. Available at 25 EXEMPT ORG. TAX REV. 138 (1999).

Articles Editor, THE TAX LAWYER (American Bar Association), from 1996-1999. Edited Claire E. Toth, *Nonrecourse Debt in Excess of Fair Market Value and Disappearing Basis: The Partnership Paradox*, 50 TAX LAWYER 37 (Fall 1996); Peter C. Canellos, *Reasonable Expectations and the Taxation of Contingencies*, 50 TAX LAWYER 299 (Winter 1997); Daniel S. Goldberg, *Nonrecourse Debt in Excess of Fair Market Value*, 51 TAX LAWYER (Fall 1997); and Jeffrey A. Maine, *Evaluating Subchapter S in a Check-the-Box World*, 51 TAX LAWYER 717 (Summer 1998).

Member, **Great Lakes TE/GE Council** (advisory group to the IRS Tax-Exempt/Government Entities Division) (starting April 2001). Made a presentation on "Lessons from the Bishop Estate Case" at the April 20, 2001 meeting.

Member, **Academic Advisors to the Joint Committee on Taxation in Connection with a Study of the Overall State of the Federal Tax System** (meetings with Joint Committee Staff held Washington, D.C., June 5-6, 2000; January 26, 2001; and February 23, 2001).

Nonprofit Legal Projects:

Participant and commentator, **ALI Law of Nonprofit Organizations** conference (N.Y.U. School of Law, May 1, 2000). Scheduled to attend second meeting in Boston, September 14, 2001.

Task Force Chair, Chapter 8 (Board of Directors), for working group on revision of **The American Bar Association's Revised Model Nonprofit Corporation Act** (from March 2000).

Multidisciplinary Nonprofit Projects:

Council Member, **Nonprofit Sector Research Fund, The Aspen Institute** (from September 2000; previously, member of the Grant Advisory Committee).

Member, **Illinois Nonprofit Study Advisory Committee, Donors Forum of Chicago** (from 1999).

Peer reviewer of manuscripts for the **NONPROFIT AND VOLUNTARY SECTOR QUARTERLY** and for **NONPROFIT MANAGEMENT & LEADERSHIP**.

Member, **Association for Research on Nonprofit Organizations and Voluntary Action** (ARNOVA) Blue Ribbon Presidential Task Force on New Directions (two-year term, beginning November 1999). ARNOVA member since 1996.

Participant, "**Accountability in the Nonprofit Sector**," at the invitational meeting convened by the Council on Foundations, Council of Better Business Bureaus, Independent Sector, National Charities Information Bureau, National Center for Nonprofit Boards, National Council of Nonprofit Associations, and United Way of America (Washington, D.C., June 28, 2000).

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Re: People of the State of Illinois vs. Terra Foundation, et.al.

Gentlemen:

At the court hearing on May 16, I was surprised to hear defense counsel report to Judge Kinnaird that the Attorney General's modifications to the mediator's circulated settlement were a substantial deviation from the terms of the mediation agreement. I was further surprised to hear that the mediator's office had also suggested to defense counsel that our changes are a substantial deviation from the terms agreed to last Friday. The mediator's document looked like a broad brush outline and our document was meant to provide the needed specifics.

I am writing therefore to clarify this Office's position on settlement in this case and the basis for our additions and deletions to the mediator's draft. It should be noted that we made no changes to Part A of the mediator's draft. However, settlement here was discussed on a comprehensive total settlement basis and this Office's additions and modifications were made to supply necessary needed mechanics to insure enforceability, which the mediator's draft lacked. Specifically it supplied

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16di-001348

provisions for selecting the new Board which are in the spirit of what was agreed to last Friday, but which are absent in the mediator's draft. We also provided needed precision about terms of office and how and when new officers would be selected, which was consistent with agreements and discussions on Friday, but which were not sufficient in the mediator's draft.

At the mediation meeting last Friday, I stated the Attorney General's position for settlement could be accomplished by two different approaches. One approach would be by a complex lengthy document providing the details of what the Terra Foundation could and could not do, much along the line of our past discussions, and to the point that it must operate in and from Illinois and in most instances in no other location with some board replacement and re-composition. The second approach to settlement was through a change in control of the Foundation by putting in place, now at settlement, a majority on the Board acceptable to the Attorney General and who he, in his sole discretion, believed favored Illinois, accompanied by the modest restrictive additions to the purposes on the Foundation as our set forth in the mediator's settlement proposal. It evolved through discussion that certain parties preferred a Foundation free to chart its own course, and thus preferred limited modification on purpose and the installation of a Board the Attorney General and plaintiffs would accept.

I explained at the end of the day Friday and several times during the day that this Office would not settle until the wording on restrictions was resolved, actual names of the Board members were known, and the makeup of the Board acknowledged as acceptable to this Office. I stated that we had a sense of who in the past had been pro-Illinois and who had not, and that at the end of the process the Attorney General would settle and accept the Board only if there were a majority who were pro-Illinois as determined by him in his sole discretion. Discussions proceeded and ended on this basis. The mediator's circulated document was not precise on that point.

The mediator's proposal as circulated does not contain this fundamental condition of the Attorney General. We reviewed the mediator's framework it appeared to require an election of the board but wanted the agreement prior to an election. We tried to modify the terms to allow this Office to know and effect the makeup of the Board and accept it in a settlement document before the election occurs. If the parties wish to include the terms agreed last Friday that the Board will hold an election and then allow this Office to review the new Board and decide whether we accept its makeup and whether we agree to settle, we have no objection.

There was substantial discussion about a committee to select the new directors, subject to a final review and right in the Attorney General to accept or reject the new Board prior to having a settlement. A discussion took place about how that would work. The discussions considered all plaintiffs, all defendants and Stebbins resigning. Eventually as a part of a compromise, it was decided that only Alan Simpson's resignation would be accepted and all others would stay on, but five additional Board members would be added. A provision for having a majority of Illinois citizens was then discussed. At each stage and juncture I re-stated that at the end of the process the Attorney General only would settle and accept the Board if it contained a majority who were pro-Illinois as determined by this Office.

Renewed discussions then occurred on how the five new Board members would be selected.

It was agreed that a committee composed of Messrs. Hilliard, Buntrock, Gidwitz, Stebbins and Tucker would accept nominees, that they, the committee, select new Board member candidates, that the Attorney General could make recommendations for nominations, and most importantly the Attorney General had the right at his sole discretion to decide to accept the nominated directors or not, and that ultimately five would be agreed upon by the Attorney General to be proforma elected. This process and right in the Attorney General was made clear at mediation and was an integral part of the compromise that allows the defendants to remain as Board members.

Further it was my understanding that the agreement included a mid-June special Board meeting which would mechanically complete the election of the five new Board members selected as I set forth above, and then allow an election of new officers, establish a new executive committee, establish a new steering committee and set terms of office for the fifteen Board members with the new Board members participating. Thus the agreement reached was that the Attorney General would not settle until the identity of the new Board was clearly stated and accepted by him at his sole discretion and that the new Board members would be **immediately involved** in electing new officers and the formation of the Foundation's significant committees.

The settlement document circulated by the mediator does not provide all of the terms as set forth above and therefore we do not agree that it sets forth the agreement reached last Friday. The mediator's proposal provides at (Part B 1. c.) that the entire Board will nominate candidates and participate in a special election in mid-June and that nominations shall be coordinated with a committee and the Attorney General. We do not agree that those provisions provide the terms required by the Attorney General as part of the settlement. The mediator's settlement proposal does not provide that the Attorney General has a right to withhold settling until the makeup of the new Board is decided.

Our additions to this section were meant to give meaning to the words "coordinate with....the Attorney General" to reflect our settlement requirement that at the end of the process the Attorney General would settle and accept the Board only if there was a majority who were pro-Illinois as determined by this Office. Our further provision about Illinois directors acting as a group to select the positions reserved for Illinoisans was to reflect that the committee was more than a nominating committee, that it would work to gather nominees and would select the potential Board members that would likely be accepted by the Attorney General.

We had only a limited time to reflect upon and modify the mediator's proposal. The term used by the mediator "coordinate with...the Attorney General" was not sufficient or precise enough. We attempted to work with his draft and make modifications to give effect to the parties agreed terms. We are prepared to put in the agreed terms that the Attorney General may wait until the Board goes through the election process and that he will then review the Board makeup and decide whether there is a majority is pro-Illinois, and then determine in his sole discretion whether to settle this matter.

It seemed to us that the mediator changed the terms as agreed , drafting the agreement to provide that we would agree upon Board members before they were elected. Our changes were made to work within the mediator's suggested modified process. We however, require under that

modification that we would have a right to nominate and also veto up-front any and all nominees we did not wish, leaving five new members to be pre-agreed elected to the Board by unanimous consent as an agreed process. We felt that this provision in conjunction with the other suggested changes would allow us to settle before the actual election. Please note, we have no problem with the terms agreed to last Friday that at the end of the process the Attorney General would review the composition of the new Board and in his sole discretion agree to accept it and to settle. In furtherance thereof we submit a substitute addition perfectly acceptable to us, to add at the end of (Part B 1. e) as follows: "It is agreed that upon completion of the new Board's election in Mid-June 2001 the Attorney General will have the right to determine in his sole discretion whether he believes the majority of the Board to be pro-Illinois and to decide and advise then whether he will agree to a settlement of his lawsuit."

We also added terms to (Part B 1. d) because it was agreed at mediation that the new Board members were going to participate in electing new officers and establishing a new executive committee. The mediator's agreement is an outline it did not state such with particularity. Before I was prepared to state any draft reflected the actual agreements of last Friday, I required more clarity and precision. We wanted to schedule the officers' elections so that the new Board members were assured a right to participate as had been agreed.

We believe time is of the essence here. We also wanted the new Board, its new officers, and new executive committee to be in place and moving by end of June 2001. I did not want to leave the issue of the existing officers and executive committee unresolved in limbo while a new Board elected in June 2001 tried to schedule a meeting. send adequate notice and hold those elections. The recent history of scheduling Board meetings explains our concern. I also did not want to take a chance that the new Board members would be scheduled out of such a meeting or that the new officers would be elected at a meeting without the new Board members present. Therefore our purpose was to give precision to what had been agreed to at mediation, i.e. that the new Board members would participate and elect new officers.

Our addition of (Part B 1. f.) was to add the needed mechanism to assure that the terms set forth and agreed to in Part A of the settlement were made an irrevocable part of the corporate purposes of the Foundation. Such an addition is fully consistent with the agreed terms last Friday and a requirement of a settlement here.

Our addition to (Part B 2.) concerning qualities of directors was to allow these standards to be considered and used in looking at nominees. However, while these standards have been circulated in discussion drafts they were not discussed or agreed to at mediation last Friday and clearly a Board member need not have all of these attributes to serve.

Our additions at (Part D) was to flesh out the outline supplied by the mediator. We supplied necessary mechanics to allow enforcement of the agreement, specifically the right of the court to retain jurisdiction to enforce the settlement as a Consent decree. Also it was necessary to make clear that this Office does not give general releases and to make clear that all parties are being released from all claims arising in the matter.

I must tell you I was quite chagrined when our suggested changes were reported to the court to be a vastly different settlement proposal from that agreed to last Friday, that we were in some way attempting to change the agreement. This is not a dollar damage case; here the mechanics and words employed are the settlement, and a skeletal outline proposal is not acceptable to us. In good faith we took the time to rework the mediator's proposal and flesh it out. It was an outline, incomplete and not precise and did not reflect in precise enough enforceable terms what had been agreed to. If the report made to the court was meant to indicate that the terms required by this Office which were agreed to last Friday are not going to be met, then I think we need to resolve such and advise the court.

Substantial public charitable assets are at issue here and we will not proceed in less than a precise and deliberate manner. We have no strong pride of authorship. If "wordsmithing" is needed, we are prepared to be reasonable and spend as much time as it takes, but we insist upon the terms we stated and agreed to last Friday as set forth above, or some modified process that meets the spirit of what was agreed.

In reviewing the mediator's settlement proposal further I note reference to attorney fees being decided by the court. While we agree please note that although not specifically stated in the mediator's document, his reference to a court review of the attorney fees, includes the right of the Attorney General to participate and review any and all fees and to object to fees if we believe they are inappropriate.

This document is provided for settlement discussion purposes only, and can not be used as an admission or for any other purpose in this litgation or any other. I have attached a re-modified Attorney General settlement agreement, providing the terms as agreed last Friday.

Sincerely,

Floyd Perkins, Chief
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2533

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Saturday, April 28, 2001

Metro

Foundation truce a boon for charities

J Linn Allen, Tribune staff reporter

A squabble in a wealthy and philanthropic family ended with a court settlement Friday that will likely mean a generous and speedy windfall for a number of major Chicago cultural institutions, hospitals and other charities.

Cook County Judge Robert Boharic approved the agreement, which provides that $50 million will be distributed this year from the Regenstein Foundation to a number of recipients, including the Lincoln Park Zoo, the Art Institute, the University of Chicago and Rush-Presbyterian-St. Luke's Medical Center.

It also stipulates that 90 percent of all money donated in the future by the $125 million fund will go to charities and institutions in the Chicago area.

The pact ended more than half a year of wrangling among members of the Regenstein clan on how to distribute money from the Chicago-based foundation, one of the city's major benefactors for more than 50 years.

The conflict began late last summer when Betty Regenstein Hartman, daughter of fund founders Joseph and Helen Regenstein, proposed to give away $82 million to various charities in a single year, which would cut foundation funds by two-thirds. Typically the fund gives out only about 5 to 7 percent of its assets a year.

The fund's director, Robert Mecca, blocked the plan, expressing fears that it was a prelude to shutting the fund down. He was supported by Susan Regenstein Frank, a daughter of Hartman's brother, Joseph Regenstein Jr., who ran the fund for many years before his death last year.

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Conflict landed in court

Hartman filed a suit in September trying to bar Mecca from thwarting her wishes and allowing the lump-sum distribution to go ahead, which would have included $15 million to the zoo, $12 million to the Art Institute and $10 million to the University of Chicago's Regenstein Library.

The settlement allows Hartman to distribute $50 million this year to beneficiaries on the same list as her original plan, which included more than two dozen charities. No donation amounts were specified, though a $12 million limit was set for any single recipient. Hartman declined to comment on how she intends to divide the money.

Once that is done, the pact provides that Hartman will step down as a fund director and that a new board will be set up with five members to supervise future donations, including at least $20 million more over the next five years.

Members of the new board will be Mecca; Frank; Frank's brother Joseph Regenstein III; one of Hartman's two daughters; and Marshall Field V, who has been involved with various civic institutions.

Field is to occupy a board seat reserved for a "disinterested, non-family person who resides in the State of Illinois," in the words of the settlement agreement. That is important because although Hartman lives in Winnetka, the family members on the new board all live out-of-state.

The fact that the new directors lived elsewhere had concerned the state attorney general's office, which intervened in the case and insisted the settlement say that most of the money would be disbursed here.

"We're happy to get it locked in for the Chicagoland area," said Assistant Atty. Gen. Floyd Perkins. He noted that his office has intervened in another case to prevent the Terra Museum of American

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Art on Michigan Avenue from moving out of town.

'I'm glad it's over'

Susan Frank, who lives outside Philadelphia, said she and her brother were happy about the settlement, and added that she had long wanted to be a member of the foundation board. "I'm glad it's over," she said.

Last fall, when the family conflict became public, Frank said closing down the foundation would be contrary to the wishes of her father, Joseph Regenstein Jr., who had long been a fixture in Chicago philanthropic circles as head of the foundation.

Frank also said at the time that Hartman didn't have the "energy, care or education to be bothered" with the foundation.

Among the factors holding up settlement of the case, whose terms had been worked out in principle months ago, were some $750,000 in fees being billed to the foundation by attorneys representing the warring parties. A side letter to the pact said the lawyers would reduce their billings to the foundation by 15 percent.

Lincoln Park Zoo president Kevin Bell said he was glad the foundation would continue to be a major giver in Chicago over the long term.

Bell said that the foundation has pledged $9 million for a project to transform the large mammal house to the Regenstein African Journey, and that funds for the project had been coming in regularly despite the conflict.

Joseph Regenstein, who made his fortune in the paper-making and chemical business, and his wife, Helen, set up the foundation in 1950.

---- INDEX REFERENCES ----

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NAMED PERSON: HARTMAN, BETTY REGENSTEIN; FRANK, SUSAN; REGENSTEIN, JOSEPH JR

ORGANIZATION: UNIVERSITY OF CHICAGO

KEY WORDS: COOK COUNTY; COURT; DECISION; FAMILY; ASSET; CHARITY

NEWS SUBJECT: Lifestyle; Charities, Community & Civic Groups; English language content; Charities; Political and General News; General News; Corporate and Industrial News; Health; Health (LIF CMY ENGL GCHA GCAT GEN CCAT GHEA HLT)

MARKET SECTOR: Consumer Cyclical (CYC)

INDUSTRY: Recreational Services and Attractions; All Entertainment & Leisure; Recreational Products & Services (RCS ENT REC)

PRODUCT: Leisure (DLE)

REGION: United States - Illinois; Central U.S.; United States; North American Countries; Illinois; North America; United States (USIL USC USA NAMZ IL NME US)

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RICHARD H. STERN, OF COUNSEL

July 12, 2001

By Facsimile and Federal Express

Mr. Thomas Ioppollo
Assistant Attorney General, General Law
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

Re: Interview of Floyd D. Perkins Regarding Terra Foundation Litigation

Dear Mr. Ioppollo:

Thank you for responding by telephone to our request to interview Mr. Perkins. While the circumstances compel us to accept your limitation of the interview (as you put it, to an informal "chit-chat"), we are disappointed that Mr. Perkins has refused to discuss his role in the Terra case on the record and under oath.

Nevertheless, due to the tight briefing schedule set by the Court, we feel we must proceed with the interview. Of course I am sure you understand that we do so without waiving our right to depose Mr. Perkins or any other discovery rights to which our clients are entitled under well settled law.

We ask that you reconsider, at least, conducting the interview on the record. This will serve all parties' interests in avoiding confusion about the content of the conversation. A transcript will make clear the questions put to Mr. Perkins and his answers without the need to rely on note taking. This is in everyone's interest.

We will be present at your offices for the interview on the afternoon of Monday, July 16, 2001, at 2:00 p.m. if that is convenient. Please do not hesitate to call me at (202) 326-7905 if you have any additional questions.

Very truly yours,

K. Chris Todd /kg fm

K. Chris Todd

bcc: [redacted]
Neil M. Gorsuch
Leonard Garment
Larry Levinson
Joel Bellows
Laurel Bellows

16di-001366

EXHIBIT 34

16di-001367

EXHIBIT 34

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July 13, 2001

BY FACSIMILE AND U.S. MAIL

Lawrence E. Levinson, Esq.
Verner, Lipfert, Bernhard, McPherson and
Hand
901 15th Street, N.W.
Washington, D.C. 20005-2301

Dear Mr. Levinson.

Dr. Stebbins is on vacation. He learned yesterday of your desire to interview him "on the record and under oath" on Tuesday, July 17 "concerning [his] involvement in the Terra Foundation litigation."

Dr. Stebbins has already stated on the record at the June 29, 2001 Board Meeting the reasons why he joined a majority of the Board in voting in favor of the results of the Court-ordered mediation. We believe you already have a copy of the tape of that meeting. We have prepared a transcript of the meeting of which you could have a copy if you like. Dr. Stebbins would not say anything to you inconsistent with what he already said on the record at the June 29 Board Meeting.

Yours truly

Stephen C. Carlson

SCC:ljp

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16di-001370

EXHIBIT 35

EXHIBIT 35

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ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

July 16, 2001

Via Facsimile and FedEx

J. William Roberts, Esq.
Hinshaw & Culbertson
222 North La Salle Street, Suite 300
Chicago, Illinois 60601-1081

Re: *Interview of Dr. Stephanie Marshall*

Dear Mr. Roberts:

I represent Alan Simpson, Judith Terra and Paul Hayes Tucker in the Buntrock v. Terra litigation and am writing to request your assistance in scheduling an interview of Dr. Stephanie Marshall in connection with the upcoming hearing on the proposed settlement of that dispute.

I understand that you represent Dr. Marshall in connection with the Illinois Attorney General's investigation concerning the Illinois Mathematics and Science Academy. We have been seeking to interview Dr. Marshall regarding the settlement of the Buntrock v. Terra litigation. Last week Laurel Bellows, my co-counsel, called Dr. Marshall's office and spoke with her assistant; Ms. Bellows left a message explaining that she would like to interview Dr. Marshall concerning the settlement and requested that Dr. Marshall return her call. Dr. Marshall did not return Ms. Bellows' call.

While I do not understand you to represent Dr. Marshall in connection with this specific dispute, I am requesting your assistance in scheduling the interview given your representation of her in a closely-related matter. We would like to interview Dr. Marshall under oath and have a transcript made of the interview. Due to the schedule set by the Court, we would like to conduct the interview tomorrow or Wednesday, although we also may be able to do it Thursday morning.

I appreciate your assistance in this matter and look forward to hearing from you.

Very truly yours,

David E. Ross

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

FILED-2
2001 JUL 20 PM 4:16
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
CLERK

MOTION FOR LEAVE TO CONDUCT LIMITED, FOCUSED DISCOVERY CRITICAL TO A RESOLUTION OF PROPOSED SETTLEMENT

Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson (collectively, the "Defendants"), individually and derivatively on behalf of the Terra Foundation for the Arts (the "Foundation"), respectfully move this Court, pursuant to Illinois Supreme Court Rules 201, *et seq.*, for the entry of an order granting defendants limited and focused discovery as follows:

the deposition of Assistant Attorney General Floyd Perkins;

the deposition of Stephanie P. Marshall;

the deposition of Dr. Theodore Stebbins.

* * *

As set forth in our objections of July 19, 2001,[1] no reasonable basis exists for denying the defendants an opportunity to develop additional credible evidence that the proposed settlement was arrived at in contravention of Illinois law. Verified evidence already before this Court – including admissions of Perkins, et al. – are more than sufficient to warrant the requested discovery. Absent this evidence, this Court simply cannot fairly or adequately consider the manifest wrongdoing associated with the coerced and improvident action by certain board members in supporting the proposed settlement. No proper resolution of the issues pertinent to the proposed settlement can be fairly, justly or reasonably effected absent the defendants' opportunity to cross-examine the above identified critical witnesses.

Wherefore defendants respectfully urge this Court to grant the limited discovery requested herein and to adjourn and continue any hearing dealing with the proposed approval of the settlement pending the conclusion of such discovery.

Respectfully submitted,

JUDITH TERRA, ALAN K. SIMPSON and
PAUL HAYES TUCKER

By: _____
One of their Attorneys

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Telephone: (312)578-0500
Fax: (312)578-1234

[1]Objections of Defendants Judith Terra, Paul Hayes Tucker, And Alan K. Simpson at pp. 25 and 26.

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of of Motion and Motion for Leave to Conduct Limited, Focused Discovery Critical To A Resolution of Proposed Settlement to be served on the parties listed on the attached Service List via the method indicted on this 20th day of July, 2001.

Robert P. Cummins

DEAN L. BUNTROCK, ET AL.
V.
JUDITH TERRA, ET AL.
00 CH 13859

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

JUL 24 2001

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

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2001 JUL 20 PM 4:16
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
DOROTHY KINNAIRD CLERK

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Tuesday, July 24, 2001 at 2:00 p.m., we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2302, Richard J. Daley Center, Chicago, Illinois, and then and there present the Motion for Leave to Conduct Limited, Focused Discovery Critical To A Resolution of Proposed Settlement, a copy of which is attached hereto and hereby served upon you.

Dated: July 20, 2001

One of the Attorneys for Defendants

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
Firm ID No. 37288
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Telephone: (312)578-0500
Facsimile: (312)578-1234

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al., Plaintiffs, v. JUDITH TERRA, et al., Defendants.	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, et al., Defendants.	)	

FILED
2001 JUL 20 PM 4:16
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
CLERK

MOTION FOR LEAVE TO FILE RESPONSIVE PLEADINGS AND TO JOIN ADDITIONAL PARTIES

Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson (collectively the "Defendants"), individually and derivatively on behalf of the Terra Foundation for the Arts (the "Foundation"), respectfully move for leave to file responsive pleadings and to join additional parties. Such filings had previously been abated pending mediation proceedings as directed by this Court. The filing of these responsive pleadings is consistent with the interest of justice and conforms in all respects with the applicable Rules of Civil Procedure.

Wherefore, defendants respectfully request the entry of an order granting leave to file the attached responsive pleadings and to join additional parties instanter.

Respectfully submitted,

JUDITH TERRA, ALAN K. SIMPSON and PAUL HAYES TUCKER

By: _____
One of their Attorneys

Robert P. Cummins
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

JUL 24 2001

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

FILED
2001 JUL 20 PM 4:16
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
CLERK

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Tuesday, July 24, 2001 at 2:00 p.m., we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2302, Richard J. Daley Center, Chicago, Illinois, and then and there present Motion for Leave to File Responsive Pleadings and to Join Additional Parties, a copy of which is attached hereto and hereby served upon you.

Dated: July 20, 2001

One of the Attorneys for Defendants

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
Firm ID No. 37288
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Chicago, Illinois 60601
Telephone: (312)578-0500
Facsimile: (312)578-1234

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al., Plaintiffs, v. JUDITH TERRA, et al., Defendants.	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, et al., Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE RESPONSIVE PLEADINGS AND TO JOIN ADDITIONAL PARTIES

Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson (collectively, the "Defendants"), individually and derivatively on behalf of the Terra Foundation for the Arts (the "Foundation"), respectfully submit this memorandum in support of their motion for leave to file the attached responsive pleadings. Such filings had previously been abated pending mediation proceedings as directed by this Court. The filing of these responsive pleadings is consistent with the interest of justice and conforms in all respects with the applicable Rules of Civil Procedure.

The applicable provisions of the Code of Civil Procedure (i.e., 735 ILCS 5/2-601 *et seq.*) are to be broadly and liberally construed so that cases are resolved on their merits. (*See Lee v. Chicago*

Transit Auth., 152 Ill. 2d 432, 467 (1992), *cert. denied*, 508 U.S. 908 (1993); *Savage v. Pho*, 312 Ill. App. 3d 553, 556-57 (2000); *First Sec. Bank*, 165 Ill. App. 3d 725, 730 (1987).

Analogizing the filing of our proposed responsive pleadings to a circumstance in which pleading amendments are sought to be effected, our Supreme Court as held that the granting of such relief is clearly in the interests of justice. Indeed, the Illinois Supreme Court has identified a number of criteria the satisfaction of which endorses the granting of the relief herein requested.

Stated summarily and consistent with the Court's criteria, the filing of the responsive pleadings is timely; had been abated by the Court's referral to mediation; will advance the merits and resolution of the litigation; and will not prejudice any party to these proceedings. Indeed, absent an opportunity to respond to the unfounded allegations of the complaints, it is the defendants who will be irreparably prejudiced.

Wherefore, we respectfully request that the Court grant the defendants leave to file the attached consolidated answers and counterclaims instanter.

Respectfully submitted,

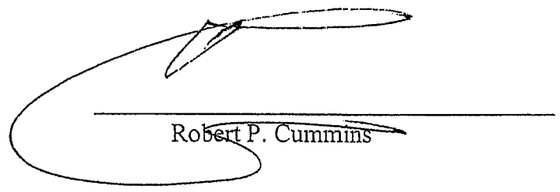
JUDITH TERRA, ALAN K. SIMPSON and
PAUL HAYES TUCKER

By: _____
One of their Attorneys

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Telephone: (312)578-0500
Fax: (312)578-1234

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of of Motion, Motion for Leave to File Responsive Pleadings and To Join Additional Parties and Memorandum in Support to be served on the parties listed on the attached Service List via the method indicted on this 20th day of July, 2001.



Robert P. Cummins

DEAN L. BUNTROCK, ET AL.
V.
JUDITH TERRA, ET AL.
00 CH 13859

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

TERRA FOUNDATION'S REPLY TO INDIVIDUAL DEFENDANT DIRECTORS' OBJECTIONS TO PROPOSED SETTLEMENT

Defendant the Terra Foundation for the Arts (the "Foundation"), an Illinois not for-profit corporation, by its attorneys, Sidley Austin Brown & Wood, hereby by submits its Reply to Objections of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson to the Proposed Settlement.

Factual Background

On September 22, 2000, plaintiffs Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), two members of the Foundation's Board of Directors, filed a lawsuit against the Foundation and three other members of the Board, Judith Terra, Dr. Paul Hayes Tucker and Senator Alan K. Simpson (collectively the "individual defendants") and another unrelated third party, Naftali Michaeli. After over four months of contentious motion practice,

on February 5, 2001, the Court ordered the parties to submit to mediation and stayed all further proceedings. See 2/5/01 Order. Over almost a five month period, the parties engaged in mediation sessions both jointly and individually with the mediator in order to attempt to reach an agreement which would result in the dismissal of this lawsuit. On June 29, 2001, the Foundation held a properly noticed and convened Board meeting at which eight directors were present – a number sufficient to constitute a quorum. At that meeting, by a vote of 6 to 2, the Foundation passed certain Resolutions authorizing the Foundation to enter into a Consent Judgment and Order which would settle this litigation. (See Exhibits A and B to The Foundation's Motion for Entry of Consent Judgment and Order). On July 6, 2001, the Foundation filed a motion for entry of that Consent Judgment and Order. The individual defendants subsequently filed objections to the proposed settlement.

Argument

In an attempt to upset an agreed settlement which they do not personally support, the individual defendants advance four main arguments, none of which are availing. First, the individual defendants argue that Drs. Stebbins and Marshall had a supposed "conflict of interest" which should have prevented them from voting on the Consent Judgment. However, this argument lacks support in the Illinois General Not For Profit Corporation Act or other applicable Illinois law. Second, the individual defendants allege that Drs. Stebbins and Marshall were supposedly "coerced" into voting in favor of the settlement, despite the fact that such "coercion" has been unequivocally denied by both directors, and despite the fact that the individual defendants have presented no affirmative concrete evidence proving such "coercion." Third, the individual defendants argue that the allegedly improper actions of the Attorney General should nullify the settlement. However, the proper inquiry in this case is not what the Attorney General

may or may not have tried to accomplish but rather what the actual effect of his conduct on Drs. Stebbins and Marshall was, and both Dr. Stebbins and Dr. Marshall have denied that the Attorney General's actions had any effect on their votes. Fourth, the individual defendants argue that because in their opinion the settlement is not in the best interest of the Foundation it should be overturned by the Court, even though that argument improperly invites the Court to substitute its judgment for the business judgment exercised by the majority of the Board's directors. None of these arguments warrant rejection of the Consent Judgment, which was the product of five long months of negotiation among the parties and which was approved by a majority of the Foundation's directors at a properly noticed and properly conducted Board meeting.

I. NEITHER DR. STEBBINS NOR DR. MARSHALL SUFFERED FROM ANY CONFLICT OF INTEREST.

Drs. Stebbins and Marshall had no direct or indirect pecuniary interest whatsoever in the approval of the Consent Judgment and, therefore, no conflict of interest existed. The Foundation is an Illinois not-for-profit corporation governed by the General Not For Profit Corporation Act of 1986 (the "Act"), 805 ILCS 105/101 et seq. Section 108.60 of the Act governs director conflicts of interest. That section provides that a director of a corporation has a conflict of interest if he is either "directly or indirectly a party to the transaction." 805 ILCS 105/108.60. There is no question that neither Dr. Stebbins nor Dr. Marshall is a direct party to the Consent Judgment. The Consent Judgment is entered into by and between plaintiffs Buntrock and Gidwitz and the Attorney General on the one hand and the Foundation on the other. Drs. Stebbins and Marshall are also not indirect parties to the Consent Judgment. "A director is 'indirectly' a party to a transaction if the other party to the transaction is an entity in which the director has a material financial interest or of which the director is an officer, director

or general partner." 805 ILCS 105/108.60(d) (emphasis added). None of these circumstances exist between Drs. Stebbins and Marshall and the plaintiffs in this case.

In support of their "conflict of interest" argument, the individual defendants ignore § 108.60 and instead cite to out-of-state case law which purportedly stands for the proposition that a conflict of interest allegation is a valid objection to the approval of a settlement. (See Objections of Defendants, p. 16). However, both of the cases cited in support of this position involve class actions. See New York Hotel & Motel Trades Council v. Hotel Ass'n, 747 F. Supp. 1074, 1078 (S.D. N.Y. 1990); In re Corrugated Container Antitrust Litig., 643 F.2d 195, 208 (5th Cir. 1981). This case is not a class action. The standards imposed by courts in approving class action settlements afford protection to absent class members whose rights will be affected by a settlement. Those standards do not apply in this case. The only rights that are affected by entry of the Consent Judgment are those of the plaintiffs and the Foundation – none of which were absent and all of which had an opportunity to participate in the negotiation of the Consent Judgment.

Even if the Court were to consider the class action cases cited, the individual defendants' objections are still invalid. In New York Hotel and Motel Trades Council, the court held that a non-settling defendant only has standing to object to a settlement on conflict of interest grounds, if such defendant "demonstrates that they will suffer 'formal' or 'plain legal prejudice' as a result of this settlement." 747 F. Supp. at 1078. The individual defendants have not even attempted to make such a showing. They are not a party to the Consent Judgment and none of their legal rights or remedies will be foreclosed as a result of the settlement.[1]

[1] The individual defendants' citation to Kerrigan v. Unity Sav. Ass'n, 58 Ill. 2d 20 (1974), is also misplaced. In the Kerrigan case, the Court found that individual directors, who formed an organization engaged in the same business as that of the entity to which such directors owed fiduciary duties, violated their duties by participating in a vote on a transaction which would be

II. THE INDIVIDUAL DEFENDANTS CANNOT MEET THEIR HIGH BURDEN OF ESTABLISHING COERCION BY "CLEAR AND CONVINCING" EVIDENCE IN ORDER TO INVALIDATE THE APPROVAL OF THE CONSENT JUDGMENT.

The individual defendants' argument that Drs. Stebbins and Marshall were "coerced" to cast their votes a certain way is similarly unpersuasive. As an initial matter, the individual defendants mistakenly try to shift the burden in this case and argue that it is the plaintiffs and the Foundation who have the burden of establishing the fairness of the proposed Consent Judgment and Order. (See Objections of Defendants, p. 14). In support of this position, the individual defendants cite to cases involving derivative and class action lawsuits. (See id at 13-14). Yet this case is neither a class action nor a shareholder derivative suit. Accordingly, the standards which apply in those circumstances are not applicable here. Rather, it is the individual defendants who bear the burden of proving by "clear and convincing" evidence that the Consent Judgment, which was properly entered into by and between the Foundation and the plaintiffs, should be rejected. See In re Marriage of Gorman, 284 Ill. App. 3d 171, 180 (1st Dist. 1996); In re Marriage of Smith, 164 Ill. App. 3d 1011, 1016 (1st Dist. 1987); Porter v. Chicago Board of Education, 981 F. Supp. 1129, 1132 (N.D. Ill. 1997); Allstate Financial Corp. v. Utility Trailer of Ill., Inc., 936 F. Supp. 525, 529 (N.D. Ill. 1996).

The individual defendants argue that two of the Foundation's Board members were essentially intimidated or coerced into voting in favor of the Consent Judgment as a result of actions taken by Assistant Attorney General, Floyd Perkins. Coercion has been defined as "the imposition, oppression, undue influence, or the taking of undue advantage of the stress of another, whereby that person is deprived of the exercise of her free will." In re Marriage of

---

"financially advantageous" to those directors. 58 Ill. 2d 20, 24-25. Drs. Stebbins and Marshall do not have any financial or otherwise pecuniary interest in the approval of the Consent Judgment, and not surprisingly, the individual directors do not allege any such pecuniary interest.

Gorman, 284 Ill. App. 3d at 180 (internal citations omitted). The person asserting coercion bears the burden of proving it by "clear and convincing evidence." Id. The individual defendants have not and cannot meet such a high burden.

Despite the individual defendants' speculation as to the subjective state of mind of Drs. Marshall and Stebbins at the time they voted in favor of settling this case, the fact remains that both directors stated at the time of the vote that they were casting their votes based upon their own judgment as to what was in the best interest of the Foundation, without regard for any extraneous considerations. These directors emphasized that they were voting their own conscience, and were doing so freely from outside influence or pressure. Specifically, just before the Board voted on the proposed settlement, corporate counsel for the Foundation stated

> "[i]n light of the allegations . . . about the coercion [that] some members of this board may feel uh, or may not feel, uh from the action of the attorney general. I think it's important for each one of you to . . . indicate . . . that you are voting freely . . . and without that pressure. And if anyone feels they can't do that, I don't think you should vote."

(Transcript of 6/29/01 Board meeting, p. 26, filed under seal as Exhibit A hereto). In response to this advice, Dr. Marshall specifically stated that while the attorney general has asked the Illinois Mathematics and Science Academy to respond to "a fact finding investigation," that "has not played a part in my decision making with respect to my fiduciary responsibilities, as a board member of this Foundation." (Transcript of 6/29/01 Board meeting, p. 27). Similarly, Dr. Stebbins stated, "I abhor the threatening tactics of the attorney general, but I am voting my own conscience, and for what I believe is in the best interest of the Foundation for its future as an independent, viable force in Chicago, and in France." (Transcript of 6/29/01 Board meeting, p. 27).

In the face of such unequivocal statements by Drs. Stebbins and Marshall, the individual defendants' subjective belief that Drs. Stebbins and Marshall felt pressure from Mr. Perkins does not even come close to establishing coercion by clear and convincing evidence. The individual defendants have simply failed to meet the necessarily high burden of proof required to upset a presumptively valid settlement agreement. Indeed, the individual defendants tacitly concede as much by their alternative request for more discovery. Given their failure to make the necessary threshold showing, such discovery request should be denied.[2]

III. THE INDIVIDUAL DEFENDANTS INCORRECTLY FOCUS ON WHAT MR. PERKINS SUPPOSEDLY DID, RATHER THAN ON THE ACTUAL EFFECT OF SUCH ACTIONS ON DRS. STEBBINS AND MARSHALL.

Although the individual defendants harshly criticize the Attorney General and argue that the alleged impropriety of his actions should nullify the settlement, this argument misses the point. The relevant inquiry is not whether Mr. Perkins attempted to employ questionable tactics against Drs. Stebbins and Marshall, but rather whether those alleged tactics had the actual effect of changing Drs. Stebbins' and Marshall's votes in favor of the settlement. Both have already stated that their decision was not influenced by Mr. Perkins. (See Transcript of 6/29/01 Board Meeting, p. 27). Given these statements, the individual defendants' argument about the Attorney General's actions is unavailing.

[2] The individual defendants are simply mistaken when they complain about the fact that Drs. Stebbins and Marshall declined to present themselves for depositions prior to tomorrow's hearing. The Court never required Drs. Stebbins and Marshall to do so – instead, at the last hearing the Court merely suggested that the Attorney General make himself available to answer questions. (See Transcript of 7/02/01 Hearing, pp. 97-98, attached hereto as Exhibit B). Indeed, the Court indicated that the whole point of allowing the individual defendants to file written objections was to determine whether depositions or other formal discovery would be permitted in the future or whether the Court would simply enter the Consent Judgment forthwith. (See id. at p. 92). By complaining about the lack of discovery so far, the individual defendants are putting the cart before the horse.

IV. NEITHER THIS COURT NOR THE MINORITY DIRECTORS MAY INTERFERE WITH THE EXERCISE OF BUSINESS JUDGMENT BY THE MAJORITY DIRECTORS.

This Court's review of the Foundation's decision to settle this case is limited by the business judgment rule. See Mills v. Esmark, Inc., 544 F. Supp. 1275, 1282 (C.D. Ill. 1982). The business judgment rule provides that courts are not at liberty to interfere with the exercise of business judgment by corporate directors. Stamp v. Touche Rosee & Co., 263 Ill. App. 3d 1010, 1016 (1st Dist. 1993). Absent fraud, bad faith or "gross overreaching," under the business judgment rule, "courts will not second-guess" decisions of corporate directors. Lewis v. Playboy Enterprises, Inc., 279 Ill. App. 3d 47, 57 (1st Dist. 1996); see also Fields v. Sax, 123 Ill. App. 3d 460, 464 (1st Dist. 1984) (holding that "this court is without authority to substitute its judgment for the lawful decisions of the directors.").

Although the individual defendants contend they have the best interests of the Foundation's "beneficiaries" at heart, and although they may fervently believe that the approval of this settlement is not in the best interest of the Foundation, the fact remains that these individual directors are seeking to substitute their judgment for the contrary assessments made by their fellow directors. What the individual defendants fail to recognize is that various directors – acting in good faith and in full accordance with their fiduciary duties – may come to alternative conclusions about what is in the best interest of the Foundation. Although the individual defendants focus on such issues as expanding the audience for the Terra collection and operating without "parochial restrictions," other directors voting in favor of this settlement may have legitimately focused on competing concerns such as the drain on the Foundation's resources caused by protracted and expensive litigation. Evaluating and balancing these competing factors falls within the exclusive province of the Foundation's directors, and the

collective judgment made by the majority of the directors should not be circumvented by the Court (or by minority directors seeking to use the Court to override the will of the majority).

As the Foundation has consistently argued before this Court, it is for the Foundation's Board of Directors to determine what is in the best interest of the Foundation, and neither this Court nor a minority faction of the Board should be permitted to interfere with the will of the Board majority absent a showing of fraud or bad faith. Any such fraud or bad faith must be proven by "clear and convincing evidence." Allstate Financial Corp., 936 F. Supp. at 529. In light of the unequivocal statements made by Drs. Marshall and Stebbins that they were acting in good faith for the best interests of the Foundation, and given the lack of any affirmative evidence showing fraud or bad faith on the part of any of the majority directors, the individual defendants are forced to resort to mere speculation and innuendo. This is simply not enough to satisfy their heavy burden. Accordingly, this Court should enter the properly approved Consent Judgment and Order now, without interjecting itself any further into the internal workings of the Foundation's Board.

Conclusion

This case has been pending for almost a year. After approximately five months of negotiation, the Foundation and the plaintiffs have reached a compromise settlement which will put an end to this expensive, divisive, and distracting litigation. This resolution has been approved by a majority of the Foundation's directors. The Board has spoken, and the will of the Board should be respected. Accordingly, the Court should enter the Consent Judgment and Order without further delay, so that the Foundation can once again turn its attention to matters of art rather than matters of litigation. For all of the foregoing reasons as well as those to be

presented at oral argument, the Foundation respectfully requests that the Court promptly enter the Consent Judgment and Order.

TERRA FOUNDATION FOR THE ARTS

By: _____
One of its Attorneys

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
SIDLEY AUSTIN BROWN & WOOD
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Chicago, Illinois 60603
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Firm ID No.: 38315

EXHIBIT B

In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
July 2, 2001

P.M. SESSION

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,
Defendants.

Case No. 00 CH 13859

PROCEEDINGS JULY 2, 2001

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF ILLINOIS ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:
QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;
BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson;
VERNER, LIIPFERT, BERNHARD, McPHERSON & HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named Defendants;

APPEARANCES: (Continued)
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
Defendants;
SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson;
SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant Terra Foundation for the Arts;

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you get those, by all means. Mr. Perkins isn't under any kind of a gag order.

Are you willing to speak to counsel for the defendants about this?

MR. PERKINS: I'll be glad to, Judge.

MS. BELLOWS: About the investigation that's taking place against himself?

MR. PERKINS: To the extent I can, Judge. I'll be glad to share some information. However, that's a private person who has a right to be protected.

THE COURT: I understand.

MR. PERKINS: And these people perhaps have no basis or they obviously have no knowledge about what's going on. So we'll get to that. But I'll be glad to answer some questions.

THE COURT: Okay. And then the other thing that I just want to make sure. I want to make it absolutely clear, we are not at any time in this proceeding deposing the mediator in this case.

And as of right now, the documents that were granted leave to be filed under seal on Friday, they're going to stay that way for now. You don't have leave to file these documents today

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because let's get their motion. I think it would be very, very helpful before you file a motion objecting to what went on Friday, you really knew what went on Friday. So why don't you get the transcript because I assume that hasn't been made available to any one of —

MS. STONE: No, it's not. We only have a very rough draft, your Honor.

MR. GARMENT: We have heard the tape recording of it. I mean, it was recorded.

Your Honor, may I just say this. The Attorney General said he does not want to get into the matter of something involving a private person. I think your Honor is right, that issues such as Dan Terra's intent are secondary to what is the central issue in this case. And that is whether or not crucial votes were obtained by the improper intervention by the Attorney General.

We are entitled to examine the Attorney General representative and the persons who were involved in the initiation under these more than coincidental circumstances in the switch of the crucial votes that turned this Foundation from one level of management to another. With all of its

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implications to fasten the property here in the state of Illinois, make no suggestion that it would not be properly administered in the state of Illinois. But it is a taking of property of a very serious order involving acts, undeniable acts on the part of the Attorney General's Office at the time that the question of the exercise of discretion was being considered by the crucial parties —

THE COURT: I'm sorry, counsel, you're saying "undeniable act." We haven't even let him talk.

MR. GARMENT: Your Honor, may I just finish? We are entitled as a matter of law to take testimony to have people testify about the circumstances in which this dramatic shift, which spells the extinction of a long-standing foundation, which destroys its ability to operate freely, which sends a message to the world that if you bring a foundation to Illinois, you are subject to the intervention of the Attorney General to fasten those assets in the state of Illinois on pretext. And so far it's all pretext.

There has not been an evidentiary hearing with respect to the central issues since

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the beginning of this case nor has the public through the press been empowered to make its own judgments about what is going on in this case.

THE COURT: This entire record with the exception of the mediation has been fully open to the press and —

MR. GARMENT: But the mediation is the heart of the problem. The mediation has been infected by the actions of the Attorney General. That is our allegation, and we are entitled to have a day in court to prove it.

THE COURT: And I'm not saying that you may or you may not have a day in court. I'm saying you need to have a verified pleading directed to these issues before the Court. And once I see a verified pleading directed to the issues of intimidation from the Attorney General, it will determine whether or not there needs to be some additional discovery regarding those allegations.

But that's not this document. I don't have any affidavits in this document. I don't have anything from anybody that suggests that the Attorney General has exercised pressure. I have a hearsay affidavit that was attached or a

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proposed consent degree?
MR. BELLOWS: 21 days.
THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while — perhaps while I was gone.
This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.
MR. BELLOWS: Are you ordering the Attorney General to submit himself — or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.
THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

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will cooperate with you as fully as he can and answer any concerns you have.
MR. BELLOWS: You have that on the record. Not your statements, his statement.
THE COURT: Well, I have no doubt that Mr. Perkins is going to cooperate and answer whatever questions you have without compromising ongoing investigations.
MR. PERKINS: That's correct, Judge.
THE COURT: Now, can you within a week of — I mean, this isn't any big surprise here. You know what they're going to file. Within a week can you file some type of a verified document to see whether or not we even need to have —
MR. TODD: Your Honor, may we have two weeks for this reason? I'm scheduled to leave on Thursday for a long, planned trip, a business trip, where I'm going to be meeting with over 200 of my clients in the Mideast, and it would be extremely difficult for me to change that. I will be back here July 12th, so if your Honor could compromise and give us two weeks from Friday and we will get it done.
MR. CARLSON: Your Honor, as far as we're

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concerned, all our petition is going to be is a petition for the Court to approve the consent judgment, the decree, and I will attach probably the resolution that was passed by the board. To get all the formalities done, I would probably like until Friday to do it, but counsel can assume — he already knows what we're going to be filing, and if two weeks from today is some time in which he can be done with whatever he wants, maybe we could speed it up a little bit.
MR. QUINLAN: Your Honor, there are things under the consent decree that are expected to be done speedily so that the board can continue to operate and operate appropriately.
We also note there's three different sets of counsel here. I would imagine that somebody could pick up for counsel who's not available.
MR. GARMENT: Your Honor, may I just make a brief statement?
THE COURT: Yes.
MR. GARMENT: I know I've spoken with a certain amount of vehemence today, but this case started with some demonstrably false and very

Page 100

serious allegations against the defendants. They have not been proved. There has not been a hearing to present a bit of evidence in support of those allegations.
THE COURT: And they remain unproven.
MR. GARMENT: And it is our intention, and we ask leave to file an amended answer which will raise those issues in terms of — our present contemplation is to assert counterclaims, which we are entitled to do under an amended pleading.
These issues have never come into focus, and what has happened is through the intervention of the Attorney General, in cooperation with Messrs. Gidwitz and Buntrock, who were the dissenting directors who did not want consideration given to any kind of change in the venue of the museum activities, this process was brought to a halt.
Your Honor understandably tried to find a solution through a mediation process. That mediation process stopped everything except the actions that were necessary in the view of the Attorney General to bring the process to the conclusion he wanted.

16di-001403

CERTIFICATE OF SERVICE

I, Susan A. Stone one of the attorneys for defendant the Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the foregoing document to be served upon the following counsel by messenger deliver:

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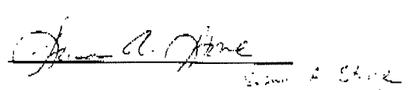
on this 23rd day of July, 2001.



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July 23, 2001

By Hand

The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: Buntrock et al. v. Terra et al., No. 00 CH 13859

Dear Judge Kinnaird:

Please find enclosed a courtesy copy of the *Terra Foundation's Reply to Individual Defendant Directors' Objections to Proposed Settlement* as well as copies of the case law cited therein.

Sincerely,

Lori L. Roeser

Lori L. Roeser

cc: Counsel of Record (by fax w/o encs.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

JUL 24 2001

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

FILED UNDER SEAL

NOTICE OF FILING DOCUMENT UNDER SEAL

The following document contained herein, is submitted for filing under seal on July 23, 2001, pursuant to the instructions of the Honorable Dorothy Kirie Kinnaird at the hearing of this matter on July 20, 2001:

Exhibit A to

Terra Foundation's Reply to Individual Defendant Directors' Objections to Proposed Settlement

16di-001408

JUL 24 2001

Board of Directors Meeting for the
Terra Foundation for the Arts
June 29, 2001

Tape 1, Side 1

(Music)

Announcer — Thank you for using conferencecall.com. Please stand by. Your meeting will begin when the chairperson joins the teleconference by entering their unique pass code.

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(Music)

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(Music)

(Beeps)

Ron Gidwitz — Hello?

Ambassador Arthur Hartman — Hello.

Gidwitz — Hello.

Dr. Stephanie Pace Marshall — Yes, who's, is that Ron?

Gidwitz — Yes.

Marshall — Ron, good afternoon. Stephanie.

Gidwitz — Hi Stephanie.

Marshall — Is there anyone else on the line?

Hartman — Yes, Art Hartman is on.

Marshall — Uh, good afternoon, Arthur, where are you?

EXHIBIT A

16di-001409

Hartman I'm just in from Moscow, in France.

Marshall Are you, so you're home?

Hartman In France, yes.

Marshall Oh, you're in France, OK. (laugh) OK, well we're just, uh

Hartman Where are you, Stephanie?

Marshall Just gathering. I'm at uh my office.

Hartman OK.

Marshall And I think people will be calling in from all over, I think uh Ron, you're in the uh Foundation offices?

Gidwitz No, actually I'm in my office.

Marshall You're in your office, OK.

(Beeps)

Marshall I think uh Maggie and Dean may be in the Foundation offices.

Gidwitz The food will probably be better there than it is here.

Marshall Anyone else join the line?

Gidwitz Arthur, how's the weather over there?

Hartman It's just perfectly beautiful, you wouldn't believe it. The sky's blue, no wind, nice and warm.

(Beep)

Hartman It was lovely in Moscow, too.

Marshall Uh, who has, someone has joined us?

Dr. Theodore Stebbins Uh, it's Ted.

Marshall Uh, good afternoon, Ted.

Gidwitz Hi Ted.

Stebbins Hi, Stephanie.

Marshall I'm going to turn up the volume here.

Hartman Hi Ted. Arthur.

Stebbins Hi Arthur.

Marshall Ted, I don't hear you very loudly, so we may ask you to talk a little more loudly.

Stebbins Can you hear me now?

Marshall Yeah, that's better.

Stebbins OK. Arthur's very clear. Where are you Arthur?

Hartman I'm in France.

Stebbins Good. Who else have we got here?

Marshall Uh, Ron is in his office, and that's all of us so far.

Gidwitz Yeah, Ted, I'm here.

Stebbins OK, Ron, Hi.

Gidwitz Hi.

Hartman Are you out on the Cape? Ted?

Stebbins No, I'm at home in Brookline.

Hartman Ah, there you go.

(Beeps)

Marshall Uh, welcome whoever has joined us. Who has joined us? Hello? Anyone join us? Ted are you still there?

Stebbins I'm here.

Marshall Alright, everybody still there?

Hartman Yep.

Marshall OK.

Gidwitz Here.

Marshall OK. Hello, has anyone just joined us? Hmm. OK.

Margaret Daley There are people on.

Don Ratner OK, talk to him on the other line.

Daley OK.

Marshall Uh, Don, do I hear your voice?

Daley How do I put this on speaker? OK.

Ratner Hello.

Marshall Uh, yes.

Ratner Hello.

Marshall Yes, Don is that you?

Ratner Stephanie, Hi. It's Don, uh, Maggie and and and Dean are here.

Marshall OK.

Ratner Steve Carlson.

Marshall OK. Very good.

Ratner And, we're waiting for the others to call in, and get hold of people, this may take a few, few minutes still.

Marshall — We have um, we have Ron, and Arthur and Ted and I so far, uh, so we're still waiting for uh Jacques, and uh Alan, uh Judith, and Paul.

Ratner — Alright, Ron's on the phone?

Marshall — Correct.

Gidwitz — I am on the phone. I'm still at my office.

Ratner — Oh, I thought you were going to be over here. Oh, I'm sorry.

Gidwitz — Well, that's an extra sandwich for you to eat.

Hartman — Don't make me hungry.

(laughs)

Daley — Hello, everyone.

Marshall — Maggie?

Daley — Yes.

Marshall — Good afternoon.

Daley — Yes, nice to talk to you.

Marshall — Have you uh walked past the Taste of Chicago yet?

Daley — No, but I've been waiting in traffic. (laughs)

Hartman — What's that?

Marshall — Oh, the Taste of Chicago? (laughing)

Hartman — Yeah.

Marshall — It's a huge gastronomical extravaganza where all the restaurants in Chicago, or at least the better ones, sort of lay out their wares, at uh, along the lake. It's terrific.

Hartman — Ah ha.

Marshall — And you sample your way to high cholesterol levels.

Hartman — Ha, ha.

(inaudible background)

Marshall — I understand they will have Lipitor salesmen standing by.

Hartman — laughs. I can tell you that Mevicor works.

Marshall — laughs. Don have you heard from anyone? We know Helene will not be on the call, but have you heard from uh Judith or Paul or Alan?

Ratner — They're expected to be on the call, so we're just sort of waiting for them all to.

Hartman — And we're expecting Jacques?

Ratner	Yes.
Marshall	We are. Right. I know Paul is in Italy, I don't know where Judith or Alan are.
Ratner	In Washington, Alan's in Russia, and uh Arthur is in.
Marshall	Arthur's here.
Ratner	Arthur's already there.
(Beeps)	
Marshall	Hello. Hello? Who has joined us now?
(inaudible background)	
Marshall	Jacques, Judith or Paul joined us yet?
Ratner	No.
Marshall	OK. We're hearing uh beeps sometimes and you, you assume that someone has joined the call when you hear that.
Stebbins	And what lawyers are present?
Ratner	Uh, well, here, Mark Heatwole, and Steve Carlson.
Stebbins	OK. Oh, hi Steve.
Steve Carlson	Hi, Ted.
Susan Stone	Susan Stone, from Sidley Austin Brown & Wood, here with Stephanie.
Stebbins	Hi, Stephanie.
John Sabl	Also, John Sabl from Sidley Austin Brown & Wood, out here with Susan and Stephanie.
(Beeps) (inaudible background)	
Gidwitz	OK, who are all the lawyers, I didn't catch them all.
Marshall	Uh, we have Susan Stone, uh Steve Carlson, uh John uh Sabl, and my understanding is that Mark Heatwole is in Chicago. Uh, let me ask anyone else are there, are, is there any other legal counsel present with anyone?
(Beeps)	
Judith Terra	Hey Stephanie?
Marshall	Uh, yes, Judith, good afternoon.
Terra	Hi, I, I've been on the line a minute, I just didn't want to interrupt. Um, have we, have you started things?
Marshall	No, not at all. We're still waiting for a, well, we were waiting for you, and for Paul, and for Alan. Uh, and, and Jacques. Everyone

else is here, except Helene, who was not going to be on the meet, on the call.

Terra OK.

Marshall So, no we've not, we've not started anything.

Terra OK. So who is we, who is.

Marshall We've just a, we've just a, the question was asked, who are the legal counsel president, uh present, and we have Mark Heatwole, who is in Chicago at the Foundation office, uh, as the regular Foundation counsel, and we have Susan Stone, uh and John uh Sabl who are here with me uh in Aurora, and Steve Carlson, uh, who is in the Foundation office, all representing uh Sidley Austin. And I was just asking every other board member on the line, uh, are there any other legal counsel present?

Hartman Not here in France.

Marshall Anyone else? Ron?

Gidwitz No, I'm all by myself.

(Beeps)

Marshall Judith?

(inaudible background)

Marshall Has anyone joined the call? Jacques or Alan or Paul?

(inaudible background)

(Beeps) (inaudible background)

Marshall Hello? Has anyone else joined the call?

Ratner Who's there?

Marshall Alan, Paul, Jacques? Hello, has anyone else joined the call?

Ratner There's a lot of beeps on the phone, but.

Marshall Yes there are. (laughs) there are. Well, at some point, we need, we will make a decision to, to move forward, but I think, uh, I know Jacques is overseas, and so is Alan, so we'll wait uh wait just a few more moments, but we are, we are going to have to proceed relatively shortly.

Stebbins Stephanie, I assume you are chairing the meeting?

Marshall I am, Ted.

Stebbins And, uh what's it, what does a quorum consist of?

Ratner A majority.

Stebbins Oh.

Marshall — Uh, a majority of the meeting, but, as you know, we need uh six people to amend the bylaws, so that, that's critical.

Ratner — A quorum is six, and you need, you also need six to amend the bylaws, so.

(inaudible background)

Daley — So right now, who's missing? Jacques.

Ratner — Jacques, Helene, and Paul. And Alan.

(inaudible background)

Marshall — Uh, Don, is there any a way we might call people to see if, if they are uh available? Were you able to get the faxes to everyone as far as you know?

Ratner — I talked to everybody, everybody said they were going to be on the call. If you've heard from Helene since, fine. I talked to Jacques, who said Helene was going to be on the call, I've talked to Andreani, I've talked to Paul, I've talked to Alan, everybody.

Marshall — Oh, OK.

(Beeps)

Marshall — Uh, has anyone joined us now?

Stebbins — It sounds like Don did a good job of reaching everyone.

Marshall — Yes, I mean, we, we do have a quorum now, but I think in fairness, we'll wait just a few more moments.

(Beeps)

Marshall — Hello, has anyone joined us? Arthur, are there challenges when you call in from Russia?

Hartman — No.

Marshall — No? OK. I know that's where Alan.

Hartman — Well, I'm calling from France, but.

Marshall — Well, I know you are, but Alan is in Russia, so I was just curious.

Hartman — No, no, the same system applies there.

Ratner — Actually, Stephanie, we are trying to call him. He asked us to call him.

Marshall — Oh.

Ratner — And, we got hold of his, his number, but there's nobody there, we get a voicemail. So he may have gotten delayed or something.

Carlson — Or he may be on the phone.

Daley — What time is it there?

Ratner	9:30.
Hartman	A lot of traffic there. What hotel is he in?
Ratner	I have no idea. If I give you the number, you recognize it?
Hartman	Nope.
Gidwitz	I take it you don't (inaudible) numbers?
Hartman	Nope. (laughs)
(Beeps)	
Marshall	Has anyone just joined us?
Ratner	Stephanie, apparently when Karen tries to call these people, on the line it beeps. That's what the beeping is all about.
Marshall	Oh, I see. I thank you. I keep thinking somebody is joining the call. But Don, you say you talked to Jacques Ahrweiler and Helene will be on the call?
Ratner	I talked to Jacques last weekend, and he said that he was going to get Helene on the call, but you don't think so.
Marshall	OK. OK.
Gidwitz	Could someone please share with me what happened, while we're waiting, in court today? What's all that about?
Carlson	I guess I can. This is Steve Carlson, from Sidley Austin.
Marshall	Steve, could you speak up a little bit please?
Carlson	I'm speaking pretty loud for this room.
Marshall	Oh, OK, I'm sorry.
Carlson	But that's OK if I don't blow anyone out of the room, I'll keep speaking up. Uh, there was a motion filed by Mrs. Terra and Dr. Tucker and Senator Simpson, uh, for a temporary restraining order to try to stop this meeting from going ahead. Uh, I won't.
Hartman	What court was this in, Steve?
Carlson	In the state court in front of Judge Kinnaird, who we've been in front of in the litigation all along.
Hartman	Right.
Gidwitz	Who are they representing? I mean, who, did they file that themselves, or was it, because yesterday, apparently, they filed on behalf of the Foundation. Were they doing that again today?
(Beeps)	
Carlson	They had Joel Bellows from the firm of Bellows and Bellows, and Laurel Bellows was there as well, uh, Leonard Garment, uh let's

see, Chris Todd. Those were the same people from yesterday in the federal court. But today they were representing only the individual uh defendant directors in this main lawsuit. And they sought uh a TRO to block this meeting from going forward, and made uh much the same argument that they made in the federal court uh yesterday. Uh and the attorney general uh primarily responded to it. Judge Kinnaird I think at the end of the day was interested in what irreparable effect, whatever happens at this meeting has. And I think at the end of the day she decided that since the draft resolutions that the board was going to be considering appeared to say that whatever you all vote to do today does not become effective until the consent judgment and order is entered by the court herself, she didn't need to enjoin this meeting at all. That she could give uh Senator uh Simpson's lawyers and Dr. Tucker's lawyers and Mrs. Terra's lawyers an opportunity to make whatever presentation they wanted to, to make whatever argument they wanted to about the propriety of the settlement when the consent judgment is presented to her at a later date, which may very well be Monday afternoon at 2 o'clock.

Gidwitz And who's defending the Foundation, are you?

Carlson I'm the Foundation's lawyer, yes.

Gidwitz And what kind of a defense did you put on today, aggressive?

Carlson Uh, I'm always aggressive.

Gidwitz That's what I've heard. I haven't seen you in action. I understand you're always aggressive. Were you aggressive today?

Carlson A properly noticed and called the board meeting and that I had argued that strenuously to the court on many occasions that it was the Foundation's position that a properly noticed board meeting should go ahead. It should not be interfered with by disgruntled members of the board or by the court or anybody else.

Hartman Thank you.

Gidwitz Thank you.

Marshall Is there anyone else on the call? Jacques, Helene, uh Judith, you are on the call, Paul and Alan?

Terra Stephanie?

Marshall Yes, Judith, is that you?

Terra Yes.

Marshall Yes, go ahead, Judith.

Terra No, I was just responding, I had to step out. Emma came to get me.

Marshall	Oh, yeah, we're still waiting for Jacques, Helene, Alan and Paul.
Terra	OK. There was a call on my other line.
Ratner	Jacques, how are you? Tali.
Gidwitz	We've got Tali too? I'm sorry, I didn't hear the answer to that. Is Tali on the call as well? That's the question.
Marshall	Uh, it's not appropriate for anybody to be on the call other than the directors and the legal counsel that we have so noted already.
Stebbins	Is Don there?
Carlson	No, he just left.
Daley	Why is Tali talking to Don?
Dean Buntrock	Tali called Don. He left.
Daley	Don left the room.
Stebbins	I think that's extremely inappropriate.
Daley	So do I.
Marshall	But we will not proceed until this is a meeting of the directors and the legal counsel that we have already so noted. So um when everybody gets back I will make, ask Tali to leave the call.
Buntrock	He's not on this call.
Marshall	Excuse me, I really can't hear very well.
Daley	He's a, he called Don on his cell phone and Don has left the room to talk to him.
Marshall	OK, that's fine.
(Beeps)	
Daley	I still don't think that's appropriate in either case.
Marshall	Has anyone else joined the call? Jacques, Helene, Alan or Paul?
Gidwitz	How long do we expect to wait? Out of curiosity?
Marshall	Not, not very much longer, Ron. I think it's important that we proceed and a
Stebbins	Don is, Don is.
Marshall	And move forward on this meeting as expeditiously as we are able to do.
Ratner	Well, everybody, uh, we've been calling everybody, we can't get ahold of anybody who's not on the call.
Marshall	OK, then I think uh, I think we will begin. As you all know, uh, this is Stephanie, and I hereby call this meeting to order. Uh, could

	we please have a roll call of all present? Jacques Andreani, Helene Ahrweiler, Dean Buntrock
Buntrock	Present.
Marshall	Maggie Daley.
Daley	Present.
Marshall	Ron Gidwitz.
Gidwitz	Present.
Marshall	Arthur Hartman.
Hartman	Present.
Marshall	Stephanie Marshall, present. Alan Simpson, Ted Stebbins.
Stebbins	Present.
Marshall	Judith Terra.
Terra	Present.
Marshall	Paul Tucker. Alright, as we know, also present are Don Ratner, Susan Stone, Steven Carlson, John Sabl and Mark Heatwole.
Heatwole	Uh, Stephanie, Scott Sela from my office who was in court this morning observing the proceedings has joined us. That's Scott S-e-l-a.
Marshall	Scott is from Winston, Mark?
Heatwole	Yes, ma'am
Marshall	And he is regular Foundation counsel. Alright, we are here today to consider, as you know, a proposed settlement of outstanding litigation and the number of matters closely related thereto. Dr. Stebbins?
Stebbins	Yes, I'd like to make a motion. I hereby move the adoption of all the resolutions contained in the three pages of resolutions which the Foundation distributed, including, without limitation, the approval of the consent judgment and order distributed by the Foundation with such resolutions with James Donnelley, Marshal Field V, Kathleen Foster, Robert Hamada and Frederick Cribel, or Krehbiel, I guess it is, being the five new class two directors. And, in addition, I have a couple of minor changes, um.
Ratner	Ted, could you go through those five names one more time?
Gidwitz	Yeah, read the list again, if you wouldn't mind please?
Stebbins	The list is James Donnelley,
Gidwitz	Donnelley, OK.

Stebbins — Marshall Fields V, Kath, Dr. Kathleen Foster, Dr. Robert Hamada, and Mr. Frederick Krehbiel.

Marshall — And Ted you said you have some minor changes?

Stebbins — And I have some minor changes, which various people have suggested. Um, first, in the draft resolutions, uh, paragraph 4, where it reads "further, resolved that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized and directed in the name and on behalf of the Foundation to file with the Circuit Court of Cook County the consent judgment, if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the attorney general of the state of Illinois and", and from there on I would suggest we take out "and any other document they believe necessary or advisable in connection with the settlement of the litigation." So consider that part of my resolution, amending that phrase. Uh.

(Beeps)

Daley — What paragraph are you?

Ratner — Yeah, we can't find it, could you, this is on the first page of the resolution, page 10 of your.

Stebbins — Yes, paragraph 4

Ratner — Wait a minute let me get my directions, page 10 of your fax.

Dr. Paul Tucker — Sorry, everyone, I've just uh finally made it through the Terrace Midland to be here.

Marshall — Oh, Hi Paul.

Stebbins — Hi, Paul.

Tucker — Hi, Stephanie. Hi, Ted.

Marshall — Paul, we are, Ted is uh, we have called the meeting to order and Ted is uh, Ted has almost concluded his resolution, and Don is helping people find the appropriate

Ratner — Page 10, first paragraph Ted, I think it says, it starts out "further resolved."

Stebbins — "Further resolved."

Ratner — OK, now what do you want to change?

Stebbins — I want to take out uh, the last phrase "any other document that they believe necessary or advisable in connection with the settlement of the litigation."

Marshall — And you said you had another minor change?

Stebbins — And that's my only change in the, in the resolutions. In the consent judgment, uh, and order, under paragraph 2.

Ratner	Wait a second, now what page is that, Ted?
Stebbins	On page, uh,
Ratner	Five of the fax. Paragraph 2, "the parties hereto"
Stebbins	I'd like to say "the parties, including plaintiffs and defendants."
Marshall	No, Ted, you can't do that. The Foundation can't speak for defendants.
Gidwitz	Well, the original documents, Stephanie, if you'll recall, spoke to the plaintiffs and the defendants. If you want to add people, that's fine, but you can't subtract.
Marshall	Well, it's the Foundation, it's my understanding, and maybe legal counsel can speak to this, that the, this wording is the only wording that can that can be in place, because the Foundation cannot require the defendants to do anything against their will.
Gidwitz	Let a court of law decide that. What I am concerned about with this language, if I understand, Stephanie, is, I don't want to be set up to be sued. And this strikes me, the way that this has been drafted, that it doesn't release the defendants, and therefore it's permissive in terms of having them sue me.
Marshall	I think, uh
Gidwitz	And I want protection.
Stebbins	Well, I'd like to
Marshall	Well, I think, Ted, uh, I think.
Stebbins	Stephanie, why don't we ask legal counsel their opinion, because I
Tucker	Can you speak as to why you want to include this?
Stebbins	I want to be accommodating.
Marshall	Uh, may I, let me take the privilege of the chair one moment. We are in the middle of a proposed resolution. I recommend uh, or proposed motion. I recommend that Ted make his motion. I will see if there is a second. If there is not a second, the motion fails. There may be a second, and then we have discussion. In my view, it is not appropriate to argue, uh, the language or the merits of a motion, until the motion is duly put on the table.
Gidwitz	Absolutely. I will comply.
Marshall	Ted, if maybe you will.
Stebbins	OK, my motion includes the slight change of the resolutions, it includes in the consent order making it uh, "the parties, including plaintiffs and defendants, hereto desire". And it includes, under section 7 of the same consent judgment, that includes modifying the second para, the second phrase, with the, and it should now

read, "with the exception that in until the annual 2002, sorry until the 2002 annual meeting, or December 31, 2002, whichever occurs first, then 50% of such board positions should be held by Illinois residents." The purpose of this is to guarantee that is happens in case the annual meeting is delayed for some reason. And uh, those are my, that's my resolution.

Marshall — Alright, we have a resolution, and since it was uh, a rather circuitous, I don't know if it's appropriate for me either to ask you. I think maybe you should state it again, so people are very clear what the resolution is.

Stebbins — My resolution, I move adoption of the resolutions, OK. There is a three pages of resolutions, which we have distributed, including without limitation, the approval of the consent judgment and order with James Donnelley, Marshall Field V, Kathleen Foster, Robert Hamada, and Frederick Krehbeil being the five new class 2 directors with the other uh three amendments that I mentioned.

Marshall — OK. We have a motion on the table. Is there a second.

Gidwitz — I'll second it.

Marshall — Alright, that's moved by Ted, seconded by Ron. The motion has been moved and seconded, uh

Gidwitz — I'd like to offer a

Marshall — Uh, let me, because it involves an amendment to the bylaws, it's passage requires the affirmative action of at least six directors. Now it's appropriate to call for any discussion. I think Ron, if you'd give me the privilege of the chair, I would like legal counsel to address um one of the changes that uh Ted uh referred to, because I, although I want to be able to uh vote for this motion, I would not be able to do so with one of the changes that he's, he's suggested, because it's my understanding that it is simply not possible for the Foundation to make this judgment, so I would really like legal counsel, so that we're all clear uh, on exactly uh where we are and uh where we are at this point in time. I personally don't have any problem with the other modifications that Ted, you made, but I, I would not be able to support the motion as it is presently.

Stebbins — Let's try to let the lawyers lead us through the problem here.

Marshall — Yes. Yes, I've asked legal counsel to do that.

Carlson — Do you have any preference as to who addresses it? Do you want Susan to address it, or John, or

Stone — I can address it. This is Susan Stone from Sidley Austin Brown & Wood. I understand, Stephanie, you would like guidance with respect to whether paragraph 2 of the proposed consent judgment

and order um could be amended to change the description of the parties giving the relief um to a more general description, which would include all of the parties, including the plaintiffs and the individual defendant directors, is that correct?

Marshall — That's correct.

Stone — Alright. Um, it is my understanding that the individual director defendants are not prepared voluntarily to enter into this proposed settlement. They are not agreeing to settle their litigation. Um, and that therefore they are not voluntarily agreeing that

Stebbins — We don't know that until we've taken a vote, right?

Stone — My understanding, that is correct, you don't know that categorically, it is my understanding from, from what was recorded from the mediation sessions, that the individual director defendants are not prepared to voluntarily release. And I think the question being posed is whether or not the Foundation unilaterally can impose upon a non consenting party an obligation that they release their legal rights. And I do not believe that the Foundation can do that, or even that, if the Foundation purported to do it, that it would have any legal effect. Uh, you could indeed, as Ted points out, query, uh the individual director defendants as to whether or not they will voluntarily agree to release, and then all of this is, uh perhaps an unnecessary academic legal debate. Uh, that might be appropriate at this time.

Gidwitz — Uh, let me ask you a question, before we ask that one, and that is, what is the effect of doing it, and, I just heard you say, Susan, that it may not have any legal effect, period. So, what's the downside of just including them?

Stone — No, I'm saying, that even if you purport, with that question from Ron, Ron even if you purport to, um, have the Foundation, uh require the individual defendant directors to release rights, that requirement may not be binding, in other words, it might not be a valid release, because

Gidwitz — I understand, but there's no damage done.

Stone — Well, I do not believe that the Foundation can do this. I do not believe the Foundation can take away the legal rights of another party.

Gidwitz — I understand that, but we have it, what my concern is, Susan, is that we have a document that was written and agreed to by six directors, wherein, if it doesn't materially affect the execution of the document, why are we making changes?

Stone — No, the question is, what can the Foundation counsel put in front of the board, as a document which the board could pass that has the

possibility of standing up to judicial scrutiny, if the board decides it wants to pass it. And I'm telling you that um whatever six individual members of the board might have done in the last mediation session, that was not an act of the Foundation. The Foundation is a corporation. It can only act through a majority vote of the board of directors at a duly called meeting. Um, that has not happened until today. And so the question is, what can the board do at this point in time. The board as a Foundation, which is one party to this litigation, cannot unilaterally take away the rights of other parties to the litigation.

Gidwitz — I keep hearing this, and frankly, my counsel has also reported to me on numerous occasions that you have made the case that, unless we have a duly called meeting, there's a difference of opinion. And the real issue here, it seems to me, is we'd like to get, we'd like to get, this litigation settled. And therefore, we'd like to have a document that we can go to the court with next week, which everybody can agree to. And if, in fact, I feel exposed, I will not agree. It's senseless, then going through this whole process is senseless.

Stone — Well, with

Carlson — Can we left Mark Heatwole respond to that, he wanted to say something, if you could let him talk.

Mark Heatwole — Just, Ron?

Gidwitz — Yes, Mark.

Heatwole — If you brought this actions solely against the Terra Foundation

Gidwitz — Say again?

Heatwole — If you brought this action solely against the Terra Foundation, you would be in a position today to settle this matter. But by naming three of the individuals, you, I believe Susan's position is right, that the agreement on behalf of the board of the Foundation, to settle this matter, only will operate vis a vis the Foundation. And not as against the individuals and their rights. That puts you at peril, and being at peril in this sense. On those same terms, you could be in a position where you will have settled your claims against the Foundation, and under this agreement against those individuals, and waive those rights, and those individuals may still have the ability to claim back against you. You can't force them to waive those rights through this settlement agreement, I don't believe.

Buntrock — That's fine, Mark. Ron's point is, which I agree, then it doesn't have to be taken out, because the matter can be decided by the court.

Heatwole — But if you vote in favor of it, and Ron votes in favor of it, what I am telling you is it could work to your detriment. I'm not your lawyer, but, you've got a situation, where, everything I know about this situation tells me, force Paul, Judith and Alan to settle a case that they don't want to settle. And and that means this is a one way, potentially a one way settlement by you and Ron against them and they're not waiving rights against you.

Marshall — Yeah, I have to say, just to weigh in on this personally, that, uh, I mean, it's no secret that, that this, uh, this motion, and any changes in bylaws require uh, the vote of at least six directors. And I cannot support the motion as it is currently stated with this amendment to number 2. I can certainly support, and will support, the other changes, Ted, that you made, uh, in both the resolution, and the consent judgment order they seem reasonable. But I cannot, and will not, support this motion, which frankly means you do not have six votes. So, I came prepared, I read the motions, I read the consent, I mean I read the resolution, I read the consent judgment, I am prepared to support this, but this is uh, a last minute eleventh hour change, and I cannot be more clear than I'm being right now. I cannot and will not support this change as it is currently stated.

Gidwitz — Which change is that, Stephanie?

Marshall — You can continue the conversation, if you wish, uh, or Ted you can amend your motion.

Stebbins — Well, I knew this was of concern to Ron, that's the reason I suggested it, to hope the lawyers could work it out, but if it's a, uh, if it's thought to be, uh, a legal impossibility, then I would go back to the uh original text, as it was distributed. And leave out the amendment, of section 2.

Marshall — You are accepting an amendment?

Stebbins — Uh, yes.

Marshall — OK.

Buntrock — Stephanie?

Marshall — Yes, Dean.

(inaudible background)

Buntrock — Doesn't Ron have to agree to that?

Hartman — No, it's Ted's motion.

Marshall — We had, Ted has a motion, he's accepted the amendment, which is, keeping the first two changes he made and eliminating the change in the consent order paragraph 2. But I guess the question is, is there any further discussion, or we have a properly made and

seconded uh motion and then we could proceed with the vote, if we are ready to do so.

Buntrock — Stephanie, wait a minute. I think there's more discussion.

Marshall — That's fine.

Buntrock — Uh, first of all,

Stebbins — Who's this speaking?

Marshall — This is Dean.

Stebbins — Hi Dean.

Buntrock — Hi. First of all, I'd like you to respond. You made your position very very clear, but when, when counsel for the Foundation, and counsel on the lawsuit has both said, as Susan has said, that you can't do it, uh, what difference does it mean, to leave the language in there? I cannot see why you take such a strong position, and uh

Marshall — I guess I take.

Buntrock — And uh, (inaudible). Can you respond to that?

Marshall — Yeah, I mean, uh it's my understanding, well, based on what legal counsel is saying, Dean, I would be voting for something which is, which is uh judged not to be legal and/or appropriate. I, I will not vote for,

Buntrock — No one, no one has said,

Marshall — I will not vote to force anyone, uh, into a position, that, uh four attorneys are saying, uh, is inappropriate. Uh, the Foundation, I don't think, or certainly I do not want to approve a settlement, uh, that, that contemplates a release that's that doesn't exist.

Buntrock — Stephanie, they haven't. All they've said is that you legally can't do that. So,

Stebbins — I appreciate the fact.

Buntrock — If you can't do it, you can't do it. And uh, I think changing it is unnecessary.

Carlson — Can I make a comment? I've got one more legal comment to make. This is Steve Carlson.

Marshall — Yes, Steve, go ahead.

Carlson — I think anybody who is interested in the possibility of a settlement accomplished and the consent judgment and order being approved by the Foundation and entered by the court needs to consider at least for a moment the question of what happens when it's presented to the court if the consent judgment and order presented to the court contains some obviously questionable provision. You are concerned about the possibility that there may be some

members of the board that will attack the consent judgment and order, as they have already tried to stop this meeting. Uh, I would as counsel to the Foundation say that you probably ought to think strongly about doing something that is as close as you can to being something that looks like it's appropriate. And within the limits of what the corporation can truly do. I'm afraid you may be giving fuel to the fire, that somehow the corporation has acted inappropriately, if it passes resolution, or consents to consent judgments and orders, that, uh, have clear legal defects in them.

Stone — I would like to underscore that, and add that, although I was not in court today, it is my understanding that the judge has in essence invited the individual director defendants' attorneys to raise any concerns they have when this order is presented to her. So, uh, you know that this order and the procedure that led up to the orders, in fact you vote for the order, uh, will be under judicial scrutiny, and so I second what Steve says, that I think you want to err on the side of doing everything with scrupulous attention to detail and keep your process as clean as possible.

Marshall — And I really, I think frankly, that, Dean, to your question, and Ron, that if you wanted a release from the defendants, then I think it was essential at the time we were in mediation that there was, uh, uh, there was another line, uh, or sentence, or something that would have induced the individuals to settle, but that was not part of the mediated agreement, uh, and, as I said, at this point, I feel it is highly significant, eleventh hour change, and, I'll stand with what I said before, I came to this meeting as I trust we all did in good faith, there were six people that signed off on an intention to ratify, there were some things we had to work out since the last mediated agreement, especially the slate of officers, uh, and I think, um, we were prepared, and I hope, still are prepared, uh, to to reach agreement. But, uh, if we hold, if some hold fast to this, uh, then that is not going to be possible.

Stebbins — Well, I'm persuaded that I was in error, and that I think the attorneys comments are appropriate, and we need an agreement that will stand up under scrutiny.

Gidwitz — Stephanie, I will back off, excuse me, I've got a little food in my mouth, but I will back off of my

Tape 1 side 2

Gidwitz — For the record, that the language that plaintiffs and defendants originally, that the Sidley & Austin attorneys have been moving to change it, I believe

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Stebbins — It was written in the

Gidwitz — That is correct.

Stebbins — Distributed uh version.

Marshall — OK, thank you Ron.

Tucker — This is Paul. Can, am I coming through?

Marshall — Yes, you are, Paul, go ahead.

Tucker — I appreciate the fact that this will be dropped. I just for clarification, can I just, Ted, you had been the one who proposed it, could you just speak a little bit more, as to why, so it can be understood a little more clearly as to that we've spent so much time on this, as to why this really had been of concern?

Stebbins — Paul, are you asking me?

Tucker — Yeah.

Stebbins — Uh, the um this is discussing section 2, well, I think we've discussed it at length, it was written, as you know, in mediation, to cover um plaintiffs and defendants. And, uh, we're just, we're hearing now that defendants can't be covered. And uh, I was, uh, trying to make it broad enough to win everyone's acceptance, but, but I'm now persuaded, having heard the legal arguments that, that that's not a good course. So that's why I'm going back to, to the original Sidley version.

Marshall — I, I am prepared to call for a vote on the question, but I don't want to uh, terminate discussion prematurely, so is there uh any further discussion on the motion, which also has been seconded?

Daley — I'm not clear. I want to know exactly what we're talking about, now, in terms of changes. I'm personally not clear.

Marshall — Alright, Maggie, if I can try to summarize where we are, um, we have a, we had Ted's motion, which was to adopt the resolution, that the Foundation had prepared, which is that three page document that we all received. And he further modified his resolution, uh, motion, to, uh, make a minor change on the resolution, which was page 1, paragraph 4, uh, the last two sentences were eliminated, so in that paragraph it ended, the attorney general of the state of Illinois. And then we had also a minor revision on the uh, consent agenda, paragraph or number 7, which added after the 2002 annual meeting, or until 12/31/02, since the date was not clear. So it was Ted's motion to approve the resolution, and then those two minor changes, one to the resolution, and one to the consent judgment.

Stebbins — Right.

Marshall — So unless there is further discussion, uh, I guess the question is, are we

Ratner — In a second, Steph, I'm just going over this with Mrs. Daley. Uh, this is where, uh

(inaudible background)

Hartman — This is Arthur, I'm prepared to vote.

Ratner — Stephanie, one second, I'm going over this with Mrs. Daley.

Marshall — Don, and I want to, I left out one part as Ted was talking, it was, until 12/31/02, or whichever comes first.

Ratner — Just going over that all with Mrs. Daley. So just one second.

Marshall — OK.

Buntrock — So the only changes are to paragraph 2 and paragraph 7. Right?

Marshall — Uh, the uh, on the resolution, Dean, there's a change, uh, eliminating, uh, the last two sentences on the fourth paragraph, and on the consent judgment, it's number 7 where we have inserted the date. There's no change to paragraph 2.

Ratner — Stephanie, let me, if I can, I've got the document here, let me go through this with the pages, so they can see what we're doing, OK? OK give me 30 seconds, OK? Stephanie?

Marshall — Sure. You have different page numbers than we do?

Ratner — Let me just show them, it's easier.

Marshall — OK.

Ratner — OK, we're making we're adding this December 31 date.

Daley — And we're on page 6 of the fax.

Ratner — That is paragraph 6, page 6. Then we're adding the five board members, OK. And then, the only other thing we're doing, is, we're taking out this last line. This is on the resolution on page 10, and any other document.

Carlson — That's the motion on the table.

Ratner — Well, but the motion on the table is effective and the settlement mediation, so I've got to go through the mediation pieces too.

Buntrock — Sure.

Terra — Stephanie. Stephanie?

Marshall — Yes, Maggie.

Terra — No, this is Judith.

Marshall — Oh, Judith, I'm sorry. I can't hear you very well. Hello?

Terra	Pardon?
Marshall	Hello.
Ratner	Closer to the phone.
Terra	I've got it right in my ear. Can you hear now?
Marshall	Yes we can, not very well, but we can.
Terra	OK. I just want to say that I am definitely going to object to uh any waiver of my legal action. And I think I would like to express strong objection to the fact that uh Allan Simpson, Helene Ahrweiler and Jacques Andreani are not on this, uh, at this meeting, not on this call.
Marshall	Yeah, we will.
Gidwitz	I couldn't hear a word of that Stephanie.
Marshall	Uh, she said uh, that she uh would not agree to anything that that waived her rights, and that she asked she is voicing strong objections uh, to the fact that Jacques and Helene and Alan are not on the call. And as here, I can just simply duly note that, but they were given every opportunity to be on the call, Don talked with
Hartman	I had no trouble getting in from France.
Marshall	They said that they would be, so it is absolutely most unfortunate, but we really could not wait, so Judith, we will, we will note that for the records, this is being taped, so that will be recorded. Don have you concluded your review? We are
Ratner	No, no, Dean is now talking to Mark. And Scott, he's got a question about the last line that's being eliminated on the uh resolution. Uh, which is "and any other document," and so forth and so on, that's paragraph 4.
Marshall	Correct.
Ratner	So there's a question about that, you want to explain to everybody?
Heatwole	Actually, I didn't draft this, John Sabl did, but John, maybe you would tell us why you would include something like that language in your resolution. I said to Dean I thought it was a catch all in case there was anything else that Sidley needed to do in order to effectuate the settlement.
John Sabl	And that is why it was there, Mark, you're absolutely right. My understanding was that, Ron had a concern as to whether it was too broad or seemed to contemplate going very far afield, we didn't think there was anything else that would need to file, and anything that was ministerial we think would have been would be contemplated by by the general authorization at the end. So we think it would be better to have it in, on the one hand, but we don't

see a problem taking it out. I guess we didn't have a strong view either way. We have a mild preference to leave the language in, but since there were some feelings to the contrary, we didn't think it was particularly important.

Heatwole — So if there was anything else that was required, we would have to come back to the board and get approval?

Sabl — I don't think so, I think it would only be if it was something substantive, and Ron, maybe you want to speak to what your concern was, since I heard this indirectly from Ted. This language was not intended to make, you know, to file, you know, substantive changes, and we thought it was helpful from a catchall, but what uh, what was your concern, Ron?

Marshall — Ron are you there?

Gidwitz — I was knocked off, somehow. I'm just coming back on.

Sabl — OK, Ron the question was asked by, it's John Sabl, the question was asked by Mark Heatwole, why we were taking out the catchall language in the resolution, the one change that, that Ted made to the resolutions, that, I understood he made at your request, and, um, and Mark said, isn't that sort of a catch all if other things need to be filed, and would it be better to leave it in.

Gidwitz — And that's just the point where, I heard that, and then I was knocked off.

Sabl — OK, and I said that I think this, I thought this language was fine, as we drafted it, it was appropriate, and the catch all was just meant to be if other things needed to be filed, that it might be better to specifically recognize that. Um, I understood, or I maybe theorized that your concern was that language somehow, was too broad. Um.

Gidwitz — That is correct.

Sabl — OK. I guess, I think in terms of anything else, if it's ministerial, and I think you'd agree if it's just ministerial, filing something the second time or not making a substantive change, you don't have a problem with that, and that, and that even as the resolutions change, that really doesn't effect anything.

Gidwitz — I guess my concern, quite frankly, is the things that Sidley has historically considered to be ministerial and insignificant me and my counsel have not had the same level of uh lack of concern. So I just, maybe it's the result of this experience, but I am not particularly tolerant of things that I don't understand and don't know about.

Sabl — OK, well, Ron, I guess our point was, we're happy with the language either way, so

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Gidwitz	Alright, well, let's just strike it, and then I'll be happy.
Sabl	OK. Good. Again, Mark, we don't believe that uh this would mean that anything else that was you know so clearly contemplated would be prohibited from us doing it, it was just that, I think it's something that Ron is concerned that, and that there shouldn't be substantive changes made.
Heatwole	I had no problem with taking it out. Dean raised the question with me as to whether or not there was impact from that, and I was just trying to explain it.
Sabl	Yeah, I don't think there really is an impact. I think we don't
Buntrock	I'm satisfied with my question. Thank you.
Sabl	Thank you.
Marshall	Uh, Don, have you uh, have you been able to clarify for Maggie and Dean exactly where the changes are, and then, uh, if so, uh everyone fully understanding what we what they will be voting on, then I would uh, like to call for a vote on the question.
Terra	Stephanie?
Marshall	Judith?
Terra	Yes, I would like to say a few words before the vote is taken.
Marshall	Yes, please.
Terra	Can you hear me OK?
Marshall	Yes we can.
Terra	It must be the phone, I don't know what.
Ratner	Can we just respond to Stephanie's question? I think Mrs. Daley and Mr. Buntrock can respond to that better than I. I think I described it, but, they're nodding that they understand all this.
Marshall	OK, fine. Thank you. Judith, go ahead.
Terra	Well, I just want to say before we take a vote on this motion, that uh the outset with all due respect to the each of my fellow board members, I think that, the uh the mediation results that we are being asked to endorse, um and for which we really had high hopes in the beginning, has turned out to be something very different than what we anticipated. Um, for me, it's a process which has distorted the consensual nature of what mediation really should be all about, as reflected in this document. And I think as Paul Tucker our chairman has already observed, the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees. And I think that this vote that we're about to take is a very momentous decision. Because basically today we're going to determine whether we will allow the Terra

Foundation to really be destroyed for all times, in a process which I believe is oppressive and unlawful. And I think you've seen this reflected in my um, in some of my memos to you. Uh, certainly, it will destroy Dan Terra's dream, of allowing this private Terra Foundation to really chart it's own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art. At least, um, he thought it was magnificent, and I would agree. And I think that, uh, the last think we must really think about is that we will be sending a chilling signal to the entire foundation world, as a result of this uh mediation proposal. As a board, we have invited the state of Illinois to really come in and run our Foundation. Because this is basically the end result of this proposal. Telling us only Illinois residents can serve, and really depriving the Foundation of access to the most, some of the most outstanding voices certainly in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation. And uh, so, I'm asking each of you to use your best judgment and wisdom in upholding the principles of self-government that have really been the basic part of this Foundation since its inception in 1978. I hope Stephanie, and all of you, that you will examine your conscience, and your fiduciary duties, and please do not permit the Terra Foundation to be destroyed. So obviously, I hope that each of you will join me in voting against this proposal. And I, I did say earlier, when you couldn't hear me well, that I think it's uh, I object strongly to the fact that um, Helene, and Jacques Andreani, and Alan Simpson were not on this call. Thank you.

Hartman — Uh, this is Arthur Hartman. Um, we'll be taking a vote which will indicate um what all of our views are. I couldn't disagree more with what Judith has said. I think the good of this Foundation has been found in this mediation, and it will carry on the kinds of things that Dan Terra was interested in. And, uh, that is my own personal position. Thank you.

Marshall — You know, I, I would just like to make a personal comment too, and I also regret that, uh, Jacques, and Alan, and Helene, uh, are not on the, are not on the call, because I think it would have been important for everyone to have had the opportunity to hear the conversation and to make a statement, if in fact they wish to do so. I sent a letter to uh David Hilliard dated June 17, where I was responding to the mediated settlement. Uh, and in that letter, uh, I raised several concerns which were pretty consistent with concerns I had raised in the past, and then I did say in the letter, having said this, and verbalizing these concerns, that I could live with the substance of the settlement, albeit with a heavy heart. And that I

was prepared to ratify it, at an authorized board meeting. Uh, I also said in that letter that I believe in my heart that it does preserve the most fundamental dimensions of the Foundation's independence in determining the course of its own destiny, which I believe to be stated in the mediated agreement, although, I do believe that unprecedented restrictions have been imposed on the Foundation, as well, but I believe that a settlement, and not continued litigation is perhaps in the best interest of the Foundation and I would hope, um that the sixteen board members for this year, and the fifteen board members in the future, would see uh, the astounding opportunities that this Foundation has to make a mark, uh, not only in this country, but around the world. And I would hope that we would in fact commit uh to uh to ensuring that the vision of Dan Terra remain not only alive, but burn very brightly. Are there any other, any other points of discussion?

Heatwole Stephanie?

Marshall Yes.

Heatwole Mark Heatwole. Just one last item, before you vote. And I think this is important, and Judith touched on it, and Stephanie, you touched on it in your comments as well. In light of the allegations that have been uh brought forward in the federal court yesterday, to a certain extent, I was not there, but I understand that sort of the same substantive comments were made in the Cook County Courts this morning, about the coercion um that uh some members of this board may feel uh, or may not feel, uh from the action of the attorney general. I think it's important for each one of you to, I think, indicate before you take this vote, that you are voting freely, and you are voting with your fiduciary obligations to this board and this institution and without, and without that pressure. And if anyone feels they can't do that, I don't think you should vote. But if you are voting freely, and if you do not feel that compulsion, then, I think you are free to vote. And I, I think the board ought to be on record and everybody ought to be clear that this vote is being taken without that pressure, without that, um impediment.

Marshall Well, Mark, are you asking then, for a statement, or a comment, because I certainly can, can comment on what you just said.

Heatwole The comment was directed really to you and Ted.

Marshall OK.

Heatwole But in a general way to everyone. Because you do have fiduciary obligations to this institution. Um, which transcend your obligations to other, other facts. And, uh, each one of you should examine that, I think Judith brought that to the fore, Stephanie, you echoed it, but since the allegations have been made, I think it's

important to be on the record, that if anyone feels that they can't vote that way, I think they should abstain. So, having said that, if you vote, I assume that means you are not doing so um feel freely.

Marshall — Well, I, let me just make a personal comment, just in response to what you just said, Mark. I have felt in the past that uh, despite the desire of some board members, uh, over the last year or so, to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked uh, my own path, and I have always spoken with my own voice, uh, to represent the integrity of my own convictions. Uh, I have done it throughout this arduous process, and I do so now, with full knowledge of my fiduciary responsibilities. It is true, that the attorney general's office has asked the Illinois mathematics and science academy to respond to a fact finding investigation. This has not played a part in my decision making with respect to my fiduciary responsibilities, as a board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation. Ted, I don't know, if you want to make a comment as well.

Stebbins — I'd just, I'd like to say, that I came to the board, like Stephanie, and everyone else, as a volunteer. Um, I came to the board, at, I knew Dan Terra, I came to the board at the request of Jim Collins and Judith Terra, I've served as chair of the collections committee, and I think I've served effectively. And I've brought some wonderful new paintings, helped bring some wonderful new paintings to the Foundation collection. I've done this without any iota of a conflict of interest. I value my reputation, both as a scholar and as someone of complete integrity, very very highly, and I think I'm well known for both those uh things. Uh, I've last when I've always felt free to form my own judgments, and last either August or early September, um, when Paul Tucker told me first about his enthusiasm for the building in Washington, and wanting to move there, I disagreed. I long argued to explore a variety of stand-alone options in Chicago, I was willing to consider as part of the strategic planning going elsewhere, but I've always been a defender of Chicago. Uh, like Arthur, I at the board meeting in Giverny, on September 25, I guess it was, 2000, when we learned of the suit, I argued for a total board replacement. Um, at the same time, I abhor the personalized suit brought by the plaintiffs. Unnecessary. I feel very very sympathetic for Judith Terra. I lament the behavior of Senator Simpson. I'm very saddened by the behavior of Paul Tucker. I abhor the threatening tactics of the attorney general, but I am voting my own conscience, and for what I believe is the best interests of the Foundation for its future as an independent, viable force in Chicago, and in France. For the promulgation of American art.

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Marshall — Is there anyone who has a statement, uh, to make, otherwise I will, I think it's appropriate that we now call for, call the question.

Tucker — I'd like to make a statement, Stephanie.

Marshall — Paul is that you?

Tucker — That's me.

Marshall — OK.

Tucker — Um, I, it's painful to hear, the comments that have been made, and in many quarters, although I admire the honesty about it all. I think it's very difficult to be able to predict the future in any form or fashion. None of us could have thought we would be at this particular juncture when we all joined the board. Maybe some did, I don't know, but I certainly didn't. And I don't think Ted did, or Stephanie did. And I applaud their efforts to try to be able to find the right way to act in these difficult causes. But I find most disturbing is the ways in which uh, this Foundation is a not-for-profit entity, is in fact going to become part of uh, the state's purview. Uh, the invasion of its independence, its privacy, of a, a public domain, i.e., the hand of the attorney general, I find repugnant. I find it detrimental and offensive, I find it also counter to the very foundations on which foundations and America as a whole are supposed to be founded, which is why I protested this mediation will continue to do so. Uh, I also find it, uh, disturbing that the um, resolution, um calls for the continued presence of uh the Illinois factions, not that they're not wonderful people in Illinois, certainly more than enough to handle all of this, but I think that that should have been our choice, not somebody else's choice. Uh, and that compromise of our independence is something which uh I think again goes right to the heart of the matter. I think that everybody's consciences have been articulated with grace and conviction, and I think that that is appropriate. But I also believe, in the end, that there are serious principles, uh particularly that of the ways in which a foundation is supposed to operate, which are deeply compromised by this mediation and this process. And I think that it is in the end a sad day for uh the Foundation, and ultimately a sad day in the larger case for the ways in which the state interferes with uh private property.

Marshall — Uh,

Hartman — I I really would like to make one further, short comment. And that is that foundations are established under certain laws, and have to meet certain requirements. Their responsibilities are to the people, uh, of the jurisdiction, that has permitted them to set up these tax free organizations. Therefore, I do not see that an oversight by such authorities is out of order. Thank you.

Marshall	I think it's time for us to call the question, so we will now proceed to a role call vote on the motion. Uh, and I guess the question is, uh, OK, Mr. Jacques, not here, Helene, not here, Dean,
Buntrock	I vote yes.
Marshall	Maggie.
Daley	Yes.
Marshall	Ron
Gidwitz	Yes
Marshall	Arthur
Hartman	Yes.
Marshall	Stephanie, yes. Alan, Ted
Stebbins	Yes.
Marshall	Judith
Terra	No
Marshall	Paul
Tucker	No.
Marshall	Paul?
Tucker	No, Steph.
Marshall	Oh, I'm sorry, I didn't hear you, Paul.
Tucker	That's OK.
Marshall	Um, the motion has been passed by six board members, uh, we now need a motion for adjourn.
Stebbins	I move to adjourn.
Marshall	Oh, I'm sorry, is there, the agenda did say, any new business. Is there any new business which needs to come before this board at this time? Hearing none, uh, we need a motion to adjourn.
Stebbins	So moved.
Marshall	Is that Ted?
Hartman	Second
Marshall	Second, I'm sorry, Dean?
Buntrock	No, that was Arthur.
Marshall	Oh, Arthur.
Hartman	Yes.
Marshall	Do we need a roll call? Uh, role call for the motion? Dean.

Buntrock	Uh, I move to ad, we adjourn, or uh, I vote to adjourn.
Marshall	OK, yes. Maggie.
Daley	Yes.
Marshall	Ron.
Gidwitz	Yes.
Marshall	Arthur.
Hartman	Yes.
Marshall	Stephanie, yes. Uh, Ted.
Stebbins	Yes.
Marshall	Judith.
Terra	Yes.
Marshall	Paul.
Tucker	Indeed, yes.
Marshall	Uh, the uh, this meeting is adjourned. Thank you all, and bonne chance.
Hartman	Thank you.
Ratner	Thank you.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

PLAINTIFFS' RESPONSE TO DIRECTOR DEFENDANTS' OBJECTIONS TO SETTLEMENT

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of the Terra Foundation for the Arts ("Terra Foundation" or "Foundation") by their attorneys Quinlan & Crisham, Ltd., ("Plaintiffs"), hereby respond to the Director Defendants' Objections to Settlement and state as follows[1]:

[1] At the outset, it should be noted that Plaintiffs' response is in excess of the Court's 15-page limit because the Defendant Directors' objections, filed without leave of Court, were 27-pages long. Also, several of the cases in the authority received by Plaintiffs from the Defendant Directors have been highlighted or the text has otherwise been altered.

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INTRODUCTION

On July 6, 2001, the Terra Foundation filed its Motion for Entry of Consent Judgment and Order. In response, Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson (hereinafter "Defendant Directors") filed objections to the proposed settlement. Contrary to this Court's statement on July 2, 2001, that "the issues are coercion and illegality and those issues only" (Exhibit J at p.88), the Defendant Directors again devote a substantial portion of their 28 page objections to a discussion of Dan Terra's intent.

Further, the Defendant Directors' objections do not present new evidence of any substance supported by affidavit as to why the consent decree should not be approved by this Court. Thus, the Defendant Directors should not be allowed to overturn the settlement without a scintilla of proof regarding the purported conflict of interest or evidence of any unlawful coercion by the Attorney General.

STATEMENT OF FACTS

A. Background

Plaintiffs, Dean Buntrock and Ronald Gidwitz, as directors of the Terra Foundation for the Arts, instituted this action on September 22, 2000. The verified complaint alleged, among other things, that Defendant Directors Paul Tucker, Judith Terra, and Alan Simpson engaged in an unlawful effort to close the Terra Museum in Chicago and relocate the Foundation's $450 million in assets outside of Illinois. The Defendant Directors further intended to remove plaintiffs from the board of directors because of their opposition to the scheme. The complaint also alleged that the

Defendant Directors mismanaged the Terra Museum in Chicago to justify their scheme to close the museum.

The Illinois Attorney General, who possesses broad common law and statutory authority over charitable trusts in Illinois, intervened in this action. The Attorney General filed a complaint seeking, among other things, the removal of the defendant directors from the Board of Terra Foundation for their alleged malfeasance, the appointment of a receiver for the Foundation, an accounting, and the appointment of new directors to the Board.

James Terra, the son of Dan Terra also sought to intervene in this action to ensure that the Terra Foundation remained in Chicago, in accordance with his father's intent. James Terra's petition to intervene was entered and continued until completion of the mediation.

B. The Defendants' Requested Mediation

On January 30, 2001, the Court informed all parties that it had received a letter from counsel for the Defendant Foundation requesting the parties to enter into mediation to settle this case. The Defendant Directors also sought mediation. The Defendant Directors knew well the Attorney General's litigation position going into mediation: the Terra Foundation may not close the museum in Chicago and remove the Foundation's assets from the State of Illinois. Indeed, the Attorney General's position was clearly expressed to all parties and the Court. By participating in mediation the parties (including, Terra, Simpson and Tucker) recognized that the mediation, if successful, would require compromise of the legal issues in the case, including the Terra Foundation's ability to remove its charitable assets from the State of Illinois.

The Defendant Directors were strong proponents of mediating this dispute. They submitted names of several mediators to the Court for consideration. David C. Hillard was one of the

mediators recommended by the Defendant Directors to be of "outstanding skill" and "best equipped to handle this mediation." (*See* February 1, 2001, letter from Brian L. Crowe; February 2, 2001 letter from James Wilson, attached hereto as Exhibits A and B, respectively).

On February 5, 2001, this Court entered an order appointing Mr. Hilliard to mediate this dispute between the parties. The Court stated that Mr. Hilliard would be responsible for setting the ground rules for the mediation and reiterated in a court order the parties' agreement that no statements made by any participants in the mediation process would be admissible as evidence in court. (*See* Report of Proceedings dated February 5, 2001, attached as Exhibit C at pp. 7-8,and Order of February 5, 2001 attached as Exhibit D) The parties, including the Defendant Directors, also agreed that the Attorney General be permitted to fully participate in the mediation process. (Exhibit D; February 5, 2001 Order)

After nearly four months of difficult negotiations and mutual compromise, the parties reached a written agreement on June 19, 2001 on all material terms, thus resolving this matter.

C. The Defendant Directors' Failed Attempt to Defeat the Settlement in Federal Court.

The board schedule a meeting for June 29, 2001 to formally vote on the agreement reached on June 19, 2001. On June 28, 2000, just one day prior to the Board's scheduled vote on the mediated agreement, the Defendant Directors filed a complaint in federal court against the Assistant Attorney General, Floyd D. Perkins. A copy of the Complaint is attached as Exhibit E. The Defendant Directors did not dispute the terms of the agreement. Rather, they alleged that Assistant Attorney General, Mr. Perkins, violated their federal constitutional rights by coercing two Terra Foundation directors, Dr. Stebbins and Dr. Marshall, to vote in favor of the agreement. The complaint alleged that Mr. Perkins had coerced Dr. Stebbins by proposing to name him in a lawsuit,

and had coerced Dr. Marshall by investigating the Illinois Mathematics and Science Academy, where Dr. Marshall serves as President. The Defendant Directors failed to submit any affidavits from either Dr. Stebbins or Dr. Marshall supporting these allegations. Nevertheless, the Defendant Directors sought a temporary restraining order enjoining Dr. Stebbins and Dr. Marshall from voting at the Board meeting scheduled for June 29, 2001.

The case was heard by Judge Bucklo that same day. After a two hour hearing, Judge Bucklo issued a twelve page Opinion and Memorandum ("Opinion"), dismissing the Defendant Directors' complaint and denying their emergency motion for temporary restraining order. A copy of Judge Bucklo's Opinion is attached hereto as Exhibit F. Judge Bucklo dismissed the case pursuant to the abstention doctrine, but also addressed the substantial allegations of the complaint and ruled that the Attorney General's activities and Dr. Stebbins' and Dr. Marshall's support of the agreement were entirely lawful. (Exhibit F at p. 10-11.) With regards to the allegations that Mr. Perkins' actions may have influenced the votes, Judge Bucklo noted that under the law "not every incentive and disincentive is coercive." *Id.* In addition, the Court found that the conduct allegedly being induced - - a changed vote -- was also lawful because it was something that Dr. Stebbins and Dr. Marshall "had a lawful right to do in any event." *Id.*

D. The Defendant Directors' Second Attempt to Defeat The Settlement.

Unable to state a claim in federal court, the Defendant Directors rushed to this Court the next day urging this Court to do what Judge Bucklo had refused to do. Just hours before the duly noticed Board meeting, the Defendant Directors filed an emergency motion for a temporary restraining order seeking to prevent the Board from meeting and voting on the mediated agreement. After a hearing, this Court also denied the Defendant Directors' motion for a temporary restraining order and

allowed the board of director's meeting to proceed as scheduled. A copy of the Court's June 29, 2001 Order is attached as Exhibit G.)

E. The Board's Votes to Approve the Proposed Settlement.

The Terra Foundation Board convened at approximately 12:45 pm on June 29, 2001, with a quorum of eight directors present. The meeting was properly noticed and called in strict conformity with the Foundation's bylaws. Counsel for the Foundation was also present. During the meeting, the Board discussed various aspects of the agreement. The Board also specifically addressed the allegations made by the Defendant Directors in federal court and in this Court regarding the alleged coercion of Dr. Stebbins and Dr. Marshall. Dr. Stebbins and Dr. Marshall explicitly denied any duress and state that they approved the settlement in the best interests of the Foundation and consistent with their fiduciary duties. (See Exhibit H, p. 41)

After substantial discussion, the Board of the Terra Foundation by a vote of 6 to 2 passed a Resolution which authorized the Foundation to enter into the Consent Judgment and Order and amend Article III of its By-Laws. (A copy of the Consent Judgment and Order and Resulution are attached as Group Exhibit I).

F. The Defendant Directors' Third Attempt to Defeat the Settlement.

On July 2, 2001, the Defendant Directors made yet another attempt to defeat the mediated settlement and filed a motion for leave to file written objections and demand for an evidentiary hearing. The motion recycled the same arguments previously rejected by Judge Bucklo. Attached to the motion were the Defendant Directors' written objections, along with a number of exhibits purporting to reflect Dan Terra's intent to move the Terra Museum to Washington, D.C. After reviewing these materials, the Court denied the Defendant Directors' motion for leave to file the

documents, stating that those documents were unsupported by sworn affidavits and entirely irrelevant to the issue of coercion. The Court then requested counsel for the Terra Foundation to file a motion to approve the consent decree and allowed the Defendant Directors yet another opportunity to object to entry of the Consent Judgment and Order. However, the Court made it very clear that the only issues that were relevant to the approval of the consent judgment were "coercion and illegality and those issues only." (Exhibit J, July 2, 2001, p. 88). The Court specifically stated "I do not want to hear anything more about the intent of the original founder . . . . That is not before the Court on this motion to approve the consent decree. " Id.

G. Defendant Directors Misrepresent the terms of the Consent Decree.

The Defendant Directors' exaggerated misstatements regarding the actual terms and implications of the Consent Judgment are belied by a reading of the agreement itself. (Group Ex. I, attached). The Defendant Directors mischaracterize the Consent Judgment as effectively limiting the Foundation's ability to function. However, the decree expressly states: "[T]he Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants." ¶4. The Defendant Directors claim that the world wide art community is prevented from enjoying the Collection. However, nothing in the Decree prevents the Foundation from making loans of artwork to institutions worldwide, as it has done for many years. Moreover, the Consent Judgment specifically protects the role of the Museé in Giverny, France. "[T]he Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection." ¶5.

Contrary to the Defendant Directors' claim that the Consent Judgment limits the Foundations' ability to partner with other institutions, the Consent Judgment allows the Foundation to maintain and exhibit the Collection "*either by itself or through partnerships* or arrangements with other institutions, in the Chicago metropolitan area." ¶5 (emphasis added). In this way, the Foundation Board, in its discretion, may determine whether a partnership, several partnerships, or no partnership is the best course of action.

H. The Defendants' Objections Violate Rule 191.

On July 19, 2001, the Defendant Directors filed their objections to the Proposed Settlement again arguing Dan Terra's intent . Their objections are supported by numerous affidavits previously rejected by this Court.

ARGUMENT

I. The Settlement is Valid, Binding and Represents the Agreement of the Parties.

Pending before this Court is a Motion for Entry of Consent Judgment and Order. The only proper question before this Court at this stage is whether or not there was an agreement to settle between the parties. Here, it is undisputed that the parties to the agreement approved the agreement. Illinois law is clear that "[T]he agreements are binding so long as there is clearly an offer and acceptance to compromise, and there is a meeting of the minds as to the terms of the agreement." *Sheffield Poly-Glaz, Inc. v. Humbold Glass Co.*, 42 Ill. App. 3d 865, 356 N.E.2d 837, 840 (1st Dist. 1976). Here, there is no question that the parties reached a settlement and that Consent Judgment reflects the proper terms. In fact, the parties to the agreement have approved the agreement and this Court need only enter the agreement as submitted. This is because of the long standing Illinois public policy that settlements are to be encouraged and given full force and effect. *Id.*

None of the parties to the agreement challenge the agreement. Instead, this challenge is brought by three directors who oppose the agreement. There is simply no legitimate question and no dispute among the parties or the Attorney General that the agreement reflects an offer and an acceptance to compromise and there is a meeting of the minds as to the terms of the agreement. Even the Defendant Directors do not challenge the terms of the agreement. This Court should, therefore, enter the Consent Judgment and Order.

II. The Votes Approving The Settlement Were Legal And Valid.

A. This Agreement Was Approved at a Properly Called Meeting of the Board.

It is undisputed that the Board's approval of the mediated agreement occurred at a properly noticed and called meeting of the Foundation's board of directors. Indeed, the Defendant Directors do not challenge the propriety of the meeting. On June 19, 2001, a majority of the directors agreed in writing to a settlement of this matter. The agreement was reached at a session with the mediator.

On June 29, 2001, at approximately 12:30 p.m., the meeting was called to order with due notice to all directors in compliance with Foundation's bylaws. A copy of the bylaws are attached as Exhibit K. Participating at that meeting were Directors Buntrock, Gidwitz, Daley, Hartman, Marshall, Stebbins, Tucker and Terra. Also present were the attorneys for the Foundation, including Winston and Strawn, and Sidley Austin Brown and Wood. Eight directors were present at the meeting out of a total of eleven directors on the Board. Therefore, a quorum was present. After much debate and extensive discussion, at the conclusion of the meeting, a vote was taken as to the settlement and six directors voted for the settlement (Buntrock, Gidwitz, Daley, Hartman, Marshall and Stebbins) and two directors voted against the settlement (Terra and Tucker). Thus, there was a majority vote of the directors taken at a duly called meeting with a quorum present. The

agreement to enter into this settlement was clearly the action of the Board. All of the directors had an opportunity to participate and there was lengthy discussion prior to taking of the vote. (See Exhibit H Transcript of June 29, 2001)

Counsel for the Foundation has also stressed that the actions taken at the June 29, 2001 meeting were proper. At the July 2, 2001 meeting, the counsel for the Foundation stated:

> And here you have a situation where there was a duly constituted, duly called board meeting. A quorum was present. There was vigorous discussion and a vote was held. And 6 to 2, the directors voted, exercising their free will that this - and in accordance with their fiduciary duties that this was in the best interests of the Foundation as they understood it.

(Exhibit J, July 2, 2001 Tr. at pp. 42-43)

B. There Was No Conflict Of Interest.

The Defendant Directors now assert that the alleged coercion of the Attorney General created a conflict of interest for Dr. Stebbins and Dr. Marshall, which rendered their votes a nullity. Such assertions do not, however, establish a conflict of interest under Illinois law. Moreover , the Settlement was properly approved by the Board consistent with the Illinois Not For Profit Corporation Act. Also, the Defendant Directors' assertions totally ignore the relevant statutory provisions. In fact, the only authority cited by defendants as support for the alleged conflict of interest is not even applicable here. The cases cited by defendants involve dealing with general corporate principles not applicable to the circumstances here. The operations of the Foundation are governed by an entirely separate statutory scheme. 805 ILCS 105/1, *et seq.*

1. Conflicts in this context are limited to pecuniary conflicts.

In the objections, the Defendant Directors failed to cite a single case which establishes that the votes taken here amount to a conflict of interest under Illinois law.

Even more telling, defendants fail to cite to the appropriate statutory provisions which actually govern the existence of a director conflict of interest with regard to a not-for-profit corporation. *See* 805 ILCS 105/108.60.

Section 108.60 provides that a conflict of interest exists if a director of the not for profit corporation is directly or indirectly a party to the transaction. *Id.* Section 108.60(d) further provides that a conflict of interest occurs where a director of a Not-for-Profit corporation is an is an officer, director or general partner or has a material financial interest in an entity which is the other party to the transaction at issue. Thus, a conflict of interest only arises if a director has a pecuniary interest in the transaction. Here, it is undisputed that neither Dr. Stebbins nor Dr. Marshall had a financial interest in any other party to the settlement — nor were they officers or directors of any other entity that was a party to this transaction. There simply was no conflict of interest within the realm of section 108.60. Accordingly, Defendants' argument that the purported conflict of interest invalidates the settlement is without merit and does not meet the test under section 108.60.

Moreover, even if the "conflict of interest" did exist — which it did not — section 108.60 provides that such a transaction may be ratified by the corporation. *Id.* Here, stripped of all rhetoric, it is clear that the allegations of a "conflict" are merely the assertions of the individual defendants who are unhappy with the settlement. These self-serving statements of Defendants fail to demonstrate how the settlement was the result of any conflict of interest.

Defendants' disregard for section 108.60 is also fatal to their argument that discounting the votes of Marshall and Stebbins would somehow invalidate the Settlement. The premise of defendants' argument is that Stebbins and Marshall should have been disqualified and, had their votes been excluded, the Settlement would have only 4 votes and would not be approved. Section 108.60(b) defeats defendants' argument. Section 108.60 provides that so long as the alleged "conflict" is disclosed, the transaction may be approved by a majority of disinterested directors, "even though the disinterested directors be less than a quorum." Section 108.60(c) makes clear that the presence of a director who is directly or indirectly a party to a transaction or otherwise disinterested, may be counted to determine whether a quorum exists, but may not be counted when the board takes action on the transaction. Thus, under the theory of the Defendant Directors, there were six disinterested directors at the board meeting. Accordingly, if the votes cast by Marshall and Stebbins were invalidated, the Settlement received 4 votes and was properly approved by a majority of the 6 disinterested directors. Therefore, even if this Court were to invalidate Marshall and Stebbins' votes — which it should not do — the Settlement Agreement was approved by a majority of disinterested directors at the board meeting.

2. The Foundation's Own Conflict of Interests Policy Defines Conflicts as Financial Conflicts Only.

Furthermore, the Foundation's own policy is consistent with Illinois law that a director conflict relates to a director's pecuniary interest in the subject transaction. 805 ILCS 105/1108.60 In November of 1998, the Board itself adopted a specific conflict of interests policy to apply to all of its officers, directors and key employees. A copy of the policy is attached as Exhibit L. That policy defines an interested person as one who has a direct or indirect financial interest in a transaction involving the Foundation. *Id.* As noted above, neither Dr. Marshall and Dr. Stebbins

have a financial interest in the settlement and are, therefore, conflict free, consistent with the Foundation's own conflict of interest policy.

Significantly, the cases relied upon by defendants also reflect the principle that conflicts of interest relate to pecuniary interests. Specifically, *Weiss Med. Complex v. Kim*, 87 Ill. App. 3d 111, 408 N.E.2d 959 (1980) involved a board vote to invalidate non-compete clauses that were provided for in the contracts of certain directors who voted on the issue. Similarly, in *Elward v. Peabody Coal Co.*, 9 Ill. App. 2d 234, 132 N.E.2d 549 (1956) certain board members voted to issue a stock option to themselves.[2]

Additionally, Defendants' effort to parallel the alleged "conflict" with this Court's prior orders removing Tucker from serving as the litigation director is without merit. This Court removed Tucker as the litigation director in accordance with well-established authority that provides that when serious allegations of wrongdoing are alleged against directors of a corporation, the corporation must independently investigate the allegations and determine its position in the litigation. *See Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979). Here, defendants are arguing that Stebbins and Marshall had some alleged personal interest that could have impacted their vote in favor of the settlement. There is simply no comparison. Tucker's conflict was palpable – he could investigate himself. Taken to its logical extension, defendants' "analogy" would prohibit any party

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[2] Two cases were cited by defendants do not even involve conflicts of interest in a corporate context. *Kerrigan v. Unity Savings Ass'n*, 58 Ill. 2d 20, 317 N.E.2d 39 (1974) is a business opportunity case. where certain directors failed to inform the corporation of a business opportunity and instead, usurped the business opportunity for their own benefit. Clearly, there was no business opportunity improperly usurped by Marshall and Stebbins and defendants do not allege any such conduct by Stebbins or Marshall. Further, *Martin v. Heinhold Commodities, Inc.* 163 Il. 2d 33, 643 N.E.2d 734 (1994) involved an action against a broker for investors and did not involve actions by a corporate board of directors.

to the litigation from approving a settlement because of any interest a party may have in resolving the litigation. Defendants cite no cases for such an argument.

Defendants' reliance on *New York Hotel & Motel Trades Council v. Hotel Ass'n*, 747 F. Supp. 1074 (S.D. N.Y. 1990) and *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981) is equally unavailing. The crucial factor — disregarded by defendants — is that the purported conflict of interest at issue in *New York Hotel* and *In re Corrugated* involved a conflict suffered by counsel not members of a board of directors. Here, the Defendant Directors make no allegations as to the adequacy of the representation by counsel. *New York Hotel* and *In re Corrugated* are thus, inapposite.

Finally, defendants' contention that there is no need to prove that Dr. Marshall and Dr. Stebbins actually voted to pursue their own interests rather than those of the Foundation to void their vote is unfounded in law. The Defendant Directors cite no cases for this proposition. Moreover, defendants reliance on In Fletcher Cyclopedia of the Law of Private Corporations, § 837.60 is misplaced. Even Fletcher provides that:

> Multiple loyalties or apparent conflicts are insufficient in themselves to establish a breach of loyalty.

Fletcher Cyclopedia of the Law of Private Corporation, § 837.60 (rev. vo. 1994 & Supp. 2000). Here, defendants allege no facts that Dr. Stebbins or Dr. Marshall suffered a conflict of interest – much less an apparent conflict of interest used their positions as directors of the Foundation to effectuate a transaction between the Foundation and themselves.

C. Defendant Directors' Reliance on Class Action Cases is Misplaced.

The Defendant Directors also cite numerous class action cases as the basis for their claim that it is the Foundation and Plaintiffs and the Attorney General that bear the burden of establishing the settlement, as if this action were a class action. (Objections, p. 13.)[3] This clearly is not a class action suit and the defendant's argument is misplaced. The class action context is inherently different than the case at bar. Settlements of class actions are governed by Section 2-806 of the Code of Civil Procedure which mandates that a class action "shall not be compromised or dismissed except with the approval of the court..." 735 ILCS 5/2-806. As described above, in the context of non-class action settlements, the burden in challenging a settlement agreement is on the challenging party, not on the proponent of the settlement. *Flynn v. Flynn*, 232 Ill. App. 3d 394, 401, 597 N.E.2d 709, 713 (burden of proving duress or coercion by clear and convincing evidence is on the party asserting it). This case is not a class action nor was it alleged to be a class action in any pleading. It was never certified as a class action (735 ILCS 5/2-801), there is no defined class (735 ILCS 5/2-802), no notice was sent to prospective class members (735 ILCS 5/2-803) and moreover, it has never been treated as a class action by any of the parties or the Court. All of the parties are before this Court. There are no absent parties, as the defendants content.

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[3] Defendant Directors have misidentified several class action cases they rely upon, suggesting instead that they are cases of general applicability. *See*, Obj. p. 13, "[W]hen, as here, parties seek court approval of settlements" *citing Waters,* ; *Steinberg*, "court has the affirmative obligation to ensure that any settlement is 'fair, just ...'"; p. 14, "[I]n any contest over a proposed settlement" *citing Waters* and *In re General Motors*; p. 16, "Courts in similar circumstances" *citing New York Hotel & Motel*; p. 25-26, *citing In re General Motors Corp.*, *Patterson*, *Steinberg*, and *In re Brand Name Prescription Drugs*, for the proposition that discovery is required whenever settlement is objected to; p. 27 *citing In re General Motors*, for proposition that burden is on proponents of a settlement. In each of these instances the Defendant Directors have ignored that these are class action cases and that the courts therein were applying rules of class actions, not general principles as the Defendant Directors would have the court believe.

D. Under Established Illinois Case Law, the Defendant Directors are Not Entitled to an Evidentiary Hearing.

The Defendant Directors argument must be rejected for yet another reason. The safeguards instituted for the approval of a class action settlement are entirely inapplicable to the settlement of a non-class action legal dispute, such as here. As Justice Posner explained:

> "The fairness of a settlement of a legal dispute is like the adequacy of the consideration supporting a contractual promise: a matter best left to negotiation between the parties. A settlement is a contract, and normally the test for the fairness of a contract is strictly procedural: were the parties competent adults duly apprised of the basic facts relating to their transaction? The problem in the class-action setting, and ***the reason that judicial approval of the settlement of such an action is required, is that the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals.***

Mars Steel Corporation v. Continental Illinois National Bank and Trust Company of Chicago, 834 F.2d 677, 681 (7th Cir. 1987)(emphasis added).

In this instance, there is no "lawyer for the class" to warrant a hearing on the settlement. Illinois law provides that this Court may decide a motion or other objection directed at a settlement on affidavits, pleadings and arguments of counsel alone without an evidentiary hearing. In *Marriage of Varco*, 158 Ill. App. 3d 578, 580, 511 N.E.2d 736, 737-38 (1st Dist. 1987), the court affirmed the trial court's rejection of a petition to open a settlement without holding an evidentiary hearing. The court held that it was proper for the trial court to dispose of the petitioner's contentions that his wife entered into settlement as a result of duress without holding an evidentiary hearing. *Id.* The court cited the well-established rule under Illinois law that motions may be decided on the basis of affidavits alone. *Id.* Likewise, in *Filko v. Filko*, 127 Ill. App. 2d 10, 23, 262 N.E.2d 88, 94-95 (1st Dist. 1970), the appellate court affirmed a trial court's determination that no hearing as to duress was necessary where the offer of proof

sufficiently presented to the court what the proposed witnesses would testify, the trial court was well acquainted with the matters proposed by movant and there was no showing that there were anything to be presented above and beyond the scope of the offer of proof. *See also In re Marriage of Chapman*, 162 Ill. App. 3d 308, 312-15, 515 N.E.2d 424, 427-29 (1st Dist. 1987) (where matters raised by motion to vacate settlement were familiar to the trial court and sufficiently informed the court of the proposed testimony, it was not necessary for trial court to hold evidentiary hearing).

E. Defendant Directors' Arguments Regarding the Substance of the Agreement Fail in Light of the Business Judgment Rule.

The Defendant Directors also attempt to subvert this agreement by making extraneous arguments such as Ms. Brody's opinions regarding the agreement.[4] This Court can dispose of those arguments by a simple application of the business judgment rule.

Under the business judgment rule, a presumption attaches by operation of law that in making a business decision the directors acted in an informed manner, in good faith and in the honest belief that they acted in the best interest of the company. *Lewis v. Playboy Enterprises*, 279 Ill. App. 3d 47, 54, 664 N.E.2d 133, 138 (1st Dist. 1996). In the absence of sufficient factual allegations to the contrary, the court must presume that the protections of the business judgment rule apply. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1018, 636 N.E.2d 616, 623 (1st Dist. 1993). Here, a majority of the board has determined that the best interests of the Foundation will be served by this settlement, that determination is protected by the business

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[4] Ms. Brody offers opinions that she would have preferred different terms to the agreement. Ms. Brody's opinion testimony is not predicated on evidence or personal knowledge and, as such, is not only irrelevant but should also be stricken under Ill.S.Ct.R. 191.

judgment rule and the court should not accept the Defendant Directors' invitation to insert itself into the Board's management of its corporate affairs. In fact, in *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168, 1193-94 (N.D. Ill. 1980) (Dir. Def.s' Obj. Tab 13), relied upon by Defendant Directors to claim a breach of duty resulting from waste of corporate assets, the court actually entered a directed verdict for the defendants based upon its determination that the actions of the directors was protected by the business judgment rule.

III. The Defendant Directors' Fail to Meet Their Burden to Set Aside the Consent Judgment and Order.

A. A Consent Decree Can *Only* be Set Aside by Proof of Fraud, Duress, Unconscionability or Newly Discovered Evidence.

It is well settled under Illinois law that a consent decree can *only* be *set aside* by agreement of the parties to the decree or by a showing that it resulted from fraud, duress, incompetence to contract, unconscionability or newly discovered evidence. *Sakun v. Taffer*, 268 Ill. App. 3d 343, 353, 643 N.E.2d 1271, 1279 (1st Dist. 1994); *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1094-95, 603 N.E.2d 1, 4 (1st Dist. 1991); *Filosa v. Pecora*, 18 Ill. App. 3d 123, 127, 309 N.E.2d 356, 359 (1st Dist. 1974). Here, none of the parties to the agreement challenges this agreement. Instead, three directors who refused to take part in the settlement are attempting to launch a collateral attack on an agreement, which all of the parties thereto agree is valid, binding and should be entered by this Court. This Court should enter this consent decree without further delay. *See New York Hotel & Motel Trades v. Hotel Assoc. of NYC*, 747 F. Supp. 1074, 1079 (S.D. NY 1990) (Dir. Def.s' Obj. Tab 12) (rejecting objection of non-settling party stressing that none of the settling parties had any objection to the settlement).

B. The Burden is on the Party Challenging the Decree.

The Defendant Directors assert that the agreement was the result of coercion and duress. As such, the Defendant Directors must plead and prove the existence of duress or coercion by clear and convincing evidence. *Wallenius v. Sison*, 243 Ill. App. 3d 495, 503-04, 611 N.E.2d 1096, 1101 (1st Dist. 1993) (affirming trial court refusal to vacate a settlement agreement where movants failed to establish fraud, coercion or duress by clear and convincing evidence); *Flynn v. Flynn*, 232 Ill. App. 3d 394, 401, 597 N.E.2d 709, 713 (1st Dist. 1991) (burden of proving duress or coercion by clear and convincing evidence is on the party asserting it). The defendants fail to meet this burden. Not surprisingly, the Defendant Directors retreat from this burden. Illinois law is clear, however, that the burden lies with the defendants. *Id.*

C. No Duress or Coercion has been Established by the Defendant Directors.

Duress is not found merely because the bargaining process was tough. Instead, Illinois law requires: 1) a wrongful or illegal act or threat against a person which 2) deprives him of the exercise of his free will. *Regengold v. Baby Fold, Inc.*, 68 Ill. 2d 419, 433, 369 N.E.2d 858, 864 (1977); *Wallenius v. Sison*, 243 Ill. App. 3d 495, 503-04, 611 N.E.2d 1096, 1101 (1st Dist. 1993); *Flynn v. Flynn*, 232 Ill. App. 3d 394, 401, 597 N.E.2d 709, 713 (1st Dist. 1991); *Higgins v. Brunswick*, 76 Ill. App. 3d 273, 277, 395 N.E.2d 81, 85 (1st Dist. 1979); *Towne v. Town of Libertyville*, 190 Ill. App. 3d 563, 569, 546 N.E.2d 810, 815 (2d Dist. 1989); *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 214-15, 633 N.E.2d 225, 230 (4th Dist. 1994). The Defendant Directors fail to establish either of these requirements.

First, the Defendant Directors have not alleged a single action by the Attorney General or any other party which is illegal. Specifically, the filing or threatening to file a lawsuit is not

illegal and cannot be used to support a claim of duress. In *Regengold v. Baby Fold, Inc.*, 68 Ill. 2d 419, 433, 369 N.E.2d 858, 864 (1977), the Illinois Supreme Court refused to accept a mother's claim of duress to invalidate a consent to adoption. The Supreme Court stressed that the action alleged must be wrongful or illegal, citing, *inter alia*, *Kaplan v. Kaplan,* 25 Ill. 2d 181, 186, 182 N.E.2d 706, 709 (1962), wherein the court held that it was not duress to threaten to institute a suit to enforce what a party believes to be his legal right. *Id. Higgins v. Brunswick*, 76 Ill. App. 3d 273, 278, 395 N.E.2d 81, 85 (1st Dist. 1979) (merely informing plaintiffs of the legal consequences which could be avoided by settling not illegal or wrongful); *Towne v. Town of Libertyville*, 190 Ill. App. 3d 563, 569, 546 N.E.2d 810, 815 (2d Dist. 1989) ("not duress to threaten or institute a lawsuit, nor is it duress for a person to assert his legal rights"); *Fagala v. Sanders*, 140 Ill. App. 3d 429, 432, 488 N.E.2d 1093, 1096 (5th Dist. 1986) (lawful demand or threat to enforce one's rights does not amount to duress).

Second, here the parties who were allegedly bereft of their free will have expressly stated that they understood the vote they were taking and that their votes were the product of their own evaluation of what was in the best interest of the Foundation. At the June 29, 2001 Board meeting, immediately prior to taking a vote, the following exchange occurred:

Heatwole: . . . In light of the allegations that have been uh brought forward in the (counsel) Federal Court yesterday, to a certain extent, I was not there, but I understand that sort of the same substantive comments were made in the Cook County Courts this morning, about the coercion um that some members of this board may feel uh, or may not feel, uh from the action of the attorney general. *I think it's important for each one of you to, I think, indicate before you take this vote, that you are voting freely, that you are voting with your fiduciary obligations to the board and this institution and without, and without that pressure. And if any feels they can't do that, I don't think you should vote. But if you are voting freely, and if you do not feel that compulsion, then I think you are free to vote.* And

I, I think the board ought to be on record and everybody ought to be clear that this vote is being taken without that pressure, without that, um impediment.

* * *

Because you do have fiduciary obligations to this institution. Um, which transcend your obligations to other, other facts. And uh, each one of you should examine that, I think Judith brought that to the fore, Stephanie, you echoed it, but since the allegations have been made, I think it's important to be on the record, that if anyone feels that they can't vote that way, I think they should abstain. So, having said that, if you vote, I assume that means you are not doing so um feel freely.

Marshall: Well, I, let me just make a personal comment, just in response to what you just said, Mark. I have felt in the past that uh, despite the desire of some board members, uh, over the last years or so, to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked, uh, my own path, and I have always spoken with my own voice, uh to represent the integrity of my own convictions. Uh, I have done it throughout this arduous process, and *I do so now, with full knowledge of my fiduciary responsibilities. it is true, that the attorney general's office has asked the Illinois Mathematics and Science Academy to respond to a fact finding investigation. This has not played a part in my decision making with respect to my fiduciary responsibilities, as a board member of this Foundation. I believe now, as I have said before, that his motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation.*

Stebbins: I'd just, I'd like to say, that I came to the board, like Stephanie, and everyone else, as a volunteer. Um, I came to the board, at, I knew Dan Terra, I came to the board at the request of Jim Collins and Judith Terra, I've served as chair of the collections committee, and I think I've served effectively. And I've brought some wonderful new paintings, helped bring some wonderful new paintings to the Foundation collection. I've done this without any iota of a conflict of interest. I value my reputation, both as a scholar and as someone of complete integrity, very very highly, and I think I'm well known for both those um, things. Uh, I've last when I've always felt free to form my own judgments, and last either August or early September, um, when Paul Tucker told me first about his enthusiasm for the building in Washington, and wanting to move there, I disagreed. I long argued to explore a

> variety of stand-alone options in Chicago, I was willing to consider as part of the strategic planning going elsewhere, but I've always been a defender of Chicago. Uh, like Arthur, I at the board meeting in Giverny, on September 25, I guess it was, 2000, when we learned of the suit, I argued for a total board replacement. Um, at the same time, *I abhor the personalized suit brought by the plaintiffs. Unnecessary. I feel very very sympathetic for Judith Terra. I lament the behavior of Senator Simpson. I'm very saddened by the behavior of Paul Tucker. I abhor the threatening tactics of the attorney general, but I am voting my own conscience, and for what I believe is the best interests of the Foundation for its future as an independent, viable force in Chicago, and in France. For the promulgation of American Art.*

(Ex. H; Tr. of June 29, 2001 Board Meeting, p 27.) (emphasis added.)

Additionally, Dr. Stebbins and Dr. Marshall and the Defendant Directors participated in the negotiations over many months, were represented by counsel and had many opportunities to consider and reconsider their position on the settlement. *See Higgins v. Brunswick*, 76 Ill. App. 3d 273, 278, 395 N.E.2d 81, 85-86 (no duress where parties voluntarily entered into a settlement with the benefit of advice of counsel); *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 215-16, 633 N.E.2d 225, 230 (in rejecting claim of duress, court distinguished situations where the complaining party had not participated in the negotiations, had no input in drafting of agreement and where negotiations were hasty); *In re Marriage of Cierny*, 187 Ill. App. 3d 334, 344, 543 N.E.2d 201, 208 (1st Dist. 1989) (court relying on duration of settlement discussions as dispositive factor); *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 710, 670 N.E.2d 1146, 1152 (3d Dist. 1996) (duress not shown where challenger agreed to negotiations and took part in negotiations).

by mediation, parties are encouraged to participate more frankly in mediation and accordingly, settlement is more likely. If confidentiality was not available, mediation would simply perpetuate the adversarial nature of litigation. Specifically, in *Lake Utopia Paper, Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979, *cert denied*, 44 U.S. 1076, (1980), the court directly addressed the significance of ensuring the confidentiality of mediation:

> If participants cannot rely on the confidential nature of everything that transpires during these sessions, then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommital matter more suitable to poker players in a high stakes game than adversaries attempting to arrive at a just solution of a civil dispute.

Id. cited in Mediation: Law, Policy & Practice, Section 9.02 (Second Edition, 1994).

In this case, there is no doubt that from the onset of the mediation all parties agreed that "[n]o statements made by the participants in the mediation would be admissible in evidence or otherwise used in any further proceedings in this case." (Exhibit C at pp. 7-8). To allow new counsel for the Defendant Directors to now attack the settlement agreement based on the mediation position of the Attorney General would be in violation of that agreement and would have an extremely detrimental effect on all future mediation.

CONCLUSION

WHEREFORE, for all the reasons stated herein, Plaintiffs Buntrock and Gidwitz respectfully request that the Court deny the Defendant Directors objection and approve and enter the Consent Judgment and Order thereby dismissing the actions with prejudice.

DATED: July 23, 2001

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

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16di-001463

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on July 23, 2001, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **Plaintiffs' Response to Director Defendants' Objections to Settlement (without Exhibits)**, a copy of which is attached and hereby served upon you.

Respectfully submitted,

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Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

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(Via Messenger)

CERTIFICATE OF SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that true and correct copies of the **Notice of Filing** and **Plaintiffs' Response to Director Defendants' Objections to Settlement (without Exhibits)**, were served upon all parties on July 23, 2001 as indicated on the attached Service List.

SUBSCRIBED AND SWORN to before me this 23rd day of July, 2001.

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Mary Butler
NOTARY PUBLIC

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

EXHIBITS TO PLAINTIFFS' RESPONSE TO DIRECTOR DEFENDANTS' OBJECTIONS TO SETTLEMENT

FILED UNDER SEAL

179132

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.,* Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.,* Defendants.	)	

EXHIBITS TO PLAINTIFFS' RESPONSE TO DIRECTOR DEFENDANTS' OBJECTIONS TO SETTLEMENT

EXHIBITS TO PLAINTIFFS' RESPONSE TO DIRECTOR DEFENDANTS' OBJECTIONS TO SETTLEMENT

A. February 1, 2001 Letter from Brian L. Crowe
B. February 2, 2001 Letter from James Wilson
C. February 5, 2001 Transcript
D. February 5, 2001 Order
E. Director Defendants' Federal Complaint filed June 28, 2001
F. Judge Bucklo Opinion
G. June 29, 2001 Order by Judge Kinnaird
H. June 29, 2001 Transcript of Board Meeting
I. Consent Decree and Resolutions
J. July 2, 2001 Transcript of Proceedings
K. Bylaws
L. Conflict of Interest Policy

16di-001471

EXHIBIT A

LAW OFFICES
SHEFSKY & FROELICH LTD.

'4 NORTH MICHIGAN AVENUE
ICAGO, ILLINOIS 60611

TELEPHONE (312) 527-4000
FACSIMILE (312) 527-5921
E-MAIL sfltd@shefskylaw.com

JAMES D. WILSON
DIRECT DIAL: (312) 836-4052
DIRECT FAX: (312) 527-1007

KEC'a
212
EE
400 pm

IN REFERENCE TO:

February 2, 2001

VIA MESSENGER

The Honorable Dorothy Kirie Kinnaird
Judge, Circuit Court of Cook County
2302 Daley Center
Chicago, IL 60602

Re: ***Buntrock, et al. v. Judith Terra, et al.***
Case No. 00 CH 13859

Dear Judge Kinnaird:

We have had an opportunity to discuss the individuals suggested for mediator with our clients.

We believe, as currently postured, this may be a complex and difficult case to mediate. The mediator must not only have excellent legal skills, but also an ability to think creatively in attempting to bring these board members to a resolution of the disputes currently before them. Thus, despite the outstanding credentials of many of those proposed from the business world and litigation practices, we believe that individuals who have dedicated a considerable portion of their careers to the alternative dispute process in general and mediation in particular are best equipped to bring about a resolution. Thus, a single mediator with outstanding skills as a mediator is needed.

With this in mind, we believe that John W. Cooley, suggested by the Attorney General and Sidley & Austin, Stephen Goldberg, suggested by Sidley & Austin, Bill Hartgering, Gary McGowan and David Hilliard, suggested by our clients, are best equipped to handle this mediation.

Very truly yours,

SHEFSKY & FROELICH LTD.

James D. Wilson

JDW:kmm
690147.1
cc: All counsel of record via facsimile

16di-001473

EXHIBIT B

LAW OFFICES
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BRIAN L. CROWE
DIRECT DIAL: (312) 836-4101
DIRECT FAX: (312) 527-1007

IN REFERENCE TO:
25134-01

February 1, 2001

VIA MESSENGER

The Honorable Dorothy Kirie Kinnaird
Judge, Circuit Court of Cook County
2302 Daley Center
Chicago, IL 60602

Re: ***Buntrock, et al. v. Judith Terra, et al.***
Case No. 00 CH 13859

Dear Judge Kinnaird:

We would like to suggest the following individuals to be mediator:

(a) Joseph Stone, Esq., D'Ancona & Pflaum, Loyola University

(b) William Hartgering, Esq., JAMS/Endispute

(c) Gary McGowan, Esq., Houston, Texas

(d) David C. Hilliard, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson

Attached are copies of their curricula vitae.

Very truly yours,

SHEFSKY & FROELICH LTD.

Brian L. Crowe

BLC:kmm
Enclosures
689872.2
cc: All counsel of record via facsimile

16di-001475

EXHIBIT C

LAW OFFICES
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BRIAN L. CROWE
DIRECT DIAL: (312) 836-4101
DIRECT FAX: (312) 527-1007

IN REFERENCE TO:
25134-01

February 1, 2001

VIA MESSENGER

The Honorable Dorothy Kirie Kinnaird
Judge, Circuit Court of Cook County
2302 Daley Center
Chicago, IL 60602

Re: ***Buntrock, et al. v. Judith Terra, et al.***
Case No. 00 CH 13859

Dear Judge Kinnaird:

We would like to suggest the following individuals to be mediator:

(a) Joseph Stone, Esq., D'Ancona & Pflaum, Loyola University

(b) William Hartgering, Esq., JAMS/Endispute

(c) Gary McGowan, Esq., Houston, Texas

(d) David C. Hilliard, Pattishall, McAuliffe, Newbury, Hilliard & Geraldson

Attached are copies of their curricula vitae.

Very truly yours,

SHEFSKY & FROELICH LTD.

Brian L. Crowe

BLC:kmm
Enclosures
689872.2
cc: All counsel of record via facsimile

16di-001477

EXHIBIT D

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock

v.

Terra

NO. 00 CH 13859

1 of

ORDER

This matter coming on to be heard for status and on various motions due notice having been given, and the Court being fully advised IT IS HEREBY ORDERED THAT:

(1) David C. Hilliard of Pattishall, McAuliffe, Newbury, Hilliard & Geraldson is hereby appointed as a mediator to mediate between the parties the issues raised by Counts I, II and III of the Buntrock and Gidwitz Complaint and the Attorney General's Complaint;

(2) No statements made by participants in the mediat will be admissible in evidence or otherwise usable in any way in any further proceedings in connection with this case

(3) The mediation shall be a private proceeding and no party to this action, no member, Employee and/or Agent of the Board of the

Atty No. 90761

Name [illegible]

Attorney for [illegible]

Address [illegible]

City / Zip [illegible]

Telephone [illegible]

ENTER:

Judge **Judge's No.**

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-001478

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

2

BUNTROCK

v.

TERRA

NO. 00CH 13859

2 of 2

ORDER

Terra Foundation, or attorney for any of the parties herein shall discuss the mediation or anything said or done in the course of the mediation with members of the press or public or anyone outside of those involved in the mediation process.

④ The manner and method of the mediation will be determined by the mediator.

⑤ All motions and matters herein are hereby stayed pending further Order of the Court with the exception of the Director Defendants' Motion for Adjudgment of Fees AND ANY EMERGENCY MOTIONS FOR A TEMPORARY RESTRAINING ORDER.

Atty No. 90761

Name Steve Carlson

Attorney for Terra Fo

Address

City / Zip

Telephone

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
FEB 05 2001
JUDGE DOROTHY KINNARD - 276
DEPUTY CLERK

ENTER:

Judge **Judge's No.**

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-001479

16di-001480

EXHIBIT E

RECEIVED

JUN 28 2001

ATTORNEY GENERAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JUDGE BUCKLO

MAGISTRATE JUDGE LEVIN

01C 4976

Case No. _____

RECEIVED

JUN 28 2001

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,
PAUL HAYES TUCKER, Director, Chairman, and President, the Terra Foundation for the Arts,
ALAN K. SIMPSON, Director, the Terra Foundation for the Arts,
JUDITH TERRA, Director, the Terra Foundation for the Arts,

Plaintiffs,

v.

FLOYD D. PERKINS, in his official capacity as Assistant Attorney General, State of Illinois,

Defendant.

VERIFIED COMPLAINT

The Terra Foundation for the Arts ("Foundation"), Paul Hayes Tucker, Alan K. Simpson, and Judith Terra (with the Foundation, collectively "plaintiffs"), state as follows for their Complaint against defendant Floyd D. Perkins ("defendant"):

Nature of the Case

1. Floyd D. Perkins, the Assistant Attorney General nominally charged with enforcing the State's charitable institution laws, has engaged in an unlawful power-grab to keep the Terra Foundation (the "Foundation"), a world-renowned $500 million art charity, from moving out-of-state on his watch.

2. Using carefully timed threats of prosecutorial investigation and prosecution, Mr. Perkins has used his official powers to cower certain members of the Foundation's Board of Directors into voting to relinquish the Foundation's right of self-governance, its right to control its own assets, and its right to freedom of speech. Mr. Perkins seeks to rewrite the Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, which encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Mr. Perkins wishes to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons in perpetuity instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the founder's demonstrated intentions and plaintiffs' rights.

3. Defendant's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens to further deprive plaintiffs of (1) their freedom of speech, in violation of the First Amendment; and (2) their property without due

process of law, in violation of the Fourteenth Amendment. Plaintiffs bring this action to preclude Mr. Perkins from meddling in the internal affairs of the Foundation, to relieve those Board Members who have been subjected to Mr. Perkins's harassment from voting on the severe new bylaw restrictions he seeks, and to obtain redress for defendant's unconstitutional misconduct to date.

Parties, Jurisdiction and Venue

4. Plaintiff The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

5. Plaintiff Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachussetts.

6. Plaintiff Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired President of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming.

7. Plaintiff Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's

widow, and a resident of Washington, D.C.

8. Defendant Floyd D. Perkins is Assistant Attorney General of the State of Illinois, Bureau of Charitable Trusts and Solicitations.

9. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Personal jurisdiction exists over Defendant and venue are proper pursuant to 28 U.S.C. § 1391(b).

The History of the Terra Foundation

10. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to the present. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

11. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation.

> [T]he purposes of the corporation are to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities

which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation.

12. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He constructed a multimillion dollar museum facility on Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art.

13. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the Michigan

Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

14. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson, that he wanted his art to achieve the broadest possible impact on the public.

15. Between 1990 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized. During this period Mr. Terra also engaged in active negotiations with the Whitney Museum of American Art in

New York and the Corcoran Museum in Washington, D.C.

16. In 1996, the last year of his life, Mr. Terra focused his attention intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect to draw plans for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location, sometimes with handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

17. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable Michigan Avenue museum site.

The Board Fight Over the Future of the Foundation

18. After three years of regrouping by the Board after Mr. Terra's death, Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds

a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris; Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis.

19. Under Dr. Tucker's leadership, the Foundation began active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. In preparation for the Board's September 2000 meeting, Dr. Tucker encouraged members to focus on long-term planning options and circulate any and all ideas they might have in advance of the meeting for the group to study and consider.

20. Dr. Tucker himself circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly, Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

21. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

22. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock

filed a lawsuit in Chancery Court on September 22, 2000 against the Foundation, Dr. Tucker, Mrs. Terra, as well as Senator Simpson and non-director Naftali Michaeli. They alleged that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

23. The defendants filed a motion for judgment on the pleadings in the Gidwitz-Buntrock matter, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead encouraged simply the best possible dissemination of art knowledge and appreciation among the public in the United States and abroad. With the dispositive motion pending, the court referred the case to mediation.

The Assistant Attorney General's Demand to Keep the Foundation in Chicago

24. Defendant Floyd D. Perkins, an Assistant Attorney General charged with overseeing non-profit institutions in the Attorney General's office, had no intention of allowing one of the most prestigious and well-capitalized charitable foundations in the State to leave the jurisdiction on his watch.

25. Mr. Perkins began by intervening in the private dispute among the Foundation's Board Members. He did so expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an

"ultra vires" act. When pressed by the state court to explain how moving the collection could possibly be ultra vires, Mr. Perkins falsely asserted that the Foundation "was left for the benefit of the People of the State Illinois. . . . [T]here are enough indicia of facts that would lead one to believe that the intent of the trust was that it remain in Illinois."

26. Mr. Perkins proceeded to insinuate himself into the Court-ordered mediation process in an attempt to railroad its result. For example, at a May 10, 2000, mediation session attended only by principal board members without their attorneys, Mr. Perkins appeared and stayed the entire day. Mr. Perkins demanded throughout these negotiations that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate as a stand-alone museum in Chicago.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois for a period of at least 50 years.

c. Maintain and exhibit its collection "in the Chicago metropolitan area" for at least 50 years.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois (thereby securing the collection in the State in perpetuity).

e. Require all current Board Members to resign within one year.

27. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

The Assistant Attorney General's Resort to Harassment and Intimidation

28. Frustrated by his inability to win agreement from a majority of the Board by legitimate means, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation.

29. By way of example, on June 5, 2001, director Dr. Marshall wrote to the mediator objecting to the Perkins "settlement" proposal, insisting that "we have not agreed to any settlement of this litigation," urging the mediator to "abandon" efforts to impose portions of the plan, and asking the mediator to find "a solution which respects the independence, integrity, and identity of Dan Terra's legacy."

30. At approximately the same time, however, on information and belief, Mr. Perkins launched an ongoing non-public investigation into the Illinois Mathematics and Science Academy where Dr. Marshall serves as president full-time. Dr.

Marshall's institution depends on public funding for the vast bulk of its operating budget and is currently in the midst of a significant capital campaign.

31. By June 25, 2001, news reports indicated that Dr. Marshall had "flipped" and now planned to vote for the same draconian settlement.

32. A similar story had previously unfolded with Dr. Theodore Stebbins, another Board member and curator of American art at Harvard's Fogg Museum. Dr. Stebbins was the director who called Dr. Tucker to ask him to join the Board in late 1998. He consistently supported the efforts of Tucker and others to consider the full range of strategic planning options.

33. In March 2001, Mr. Perkins drafted a new complaint in the state court litigation seeking appointment of a receiver for the Foundation and removal of several directors, including Dr. Stebbins. The complaint named Dr. Stebbins as a defendant for the first time in the ongoing litigation, and included allegations of impropriety, including alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions. Settling the case would, however, allow for the permanent disposal of these inflammatory charges. Dr. Stebbins came to support Mr. Perkins's "settlement."

34. By virtue solely of the votes of Dr. Marshall and Dr. Stebbins, Mr. Perkins's demands are now expected to be approved

by the Board of Directors. A vote of the Board of Directors is scheduled for Friday, June 29, 2001. Once signed and entered, the settlement will carry the force of law as a consent decree and final judicial order and the Terra Foundation will be locked into Illinois for at least 50 years.

CLAIMS FOR RELIEF

Count I

Deprivation Under Color of Law of
Property Without Due Process
42 U.S.C. § 1983

35. All foregoing paragraphs are incorporated herein by reference.

36. All all relevant times, defendant acted under color of law as Assistant Attorney General of the State of Illinois.

37. Defendant's conduct constitutes an unlawful deprivation of plaintiffs' property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

38. Defendant engaged in such illegal conduct to the injury of plaintiffs.

Count II

Deprivation Under Color of Law
of Freedom of Speech
42 U.S.C. § 1983

39. All foregoing paragraphs are incorporated herein by reference.

40. At all relevant times, defendant acted under color of law as Assistant Attorney General of the State of Illinois.

41. Defendant's conduct constitutes an unlawful deprivation of plaintiffs' rights to freedom of speech under the First Amendment to the Constitution of the United States.

42. Defendant engaged in such illegal conduct to the injury of plaintiffs.

Prayer for Relief

Plaintiffs respectfully asks this Court to enter judgment on its behalf and award as follows:

(a) Injunctive relief;

(b) Damages in an amount to be determined at trial;

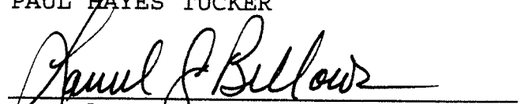
(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Respectfully submitted,

THE TERRA FOUNDATION
ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER



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McPherson & Hand
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Washington, D.C. 20005
Telephone: (202) 371-6000
Fax: (202) 371-6279

Attorneys for Plaintiffs

June 28, 2001

VERIFICATION

I, Judith Terra, the Plaintiff in this action, having been duly sworn on oath, depose and state that I have read the foregoing Verified Complaint, that I have personal knowledge of the allegations thereof and that the same are true, except as to those matters stated to be on information and belief, which I am informed and believe to be true.

Judith Terra

SUBSCRIBED and SWORN to
before me this 28th day of
June 2001.

Notary Public, District of Columbia

My Commission Expires 09/30/05

16di-001498

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation, **PAUL HAYES TUCKER**, Director, Chairman, and President, the Terra Foundation for the Arts, **ALAN K. SIMPSON**, Director, the Terra Foundation for the Arts, and **JUDITH TERRA**, Director, the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
vs.	)	No. 01 C 4976
FLOYD D. PERKINS, in his official capacity as Assistant Attorney General, State of Illinois,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs, The Terra Foundation for the Arts, Paul Hayes Tucker, Alan K. Simpson, and Judith Terra, the latter three all directors of the Terra Foundation, have sued Floyd D. Perkins, an Assistant Attorney General for the State of Illinois who is charged with enforcing the State's charitable institution laws, alleging that Mr. Perkins violated their federal constitutional rights to due process and freedom of speech by intimidating two other Terra Foundation directors who, as a result of the intimidation,[1] are

[1] Dr. Stephanie Marshall is head of the Illinois Mathematics and Science Academy, an elite but public high school in Illinois. The other director in question, Dr. Theodore Stebbins, is curator of the Fogg Museum at Harvard University and has no ties to public institutions in Illinois but was allegedly intimidated by proposed

about to vote to substantially change the by-laws of the Terra Foundation and take other acts that will force the Terra Foundation to keep its valuable art collection in Illinois for many years. Plaintiffs seek a temporary restraining order that would prevent either the vote that is expected to take place tomorrow, June 29, 2001, from taking place, or would prevent the two allegedly intimidated directors from taking part in that vote. Plaintiffs have not sued the two directors.[2] Plaintiffs nevertheless say that an injunction against the Attorney General will prevent either any vote from taking place or the two directors' participation in that vote on the ground that because of the intimidation the two directors have become de facto agents of the Attorney General. They argue therefore that an injunction against the defendant will be binding on the directors.

There are at least two problems with plaintiffs' attempted resolution of their conflict in this court. First, there is an ongoing lawsuit (two actually) presently pending in the Circuit Court of Cook County in which the present plaintiffs are defendants

---

charges of conflict of interest in an amended complaint drafted but never filed by the State of Illinois in related state litigation.

[2] Plaintiffs did offer to add them as defendants but the addition of Dr. Marshall would almost certainly prevent diversity jurisdiction, alleged presently, and unless they are state actors, could not form a basis for subject matter jurisdiction under 28 U.S.C. § 1343(a)(3), the second basis on which plaintiffs allege subject matter jurisdiction. *See* 42 U.S.C. § 1983. Whether they can plausibly be considered to be acting under color of state law is discussed further in this opinion.

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and involving the same subject matter raised in their federal court complaint. It is actually a proposed resolution of those lawsuits through a settlement which is expected to be voted on tomorrow that plaintiffs seek to stop. Plaintiffs say that neither the Rooker-Feldman doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), nor the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit this court from acting so long as it acts before the anticipated consent decree is entered in state court, but assuming that is so, principles of comity and federalism call for abstention where the issues raised can be litigated in the ongoing state action and where action by the federal court would interfere in the state proceeding.

The State of Illinois, representing Mr. Perkins, invokes *Younger v. Harris*, 401 U.S. 37 (1971), in support of abstention. *Younger* holds that federal courts cannot enjoin ongoing state criminal proceedings unless extraordinary circumstances are present. In a companion case, *Samuels v. Mackell*, 401 U.S. 66 (1971), the Court applied a similar result to actions for declaratory judgment because they would also interfere with state prosecutions. *Younger* has been extended widely, including to civil contexts. For example, the State of Illinois likens this case to *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (*Younger* abstention appropriate when the relief sought by the federal plaintiff was an

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injunction against the party that had prevailed in state court to prevent it from executing its judgment prior to an appeal to a state appellate court). That case is not precisely on point because there, judgment had been entered, whereas in the case before me the goal is to prevent judgment from being entered. However, judgment need not have been entered for *Younger* abstention to be appropriate.

The Seventh Circuit states that abstention is appropriate "if the impacted state proceedings satisfy the following requirements: (1) the judicial or judicial-in-nature state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges." *AFSCME v. Tristano*, 898 F.2d 1302, 1305 (7th Cir. 1990). These requirements are satisfied here. The state court proceedings are obviously judicial. The State of Illinois has set forth what it believes to be, and what I agree are, important state interests in its ability to regulate charitable institutions. It is not necessary that I endorse the policy adopted by the state to recognize that the interests it invokes are important. Finally, there was - and as far as I know still is - ample opportunity to raise any constitutional challenges in the state court proceedings.

The plaintiffs respond that section 1983 provides an exception to the usual application of *Younger* because federal protection is

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needed in such cases to vindicate plaintiffs' rights against state abuses. This is not in general true. For example, in *Simpson v. Rowan*, 73 F.3d 134, 138 (7th Cir. 1995), the court affirmed the use of *Younger* abstention in a § 1983 case seeking civil relief for constitutional violations of a man convicted of a crime; *accord State of Indiana v. Haws*, 131 F.3d 1205, 1210 (7th Cir. 1997)(quoting from *Barichello v. McDonald*, 98 F.3d 948, 954 (7th Cir. 1996): "*Younger* has 'come to mean that absent unusual circumstances, a federal court must refrain from entertaining injunctive relief which might interfere with the ... judicial process of state courts ....'"). Section 1983 is not a magic key into federal court, especially when, as here, there is ample opportunity to litigate the constitutional issues in state court. Moreover, there is no reason to think that the plaintiffs require the special protections of federal court even though the state is a party to the state court action. The only basis that the plaintiffs give for thinking there may be a problem with the state court is that the very able state court judge is elected. That is not a reason to think that she cannot fairly resolve charges of misconduct made against the state and its officers, such as Mr. Perkins.

Even if I were not to abstain, however, I could not grant the temporary restraining order sought by the plaintiffs. In the first place, plaintiffs do not appear to have standing. In order for a

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party to bring suit in federal court, three constitutional requirements under Article III must be met: "(1) the party must have personally suffered an actual or threatened injury caused by the defendant's illegal conduct; (2) the injury must be fairly traceable to the challenged conduct; and (3) the injury must be one that is likely to be redressed by a favorable decision." *United Transp. v. Surface Transp. Board*, 183 F.3d 606, 611 n.2 (7th Cir. 1999). In this case, the last requirement is missing.

The only defendant named is Mr. Perkins. It would do no good to enjoin him from interfering in Board business or intimidating the directors with respect to the meeting at question. The State of Illinois says that he is in Canada, and does not even know that he has been sued. As the State says, with respect to his involvement, tomorrow is the best time to hold the meeting.

The plaintiffs really want me to enjoin Drs. Marshall and Crabbins from voting or coming to the meeting, but they are not defendants. If they were named, however, they could not be sued under section 1983, the basis for my jurisdiction. The plaintiffs suggest that they can be enjoined as persons acting "in consort" with the defendant, or as his agents. But they offer no authority that persons who have been intimidated or influenced by a state actor are acting in consort with them or as agents of those who intimidate them, or indeed that they could be named as section 1983 defendants at all. That section requires state action. And that

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is hard to show.

The Supreme Court has articulated several tests for when private action is state action: the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Of these, only the "joint action" and "state compulsion" tests are worth considering. The tests are fact-specific. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir. 1990).

The "joint action" theory, articulated in cases like *Dennis v. Sparks*, 449 U.S. 24, 27 (1980), says that a private defendant acts under color of state law when he is "a willful participant in joint action with the State or its agents." A charge of joint action amounts to alleging "some agreement between private and public actors to violate plaintiff's constitutional rights." *Cunningham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991) (citing *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) ("To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown.")). "A requirement of the joint action charge therefore is that both public and private

16di-001505

actors share a common, unconstitutional goal." *Id.* If the directors in question are unwillingly intimidated, however, they are not willful joint actors who share Mr. Perkin's hypothetically unconstitutional goals. *See Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985).

I suppose one could be an unwilling co-conspirator, but what is alleged here is not that Drs. Marshall and Stebbins share any unconstitutional goals or have conspired, however unwillingly, to deprive the plaintiffs of their rights, but that they were somehow coerced into changing their votes on the settlement, basically to get Mr. Perkins off their backs, which change will have the effect of furthering Mr. Perkin's unconstitutional goals. That is not what is required.

But the situation for the plaintiffs is worse than this analysis suggests. "To state a § 1983 claim against a private actor, plaintiffs must show that the defendant invoked state authority in such a way that the defendant should be considered a state actor." *Davis v. Union National Bank*, 46 F.3d 24, 25 (7th Cir. 1994). For example in *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986), the court held that a private person became a state actor for purposes of the state action requirement when he repossessed collateral on the strength of an ex parte order issued by a court. The ex parte order instructed the sheriff to assist the private person if need be to

carry out the order. In that case it was not necessary to call the sheriff. The court held that "[t]he fact that the sheriff remained in the background and hence could not be joined as a defendant does not deprive Carpenter Cook's action in enforcing a judicial order of its character as state action." *Id.* at 1346. Here, it would not be possible to say that Drs. Marshall and Stebbins invoked the power of the Illinois Attorney General's office, which remains in the background: they are not argued to invoke any power; they have no court or administrative order to carry out, and they could not call in Mr. Perkins to back them up if they wanted to, which, the plaintiffs argue, they do not.

The plaintiffs' best shot is the "state compulsion" test, under which a § 1983 claim may be stated "when the state has so implicated itself in the defendant's action that the state has in effect compelled the action." *Starnes v. Capital Cities Media, Inc*, 39 F.3d 1394, 1396 (7th Cir. 1994). This test originated in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970). There the Court held that a "state is responsible for the [unconstitutional] act of a private party when the state, by its law, has compelled the act." 'When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it.'" *Id.* (citation omitted). However the command has to involve action under color of some "statute, ordinance, regulation, custom, or usage, of a

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State," in the language of § 1983 itself. *Id.*

The actions challenged here are not analogous to the facts in *Adickes*, where a white woman was denied restaurant service (and subsequently arrested for vagrancy) because she was in the company of African-Americans. The Supreme Court held that it would satisfy state action if she showed that she was refused service by the defendant restaurant as the result of a state enforced custom compelling segregation of the races in Mississippi restaurants. *Adickes*, 398 U.S. at 171. In this case, there are two actions alleged to force the directors to change their votes. One is proposing to name Dr. Stebbins as a defendant in a lawsuit. The other is investigating Dr. Marshall's school. These are both official practices, but in the first place, neither of these involve a "command." They do not require the conduct they are supposed to induce - that these directors change their votes. The difference between inducement and requirement is a matter of degree, but not every incentive and disincentive is coercive. For example, in *Mendoza v. United Farm Workers Organizing Committee*, 497 F.2d 311, 312 (9th Cir. 1974) (per curiam), the court rejected the idea that a union shop agreement that grows out of the "normal give and take of collective bargaining and labor-management relations," is coercive, although anyone must recognize that it involves various threats and unwelcome inducements. It might be different if Mr. Perkins had held a gun to the heads of Drs.

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Marshall and Stebbins, but all he did was to name one in a proposed amendment to a lawsuit and allegedly investigate the school of another.

Moreover, the conduct being induced (a changed vote) is not itself unlawful, unlike the racial discrimination involved in *Adickes*. Essentially the plaintiffs argue that Mr. Perkins used his undoubtedly legitimate authority to name Dr. Stebbins in a complaint and to investigate Dr. Marshall's school in order to get them to do something lawful, which the plaintiffs argue will have unfortunate effects. If the directors had just changed their minds, the plaintiffs would just have to live with it. What difference, as far as their status as potential § 1983 defendants goes, does it make if they changed their votes because of the inducements by Mr. Perkins? Even if Mr. Perkin's intentions were to violate the plaintiffs' constitutional rights by getting these directors to vote to approve the settlement, the plaintiffs do not explain, either with authority or with logic, how the directors can be charged with violating the plaintiffs' rights even under compulsion if they do what they had a lawful right to do in any event.

Since enjoining Mr. Perkins would be pointless, and Drs. Marshall and Stebbins are not state actors and cannot be sued under Section 1983, there is no relief that I can give that would redress plaintiffs' complaint. They lack standing. I abstain in any event. The plaintiffs' motion for a temporary restraining order

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must therefore be denied. The action is dismissed.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: June 28, 2001

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EXHIBIT G

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean La Buntrock et. al

v.

Judith Terra et. al

NO. 00 CH 13859

ORDER

This cause coming to be heard on the Motion for Temporary restraining Order To Prevent Irrevocable Changes To The Terra Foundation, ~~due~~ notice having been given and the reviewing the papers filed by the movants and hearing/argument of Counsel, and for the reasons set forth on the record, and the Court being fully advised, IT IS ORDERED:

1) The Motion for Temporary Restraining Order is denied.
2) This cause is set for status on July 2, 2001 at 2:00 p.m.

Atty No. 33745
Name John F. Kennedy Quinlan & Cushan Ltd
Attorney for Plaintiffs
Address 30 N. LaSalle St. 2900
City / Zip Chicago Ill. 60602
Telephone 263.0900

6/29, 01

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUN 29 2001
JUDGE DOROTHY KINNAIRD - 2761
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-001512

In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

February 5, 2001

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION
DEAN L. BUNTROCK, a Director of)
the Terra Foundation for the)
Arts, and RONALD GIDWITZ, a)
Director of the Terra Foundation)
for the Arts,)
Plaintiffs,)
vs.) Case No.
JUDITH TERRA, a Director of the) 00 CH 13859
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of the)
Terra Foundation for the Arts,)
NAFTALI MICHAELI, and the TERRA)
FOUNDATION FOR THE ARTS, an)
Illinois Not-for-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 5th day of February, A.D. 2001, at 11:11 a.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD

APPEARANCES:
QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, 2900,
Chicago, Illinois 60602), by
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL,
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;
SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. BRIAN L. CROWE,
MR. JAMES D. WILSON,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;
SIDLEY & AUSTIN,
(One First National Plaza,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON,
MR. WILLIAM F. CONLON,
appeared on behalf of Defendant
the Terra Foundation for the Arts;

APPEARANCES (Continued):
HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS,
MS. THERESE HARRIS,
Assistant Attorneys General,
Charitable Trusts Bureau,
appeared on behalf of the People of
the State of Illinois.

REPORTED BY: SHARYN A. EVERMAN, C.S.R.
CERTIFICATE NO. 84-2315.

THE COURT: Counsel, just step up and identify yourselves for the record.

I want to make sure there wasn't anything else I was supposed to read, because one of the parties said there was a reservation of rights to continue to object.

So if you would all identify yourselves.

MR. CARROLL: James Carroll on behalf of plaintiffs Buntrock and Gidwitz.

MR. KENNEDY: Good morning, your Honor. John Kennedy on behalf of plaintiffs.

MR. QUINLAN: William R. Quinlan on behalf of Mr. Buntrock and Mr. Gidwitz.

MR. PERKINS: Therese Harris and Floyd Perkins on behalf of the Illinois Attorney General.

MR. CARLSON: Steven Carlson, your Honor, on behalf of the Terra Foundation for the Arts.

MR. CROWE: And Brian Crowe, your Honor. I represent Paul Tucker, Al Simpson, and Judith Terra.

THE COURT: Are we still on the same page, that we are trying to talk about a possible

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mediator here?
MR. PERKINS: Yes.
THE COURT: Would you see if there's
eplace available for us to meet informally?
received since you were here the
last time, first of all, a letter from Shefsky &
Froelich with the individual defendants'
recommendations and resumes of all of the people
that the individual defendants have recommended.
Then I received from Sidley & Austin
their recommendations together with resumes.
I received from the plaintiffs' firm,
the Quinlan firm, the names of five individuals
and no resumes. The next day I received from
them the withdrawal of one of those names.
And I received from the Attorney
General a letter with an approach and
recommendation of co-mediation with names of
business leaders and lawyer mediators; and, once
again, although I'm familiar with most of them,
no resumes on those.
And then I received responses –
nothing more from the Attorney General; a
response from Sidley & Austin, a response from

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Shefsky & Froelich, and a response from the
Quinlan firm.
And was I supposed to get anything
else from the Quinlan firm? Because you're the
ones that said it was a short time period and
you are reserving the right to continue
objection if something came up.
Should we go into this with the idea
that there are no objections to the names that
you haven't already objected to?
MR. QUINLAN: That's our position.
THE COURT: And the Attorney General, do
you object to any of these names?
MR. PERKINS: Judge, we don't, no.
THE COURT: Is there a room available?
THE CLERK: Yes.
THE COURT: Let's have one attorney from
each side, and we'll go down the hall for a few
minutes.
MR. CROWE: Can I take Mr. Wilson? Because
he had the conversations on the phone with
everybody, Judge.
THE COURT: All right. We will be off the
record for a while.

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(WHEREUPON, discussion was had
off the record.)
THE COURT: We are going to go back on the
record on Buntrock versus Terra. Counsel, you
can stay where you are.
We have had a long off-the-record
discussion and one of the counsel had to call
clients during this period of time and wait for
calls back and that's what's taken so long.
We finally have an agreed order in
which the issues involved in this case are going
to be submitted to mediation.
The order provides for an agreed-upon
mediator who will be essentially responsible for
setting the ground rules for the mediation as
well as how the mediation will be conducted.
The parties have agreed that no
statements made by the participants in the
mediation are going to be admissible in evidence
in this court and that this is going to be a
private proceeding and no party to the action –
no member, employee, or agent of the board or
attorney for any of the parties – is going to
discuss the mediation or anything said in the

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course of the mediation with members of the
press or public or anyone outside those involved
in the mediation process.
This is a standard type of provision
in any kind of serious mediation proceeding. It
is absolutely nothing unusual.
The manner and the method of
mediation is going to be determined by the
mediator, and at this juncture we are going to
stay all proceedings in this case, including any
current briefing schedules and response times
that are in effect or the times for the filing
of any motions that have previously been set.
We have a number of hearing dates,
and we are going to strike those hearing dates.
They are the hearing date on defendants' motion
for judgment on the pleadings and the hearing
date on the Attorney General and the plaintiffs'
joint motion for the appointment of a receiver
and to enjoin the special litigation committee's
activities.
So those hearing dates are going to
be stricken for now.
Only one hearing date is going to be

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set. As we went into this mediation process, I indicated at the request of the individual defendants that I would entertain a motion which they had previously filed.

And, Mr. Wilson, the name of that motion is called what?

MR. WILSON: It's a motion to compel the advancement of fees, your Honor.

THE COURT: Okay. I'm going to have the parties agree to a schedule, and I'm going to give them the date which is the later of the dates that we have, which is I believe March 7th at 11:00.

MR. WILSON: I believe it's March 9, your Honor.

THE COURT: Let me double check in my notes. I'll need a separate order on that.

I have March 8th at 2:00. Could that possibly be it?

MR. CARLSON: That's it.

THE COURT: March 8th at 2:00. And just make sure that I have the last of the briefs by March 1st on that schedule that you've come up with.

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And also, of course, I would entertain any emergency motions for any kind of injunctive relief in the meantime if there is such a motion that really needs to be presented.

Also, the parties have advised me that a non-party to this action has put a motion on my call for tomorrow morning at 9:15. I don't have a copy of that motion.

I'm told that that is a motion – it still hasn't come in in the latest things. It's a motion by James Terra for leave to intervene, and I'll have to entertain whatever that motion is once I see it tomorrow morning at 9:15 at the appointed time since there is no one here to present it today.

And I would expect that anybody who wants to object can step forth at 9:15 tomorrow morning. You may have an agreed order in regard to that motion if counsel for the Terra Foundation wants to coordinate any efforts between now and tomorrow.

As a practical matter, however, that motion will probably be stayed also pending this mediation, but I need to hear from – I'm going to keep an open mind on that one. I don't have a movant on that, but that's something that is supposed to come in tomorrow.

The purpose of the mediation is, of course, to try to resolve this immense dispute before it goes any further, and it will go a lot further for a very long period of time based on the history that we have seen so far to date.

And I am a firm believer in alternate dispute resolution and have been an advocate of that for many, many years, as have the attorneys in this case.

The mediator that we have agreed upon is David C. Hilliard. Mr. Hilliard is a former president of the Chicago Bar Association. He's a managing partner in the law firm of Pattishall McAuliffe Newbury Hilliard & Geraldson, which is an intellectual property law firm.

Mr. Hilliard has been engaged for approximately 20 years in mediating cases in federal court, and he has also been a mediator for the last ten years for the International Trademark Association ADR Panel of Neutrals.

He has an extensive background in the art community here in Chicago. He has been a trustee of the Art Institute of Chicago since 1981. He's a former chairman of the board of the School of the Art Institute of Chicago and has been a past president or chairman of a number of not-for-profit and charitable organizations in this city.

Most everybody in this case knows him personally and there has been no objection to Mr. Hilliard at all and I'm hoping that he will be able to assist the Court in resolving some, if not all, of the issues.

And we leave what issues to be mediated and who shall be present in the mediation up to Mr. Hilliard working together with the parties, because that's what mediation is all about.

I will be discussing with Mr. Hilliard briefly before the process the history of the case to date so he can see it in some kind of context.

My understanding is that after he receives the assignment, he'll be, as would be normal, in touch with all counsel.

And we talked among ourselves subject to his agreement that he would meet probably first with counsel alone, talk about the history of the case and where they all see the case going and where it's been or what the issues are, but that the actual mediation of the disputes in this case would be without counsel present; that he would be mediating with the parties directly.

And just for clarification, when we say the parties and the issues, we are talking about the Attorney General's complaint and we are talking about the issue in the plaintiffs' complaint Count I through and including Count III.

An order has been drafted along those lines. All counsel have seen it. I am signing it now, and I guess I will see some of you tomorrow morning at 9:15 unless someone just comes in on an agreed order in that regard.

The next court date in front of me would then be March 8th at 2:00.

MR. WILSON: That's correct, your Honor.

THE COURT: Unless someone brings some

matter of an emergency nature to my attention.

Is there anything further that anybody else want to add? Okay. Thank you all, and I'm sorry we worked through the lunch hour. This order is entered.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

I, SHARYN A. EVERMAN, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 6th day of February, 2001.

Certified Shorthand Reporter

C.S.R. Certificate No. 84-2315.

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who 7:14; 10:16; 12:14
will 6:23; 7:14, 16; 10:23; 11:6; 12:10, 18; 13:18
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Y

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you're 6:4
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Board of Directors Meeting for the
Terra Foundation for the Arts
June 29, 2001

Tape 1, Side 1

(Music)	
Announcer	Thank you for using conferencecall.com. Please stand by. Your meeting will begin when the chairperson joins the teleconference by entering their unique pass code.
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Announcer	To keep background noise at your location from disrupting the call, press star six to mute or un-mute your individual line. Depending on your location, some phone lines can be louder or softer than others. If your volume in the conference call is too loud or too soft, press star four to balance your line. For more information on available conference call options, please visit our web site at www.conferencecall.com.
(Music)	
(Beeps)	
Ron Gidwitz	Hello?
Ambassador Arthur Hartman	Hello.
Gidwitz	Hello.
Dr. Stephanie Pace Marshall	Yes, who's, is that Ron?
Gidwitz	Yes.
Marshall	Ron, good afternoon. Stephanie.
Gidwitz	Hi Stephanie.
Marshall	Is there anyone else on the line?
Hartman	Yes, Art Hartman is on.
Marshall	Uh, good afternoon, Arthur, where are you?

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Hartman	I'm just in from Moscow, in France.
Marshall	Are you, so you're home?
Hartman	In France, yes.
Marshall	Oh, you're in France, OK. (laugh) OK, well we're just, uh
Hartman	Where are you, Stephanie?
Marshall	Just gathering. I'm at uh my office.
Hartman	OK.
Marshall	And I think people will be calling in from all over, I think uh Ron, you're in the uh Foundation offices?
Gidwitz	No, actually I'm in my office.
Marshall	You're in your office, OK.
(Beeps)	
Marshall	I think uh Maggie and Dean may be in the Foundation offices.
Gidwitz	The food will probably be better there than it is here.
Marshall	Anyone else join the line?
Gidwitz	Arthur, how's the weather over there?
Hartman	It's just perfectly beautiful, you wouldn't believe it. The sky's blue, no wind, nice and warm.
(Beep)	
Hartman	It was lovely in Moscow, too.
Marshall	Uh, who has, someone has joined us?
Dr. Theodore Stebbins	Uh, it's Ted.
Marshall	Uh, good afternoon, Ted.
Gidwitz	Hi Ted.
Stebbins	Hi, Stephanie.
Marshall	I'm going to turn up the volume here.
Hartman	Hi Ted. Arthur.
Stebbins	Hi Arthur.
Marshall	Ted, I don't hear you very loudly, so we may ask you to talk a little more loudly.
Stebbins	Can you hear me now?
Marshall	Yeah, that's better.
Stebbins	OK. Arthur's very clear. Where are you Arthur?

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Hartman	I'm in France.
Stebbins	Good. Who else have we got here?
Marshall	Uh, Ron is in his office, and that's all of us so far.
Gidwitz	Yeah, Ted, I'm here.
Stebbins	OK, Ron, Hi.
Gidwitz	Hi.
Hartman	Are you out on the Cape? Ted?
Stebbins	No, I'm at home in Brookline.
Hartman	Ah, there you go.
(Beeps)	
Marshall	Uh, welcome whoever has joined us. Who has joined us? Hello? Anyone join us? Ted are you still there?
Stebbins	I'm here.
Marshall	Alright, everybody still there?
Hartman	Yep.
Marshall	OK.
Gidwitz	Here.
Marshall	OK. Hello, has anyone just joined us? Hmm. OK.
Margaret Daley	There are people on.
Don Ratner	OK, talk to him on the other line.
Daley	OK.
Marshall	Uh, Don, do I hear your voice?
Daley	How do I put this on speaker? OK.
Ratner	Hello.
Marshall	Uh, yes.
Ratner	Hello.
Marshall	Yes, Don is that you?
Ratner	Stephanie, Hi. It's Don, uh, Maggie and and and Dean are here.
Marshall	OK.
Ratner	Steve Wallace, Steve Carlson.
Marshall	OK. Very good.
Ratner	And, we're waiting for the others to call in, and get hold of people, this may take a few, few minutes still.

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Marshall	We have um, we have Ron, and Arthur and Ted and I so far, uh, so we're still waiting for uh Jacques, and uh Alan, uh Judith, and Paul.
Ratner	Alright, Ron's on the phone?
Marshall	Correct.
Gidwitz	I am on the phone. I'm still at my office.
Ratner	Oh, I thought you were going to be over here. Oh, I'm sorry.
Gidwitz	Well, that's an extra sandwich for you to eat.
Hartman	Don't make me hungry.
(laughs)	
Daley	Hello, everyone.
Marshall	Maggie?
Daley	Yes.
Marshall	Good afternoon.
Daley	Yes, nice to talk to you.
Marshall	Have you uh walked past the Taste of Chicago yet?
Daley	No, but I've been waiting in traffic. (laughs)
Hartman	What's that?
Marshall	Oh, the Taste of Chicago? (laughing)
Hartman	Yeah.
Marshall	It's a huge gastronomical extravaganza where all the restaurants in Chicago, or at least the better ones, sort of lay out their wares, at uh, along the lake. It's terrific.
Hartman	Ah ha.
Marshall	And you sample your way to high cholesterol levels.
Hartman	Ha, ha.
(inaudible background)	
Marshall	I understand they will have Lipitor salesmen standing by.
Hartman	laughs. I can tell you that Mevicor works.
Marshall	laughs. Don have you heard from anyone? We know Helene will not be on the call, but have you heard from uh Judith or Paul or Alan?
Ratner	They're expected to be on the call, so we're just sort of waiting for them all to.
Hartman	And we're expecting Jacques?

Ratner	Yes.
Marshall	We are. Right. I know Paul is in Italy, I don't know where Judith or Alan are.
Ratner	In Washington, Alan's in Russia, and uh Arthur is in.
Marshall	Arthur's here.
Ratner	Arthur's already there.
(Beeps)	
Marshall	Hello. Hello? Who has joined us now?
(inaudible background)	
Marshall	Jacques, Judith or Paul joined us yet?
Ratner	No.
Marshall	OK. We're hearing uh beeps sometimes and you, you assume that someone has joined the call when you hear that.
Stebbins	And what lawyers are present?
Ratner	Uh, well, here, Mark Heatwole, and Steve Carlson.
Stebbins	OK. Oh, hi Steve.
Steve Carlson	Hi, Ted.
Susan Stone	Susan Stone, from Sidley Austin Brown & Wood, here with Stephanie.
Stebbins	Hi, Stephanie.
John Sabl	Also, John Sabl from Sidley Austin Brown & Wood, out here with Susan and Stephanie.
(Beeps) (inaudible background)	
Gidwitz	OK, who are all the lawyers, I didn't catch them all.
Marshall	Uh, we have Susan Stone, uh Steve Carlson, uh John uh Sabl, and my understanding is that Mark Heatwole is in Chicago. Uh, let me ask anyone else are there, are, is there any other legal counsel present with anyone?
(Beeps)	
Judith Terra	Hey Stephanie?
Marshall	Uh, yes, Judith, good afternoon.
Terra	Hi, I, I've been on the line a minute, I just didn't want to interrupt. Um, have we, have you started things?
Marshall	No, not at all. We're still waiting for a, well, we were waiting for you, and for Paul, and for Alan. Uh, and, and Jacques. Everyone

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else is here, except Helene, who was not going to be on the meet, on the call.

Terra OK.

Marshall So, no we've not, we've not started anything.

Terra OK. So who is we, who is.

Marshall We've just a, we've just a, the question was asked, who are the legal counsel president, uh present, and we have Mark Heatwole, who is in Chicago at the Foundation office, uh, as the regular Foundation counsel, and we have Susan Stone, uh and John uh Sabl who are here with me uh in Aurora, and Steve Carlson, uh, who is in the Foundation office, all representing uh Sidley Austin. And I was just asking every other board member on the line, uh, are there any other legal counsel present?

Hartman Not here in France.

Marshall Anyone else? Ron?

Gidwitz No, I'm all by myself.

(Beeps)

Marshall Judith?

(inaudible background)

Marshall Has anyone joined the call? Jacques or Alan or Paul?

(inaudible background)

(Beeps) (inaudible background)

Marshall Hello? Has anyone else joined the call?

Ratner Who's there?

Marshall Alan, Paul, Jacques? Hello, has anyone else joined the call?

Ratner There's a lot of beeps on the phone, but.

Marshall Yes there are. (laughs) there are. Well, at some point, we need, we will make a decision to, to move forward, but I think, uh, I know Jacques is overseas, and so is Alan, so we'll wait uh wait just a few more moments, but we are, we are going to have to proceed relatively shortly.

Stebbins Stephanie, I assume you are chairing the meeting?

Marshall I am, Ted.

Stebbins And, uh what's it, what does a quorum consist of?

Ratner A majority.

Stebbins Oh.

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Marshall	Uh, a majority of the meeting, but, as you know, we need uh six people to amend the bylaws, so that, that's critical.
Ratner	A quorum is six, and you need, you also need six to amend the bylaws, so.
(inaudible background)	
Daley	So right now, who's missing? Jacques.
Ratner	Jacques, Helene, and Paul. And Alan.
(inaudible background)	
Marshall	Uh, Don, is there any a way we might call people to see if, if they are uh available? Were you able to get the faxes to everyone as far as you know?
Ratner	I talked to everybody, everybody said they were going to be on the call. If you've heard from Helene since, fine. I talked to Jacques, who said Helene was going to be on the call, I've talked to Andreani, I've talked to Paul, I've talked to Alan, everybody.
Marshall	Oh, OK.
(Beeps)	
Marshall	Uh, has anyone joined us now?
Stebbins	It sounds like Don did a good job of reaching everyone.
Marshall	Yes, I mean, we, we do have a quorum now, but I think in fairness, we'll wait just a few more moments.
(Beeps)	
Marshall	Hello, has anyone joined us? Arthur, are there challenges when you call in from Russia?
Hartman	No.
Marshall	No? OK. I know that's where Alan.
Hartman	Well, I'm calling from France, but.
Marshall	Well, I know you are, but Alan is in Russia, so I was just curious.
Hartman	No, no, the same system applies there.
Ratner	Actually, Stephanie, we are trying to call him. He asked us to call him.
Marshall	Oh.
Ratner	And, we got hold of his, his number, but there's nobody there, we get a voicemail. So he may have gotten delayed or something.
Carlson	Or he may be on the phone.
Daley	What time is it there?

Ratner	9:30.
Hartman	A lot of traffic there. What hotel is he in?
Ratner	I have no idea. If I give you the number, you recognize it?
Hartman	Nope.
Gidwitz	I take it you don't (inaudible) numbers?
Hartman	Nope. (laughs)
(Beeps)	
Marshall	Has anyone just joined us?
Ratner	Stephanie, apparently when Karen tries to call these people, on the line it beeps. That's what the beeping is all about.
Marshall	Oh, I see. I thank you. I keep thinking somebody is joining the call. But Don, you say you talked to Jacques Ahrweiler and Helene will be on the call?
Ratner	I talked to Jacques last weekend, and he said that he was going to get Helene on the call, but you don't think so.
Marshall	OK. OK.
Gidwitz	Could someone please share with me what happened, while we're waiting, in court today? What's all that about?
Carlson	I guess I can. This is Steve Carlson, from Sidley Austin.
Marshall	Steve, could you speak up a little bit please?
Carlson	I'm speaking pretty loud for this room.
Marshall	Oh, OK, I'm sorry.
Carlson	But that's OK if I don't blow anyone out of the room, I'll keep speaking up. Uh, there was a motion filed by Mrs. Terra and Dr. Tucker and Senator Simpson, uh, for a temporary restraining order to try to stop this meeting from going ahead. Uh, I won't.
Hartman	What court was this in, Steve?
Carlson	In the state court in front of Judge Kinnaird, who we've been in front of in the litigation all along.
Hartman	Right.
Gidwitz	Who are they representing? I mean, who, did they file that themselves, or was it, because yesterday, apparently, they filed on behalf of the Foundation. Were they doing that again today?
(Beeps)	
Carlson	They had Joel Bellows from the firm of Bellows and Bellows, and Laurel Bellows was there as well, uh, Leonard Garman, uh let's

see, Chris Todd. Those were the same people from yesterday in the federal court. But today they were representing only the individual uh defendant directors in this main lawsuit. And they sought uh a TRO to block this meeting from going forward, and made uh much the same argument that they made in the federal court uh yesterday. Uh and the attorney general uh primarily responded to it. Judge Kinnaird I think at the end of the day was interested in what irreparable effect, whatever happens at this meeting has. And I think at the end of the day she decided that since the draft resolutions that the board was going to be considering appeared to say that whatever you all vote to do today does not become effective until the consent judgment and order is entered by the court herself, she didn't need to enjoin this meeting at all. That she could give uh Senator uh Simpson's lawyers and Dr. Tucker's lawyers and Mrs. Terra's lawyers an opportunity to make whatever presentation they wanted to, to make whatever argument they wanted to about the propriety of the settlement when the consent judgment is presented to her at a later date, which may very well be Monday afternoon at 2 o'clock.

Gidwitz — And who's defending the Foundation, are you?

Carlson — I'm the Foundation's lawyer, yes.

Gidwitz — And what kind of a defense did you put on today, aggressive?

Carlson — Uh, I'm always aggressive.

Gidwitz — That's what I've heard. I haven't seen you in action. I understand you're always aggressive. Were you aggressive today?

Carlson — A properly noticed and called the board meeting and that I had argued that strenuously to the court on many occasions that it was the Foundation's position that a properly noticed board meeting should go ahead. It should not be interfered with by disgruntled members of the board or by the court or anybody else.

Hartman — Thank you.

Gidwitz — Thank you.

Marshall — Is there anyone else on the call? Jacques, Helene, uh Judith, you are on the call, Paul and Alan?

Terra — Stephanie?

Marshall — Yes, Judith, is that you?

Terra — Yes.

Marshall — Yes, go ahead, Judith.

Terra — No, I was just responding, I had to step out. Emma came to get me.

Marshall	Oh, yeah, we're still waiting for Jacques, Helene, Alan and Paul.
Terra	OK. There was a call on my other line.
Ratner	Jacques, how are you? Tali.
Gidwitz	We've got Tali too? I'm sorry, I didn't hear the answer to that. Is Tali on the call as well? That's the question.
Marshall	Uh, it's not appropriate for anybody to be on the call other than the directors and the legal counsel that we have so noted already.
Stebbins	Is Don there?
Carlson	No, he just left.
Daley	Why is Tali talking to Don?
Dean Buntrock	Tali called Don. He left.
Daley	Don left the room.
Stebbins	I think that's extremely inappropriate.
Daley	So do I.
Marshall	But we will not proceed until this is a meeting of the directors and the legal counsel that we have already so noted. So um when everybody gets back I will make, ask Tali to leave the call.
Buntrock	He's not on this call.
Marshall	Excuse me, I really can't hear very well.
Daley	He's a, he called Don on his cell phone and Don has left the room to talk to him.
Marshall	OK, that's fine.
(Beeps)	
Daley	I still don't think that's appropriate in either case.
Marshall	Has anyone else joined the call? Jacques, Helene, Alan or Paul?
Gidwitz	How long do we expect to wait? Out of curiosity?
Marshall	Not, not very much longer, Ron. I think it's important that we proceed and a
Stebbins	Don is, Don is.
Marshall	And move forward on this meeting as expeditiously as we are able to do.
Ratner	Well, everybody, uh, we've been calling everybody, we can't get ahold of anybody who's not on the call.
Marshall	OK, then I think uh, I think we will begin. As you all know, uh, this is Stephanie, and I hereby call this meeting to order. Uh, could

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	we please have a roll call of all present? Jacques Andreani, Helene Ahrweiler, Dean Buntrock
Buntrock	Present.
Marshall	Maggie Daley.
Daley	Present.
Marshall	Ron Gidwitz.
Gidwitz	Present.
Marshall	Arthur Hartman.
Hartman	Present.
Marshall	Stephanie Marshall, present. Alan Simpson, Ted Stebbins.
Stebbins	Present.
Marshall	Judith Terra.
Terra	Present.
Marshall	Paul Tucker. Alright, as we know, also present are Don Ratner, Susan Stone, Steven Carlson, John Sabl and Mark Heatwole.
Heatwole	Uh, Stephanie, Scott Sela from my office who was in court this morning observing the proceedings has joined us. That's Scott Sela (spelling).
Marshall	Scott is from Winston, Mark?
Heatwole	Yes, ma'am
Marshall	And he is regular Foundation counsel. Alright, we are here today to consider, as you know, a proposed settlement of outstanding litigation and the number of matters closely related thereto. Dr. Stebbins?
Stebbins	Yes, I'd like to make a motion. I hereby move the adoption of all the resolutions contained in the three pages of resolutions which the Foundation distributed, including, without limitation, the approval of the consent judgment and order distributed by the Foundation with such resolutions with James Donnelley, Marshal Field V, Kathleen Foster, Robert Hamada and Frederick Cribel, or Krehbiel, I guess it is, being the five new class two directors. And, in addition, I have a couple of minor changes, um.
Ratner	Ted, could you go through those five names one more time?
Gidwitz	Yeah, read the list again, if you wouldn't mind please?
Stebbins	The list is James Donnelley,
Gidwitz	Donnelley, OK.

Stebbins	Marshall Fields V, Kath, Dr. Kathleen Foster, Dr. Robert Hamada, and Mr. Frederick Krehbiel.
Marshall	And Ted you said you have some minor changes?
Stebbins	And I have some minor changes, which various people have suggested. Um, first, in the draft resolutions, uh, paragraph 4, where it reads "further, resolved that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized and directed in the name and on behalf of the Foundation to file with the Circuit Court of Cook County the consent judgment, if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the attorney general of the state of Illinois and", and from there on I would suggest we take out "and any other document they believe necessary or advisable in connection with the settlement of the litigation." So consider that part of my resolution, amending that phrase. Uh.
(Beeps)	
Daley	What paragraph are you?
Ratner	Yeah, we can't find it, could you, this is on the first page of the resolution, page 10 of your.
Stebbins	Yes, paragraph 4
Ratner	Wait a minute let me get my directions, page 10 of your fax.
Dr. Paul Tucker	Sorry, everyone, I've just uh finally made it through the Terrace Midland to be here.
Marshall	Oh, Hi Paul.
Stebbins	Hi, Paul.
Tucker	Hi, Stephanie. Hi, Ted.
Marshall	Paul, we are, Ted is uh, we have called the meeting to order and Ted is uh, Ted has almost concluded his resolution, and Don is helping people find the appropriate
Ratner	Page 10, first paragraph Ted, I think it says, it starts out "further resolved."
Stebbins	"Further resolved."
Ratner	OK, now what do you want to change?
Stebbins	I want to take out uh, the last phrase "any other document that they believe necessary or advisable in connection with the settlement of the litigation."
Marshall	And you said you had another minor change?
Stebbins	And that's my only change in the, in the resolutions. In the consent judgment, uh, and order, under paragraph 2.

Ratner	Wait a second, now what page is that, Ted?
Stebbins	On page, uh,
Ratner	Five of the fax. Paragraph 2, "the parties hereto"
Stebbins	I'd like to say "the parties, including plaintiffs and defendants."
Marshall	No, Ted, you can't do that. The Foundation can't speak for defendants.
Gidwitz	Well, the original documents, Stephanie, if you'll recall, spoke to the plaintiffs and the defendants. If you want to add people, that's fine, but you can't subtract.
Marshall	Well, it's the Foundation, it's my understanding, and maybe legal counsel can speak to this, that the, this wording is the only wording that can that can be in place, because the Foundation cannot require the defendants to do anything against their will.
Gidwitz	Let a court of law decide that. What I am concerned about with this language, if I understand, Stephanie, is, I don't want to be set up to be sued. And this strikes me, the way that this has been drafted, that it doesn't release the defendants, and therefore it's permissive in terms of having them sue me.
Marshall	I think, uh
Gidwitz	And I want protection.
Stebbins	Well, I'd like to
Marshall	Well, I think, Ted, uh, I think.
Stebbins	Stephanie, why don't we ask legal counsel their opinion, because I
Tucker	Can you speak as to why you want to include this?
Stebbins	I want to be accommodating.
Marshall	Uh, may I, let me take the privilege of the chair one moment. We are in the middle of a proposed resolution. I recommend uh, or proposed motion. I recommend that Ted make his motion. I will see if there is a second. If there is not a second, the motion fails. There may be a second, and then we have discussion. In my view, it is not appropriate to argue, uh, the language or the merits of a motion, until the motion is duly put on the table.
Gidwitz	Absolutely. I will comply.
Marshall	Ted, if maybe you will.
Stebbins	OK, my motion includes the slight change of the resolutions, it includes in the consent order making it uh, "the parties, including plaintiffs and defendants, hereto desire". And it includes, under section 7 of the same consent judgment, that includes modifying the second para, the second phrase, with the, and it should now

read, "with the exception that in until the annual 2002, sorry until the 2002 annual meeting, or December 31, 2002, whichever occurs first, then 50% of such board positions should be held by Illinois residents." The purpose of this is to guarantee that is happens in case the annual meeting is delayed for some reason. And uh, those are my, that's my resolution.

Marshall — Alright, we have a resolution, and since it was uh, a rather circuitous, I don't know if it's appropriate for me either to ask you. I think maybe you should state it again, so people are very clear what the resolution is.

Stebbins — My resolution, I move adoption of the resolutions, OK. There is a three pages of resolutions, which we have distributed, including without limitation, the approval of the consent judgment and order with James Donnelley, Marshall Field V, Kathleen Foster, Robert Hamada, and Frederick Krehbeil being the five new class 2 directors with the other uh three amendments that I mentioned.

Marshall — OK. We have a motion on the table. Is there a second.

Gidwitz — I'll second it.

Marshall — Alright, that's moved by Ted, seconded by Ron. The motion has been moved and seconded, uh

Gidwitz — I'd like to offer a

Marshall — Uh, let me, because it involves an amendment to the bylaws, it's passage requires the affirmative action of at least six directors. Now it's appropriate to call for any discussion. I think Ron, if you'd give me the privilege of the chair, I would like legal counsel to address um one of the changes that uh Ted uh referred to, because I, although I want to be able to uh vote for this motion, I would not be able to do so with one of the changes that he's, he's suggested, because it's my understanding that it is simply not possible for the Foundation to make this judgment, so I would really like legal counsel, so that we're all clear uh, on exactly uh where we are and uh where we are at this point in time. I personally don't have any problem with the other modifications that Ted, you made, but I, I would not be able to support the motion as it is presently.

Stebbins — Let's try to let the lawyers lead us through the problem here.

Marshall — Yes. Yes, I've asked legal counsel to do that.

Carlson — Do you have any preference as to who addresses it? Do you want Susan to address it, or John, or

Stone — I can address it. This is Susan Stone from Sidley Austin Brown & Wood. I understand, Stephanie, you would like guidance with respect to whether paragraph 2 of the proposed consent judgment

and order um could be amended to change the description of the parties giving the relief um to a more general description, which would include all of the parties, including the plaintiffs and the individual defendant directors, is that correct?

Marshall — That's correct.

Stone — Alright. Um, it is my understanding that the individual director defendants are not prepared voluntarily to enter into this proposed settlement. They are not agreeing to settle their litigation. Um, and that therefore they are not voluntarily agreeing that

Stebbins — We don't know that until we've taken a vote, right?

Stone — My understanding, that is correct, you don't know that categorically, it is my understanding from, from what was recorded from the mediation sessions, that the individual director defendants are not prepared to voluntarily release. And I think the question being posed is whether or not the Foundation unilaterally can impose upon a non consenting party an obligation that they release their legal rights. And I do not believe that the Foundation can do that, or even that, if the Foundation purported to do it, that it would have any legal effect. Uh, you could indeed, as Ted points out, query, uh the individual director defendants as to whether or not they will voluntarily agree to release, and then all of this is, uh perhaps an unnecessary academic legal debate. Uh, that might be appropriate at this time.

Gidwitz — Uh, let me ask you a question, before we ask that one, and that is, what is the effect of doing it, and, I just heard you say, Susan, that it may not have any legal effect, period. So, what's the downside of just including them?

Stone — No, I'm saying, that even if you purport, with that question from Ron, Ron even if you purport to, um, have the Foundation, uh require the individual defendant directors to release rights, that requirement may not be binding, in other words, it might not be a valid release, because

Gidwitz — I understand, but there's no damage done.

Stone — Well, I do not believe that the Foundation can do this. I do not believe the Foundation can take away the legal rights of another party.

Gidwitz — I understand that, but we have it, what my concern is, Susan, is that we have a document that was written and agreed to by six directors, wherein, if it doesn't materially affect the execution of the document, why are we making changes?

Stone — No, the question is, what can the Foundation counsel put in front of the board, as a document which the board could pass that has the

	possibility of standing up to judicial scrutiny, if the board decides it wants to pass it. And I'm telling you that um whatever six individual members of the board might have done in the last mediation session, that was not an act of the Foundation. The Foundation is a corporation. It can only act through a majority vote of the board of directors at a duly called meeting. Um, that has not happened until today. And so the question is, what can the board do at this point in time. The board as a Foundation, which is one party to this litigation, cannot unilaterally take away the rights of other parties to the litigation.
Gidwitz	I keep hearing this, and frankly, my counsel has also reported to me on numerous occasions that you have made the case that, unless we have a duly called meeting, there's a difference of opinion. And the real issue here, it seems to me, is we'd like to get, we'd like to get, this litigation settled. And therefore, we'd like to have a document that we can go to the court with next week, which everybody can agree to. And if, in fact, I feel exposed, I will not agree. It's senseless, then going through this whole process is senseless.
Stone	Well, with
Carlson	Can we left Mark Heatwole respond to that, he wanted to say something, if you could let him talk.
Mark Heatwole	Just, Ron?
Gidwitz	Yes, Mark.
Heatwole	If you brought this actions solely against the Terra Foundation
Gidwitz	Say again?
Heatwole	If you brought this action solely against the Terra Foundation, you would be in a position today to settle this matter. But by naming three of the individuals, you, I believe Susan's position is right, that the agreement on behalf of the board of the Foundation, to settle this matter, only will operate vis a vis the Foundation. And not as against the individuals and their rights. That puts you at peril, and being at peril in this sense. On those same terms, you could be in a position where you will have settled your claims against the Foundation, and under this agreement against those individuals, and waive those rights, and those individuals may still have the ability to claim back against you. You can't force them to waive those rights through this settlement agreement, I don't believe.
Buntrock	That's fine, Mark. Ron's point is, which I agree, then it doesn't have to be taken out, because the matter can be decided by the court.

Heatwole — But if you vote in favor of it, and Ron votes in favor of it, what I am telling you is it could work to your detriment. I'm not your lawyer, but, you've got a situation, where, everything I know about this situation tells me, force Paul, Judith and Alan to settle a case that they don't want to settle. And and that means this is a one way, potentially a one way settlement by you and Ron against them and they're not waiving rights against you.

Marshall — Yeah, I have to say, just to weigh in on this personally, that, uh, I mean, it's no secret that, that this, uh, this motion, and any changes in bylaws require uh, the vote of at least six directors. And I cannot support the motion as it is currently stated with this amendment to number 2. I can certainly support, and will support, the other changes, Ted, that you made, uh, in both the resolution, and the consent judgment order they seem reasonable. But I cannot, and will not, support this motion, which frankly means you do not have six votes. So, I came prepared, I read the motions, I read the consent, I mean I read the resolution, I read the consent judgment, I am prepared to support this, but this is uh, a last minute eleventh hour change, and I cannot be more clear than I'm being right now. I cannot and will not support this change as it is currently stated.

Gidwitz — Which change is that, Stephanie?

Marshall — You can continue the conversation, if you wish, uh, or Ted you can amend your motion.

Stebbins — Well, I knew this was of concern to Ron, that's the reason I suggested it, to hope the lawyers could work it out, but if it's a, uh, if it's thought to be, uh, a legal impossibility, then I would go back to the uh original text, as it was distributed. And leave out the amendment, of section 2.

Marshall — You are accepting an amendment?

Stebbins — Uh, yes.

Marshall — OK.

Buntrock — Stephanie?

Marshall — Yes, Dean.

(inaudible background)

Buntrock — Doesn't Ron have to agree to that?

Hartman — No, it's Ted's motion.

Marshall — We had, Ted has a motion, he's accepted the amendment, which is, keeping the first two changes he made and eliminating the change in the consent order paragraph 2. But I guess the question is, is there any further discussion, or we have a properly made and

seconded uh motion and then we could proceed with the vote, if we are ready to do so.

Buntrock — Stephanie, wait a minute. I think there's more discussion.

Marshall — That's fine.

Buntrock — Uh, first of all,

Stebbins — Who's this speaking?

Marshall — This is Dean.

Stebbins — Hi Dean.

Buntrock — Hi. First of all, I'd like you to respond. You made your position very very clear, but when, when counsel for the Foundation, and counsel on the lawsuit has both said, as Susan has said, that you can't do it, uh, what difference does it mean, to leave the language in there? I cannot see why you take such a strong position, and uh

Marshall — I guess I take.

Buntrock — And uh, (inaudible). Can you respond to that?

Marshall — Yeah, I mean, uh it's my understanding, well, based on what legal counsel is saying, Dean, I would be voting for something which is, which is uh judged not to be legal and/or appropriate. I, I will not vote for,

Buntrock — No one, no one has said,

Marshall — I will not vote to force anyone, uh, into a position, that, uh four attorneys are saying, uh, is inappropriate. Uh, the Foundation, I don't think, or certainly I do not want to approve a settlement, uh, that, that contemplates a release that's that doesn't exist.

Buntrock — Stephanie, they haven't. All they've said is that you legally can't do that. So,

Stebbins — I appreciate the fact.

Buntrock — If you can't do it, you can't do it. And uh, I think changing it is unnecessary.

Carlson — Can I make a comment? I've got one more legal comment to make. This is Steve Carlson.

Marshall — Yes, Steve, go ahead.

Carlson — I think anybody who is interested in the possibility of a settlement accomplished and the consent judgment and order being approved by the Foundation and entered by the court needs to consider at least for a moment the question of what happens when it's presented to the court if the consent judgment and order presented to the court contains some obviously questionable provision. You are concerned about the possibility that there may be some

members of the board that will attack the consent judgment and order, as they have already tried to stop this meeting. Uh, I would as counsel to the Foundation say that you probably ought to think strongly about doing something that is as close as you can to being something that looks like it's appropriate. And within the limits of what the corporation can truly do. I'm afraid you may be giving fuel to the fire, that somehow the corporation has acted inappropriately, if it passes resolution, or consents to consent judgments and orders, that, uh, have clear legal defects in them.

Stone — I would like to underscore that, and add that, although I was not in court today, it is my understanding that the judge has in essence invited the individual director defendants' attorneys to raise any concerns they have when this order is presented to her. So, uh, you know that this order and the procedure that led up to the orders, in fact you vote for the order, uh, will be under judicial scrutiny, and so I second what Steve says, that I think you want to err on the side of doing everything with scrupulous attention to detail and keep your process as clean as possible.

Marshall — And I really, I think frankly, that, Dean, to your question, and Ron, that if you wanted a release from the defendants, then I think it was essential at the time we were in mediation that there was, uh, uh, there was another line, uh, or sentence, or something that would have induced the individuals to settle, but that was not part of the mediated agreement, uh, and, as I said, at this point, I feel it is highly significant, eleventh hour change, and, I'll stand with what I said before, I came to this meeting as I trust we all did in good faith, there were six people that signed off on an intention to ratify, there were some things we had to work out since the last mediated agreement, especially the slate of officers, uh, and I think, um, we were prepared, and I hope, still are prepared, uh, to to reach agreement. But, uh, if we hold, if some hold fast to this, uh, then that is not going to be possible.

Stebbins — Well, I'm persuaded that I was in error, and that I think the attorneys comments are appropriate, and we need an agreement that will stand up under scrutiny.

Gidwitz — Stephanie, I will back off, excuse me, I've got a little food in my mouth, but I will back off of my

Tape 1 side 2

Gidwitz — For the record, that the language that plaintiffs and defendants originally, that the Sidley & Austin attorneys have been moving to change it, I believe

Stebbins	It was written in the
Gidwitz	That is correct.
Stebbins	Distributed uh version.
Marshall	OK, thank you Ron.
Tucker	This is Paul. Can, am I coming through?
Marshall	Yes, you are, Paul, go ahead.
Tucker	I appreciate the fact that this will be dropped. I just for clarification, can I just, Ted, you had been the one who proposed it, could you just speak a little bit more, as to why, so it can be understood a little more clearly as to that we've spent so much time on this, as to why this really had been of concern?
Stebbins	Paul, are you asking me?
Tucker	Yeah.
Stebbins	Uh, the um this is discussing section 2, well, I think we've discussed it at length, it was written, as you know, in mediation, to cover um plaintiffs and defendants. And, uh, we're just, we're hearing now that defendants can't be covered. And uh, I was, uh, trying to make it broad enough to win everyone's acceptance, but, but I'm now persuaded, having heard the legal arguments that, that that's not a good course. So that's why I'm going back to, to the original Sidley version.
Marshall	I, I am prepared to call for a vote on the question, but I don't want to uh, terminate discussion prematurely, so is there uh any further discussion on the motion, which also has been seconded?
Daley	I'm not clear. I want to know exactly what we're talking about, now, in terms of changes. I'm personally not clear.
Marshall	Alright, Maggie, if I can try to summarize where we are, um, we have a, we had Ted's motion, which was to adopt the resolution, that the Foundation had prepared, which is that three page document that we all received. And he further modified his resolution, uh, motion, to, uh, make a minor change on the resolution, which was page 1, paragraph 4, uh, the last two sentences were eliminated, so in that paragraph it ended, the attorney general of the state of Illinois. And then we had also a minor revision on the uh, consent agenda, paragraph or number 7, which added after the 2002 annual meeting, or until 12/31/02, since the date was not clear. So it was Ted's motion to approve the resolution, and then those two minor changes, one to the resolution, and one to the consent judgment.
Stebbins	Right.

Terra	Pardon?
Marshall	Hello.
Ratner	Closer to the phone.
Terra	I've got it right in my ear. Can you hear now?
Marshall	Yes we can, not very well, but we can.
Terra	OK. I just want to say that I am definitely going to object to uh any waiver of my legal action. And I think I would like to express strong objection to the fact that uh Allan Simpson, Helene Ahrweiler and Jacques Andreani are not on this, uh, at this meeting, not on this call.
Marshall	Yeah, we will.
Gidwitz	I couldn't hear a word of that Stephanie.
Marshall	Uh, she said uh, that she uh would not agree to anything that that waived her rights, and that she asked she is voicing strong objections uh, to the fact that Jacques and Helene and Alan are not on the call. And as here, I can just simply duly note that, but they were given every opportunity to be on the call, Don talked with
Hartman	I had no trouble getting in from France.
Marshall	They said that they would be, so it is absolutely most unfortunate, but we really could not wait, so Judith, we will, we will note that for the records, this is being taped, so that will be recorded. Don have you concluded your review? We are
Ratner	No, no, Dean is now talking to Mark. And Scott, he's got a question about the last line that's being eliminated on the uh resolution. Uh, which is "and any other document," and so forth and so on, that's paragraph 4.
Marshall	Correct.
Ratner	So there's a question about that, you want to explain to everybody?
Heatwole	Actually, I didn't draft this, John Sabl did, but John, maybe you would tell us why you would include something like that language in your resolution. I said to Dean I thought it was a catch all in case there was anything else that Sidley needed to do in order to effectuate the settlement.
John Sabl	And that is why it was there, Mark, you're absolutely right. My understanding was that, Ron had a concern as to whether it was too broad or seemed to contemplate going very far afield, we didn't think there was anything else that would need to file, and anything that was ministerial we think would have been would be contemplated by by the general authorization at the end. So we think it would be better to have it in, on the one hand, but we don't

Gidwitz	Alright, well, let's just strike it, and then I'll be happy.
Sabl	OK. Good. Again, Mark, we don't believe that uh this would mean that anything else that was you know so clearly contemplated would be prohibited from us doing it, it was just that, I think it's something that Ron is concerned that, and that there shouldn't be substantive changes made.
Heatwole	I had no problem with taking it out. Dean raised the question with me as to whether or not there was impact from that, and I was just trying to explain it.
Sabl	Yeah, I don't think there really is an impact. I think we don't
Buntrock	I'm satisfied with my question. Thank you.
Sabl	Thank you.
Marshall	Uh, Don, have you uh, have you been able to clarify for Maggie and Dean exactly where the changes are, and then, uh, if so, uh everyone fully understanding what we what they will be voting on, then I would uh, like to call for a vote on the question.
Terra	Stephanie?
Marshall	Judith?
Terra	Yes, I would like to say a few words before the vote is taken.
Marshall	Yes, please.
Terra	Can you hear me OK?
Marshall	Yes we can.
Terra	It must be the phone, I don't know what.
Ratner	Can we just respond to Stephanie's question? I think Mrs. Daley and Mr. Buntrock can respond to that better than I. I think I described it, but, they're nodding that they understand all this.
Marshall	OK, fine. Thank you. Judith, go ahead.
Terra	Well, I just want to say before we take a vote on this motion, that uh the outset with all due respect to the each of my fellow board members, I think that, the uh the mediation results that we are being asked to endorse, um and for which we really had high hopes in the beginning, has turned out to be something very different than what we anticipated. Um, for me, it's a process which has distorted the consensual nature of what mediation really should be all about, as reflected in this document. And I think as Paul Tucker our chairman has already observed, the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees. And I think that this vote that we're about to take is a very momentous decision. Because basically today we're going to determine whether we will allow the Terra

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Marshall — Is there anyone who has a statement, uh, to make, otherwise I will, I think it's appropriate that we now call for, call the question.

Tucker — I'd like to make a statement, Stephanie.

Marshall — Paul is that you?

Tucker — That's me.

Marshall — OK.

Tucker — Um, I, it's painful to hear, the comments that have been made, and in many quarters, although I admire the honesty about it all. I think it's very difficult to be able to predict the future in any form or fashion. None of us could have thought we would be at this particular juncture when we all joined the board. Maybe some did, I don't know, but I certainly didn't. And I don't think Ted did, or Stephanie did. And I applaud their efforts to try to be able to find the right way to act in these difficult causes. But I find most disturbing is the ways in which uh, this Foundation is a not-for-profit entity, is in fact going to become part of uh, the state's purview. Uh, the invasion of its independence, its privacy, of a, a public domain, i.e., the hand of the attorney general, I find repugnant. I find it detrimental and offensive, I find it also counter to the very foundations on which foundations and America as a whole are supposed to be founded, which is why I protested this mediation will continue to do so. Uh, I also find it, uh, disturbing that the um, resolution, um calls for the continued presence of uh the Illinois factions, not that they're not wonderful people in Illinois, certainly more than enough to handle all of this, but I think that that should have been our choice, not somebody else's choice. Uh, and that compromise of our independence is something which uh I think again goes right to the heart of the matter. I think that everybody's consciences have been articulated with grace and conviction, and I think that that is appropriate. But I also believe, in the end, that there are serious principals, uh particularly that of the ways in which a foundation is supposed to operate, which are deeply compromised by this mediation and this process. And I think that it is in the end a sad day for uh the Foundation, and ultimately a sad day in the larger case for the ways in which the state interferes with uh private property.

Marshall — Uh,

Hartman — I I really would like to make one further, short comment. And that is that foundations are established under certain laws, and have to meet certain requirements. Their responsibilities are to the people, uh, of the jurisdiction, that has permitted them to set up these tax free organizations. Therefore, I do not see that an oversight by such authorities is out of order. Thank you.

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Marshall	I think it's time for us to call the question, so we will now proceed to a role call vote on the motion. Uh, and I guess the question is, uh, OK, Mr. Jacques, not here, Helene, not here, Dean,
Buntrock	I vote yes.
Marshall	Maggie.
Daley	Yes.
Marshall	Ron
Gidwitz	Yes
Marshall	Arthur
Hartman	Yes.
Marshall	Stephanie, yes. Alan, Ted
Stebbins	Yes.
Marshall	Judith
Terra	No
Marshall	Paul
Tucker	No.
Marshall	Paul?
Tucker	No, Steph.
Marshall	Oh, I'm sorry, I didn't hear you, Paul.
Tucker	That's OK.
Marshall	Um, the motion has been passed by six board members, uh, we now need a motion for adjourn.
Stebbins	I move to adjourn.
Marshall	Oh, I'm sorry, is there, the agenda did say, any new business. Is there any new business which needs to come before this board at this time? Hearing none, uh, we need a motion to adjourn.
Stebbins	So moved.
Marshall	Is that Ted?
Hartman	Second
Marshall	Second, I'm sorry, Dean?
Buntrock	No, that was Arthur.
Marshall	Oh, Arthur.
Hartman	Yes.
Marshall	Do we need a role call? Uh, role call for the motion? Dean.

Buntrock	Uh, I move to ad, we adjourn, or uh, I vote to adjourn.
Marshall	OK, yes. Maggie.
Daley	Yes.
Marshall	Ron.
Gidwitz	Yes.
Marshall	Arthur.
Hartman	Yes.
Marshall	Stephanie, yes. Uh, Ted.
Stebbins	Yes.
Marshall	Judith.
Terra	Yes.
Marshall	Paul.
Tucker	Indeed, yes.
Marshall	Uh, the uh, this meeting is adjourned. Thank you all, and bonne chance.
Hartman	Thank you.
Ratner	Thank you.

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts having moved to dismiss Counts I and II of the Buntrock and Gidwitz Complaint, Paul Tucker having answered the Buntrock and Gidwitz Complaint and having denied its allegations, no other answer having been filed to either complaint and the parties having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. The parties hereto desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts ("the Foundation"), its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4 The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the

negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A. No other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE:_____

_____
Judge Dorothy Kirie Kinnaird

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/02/01

Ronald L. Gidwitz

Date: 7/03/01

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd Perkins
Assistant Attorney General
State of Illinois (Title)

Print Name: FLOYD PERKINS

Date: 7/6/01

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: _____

Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its Treasurer and Secretary

Print Name: Stephanie Marshall

Date: July 6, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

[Resolutions Relating to Special Meeting of Board of Directors of the Terra Foundation of the Arts to be Held on June 29, 2001]

WHEREAS, the Foundation is a defendant in litigation (the "Litigation") entitled Dean L. Buntrock, a Director of the Terra Foundation for the Arts, and Ronald Gidwitz, a Director of the Terra Foundation for the Arts vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts and the Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation in the Circuit Court of Cook County, Illinois, County Department, Chancery Division (No. 00 CH 18359); and

WHEREAS, there has been presented a proposed settlement to the Litigation and this Board of Directors believes that it is in the best interests of the Foundation to accept the proposed settlement and take certain other action related thereto;

NOW, THEREFORE, BE IT RESOLVED THAT the form of Consent Judgment and Order (the "Consent Judgment") presented to this meeting hereby (a copy of which shall be attached to the minutes of this meeting as Exhibit A) is approved, ratified and confirmed and that the officers of the Foundation are, and each of them hereby is, authorized to execute and deliver, in the name and on behalf of the Foundation, the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois) substantially in the form presented to this meeting but with such changes therein as the officer executing the same shall approve (such approval to be conclusively evidenced by his or her execution thereof); and

FURTHER RESOLVED, that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized in the name and on behalf of the Foundation, to file with the Circuit Court of Cook County the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois); and

FURTHER RESOLVED, that Section 2 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the date the Consent Judgment shall be entered by the Circuit Court of Cook County, Illinois (the "Effective Date"), to read as follows:

Section 2. Number, Tenure, and Qualifications.

(a) Number. The number of directors elected by the Board of Directors shall

be sixteen until the 2002 Annual Meeting of the Board of Directors (the "2002 Annual Meeting") and initially be fifteen thereafter.

(b) Board Classification. The Board of Directors shall be divided into two classes until the 2002 Annual Meeting, consisting of (I) eleven Class I Directors, who shall be elected for a term to expire at the 2002 Annual Meeting and (II) five Class II Directors who shall initially be elected for a term to expire at the 2005 Annual Meeting of Directors. At the 2002 Annual Meeting the Board of Directors shall be divided into four classes, consisting of (i) three Class I Directors, who shall initially be elected for a term to expire at the 2003 Annual Meeting of Directors, (ii) five Class II Directors (i.e., the Class II Directors elected as contemplated in clause (II) of the preceding sentence) whose term shall expire at the 2005 Annual Meeting of Directors, (iii) three Class III Directors, who shall initially be elected for a term to expire at the 2004 Annual Meeting of Directors, and (iv) four Class IV Directors, who shall initially be elected for a term to expire at the 2006 Annual Meeting of Directors. Thereafter each class of directors shall be elected for four-year terms.

(c) Tenure. No person shall serve as a member of the Board of Directors for a total of more than eight years following the date in June or July 2001 on which this Section 2(c) shall have first become effective (the "Effective Date"), and none of the persons elected as Class I Directors prior to the 2002 Annual Meeting as contemplated by clause (b)(I) of this Section 2 shall serve past the 2002 Annual Meeting or be eligible to stand for election to the Board of Directors at any time thereafter. Each elected director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.

(d) Residency. Prior to the 2002 Annual Meeting at least one-half of the elected directors shall be residents of the State of Illinois. Thereafter until at least 25 years after the Effective Date have elapsed, at least a majority of the elected directors shall be residents of the State of Illinois.

FURTHER RESOLVED, that Section 8 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the Effective Date, to read as follows:

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of such director's predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors at which the class of directors to which such new director has been designated pursuant to Section 2 of this Article III shall be standing for election.

FURTHER RESOLVED, that effective as of the Effective Date, the following persons shall be elected as the respective class of director indicated below to serve until their respective successors are elected and qualified or until their earlier resignation or removal:

16di-001554

Class I Directors
(Term to Expire at
2002 Annual Meeting)

Helene Ahrweiler
Jacques Andréani
Dean L. Buntrock
Margaret Daley
Ronald Gidwitz
Arthur Hartman
Stephanie Marshall
Alan Simpson
Theodore Stebbins, Jr.
Judith Terra
Paul Tucker

Class II Directors
(Term to Expire at
2005 Annual Meeting)

James R. Donnelley
Marshall Field V
Dr. Kathleen A. Foster
Prof. Robert S. Hamada
Frederick A. Krehbiel

FURTHER RESOLVED, that not later than August 1, 2001, this Board of Directors shall meet to (i) elect a new Chairman (who shall be chosen from among the Class II Directors elected pursuant to the preceding resolution), (ii) elect new officers and committee heads, (iii) elect a new Executive Committee composed of the newly elected officers that also are directors, and (iv) elect a new Strategic Planning Committee whose members shall include Mr. Ronald Gidwitz, Dr. Theodore Stebbins, Jr. and one or more Class II Directors; and

FURTHER RESOLVED, that the new Strategic Planning Committee, once elected, shall be authorized and directed to seek to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago, it being understood that the terms of any such partnership shall be subject to the approval of the Board of Directors; and

FURTHER RESOLVED, that the officers of the Corporation are authorized, in the name and on behalf of the Foundation, to execute such additional agreements, certificates or other documents, and to take such further actions (including, without limitation, the payment of expenses or other expenditures of money) as may be necessary or advisable to carry out the preceding resolutions.

In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
July 2, 2001

P.M. SESSION

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)
Plaintiffs,	) Case No.
vs.	) 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,	)
Defendants.	)

PROCEEDINGS JULY 2, 2001

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel., JAMES E. RYAN,)
Attorney General of Illinois,)
Plaintiff-Intervenor,)
vs.)
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
and the TERRA FOUNDATION FOR THE)
ARTS, an Illinois Not-for-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:
QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;
BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;
VERNER, LIIPFERT, BERNHARD, McPHERSON &
HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named
Defendants;

APPEARANCES: (Continued)
KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
appeared on behalf of the named
Defendants;
SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;
SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant
Terra Foundation for the Arts;

APPEARANCES: (Continued)
HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, Charitable Trusts Bureau, and
MS. THERESE M. HARRIS, Assistant Attorney
General, Charitable Trusts Bureau,
appeared on behalf of the
Plaintiff-Intervenor;

ALSO PRESENT:
MR. HILLIARD.

REPORTED BY: KAY A. LEVINE, M.A., C.S.R., R.P.R.
Certificate No. 84-3654.

THE COURT: After everybody gets in position, I'm going to ask if we could start on the far right and go across for the benefit of the court reporter. And if we have two rows, that's fine. I just want to do the front row first and the second row second. It makes it easier for the court reporter if that's possible.

MR. CARROLL: Good afternoon, your Honor. James Carroll on behalf of the plaintiffs, Gidwitz and Buntrock.

MR. KENNEDY: Good afternoon, Judge. John Kennedy on behalf of the plaintiffs.

MR. QUINLAN: William R. Quinlan on behalf of plaintiffs.

MR. PERKINS: Floyd Perkins and Therese Harris on behalf of the Attorney General.

MR. CARLSON: Steve Carlson, your Honor, on behalf of the Terra Foundation for the Arts.

MS. STONE: Susan Stone on behalf of the Terra Foundation.

MR. BELLOWS: I'm Joel Bellows. I'm here for the named defendants.

MS. BELLOWS: Laurel Bellows, the same, for named defendants.

MR. GARMENT: Leonard Garment, the same, for the named defendants.

MR. TODD: Chris Todd, for the same.

MR. WILSON: James Wilson for Judith Terra, Alan Simpson, and Paul Tucker.

MR. CROWE: Brian Crowe here on the last-mentioned defendants.

MR. BELLOWS: Your Honor, is there some significance to the fact that Mr. Crowe has one foot out of the courtroom?

THE COURT: None whatsoever.

Counsel, since you were here on Friday, I've received three filings, and I don't really know yet what has been filed and what hasn't been. There was quite a bit of confusion after Friday's court proceeding, so I want to clarify some of that confusion, first of all.

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And then while I was hearing my 1:30 case, I received from the mediator a letter dated July 2nd. And I assume that all of you have received that letter?

SEVERAL ATTORNEYS: We have not, your Honor.

THE COURT: Okay. And then I also received what is the first notification officially that I have of a proposed consent judgment and order. I realize that on the papers that were tendered as courtesy copies on Friday, there are included in there some proposed drafts of things that had been circulating in the mediation process. I didn't deem it appropriate to read those on Friday or to read anything until I received something firsthand from the mediator.

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In The Matter Of:

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TRANSCRIPT OF PROCEEDINGS
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P.M. SESSION

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period of time that I've been off the bench.
Now, is there anybody here from the mediator's office? Are there extra copies of this document — oh, Mr. Hilliard is in the courtroom. Do you have extra copies for everyone, sir?
MR. HILLIARD: I have some extra copies, yes.
THE COURT: It's a one-page letter and then a proposed consent judgment. I don't have anything official as to what took place, if anything, on Friday, so I don't know if there was a vote on bylaw changes and I don't know what the vote was. And I don't know if there's anything else I'm supposed to be reading.
And then the last thing I just wanted to bring up is I'm not quite certain from the Bellows & Bellows firm what was filed on Friday. I asked my staff to call on Friday. There were a number of telephone calls back and forth.
I received Friday morning a notice of a motion for a temporary restraining order, and my staff asked two or three times the attorney who dropped it off, Is this the courtesy copy or is this the original? And we were told this is the courtesy copy, so I proceeded to start to mark it

up.
Later in the afternoon I checked with the court clerk and was told she had no original. So this is signed by Joel Bellows and — originally, it looks like — and it appears to be the original. So if this is to be filed with the clerk of the court, I have to give it to the clerk.
MS. BELLOWS: May I speak to this, your Honor, to straighten up some of the housekeeping matters that are before you? We are prepared to substitute a copy for you to work on as a courtesy copy. Because you've begun to mark it up, we can arrange as to how you want to handle that.
THE COURT: Why don't you put these two pages on the end of that, the original signed, and give me the other.
MS. BELLOWS: Right. Because we would like —
THE COURT: To file it under seal.
MS. BELLOWS: We would like to file it under seal. Thank you, your Honor. So if we could have an order that gives us authority to file those papers under seal, we will do so.

THE COURT: And those papers would be the document entitled Notice of Motion for Temporary Restraining Order. Let me give you the other, if you don't mind, a copy of the other signed one for Mr. Bellows. Those are the originals.
MR. BELLOWS: Thank you.
THE COURT: Just give me the body, you know, something to complete that.
MS. BELLOWS: I have that here.
THE COURT: Then this document, Additional Appearance, was that ever filed?
MS. BELLOWS: I thought that we have an appearance that is filed.
THE COURT: So this is — even though this is an original, this is meant to be my courtesy copy.
MS. BELLOWS: It's meant to be your courtesy copy and —
THE COURT: And you're going to file under seal the document I handed you back, reshuffled, with the signature pages and your plaintiffs' memorandum and your exhibits that were filed in the federal court case; is that right?
MS. BELLOWS: Precisely. Attached as exhibits to the motion that I filed under seal.

THE COURT: Okay. We need a separate court order that has nothing else in it but that these documents are to be filed under seal and kept separate under seal by the clerk of the court. And then that gets put on the front of the envelope. So they'll be put in an envelope sealed with that on top and give them to the clerk.
MS. BELLOWS: We have come prepared to do that today, your Honor.
THE COURT: Okay. So that was the first issue from Friday.
The second issue from Friday, when I left, I had a copy of the motion. The original, the clerk tells me from her phone call, was filed on the pro hac vice. And I did not get an order on Friday and the clerk said that an order has just been brought in on that. Anybody have a problem if I sign that order now?
MS. BELLOWS: It has been faxed to everybody for advanced notice, your Honor.
THE COURT: Okay. So the counsel from Washington are in, and I just want to make sure that before we deal with Mr. Crowe's motion, everybody's in who's supposed to be in.

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Now, Mr. Crowe, you want to leave us?
MR. CROWE: I do.
THE COURT: And, Mr. Wilson, you want to go along with him?
MR. WILSON: That's correct, your Honor. We are taking this as if it were a motion for substitution, since there is other counsel in at this point. The strictures of the Supreme Court rule regarding withdrawal we didn't feel applied here at the time because of the fact there's more than competent counsel from three law firms in two cities representing these clients.
THE COURT: And I assume that no one wants to say anything about that?
MR. CROWE: Plus, Judge, we'll assert no attorneys' lien on the file.
THE COURT: Thank you.
MS. BELLOWS: Your Honor, we have authority from our clients to enter an additional appearance.
As your Honor may recall, we began in federal court with authority to file that action by our client. Our clients, two of them, one is in Florence, the other is somewhere in Russia.

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That would be Senator Alan Simpson in Russia.
And as I indicated to your Honor at the close of court at the hearing on this matter on Friday, we do not have the ability to get authority for a substitute, only ability at least for the near future to serve as additional counsel in this matter.
THE COURT: Okay. And you've got your additional appearance on file as to the counsel from Washington. Everybody is from Washington, right? And you have leave to withdraw.
The only issue I want to deal with is or talk about is, you have a pending motion for fees, which if the settlement is approved, will be mooted. And if the settlement is not approved, it will be the first matter I deal with.
MR. CROWE: We have a petition for you today, Judge, to be filed.
THE COURT: What is that?
MR. CROWE: A petition for our fees, whether the settlement is approved or not.
THE COURT: Okay. Should that be filed with clerk of the court?
MR. CROWE: I assume it should, Judge. We'd

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give a copy to you, of course.
THE COURT: Anybody have a problem with that petition being filed at this juncture with the clerk of the court?
MR. QUINLAN: No, your Honor.
THE COURT: Okay. You can go ahead and then drop off a copy.
(WHEREUPON, Messrs. Wilson and Crowe left the proceedings.)
THE COURT: There is a motion now for an evidentiary hearing on the settlement issue. Let me hear, first of all, from counsel for the Foundation as to what happened on Friday.
And is there anything else I'm supposed to read, and does the Foundation concur that there is the need for a fairness hearing?
MS. STONE: Your Honor, on Friday there was a properly noticed, properly called board meeting. Due notice had been given. There was a meeting held, convened at approximately 12:45.
The board met, discussed the proposed settlement. There was lively debate about certain aspects of the proposed consent judgment and language of resolution that would be needed to

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amend the bylaws in order to allow the board to enter into the proposed consent judgment. After some vigorous debate, the board voted and by a vote of 6 to 2 voted to enter into the proposed consent order.
THE COURT: And that was with three individuals not present.
MS. STONE: That's correct. Those individuals were Senator Simpson, Ambassador Jacques Andreani and Madame Helene Ahrweiler. All three had been given proper notice. The Foundation administrative staff talked to all three before and after the meeting and confirmed that they had indeed been given notice of the meeting.
I do not believe — we only received the motion that the Bellows & Bellows firm is filing a few moments before court began, but I do not believe from my quick perusal of that document that they are raising any particular concerns about the way in which the notice was given. I believe notice was appropriate, and the meeting was appropriately called in strict conformity with the bylaws.

THE COURT: Was a vote taken to change the bylaws?
MS. STONE: Yes, it was, your Honor.
THE COURT: And was a vote taken to elect new directors?
MS. STONE: Yes, it was, your Honor.
THE COURT: So as far as the Foundation is concerned right now, there are how many directors?
MR. CARLSON: It doesn't change, your Honor.
THE COURT: It doesn't change anything until I sign this, right?
MR. CARLSON: That's correct, your Honor.
THE COURT: And right now the Foundation is continuing to operate as it has.
MR. CARLSON: Exactly right, your Honor.
THE COURT: Does anybody feel that we should have an oral report from the mediator? Do you want to take a brief recess and read his letter and then decide how you want to proceed? I know you all just received the Bellows & Bellows documents.
MR. CARROLL: We haven't even received the exhibits, your Honor. We just received a fax of —

in mediation that are confidential. But I can report that a vote was taken on the 19th of June on which a majority approved of a settlement agreement. That agreement was — modifications were made to it and — in order that it could be a subject of resolutions.
And it was brought before the board of the Foundation on Friday for ratification and for the election of additional members of the board, five additional members, and it has just been reported to you that took place on Friday.
The mediators were informed of this at about 2:00 o'clock in the afternoon. This morning we sent around the document to attempt to get signatures. We weren't able to get all the signatures, but that is the document which we tendered to the Court this afternoon.
THE COURT: The mediation process started on February 6th?
MR. HILLIARD: Correct.
THE COURT: And it's now the beginning of July and during this almost — what is it? — four months' period, you have had, I understand, extensive meetings with all of the parties

THE COURT: Do you have a complete copy to give counsel?
MS. BELLOWS: We do.
THE COURT: I have moved my 3:00 o'clock to 3:30 with the hopes that we would be done a little bit before — I mean relatively soon because I'm not certain this is going to be concluded today.
I want to find out what you believe is the best way that we should proceed on this, but you're not all informed because you don't all have the document. Do you want to take a few moments and look at the document and see whether an oral report is called for from the mediator today?
MR. QUINLAN: I think some sort of report from the mediator would be appropriate.
THE COURT: That was my intent. I intended to hear from him.
MR. QUINLAN: Maybe if we heard from him now, it might help us when we see the documents and where we are.
THE COURT: Okay. Mr. Hilliard, are you prepared to give us an oral report today?
MR. HILLIARD: The mediator's report is necessarily abbreviated because of the proceedings

involved and individual meetings with them, meetings with their counsel as well as group meetings of this board.
MR. HILLIARD: We've had individual meetings with all of the members of the board, all the directors of the board, and we have had group meetings in March, again in May, and again in June when we would get everyone together.
THE COURT: And when one refers to a mediated settlement, the settlement is based on a vote on the board; is that correct? I mean, there's no issue that eleven people are not 100 percent happy about this. There are dissenters?
MR. HILLIARD: That's correct.
THE COURT: But this was a proceeding in which everybody had, as far as you're concerned, a full opportunity to participate.
MR. HILLIARD: Oh, yes.
THE COURT: Do you have any concerns about the integrity off this mediation process or presenting the settlement to the court?
MR. HILLIARD: I do not.
THE COURT: Does anybody want to just take a brief recess and get the one-page letter from the

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mediator, and then we will resume after you have
'hanged some documents?
.MR. GARMENT: May I say something first, your Honor?
THE COURT: Yes, sir.
MR. GARMENT: And what I say is, I hope your Honor will take it in the spirit in which it is intended, which is to make a contribution to this proceeding and with respect. But I understand — I understood and still understand why your Honor would have started the mediating proceeding, mediation process, with an order that the proceedings be sealed in the hope and perhaps a reasonable expectation that this would facilitate the discussions of the parties and permit free and open discussion without the intervention of outsiders and outside pressures of one sort or another of publicity and debate.
And what happened thereafter is a very strong argument — I say respectfully — for the centrality of press access of proceedings of this nature. And I think that at this time the sealing provision should end. I can understand why the press and press comment was, in effect, prevented

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in order to —
THE COURT: I don't mean to interrupt you, sir, but I don't think anybody is anticipating anything to be sealed from now on, is there?
MS. BELLOWS: Your Honor, we aren't anticipating, but we have been cautious about our filing today. The mediation process — it's our understanding the mediation process is terminated —
MR. GARMENT: Well, I can conclude very quickly then.
THE COURT: And I didn't mean any disrespect in cutting you off, sir, but the order said the board couldn't meet until — or the board couldn't meet or do anything until the mediator reported back. And that during the course of the mediation process, the parties were supposed to be dealing with the mediator and working this case out.
MR. GARMENT: And, of course, your Honor, precisely what we have alleged in the district court proceeding under the Section 1983 claims relating to the interventions and not only
roper and unlawful interventions by the
Attorney General's office is precisely the reason

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why open, free access to the processes of law, whether in court or in a mediation proceeding are best aired publicly. And that is the nature of the First Amendment, sometimes abused but always exercised in the interest of public information.
THE COURT: Were these documents that were filed in federal court filed under seal?
MR. GARMENT: We filed them under seal.
MS. BELLOWS: We filed them under —
THE COURT: Because mine aren't marked that, so I have —
MR. GARMENT: In deference to your Honor's —
THE COURT: I assumed that since everyone was talking about things that have come out in the newspaper that there had been plenty of access to these documents. Because how else would anybody know about this stuff?
MS. BELLOWS: Your Honor, we filed them under seal. Judge Bucklo did not accept them under seal; that's as far as the federal court proceeding.
As far as the filings that we have, I have submitted a courtesy copy to your Honor this afternoon. We have pursuant to your clerk's

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suggestion —
THE COURT: Just brought it here to court.
MS. BELLOWS: — brought it to court, and assume that it will not be filed under seal. But if we have no motion to do so, we would intend to have your Honor — we would intend to file it in the normal course.
But in deference to your Honor and our new place here among you, with an abundance of caution we have provided your Honor with a courtesy copy, counsel with copies by fax, and no one else.
THE COURT: I am one of the strongest advocates in this building on the public's right to know, and anybody who routinely practices here knows that I virtually never seal anything in this courtroom. And the only time I do it is if I feel that there is a really important reason to have it done.
And in this case the only thing that was sealed is while this case was in mediation. I wanted to give it a chance. And I didn't want the parties or anyone or the attorneys talking to anyone except the mediator about what was going

on.
Now, lots of people, as I understand it, have violated that order, and that's another issue that we're going to have to deal with about that. That's a whole separate issue.
But now the mediator has reported. That's one of the reasons I wanted to make sure you all have what the appropriate papers are here. The plaintiffs are saying they don't know what you want to file today, Ms. Bellows, because they don't have the exhibits. So I want to take a few moments and make sure that everybody sees this document, which is being sought to be filed with the clerk of the court not under seal and see if there's any objection and whether it's — whether there is a desire on behalf of anyone to file anything under seal from now on.
The proposed consent decree, that's not supposed to be sealed, is it?
MR. CARLSON: No, it is not.
THE COURT: Am I missing something here?
MR. CARLSON: No, it is not.
THE COURT: When we talked about that one, you all came to me and you wanted to have a

certain portion of the mediated settlement not public. And I said you can go ahead and try it, but I'm not signing anything that's not going to be public. And so you went back to the drawing board and talked some more.
MS. STONE: There was one aspect of the consent, proposed consent judgment, that we should draw to your Honor's attention. That the parties who are entering into this proposed consent judgment, assuming your Honor approves it —
THE COURT: This is all they're going to say.
MR. CARLSON: That's correct.
MS. STONE: — have agreed that there is a mutually agreeable statement that will be released to the press. And that is all that people will say. And that will be binding on those who — the parties who are parties to this particular agreement.
THE COURT: That's the Attorney General, Mr. Buntrock, Mr. Gidwitz, and the Foundation.
MR. CARLSON: That's correct.
THE COURT: And that's all you're going to say. And this is not binding on the three individual defendants because they haven't bought

into it.
MS. STONE: Or Mr. Michaeli.
THE COURT: Oh, Mr. Michaeli. Okay. What I would like to do if we could is, Mr. Hilliard, if you could make available to them whatever copies of the letter that you had, I would assume that I would file this letter with the clerk of the court unless someone has a problem with doing that. But I want you all to see it.
And the proposed consent judgment and order is something I'm going to have to take a little bit of time to at least read more than the 15 minutes that I was allotted today after you spent four months putting it together.
And there is a motion which is seeking an evidentiary hearing and a fairness hearing about this, and you all get to be heard as to — unless you feel that you're barred by the consent decree judgment. You're not, are you?
Okay. I want to hear what you all have to say about their proposed motion and we can go from there. But first let's just see the motion and all the attachments. And as soon as you're ready, please let me know.

(WHEREUPON, a recess was had.)
THE COURT: Anybody have any problem if we file the letter from the mediator?
SEVERAL ATTORNEYS: No, your Honor.
MR. BELLOWS: It is what it is. We have a problem with the content, but the letter itself is what it is.
THE COURT: Okay. Well, I will file that with the clerk of the court.
Has everybody had a chance to see the exhibits that are attached to the individual defendants' motion for leave to file written objections and for an evidentiary hearing?
ATTORNEYS: (Nodding.)
THE COURT: That apparently was what the concern was, that you didn't have the exhibits.
MS. BELLOWS: Your Honor, may I speak for one moment to the exhibits. The exhibits themselves were simply the original articles of incorporation, the amended articles of incorporation, and a page of the transcript.
But counsel, Mr. Quinlan, has reminded me that also referred to in our motion are portions of the exhibits that were filed with this

And I think that that's really the point of it.
My own feeling on this is that we don't necessarily have to take the Court's time in having a hearing as long as we are able to develop — I mean, the affidavits that we get, we can get from third parties and things of that nature by virtue of the people who would not otherwise be able to get them.
I would not be reluctant or opposed to, if the Court gave us an expedited discovery schedule, to taking their depositions and avoid having to drag this thing out in court.
THE COURT: Mr. Bellows, you say that you need to take depositions of people from all over the world on this motion. And are you talking about —
MR. BELLOWS: I don't think so.
THE COURT: Well, that's what you said in this document. You said of the people that would need to be in an evidentiary hearing, witnesses are spread throughout the world. Are you talking about board members or are you talking about people that — similar to these declarations where you're talking about Dan Terra's intent? What are

we talking about as a hearing?
MR. BELLOWS: It breaks into two parts, so the answer is yes. It breaks into two parts. The affidavits of declaration from people all over the world, obviously we don't have to depose them.
With regard to the people who were intimately involved in the mediation process itself — and I would think certainly Mr. Hilliard would be one of those persons — we could either call him as a witness if the Court wanted to be involved in the give-and-take of it, or we could take his deposition and several others and just argue from those. The people all over the world, as I say, are people from whom we would get affidavits.
THE COURT: About?
MR. BELLOWS: The various points raised in the — the various points raised in our motion as to the effect of this order on entities wishing to do business in the future in Illinois, not-for-profits most particularly, foundations.
We would also bring in people who would — the Court will recall that part of the — you see, if you don't get me right then and there,

it's gone.
The Court will recall that one of the things that was not done in this very slow rush to judgment was to find out —
THE COURT: What very slow rush to judgment? The mediation process?
MR. BELLOWS: Yes. — was to get alternatives to the arrangement that is proposed in this consent decree. And I think that, for example, and this has been a very large concern of mine, although it's not exclusively.
You've got a major asset here. You've got people on the board, particularly the named plaintiffs, who are used to disposing of assets of substantial size. I have to believe that neither of them, for that matter no one else, would really undertake to make the kind of a decision that had been presented here in the consent decree without considering alternatives.
Now, part of the problem, of course, is that if you start out with the Attorney General of the State of Illinois saying that this entity will remain here, that this will be its focus, that this is where the art will be displayed, that this

is where we're going to enter into an arrangement with another entity here in Chicago, I don't know that the board members would even appreciate the fact that it would be in the Foundation's best interest to consider alternatives from places outside of the state. And I think that that is something that the Court's entitled to consider when it determines the fairness of the result of this process.
THE COURT: Now, Mr. Bellows, I don't know how much of an opportunity you all had to discuss the history of the case with your predecessor counsel.
I know from their motion today that their client has stopped communicating with them, and I know that they did not know that you all were going into court on the motion today on Thursday until they read about it in the newspaper.
But we had in this case I would say at least half a dozen sessions with the Court and with counsel from each side to talk about whether or not this case was mediatable, and we had some pretty long sessions about that.

And one of the fiercest proponents for mediation process, one of the most vociferous, "Let's go to mediation," was from your clients' counsel who wanted this case mediated.

Well, right from the very beginning the Attorney General made the statement that they were not going to be participating in any mediated agreement if it meant that this collection would be lost to the state of Illinois. That was up front from day one.

And there were many discussions about that. And that was the ground rule from their perspective pretty much when we — not the ground rule, because I don't mean to say that it was a rule that they were setting, but that was their concern from the very beginning. And there was a full airing of that with the Court about whether or not there should be a mediation to begin with because there are unresolved legal issues here.

And the Attorney General may be right or may be wrong in its view of the law, and the plaintiffs may right or wrong. But there was a substantial concern about the cost of dragging

this litigation on for years, and there was a substantial concern about the stakes of not trying to settle this.

But everybody went into the process, as I understand it, with the understanding that the Attorney General was going to have to sign on at the end to this agreement, and in order to sign on to this agreement, there was going to have to be some kind of concession made about Illinois.

That was how it started. So when you say that things were not aired, we all had a number of discussions about where the Foundation was before this lawsuit started and about negotiations with a number of other institutions throughout the country and whether or not this was the right thing or the wrong thing to do to try and settle this case.

And a decision was made by all counsel on behalf of all parties that, yes, let's give this a chance. And this was pretty much the starting point. So I know you're shaking your head yes, but I don't understand. You're gesting that this was something that got hammered in at the last minute. Well, this was

from the very beginning.

MR. BELLOWS: Pardon me for a moment, your Honor. The reason I was nodding is I thought that was the purpose of mediation. People start out with a certain position. The Attorney General started out with a position that some concession had to be made. I don't fault our predecessors in any way for agreeing to the mediation process. That's the first point of it, and the recognition that it is the process itself that is supposed to get people to change their positions. That's the first thing.

The second thing about it is I don't think that anyone really contemplated at the beginning of the process that it could be perverted to the — and that was the word I used in our motion — to the extent that it was. So I think that on two grounds — yes, I appreciate the fact that our predecessors agreed to it. We probably would have for the same reasons that they did.

But to wind up in a position where you're saying, Well, gee, the Attorney General made its views clear at the beginning of the

process. Yes, that's why you have this kind of a process, to get them to change their position.

And during that process all kinds of things happen that were not really part of a normal mediation process. You don't have people going outside of this process to attempt to intimidate people. And it is by virtue of the conflicts that arose that there's some very, very severe problems with the validity of any agreement that would be reached.

But when I say, for example, that — and only as an example — that we would want to present the Court with evidence of alternatives of places from without the state, the Court may very well decide, after having heard that evidence or alternatively reading it by way of written submissions, that anyplace that — if it turns out to be, for example, the Art Institute, that that might be a superior way of dealing with this.

A whole bunch of things, Judge, got started with bare allegations, with allegations that we believe have no basis in fact. That Dan Terra, for example, wanted his collection here when the evidence is just the opposite.

And so I think these are things that the Court should understand and appreciate. And if you say, well, gee, there are all these people that have signed on to the result of the mediation, I would say to you, Judge, you know, when you've got the Attorney General of the State of Illinois saying, This is what the law is, this is what the rules are, this is what's going to happen here, you get these participants — I'm beginning to think, well, gee, you know, if that's where this is going to wind up, I mean if it's only going to — if it's going to wind up where the Attorney General is going to be able to keep us here in Illinois so that we can't do other things, then that's what's going to — that's the result. That's what's going to happen as a result of the mediation.

And if, in fact, that had been dispelled at the beginning, if the people who participated in the process understood that they did not have to capitulate on those points, if in fact those people did not have inherent conflicts that precluded them from taking a role in the decisional process, then, your Honor, the

will that this — and in accordance with their fiduciary duties that this was in the best interests of the Foundation as they understood it.

Now, Mr. Bellows may disagree that it's in the best interests, Mrs. Terra may disagree, you may disagree, or I may disagree, your Honor. None of that is relevant. The question is whether or not the majority's will of this board will be respected.

And, your Honor, no one ducked the issue of whether or not there was coercion. That was an issue which had been discussed in federal court on Thursday and Friday morning in front of your Honor. And that matter was specifically addressed at the board meeting.

And I would like to read your Honor a portion, a very short portion, from the transcript of the board meeting. Now, this is a rough draft and we haven't had time to refine it, but this is our best understanding of what was said at the board meeting that was taped.

Corporate counsel for the Foundation, Mr. Heatwole, Mark Heatwole of Winston & Strawn, specifically advised all of the directors of their

non-majority directors would still have the numerical majority at this point.

THE COURT: Let me hear briefly from each side. Everyone is being very silent here.

MS. STONE: May I speak on behalf of the Foundation, your Honor?

THE COURT: Yes.

MS. STONE: The Foundation's position is today what it has always been in this case, which is that the board of directors should be able to run the affairs of the Foundation without undue influence from this Court, or quite frankly, from unhappy directors who happen to be in the minority. And that's as true today as it was at the start of the case.

It doesn't matter who the individuals are who may be in the minority. The fact is that a board of directors determines the face of an organization through the majority will.

And here you have a situation where there was a duly constituted, duly called board meeting. A quorum was present. There was vigorous discussion and a vote was held. And 6 to 2, the directors voted, exercising their free

need to vote their fiduciary duty.

And he stated: In light of the allegations that have been brought forward in federal court yesterday, to a certain extent I was not there, but I understand that that sort of the same substantive comments were made in the Cook County courts this morning, about the coercion that some of the members of this board may feel or may not feel from the action of the Attorney General.

I think it's important for each of you to, I think, indicate before you take this vote, that you are voting freely and that you are voting your fiduciary obligations to this board and this institution and without that pressure. And if anyone feels they can't do that, I don't think we should vote. But if you are voting freely and if you do not feel that compulsion, then I think you are free to vote.

And this is specifically what Stephanie Pace Marshall and Dr. Ted Stebbins said in response to that.

Dr. Marshall: Just in response to what you've just said, Mark, I have felt in the past

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that despite the desire of some board members over
[2] ... last year or so to try to peg me into an
[3] ...eged camp or an alleged side, one side or the
other, I have always walked my own path and I have
... always spoken with my own voice to represent the
[6] integrity of my own convictions. And I have done
... it throughout this arduous process, and I do so
now with full knowledge of my fiduciary
[9] responsibilities.
[10] It is true that the Attorney General's
office has asked the Illinois Mathematics and
Science Academy to respond to a fact-finding
[13] investigation. This has not played a part in my
] decision-making with respect to my fiduciary
responsibilities as a board member of this
[1 Foundation. I believe now, as I have said before,
[17] that this motion and settlement to be in the best
long-term and sustainable interest of this
remarkable Foundation.
[20] And then Dr. Stebbins spoke. And it's
] interesting, your Honor, that in his comments he
does criticize the tactics, as I believe he calls
[2 them, of the Attorney General. He specifically
[24] criticizes the Attorney General, but he says that

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that is not what is influencing his vote. And he
talks about his history throughout this process,
9] about how he has been more of a centrist or
1] someone who is exploring different options. He
talks about his history on the board.
I came to the board. I knew Dan Terra.
7] I came to the board at the request of Jim Collins
3] and Judith Terra. I've served as chair of the
collections committee and I think I served
effectively. And I brought some wonderful new
1] paintings, helped to bring some wonderful new
... paintings to the Foundation collection.
I've done this without any iota of a
4] conflict of interest. I've always felt free to
.5] form my own judgments. And either last August or
early September when Paul Tucker first told me
about his enthusiasm for the building in
8] Washington and wanting to move there, I disagreed.
[19] I long argued to explore a variety of stand-alone
options in Chicago. I was willing to consider as
part of the strategic planning going elsewhere,
[22] but I've always been a defender of Chicago.
[23] And then he goes on: I abhor the
... threatening tactics of the Attorney General, but I

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[1] am voting my own conscience and for what I believe
[2] is the best interest of the Foundation for its
[3] future as an independent, viable force in Chicago
[4] and in France for the promulgation of American
[5] art.
[6] So, your Honor, these particular
[7] directors clearly and unequivocally stated that
[8] they believed they were voting in the best
[9] interests of the Foundation and in accordance with
[10] their fiduciary duties as they understood it.
[11] I think the board has spoken. It was
[12] a 6 to 2 vote, and I think the board process
[13] should be respected.
[14] **THE COURT:** I have one question. I'm going
[15] to go on and let the plaintiffs speak in just a
[16] moment.
[17] The consent decree which I just
[18] received, I have read again during the breaks
[19] here. This, as I read it — and tell me if I'm
[20] wrong — has a new board, once it's elected,
[21] essentially negotiating to partner with another
[22] institution in Chicago. It doesn't require it,
[23] does it?
[24] **MS. STONE:** That's correct, your Honor.

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[1] **THE COURT:** So if something can't be worked
[2] out, the Terra would be its own separate museum.
[3] **MS. STONE:** That's absolutely an option for
[4] the board.
[5] **THE COURT:** And there's absolutely nothing in
[6] here that restricts the Foundation's ability to
[7] continue to run its programs, activities, and
[8] operations in Giverny, France?
[9] **MS. STONE:** That's particularly reserved for
[10] the board. The board's ability and freedom to
[11] conduct its activities, operations, and programs
[12] in Giverny, France, which ability and freedom the
[13] Illinois Attorney General specifically
[14] acknowledges and agrees to.
[15] **THE COURT:** It can also lend its collection,
[16] as it always had, to other museums throughout the
[17] United States and continue its educational efforts
[18] in other places of the United States.
[19] **MS. STONE:** That's correct, your Honor.
[20] **THE COURT:** The only thing that this really
[21] is making a difference, as I understand it, is the
[22] Foundation can't close up shop and move outside of
[23] Illinois permanently. I mean —
[24] **MS. STONE:** Right. I think —

THE COURT: — there's a number of other changes, new board members —
MS. STONE: — paragraph 5 of the consent judgment and order probably identifies what limitations may exist now with respect to the Foundation's activities for a 50-year period.
THE COURT: For a 50-year period.
MS. BELLOWS: And self-governing, your Honor. Which is one of the things that we would speak to when everyone else has a chance to be heard.
THE COURT: Okay. And this document is the board of the Terra Foundation amending its own bylaws to put some restrictions on its activities that Dan Terra didn't put in there when he set it up.
MS. STONE: That's correct, your Honor.
THE COURT: And any board can do that if it chooses to do that, can it not?
MS. STONE: That's correct, your Honor.
THE COURT: Okay. Let me hear from the plaintiffs and the need for — I really want you also to address whether you have a problem with anything being filed with the clerk of the court at this juncture. I can tell you that what I'm

there's no objection to that.
And the problem is that what they present is really a question that they would like to try in front of this Court, which they had the opportunity to try; namely, what was the intent of Mr. Terra and what was the law on these issues, et cetera.
And that's the reason we went into mediation is the parties agreed to set those things aside, put them off the table, and get together to see if we couldn't resolve this dispute in a way that didn't necessarily require addressing what were some concerns and issues on both sides.
And what we had here was an agreement to mediate by all the parties, including the defendant directors. Counsel now would like to come in and say, Let's take a look at what took place. Let's go out and take depositions. Let's depose the people that were there, including the mediator.
As your Honor knows, that would, in fact, destroy and undercut the ability to have any mediation in any case again, which they agreed to.

going to need to do is to read this very carefully. I want the transcript of the board meeting and —
MR. CARLSON: We'll be happy to give you the resolution that was passed.
THE COURT: Right. — and the resolution, the amended bylaws, whatever else that you have from Thursday. But let me hear from Plaintiff. Is it Mr. Quinlan I'm looking at?
MR. QUINLAN: Yes, your Honor. Well, first of all, the issue here is their motion for leave to file objections to this agreement or consent decree.
And the problem is that what you really have here is an agreement. I don't think there's any question — and I don't even think that the defendant directors raise the issue whether there's agreement or the terms of the agreement.
What they tell you is that they don't like the agreement and they don't like the terms of the agreement. But we have a 6 to 2 vote, which is here by the attorneys representing the Foundation who attest to the validity of that. We have the terms which are in front of your Honor;

This was a mediated process, and they were agreeing in that mediation that nothing in the mediation would be used against anybody involved in this, including anything that was ever said in there.
So the mediation statements and the reason for your order barring disclosure of this was that these couldn't be used in court or in any other proceeding against anybody. Again, a commonplace type of procedure in mediation because no one is going to get into the mediation process if, in fact, this is going to be something to be used against them. The same thing as a settlement. This is a settlement process.
Your Honor herself in a settlement process in any case would say, Ladies and gentlemen, you know that nothing said here is going to be anything that can be used one way or the other. People will make statements, compromise their positions, make offers, make proposals that can't be used later on to show that they were willing to at least agree to that or agree to something else, again, because it would never work.

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The public policy of the state, the
[2] blic policy of the United States, the public
[3] policy of the United States expressed in the
Arbitration Act are that these things are to be
encouraged, not discouraged. That's exactly what
[6] they would have here. If they want to complain
about this agreement, and if they want to complain
about this process, they can say it was fraud,
[9] they can say it was duress. They can say those
[10] things, but they need evidence of proof that's
clear and convincing.
There is nothing proffered anywhere
[13] here that even offers a scintilla of evidence that
[14] nobody agreed to this or it wasn't properly agreed
to. In fact, the people that they allege that
were somehow coerced are not here. They were not
[17] in the federal court. They don't file an
affidavit. The very people who supposedly were
intimidated or hurt not only do not file an
[20] affidavit or appear; in fact, they make a
[21] statement that their vote has nothing to do with
it. That they were not coerced into making this
vote. They make their vote because it's a hard
[24] question. And we think on a better analysis here,

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] it's the right result. And that's what they said.
] The federal district court judge said, Look,
[3] there's nothing unlawful about that.
[4] What we have as a situation is they
] complain about the lawful activity of the Attorney
] General and they complain about the lawful
[7] activity of two directors that are both lawful.
[8] And to somehow say that that is unlawful has in no
] way been demonstrated. And it has not.
] It is indicated here clearly what we
[11] have is a party who has agreed because they didn't
[12] prevail. Their views didn't win out. But it was
] one of those compromise decisions, and they were
[14] subject to the same requirements as everybody
[15] else. They were part of the board, and the board
] chose to do this.
] **THE COURT:** Are you saying that you're
[18] objecting to them filing a motion?
[19] **MR. QUINLAN:** I see no basis for it, your
] Honor. There is no proper tactic here. What
[21] they're asking in that motion is to come forward
[22] with evidence that is totally irrelevant to
] hether or not there was an agreement or whether
[24] or not the terms were agreed to. That's what it's

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[1] about.
[2] And if they want to say this was a
[3] coerced type of thing, it requires clear and
[4] convincing evidence. And that's after they admit
[5] there's an agreement; you must have to set it
[6] aside. There is no evidence of that at all. At
[7] all. All they have is affidavits of third
[8] parties, affidavits of an individual, Mr. Tucker,
[9] who himself can't testify to what these people
[10] feel or don't feel.
[11] He said, I think they were coerced.
[12] They just told us they weren't. And in fact the
[13] federal court couldn't see any basis to this.
[14] Nothing's new. They filed the same things in the
[15] federal court. So there's nothing here in front
[16] of your Honor to warrant any kind of allowing them
[17] to file these matters or to be heard.
[18] These are things that they are just
[19] dissatisfied with. Well, they're dissatisfied
[20] with a lot of things. Frankly, we're dissatisfied
[21] with a lot of things.
[22] **THE COURT:** Do you believe that it would be
[23] different if they came forward with a motion that
[24] was seeking to have the Court not approve the

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[1] settlement because it was not a settlement, not
[2] agreed to, something wrong?
[3] **MR. QUINLAN:** They showed that it had not
[4] been agreed or not settled to, and there was
[5] substantial evidence — that is what the Illinois
[6] law requires is substantial evidence. It might
[7] require a hearing. But there's no substantial
[8] evidence of this. In fact, it's admitted.
[9] **THE COURT:** What about an argument that
[10] perhaps there's something illegal about this
[11] settlement? I know there were some statements
[12] made about that the other day, but I don't really
[13] see that necessarily here in terms of something —
[14] cases that are cited that says that there's some
[15] provision of this agreement that is contrary to
[16] Illinois law.
[17] **MR. QUINLAN:** Well, if you notice in their
[18] pleading that they have filed — actually it's a
[19] pleading, there's no complaint on file. There's
[20] actually nothing in front of your Honor other than
[21] a request to file a motion. So that there's no
[22] request to file a pleading. There's nothing that
[23] brings this case in front of the Court other than
[24] their motion.

And, your Honor, if the illegality of this — I don't see any evidence of anything that's illegal. There's nothing here that radically changes the bylaws and says anything that's dramatic. We can never do "X" or we can never do "Y," or we immediately agree that we changed the law, the body of the law of Illinois, or whatever it might be. They're organized under the laws of the State of Illinois.

As any corporation, the laws of the state in which you are organized under are the laws that apply. They are organized under this state, and they are venued here in Illinois. Can they change it? Well, they have to look to the law of Illinois. That's where they chose to come and where they chose to do it. But they make no allegations in any way that this is wrong, illegal, or we're doing anything improper here in this particular consent decree.

All we're doing is articulating some things. That is the extent of the — to change the number of directors, to agree to do something for a period of time. That does not in any way bind them to anything else. They have voluntarily

basis for that. You know, the whole point here, they talk about stuff that's outside the state. We can take all of these depositions of people around the world. I don't know what they can add. I really don't. And I don't see how they can add anything to it, other than to say they have opinions about what might happen, et cetera.

I also would ask that even the documents that have been filed by architects and others and real estate brokers, all they talk about is what somebody might have wanted to do about renting property, of using property, et cetera.

As we all know from anything to dealing with the states, a lot of people met and intended to do a lot of things that they never got around to doing. And it didn't happen. Nobody changed the location of the Foundation from Illinois. Nobody changed the bylaws, nobody moved.

It was a question of what everybody was thinking. Everybody was looking for a better place and a better forum for the Terra Museum. And they had talked about that before, which all the parties admit. Can we find a better place in

agreed to do certain things. Other parties have voluntarily agreed not to do things which enabled us to go forward. So there is nothing here in terms of the law that is set forward. There's nothing that would contest that. There's nothing illegal. And if they did that, they'd have to do it by some motion as set forth, some basis for an illegal act of the body.

But this was mediation. There is nothing illegal about mediation, there is nothing illegal about the topics, there is nothing illegal about what was being done. As counsel for the Foundation pointed out, this is what's done all the time. This is a typical type of thing a board would consider. It's a typical type of thing going forward that you'd look at. A decree, a mediation, a resolution of this. Boards across the world consider these type of things all the time.

And for counsel to come in here and suggest at the eleventh hour that there is something strange that's going on here and to suggest deposing the mediator, I think is just outlandish, your Honor. There is absolutely no

Chicago? How can we move this? How can we move around to get this out and get a better exposure?

And these are the things that were mediated, and these were the things that were resolved. So to suggest now that we could come in and just raise it at the eleventh hour — they say they never knew about the intent of the Attorney General. They never realized this is what he wanted.

They knew from the very beginning, your Honor. They knew throughout this. These were things that if they wanted to raise to you, if they wanted to object, they could have done so. They agreed and they entered into the order to fully participate in this mediation and never withdrew that until they came in at the eleventh hour and attempted to file these pleadings in federal court.

THE COURT: No, they gave directions to their counsel to stop participating in meetings.

MR. QUINLAN: On the 4th of June. So we're talking about something that never took place at this time. And of course we have contrary affidavits that could attest to just the contrary

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intent. That was the issue that would need to be
ied and need to be resolved. But that wasn't
really part of the mediation. The approach of
mediation is to remove the issues of which people
are in contest about and to seek those things that
you are in agreement about. And that's how you
resolve it.
THE COURT: Mr. Quinlan, have you ever heard
of a situation where there's been a court-ordered
mediation, and then everybody comes in and puts
the mediator on the stand and has all the
mediation completely aired? Have you all been
able to find any cases where that's been done?
MR. QUINLAN: No, your Honor.
THE COURT: How about you all? Have you ever
been able to —
MR. BELLOWS: I haven't researched it, your
Honor, but I would say in that regard that
certainly the Court's entitled to go beyond —
behind any settlement to determine whether it was
obtained by fraud.
If the Court feels that Mr. Hilliard
is, by virtue of his appointment, sacrosanct in
these proceedings — I'm not saying that in the

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pejorative — then I could understand that. I
could even sympathize with it. But that does not
mean in and of itself that the Court's not
entitled to some of the other information that can
be obtained from this hearing. I've heard all
kinds of things, your Honor. Well, you know,
there's really nothing fundamentally changed here.
Nothing fundamentally changed here.
THE COURT: Well, there's a lot that's
changed. There is no issue that there is a lot
that has changed. One of the most significant
things and, quite frankly, one of the things that
surprised me the most is this board agreed that
the entire board was going to resign. When I read
that, I was very surprised. But that's what was
decided and voted on by the majority. I didn't
expect that to come out of this.
MR. BELLOWS: Well, I'd like to speak to
whether it was voted on by the majority. First of
all, as the Court has heard from Mr. Hilliard, at
the very beginning of this session today,
Mr. Hilliard said the vote was taken on June 19.
was ratified on June 29th. That's what
Mr. Hilliard said.

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THE COURT: Well, perhaps it wasn't —
MR. BELLOWS: I don't know whether you agree
with it or don't agree with it, but what I'm
saying is that on June the 19th it was a 6 to 5
vote.
THE COURT: Well, it wasn't a vote of the
board because there was no board meeting. It was
a mediation session on June 19th. The board did
not meet till Friday.
MR. BELLOWS: Your Honor, I think, you know,
that Mr. Hilliard was certainly capable of
articulating what it was. His position was that
it was ratified. I don't really care, your Honor,
if it was unanimous.
I still think, your Honor,
notwithstanding the statement of counsel, that it
doesn't matter what the Court believes. That's
insane. This Court is here to determine questions
of this nature. Is this corporation acting
pursuant to its charter, to its bylaws, and just
going out and changing the charter and the bylaws?
If that action of changing the charter and the
bylaws is inappropriate, if the vote could change
the charter and the bylaws it participated in by

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people who should not have been voting, should not
have been voting. And to sit here and say, I
haven't been coerced.
But, you know, the interesting thing
about it, Judge, is that these statements were
made in the context of all this pressure has been
applied to me, but I'm voting my conscience.
That's the very point of this thing.
It doesn't make any difference whether people felt
that they were being coerced; they had something
to lose by not making that vote. And what they
had to lose, your Honor, was something that didn't
have anything to do with the business of the
Foundation. It was personal, their personal
exposure. And as a result of that, your Honor,
they should not have participated in the vote.
THE COURT: Who should not have participated?
MR. BELLOWS: I'm talking about the two
people who made the statement that they weren't
being coerced even though — it's semicolon —
however, I think that what the Attorney General
has done as far as attempting to coerce me, I
think is terrible. I'm voting this way of my own
conscience but I think it's terrible that he

you get those, by all means, Mr. Perkins isn't under any kind of a gag order.
Are you willing to speak to counsel for the defendants about this?
MR. PERKINS: I'll be glad to, Judge.
MS. BELLOWS: About the investigation that's taking place against himself?
MR. PERKINS: To the extent I can, Judge, I'll be glad to share some information. However, that's a private person who has a right to be protected.
THE COURT: I understand.
MR. PERKINS: And these people perhaps have no basis or they obviously have no knowledge about what's going on. So we'll get to that. But I'll be glad to answer some questions.
THE COURT: Okay. And then the other thing that I just want to make sure. I want to make it absolutely clear, we are not at any time in this proceeding deposing the mediator in this case.
And as of right now, the documents that were granted leave to be filed under seal on Friday, they're going to stay that way for now. You don't have leave to file these documents today

implications to fasten the property here in the state of Illinois, make no suggestion that it would not be properly administered in the state of Illinois. But it is a taking of property of a very serious order involving acts, undeniable acts on the part of the Attorney General's Office at the time that the question of the exercise of discretion was being considered by the crucial parties —
THE COURT: I'm sorry, counsel, you're saying "undeniable act." We haven't even let him talk.
MR. GARMENT: Your Honor, may I just finish? We are entitled as a matter of law to take testimony to have people testify about the circumstances in which this dramatic shift, which spells the extinction of a long-standing foundation, which destroys its ability to operate freely, which sends a message to the world that if you bring a foundation to Illinois, you are subject to the intervention of the Attorney General to fasten those assets in the state of Illinois on pretext. And so far it's all pretext.
There has not been an evidentiary hearing with respect to the central issues since

because let's get their motion. I think it would be very, very helpful before you file a motion objecting to what went on Friday, you really knew what went on Friday. So why don't you get the transcript because I assume that hasn't been made available to any one of —
MS. STONE: No, it's not. We only have a very rough draft, your Honor.
MR. GARMENT: We have heard the tape recording of it. I mean, it was recorded.
Your Honor, may I just say this. The Attorney General said he does not want to get into the matter of something involving a private person. I think your Honor is right, that issues such as Dan Terra's intent are secondary to what is the central issue in this case. And that is whether or not crucial votes were obtained by the improper intervention by the Attorney General.
We are entitled to examine the Attorney General representative and the persons who were involved in the initiation under these more than coincidental circumstances in the switch of the crucial votes that turned this Foundation from one level of management to another. With all of its

the beginning of this case nor has the public through the press been empowered to make its own judgments about what is going on in this case.
THE COURT: This entire record with the exception of the mediation has been fully open to the press and —
MR. GARMENT: But the mediation is the heart of the problem. The mediation has been infected by the actions of the Attorney General. That is our allegation, and we are entitled to have a day in court to prove it.
THE COURT: And I'm not saying that you may or you may not have a day in court. I'm saying you need to have a verified pleading directed to these issues before the Court. And once I see a verified pleading directed to the issues of intimidation from the Attorney General, it will determine whether or not there needs to be some additional discovery regarding those allegations.
But that's not this document. I don't have any affidavits in this document. I don't have anything from anybody that suggests that the Attorney General has exercised pressure. I have a hearsay affidavit that was attached or a

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declaration that was attached in a federal court
er from the defendant Tucker. And I think
that's essentially it.
MR. GARMENT: We may ask the Attorney General who is here whether or not these proceedings were started and that draft complaint circulated under the circumstances —
MR. QUINLAN: Your Honor —
MR. GARMENT: — contained in our pleading.
MR. QUINLAN: Your Honor, we object. This maligning of the Attorney General —
THE COURT: Okay. Rather than ask him —
MR. QUINLAN: — without any basis whatsoever is really outlandish. And, first of —
THE COURT: Slow down.
MR. QUINLAN: — all, those documents —
THE COURT: I said slow down. She didn't get that and you want this in the transcript. Slow down.
MR. QUINLAN: The documents that he's talking about and the contentions he's talking about were found to be lawful acts by the federal court and also were the changing of the vote found to be lawful acts.

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MR. GARMENT: Not right.
MR. QUINLAN: I don't know what the burden of proof is elsewhere, your Honor, but the burden of proof here is on Mr. Garment, not on the Attorney General to disavow something. We're talking about a McCarthy type of proceeding here. We come and make an accusation and the Attorney General is supposed to now come up and disavow himself of doing anything wrong in his life.
THE COURT: The Attorney — just one second —
MR. GARMENT: It is not an accusation. Your Honor, it is —
THE COURT: Counsel. The Attorney General —
MR. GARMENT: — not an accusation. It is an admission on the part of the Attorney General —
THE COURT: You can stop the transcript if you want. She's not taking any of that down.
There have been some very serious allegations lodged against the Attorney General in this case. These documents were filed in federal court presumably on Thursday when Mr. Perkins isn't even in the country. He has not had an opportunity because you all have not even talked

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to him about any of this. And he does not have to defend himself in any way today in front of this Court based on the status of what I have in front of me. Because right now there's nothing in front of me verified to defend.
You will have an opportunity to file something. Once they file — and that means the Foundation — a petition to approve the consent decree, the only thing I need to talk to you about is the scheduling of this. I'm only here for a couple of weeks. How long will it take the Foundation to make the motion for me to approve the consent decree?
MS. STONE: Your Honor, in order to — the mechanics, in order to file that motion, we need the original signatures from Messrs. Buntrock and Gidwitz and the Attorney General before anyone from the Foundation is authorized to sign. That is what the resolution states.
So I see that the mediator, I think, tried to kind of cut to the chase in terms of what he submitted to you, and he has something that purports to be Stephanie Pace Marshall's signature on it. That's not actually accurate as a matter

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of corporate law. She's not actually empowered to sign it yet until we have the signatures from all three of the other signing parties.
THE COURT: Is that going to be a big deal? Can we just get their signatures?
MS. STONE: We have a clean form here. We could get — well, I think we need Mr. Buntrock's and Mr. Gidwitz's signatures.
MR. CARLSON: Would it be faxed around to counsel for all of the parties this morning, your Honor? Or — yes, a copy of the consent judgment, the decree. And if we get signatures, we can have it on file Friday, Monday, whenever it's —
THE COURT: So by Friday perhaps can you get on file a petition to approve the consent decree with the transcript and everything ready?
MS. STONE: Yes, your Honor.
THE COURT: Okay. And then I assume —
MS. STONE: Assuming we get the signatures.
THE COURT: And I assume that the only parties that want to file any objections to this are the defendants. And when — I don't know who to look to because there have been so many of you. When do you wish to file objections to the

proposed consent degree?
MR. BELLOWS: 21 days.
THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while — perhaps while I was gone.
This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.
MR. BELLOWS: Are you ordering the Attorney General to submit himself — or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.
THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

will cooperate with you as fully as he can and answer any concerns you have.
MR. BELLOWS: You have that on the record. Not your statements, his statement.
THE COURT: Well, I have no doubt that Mr. Perkins is going to cooperate and answer whatever questions you have without compromising ongoing investigations.
MR. PERKINS: That's correct, Judge.
THE COURT: Now, can you within a week of — I mean, this isn't any big surprise here. You know what they're going to file. Within a week can you file some type of a verified document to see whether or not we even need to have —
MR. TODD: Your Honor, may we have two weeks for this reason? I'm scheduled to leave on Thursday for a long, planned trip, a business trip, where I'm going to be meeting with over 200 of my clients in the Mideast, and it would be extremely difficult for me to change that. I will be back here July 12th, so if your Honor could compromise and give us two weeks from Friday and we will get it done.
MR. CARLSON: Your Honor, as far as we're

concerned, all our petition is going to be is a petition for the Court to approve the consent judgment, the decree, and I will attach probably the resolution that was passed by the board. To get all the formalities done, I would probably like until Friday to do it, but counsel can assume — he already knows what we're going to be filing, and if two weeks from today is some time in which he can be done with whatever he wants, maybe we could speed it up a little bit.
MR. QUINLAN: Your Honor, there are things under the consent decree that are expected to be done speedily so that the board can continue to operate and operate appropriately.
We also note there's three different sets of counsel here. I would imagine that somebody could pick up for counsel who's not available.
MR. GARMENT: Your Honor, may I just make a brief statement?
THE COURT: Yes.
MR. GARMENT: I know I've spoken with a certain amount of vehemence today, but this case started with some demonstrably false and very

serious allegations against the defendants. They have not been proved. There has not been a hearing to present a bit of evidence in support of those allegations.
THE COURT: And they remain unproven.
MR. GARMENT: And it is our intention, and we ask leave to file an amended answer which will raise those issues in terms of — our present contemplation is to assert counterclaims, which we are entitled to do under an amended pleading.
These issues have never come into focus, and what has happened is through the intervention of the Attorney General, in cooperation with Messrs. Gidwitz and Buntrock, who were the dissenting directors who did not want consideration given to any kind of change in the venue of the museum activities, this process was brought to a halt.
Your Honor understandably tried to find a solution through a mediation process. That mediation process stopped everything except the actions that were necessary in the view of the Attorney General to bring the process to the conclusion he wanted.

And we have standing out inexplicably, clearly demonstrated, the fact of two crucial votes being switched in the last few weeks on the basis or in absolute concurrence with interventions on the part of the Attorney General that were threatening to these two directors.

That I submit is enough for us to ask leave to present evidence, to ask for witnesses to come forward and testify about the circumstances of their intervention, Messrs. Gidwitz and Buntrock, the Attorney General, and the votes that were switched. That will not take much time. That does not involve affidavits from all over the world. That involves a discrete hearing process under oath where people have to explain why they did it, when they did it, so that your Honor can determine whether or not this is a free voluntary action of a majority of the board of a huge and extremely important national art collection that happens to be temporarily lodged in Chicago.

MR. QUINLAN: Your Honor, first of all —

THE COURT: I'm sorry, what you really were saying was two different things. If you're at this point asking leave to file additional

pleadings in this case, as far as a counterclaim, that leave is not granted. You would have to come in the way we normally do it here on a motion for leave to file with a document proposed. I need to know who it is against and what the cause of action is, and whether or not it's affected one way or the other by this mediated settlement. That's a totally separate issue.

What you've said about the opportunity to take discovery, I have not foreclosed that. I'm saying based on what you filed, there's nothing to take discovery on right now. I have nothing verified from these defendants to suggest that this Court should not approve this settlement, and I am willing to let you file something.

But the date that I have available to hear this is — the date I have is July 24th in the afternoon, and that's moving a case that I already have. And I want to be able to seriously consider anything that you're going to file. And I don't want, like I had today, ten minutes before ve to come out here and be given a document. I would like to be able to take it home and review

it.

So you can file the motion to approve the consent decree by July 6th, and if you can all get a response filed on time by the 19th of July — can you do July 19th?

MS. BELLOWS: May I remind the Court that one of our clients, Dr. Tucker, is in Italy and the second of our clients is available; Judith Terra is in Washington, D.C. But the third of our clients is presently somewhere in Russia. So I do not want to make the setting of the date a cause celebre. On the other hand, I do believe that we should be able to be in touch with those clients prior to filing.

THE COURT: Well, today is the 2nd, and your response would not be due until the 19th. And if you can't get in touch with your clients by the 19th, then there's a big problem.

MS. BELLOWS: Oh, I'm sorry, your Honor. I thought that you were looking to us to file a pleading on July 6th.

THE COURT: No. Just the —

MS. BELLOWS: I apologize, your Honor.

THE COURT: — and your response would be the

19th, and if the plaintiffs or the parties seeking to enforce this settlement want to file any kind of reply, because I would expect whatever the response is, it's going to have case law. It's going to have an affidavit. There's going to be some type of a firsthand affidavit that says the Attorney General's done something wrong here.

And there's going to be case law that there might be something illegal about this settlement. Because I haven't even seen a trace of that yet. And any case law that you give or that you cite, you've got to give me a copy of the cases because I'm going to have to take them home.

And everybody else, if you want to respond to their cases or whatever, I'm going to give you until noon of the 23rd. I'm sorry it's going to wreck a weekend in July, but it's the best I can do for you. And I would see you July 24th at 2:00 o'clock. And I need somebody to draw an order.

In the meantime, those documents that were filed in Court on Friday, or were supposed to be filed, can just still be filed as they were supposed to have been on file, under seal.

I do not want to have any of the papers that relate to the mediation process made public at this time. I don't see any reason why we need to have that. I will entertain any kind of a motion to open them. Is there anything that — I mean, if you all want it opened, then that's another thing.

MR. GARMENT: It should be opened.

THE COURT: Mr. Carlson, you wanted to say something?

MR. CARLSON: I was going to say now maybe this motion is moot in light of the fact that the individual defendants apparently have changed counsel. But previous counsel — you know, they had a motion they noticed up for today for an order referring the matter to the State's Attorney of Cook County for investigation relating to breaches of the confidentiality provision, your Honor's order of February 5th.

THE COURT: I haven't seen that. I never got that motion.

MR. CARLSON: Oh, you didn't?

THE COURT: No. Nobody ever gave it to me.

MR. CARLSON: Well, we may very well file a

We'd object to that from a procedure point —

THE COURT: Well, he's not going to file it without a motion for leave, and you'd have a chance to see it and then come and tell me what —

MR. QUINLAN: Plus it would be procedurally out of place at this time because the mediation process obviously substituted here, and any motion for a counterclaim frankly is not timely. They never answered to this, so that any answer they'd have to seek —

MR. GARMENT: The injunction took the place of an answer.

MR. QUINLAN: No, the injunction didn't take the place —

THE COURT: There are individual defendants I don't believe ever filed an answer.

MR. QUINLAN: Never filed an answer.

MR. CARLSON: Dr. Tucker did.

MR. QUINLAN: Only Tucker did. But there was no counterclaim filed at that time. But no counterclaim would be appropriate at this time because the mediation process stopped all that.

So to get to that point, you'd have to set aside all the mediation process, the consent

motion on behalf of the Foundation, your Honor, relating to what are apparent breaches of your Honor's February 5th confidentiality order. There are articles that appeared in Crain, Chicago Business, and elsewhere suggesting that certain members of the board perhaps have been violating the confidentiality provisions that are currently in place. And that is of concern to the Foundation, getting the confidentiality provisions that are included in the consent judgment, which we hope to have that. I just want to alert the Court to the fact that we'll take a look at it and prepare an appropriate motion.

THE COURT: Okay. Please file that other document like you were supposed to have filed it on Friday. And the document you seek to file today, I'm not going to grant leave to file it. There's nothing objectionable or unconfidential in it; it's just that let's get their motion, and most of what this is all about is Dan Terra's intent. That's not what I'm going to look at when I either approve or not approve the settlement.

MR. QUINLAN: Your Honor, one other thing. You had mentioned about filing a counterclaim.

decree, the mediation, et cetera, and then if you wanted to file a counterclaim, we'd be back to square one to file this.

My only reason for raising this is that we're going to have enough to respond to in this short period of time, and I'd prefer we don't get into these collateral issues before they're appropriately in front of the Court.

MS. STONE: Your Honor, I do want to again — we would have to object whenever anyone tries to seek to impose additional limitations on the proposed consent decree. The proposed consent decree does not release — I'm sorry, does not in any way force the individual defendants to release any claims or rights they might have. I just need to point that out to the Court.

MR. QUINLAN: That has nothing to do with the counterclaim.

MS. BELLOWS: Well, your Honor, clearly you're correct. I mean, in such time as we file a motion for a counterclaim and attach a counterclaim if that's what we decide to do.

THE COURT: That's my 9:15 call. You give them notice. You bring it in and — they'll have

a chance to file a written response and objection
hat.
Before we adjourn today, I want to express my sincere appreciation to Mr. Hilliard.
Mr. Hilliard, you've done a yeoman's effort since February, and I know it hasn't been easy. And I don't know whether or not you've ever been paid because I don't have access to that. But I assume that you are sending your bills to the Foundation, and in due course someone will have a vote and approve the payment of that if that's necessary.
And I want to make it clear if anybody — I assume that if any counsel wants to have any discussion with Mr. Hilliard — Mr. Hilliard, how do you feel about informal discussions with any counsel, or have you just about had it at this point?
MR. HILLIARD: They should meet me in my hotel room in London. I'm leaving tonight.
THE COURT: Good for you. Have a wonderful trip.
MR. KENNEDY: Just one last housekeeping matter. The September 25 is scheduled to expire

today. We recommend until this is resolved to extend it to the 24th of July.
THE COURT: That's fine. Make it 5:00 o'clock. And if you'd draw me up some orders. And I would ask if you could kind of maybe do that in the conference room.
(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)
I, KAY A. LEVINE, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.
IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 3rd day of July 2001.

Certified Shorthand Reporter
Registered Professional Reporter

C.S.R. Certificate No. 84-3654.
CSR Certificate No. 84-3654.

In The Matter Of:

DEAN L. BUNTROCK, ET AL v.
JUDITH TERRA, ET AL

TRANSCRIPT OF PROCEEDINGS
July 2, 2001

P.M. SESSION

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,
Defendants.

) Case No. 00 CH 13859

PROCEEDINGS JULY 2, 2001

(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF ILLINOIS ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,
Defendants.

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:
QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;
BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson;
VERNER, LIIPFERT, BERNHARD, McPHERSON & HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named Defendants;

APPEARANCES: (Continued)
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
appeared on behalf of the named Defendants;
SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson;
SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant Terra Foundation for the Arts;

APPEARANCES: (Continued)
HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, Charitable Trusts Bureau, and
MS. THERESE M. HARRIS, Assistant Attorney
General, Charitable Trusts Bureau,
appeared on behalf of the
Plaintiff-Intervenor;

ALSO PRESENT:
MR. HILLIARD.

REPORTED BY: KAY A. LEVINE, M.A., C.S.R., R.P.R.
Certificate No. 84-3654.

THE COURT: After everybody gets in position, I'm going to ask if we could start on the far right and go across for the benefit of the court reporter. And if we have two rows, that's fine. I just want to do the front row first and the second row second. It makes it easier for the court reporter if that's possible.

MR. CARROLL: Good afternoon, your Honor. James Carroll on behalf of the plaintiffs, Gidwitz and Buntrock.

MR. KENNEDY: Good afternoon, Judge. John Kennedy on behalf of the plaintiffs.

MR. QUINLAN: William R. Quinlan on behalf of plaintiffs.

MR. PERKINS: Floyd Perkins and Therese Harris on behalf of the Attorney General.

MR. CARLSON: Steve Carlson, your Honor, on behalf of the Terra Foundation for the Arts.

MS. STONE: Susan Stone on behalf of the Terra Foundation.

MR. BELLOWS: I'm Joel Bellows. I'm here for the named defendants.

MS. BELLOWS: Laurel Bellows, the same, for named defendants.

MR. GARMENT: Leonard Garment, the same, for the named defendants.

MR. TODD: Chris Todd, for the same.

MR. WILSON: James Wilson for Judith Terra, Alan Simpson, and Paul Tucker.

MR. CROWE: Brian Crowe here on the last-mentioned defendants.

MR. BELLOWS: Your Honor, is there some significance to the fact that Mr. Crowe has one foot out of the courtroom?

THE COURT: None whatsoever.

Counsel, since you were here on Friday, I've received three filings, and I don't really know yet what has been filed and what hasn't been. There was quite a bit of confusion after Friday's court proceeding, so I want to clarify some of that confusion, first of all.

What I've received since Friday is Mr. Crowe and Mr. Wilson's emergency motion to withdraw on behalf of the individual defendants, and I assume that everybody has received that.

I also received at 1:15 today, right before I went and did my 1:30 case, from Bellows & Bellows a motion for leave to file written

objections and for an evidentiary hearing on a proposed settlement. And there are some attachments to that, and in this short period of time I haven't gotten through all the attachments on that one.

And then while I was hearing my 1:30 case, I received from the mediator a letter dated July 2nd. And I assume that all of you have received that letter?

SEVERAL ATTORNEYS: We have not, your Honor.

THE COURT: Okay. And then I also received what is the first notification officially that I have of a proposed consent judgment and order. I realize that on the papers that were tendered as courtesy copies on Friday, there are included in there some proposed drafts of things that had been circulating in the mediation process. I didn't deem it appropriate to read those on Friday or to read anything until I received something firsthand from the mediator.

What I've received from the mediator is a one-page letter and a proposed consent judgment and order which I have just started to get through and which I haven't gotten through in the short

period of time that I've been off the bench.
Now, is there anybody here from the mediator's office? Are there extra copies of this document — oh, Mr. Hilliard is in the courtroom. Do you have extra copies for everyone, sir?
MR. HILLIARD: I have some extra copies, yes.
THE COURT: It's a one-page letter and then a proposed consent judgment. I don't have anything official as to what took place, if anything, on Friday, so I don't know if there was a vote on bylaw changes and I don't know what the vote was. And I don't know if there's anything else I'm supposed to be reading.
And then the last thing I just wanted to bring up is I'm not quite certain from the Bellows & Bellows firm what was filed on Friday. I asked my staff to call on Friday. There were a number of telephone calls back and forth.
I received Friday morning a notice of a motion for a temporary restraining order, and my staff asked two or three times the attorney who dropped it off, Is this the courtesy copy or is this the original? And we were told this is the courtesy copy, so I proceeded to start to mark it

up.
Later in the afternoon I checked with the court clerk and was told she had no original. So this is signed by Joel Bellows and — originally, it looks like — and it appears to be the original. So if this is to be filed with the clerk of the court, I have to give it to the clerk.
MS. BELLOWS: May I speak to this, your Honor, to straighten up some of the housekeeping matters that are before you? We are prepared to substitute a copy for you to work on as a courtesy copy. Because you've begun to mark it up, we can arrange as to how you want to handle that.
THE COURT: Why don't you put these two pages on the end of that, the original signed, and give me the other.
MS. BELLOWS: Right. Because we would like —
THE COURT: To file it under seal.
MS. BELLOWS: We would like to file it under seal. Thank you, your Honor. So if we could have an order that gives us authority to file those papers under seal, we will do so.

THE COURT: And those papers would be the document entitled Notice of Motion for Temporary Restraining Order. Let me give you the other, if you don't mind, a copy of the other signed one for Mr. Bellows. Those are the originals.
MR. BELLOWS: Thank you.
THE COURT: Just give me the body, you know, something to complete that.
MS. BELLOWS: I have that here.
THE COURT: Then this document, Additional Appearance, was that ever filed?
MS. BELLOWS: I thought that we have an appearance that is filed.
THE COURT: So this is — even though this is an original, this is meant to be my courtesy copy.
MS. BELLOWS: It's meant to be your courtesy copy and —
THE COURT: And you're going to file under seal the document I handed you back, reshuffled, with the signature pages and your plaintiffs' memorandum and your exhibits that were filed in the federal court case; is that right?
MS. BELLOWS: Precisely. Attached as exhibits to the motion that I filed under seal.

THE COURT: Okay. We need a separate court order that has nothing else in it but that these documents are to be filed under seal and kept separate under seal by the clerk of the court. And then that gets put on the front of the envelope. So they'll be put in an envelope sealed with that on top and give them to the clerk.
MS. BELLOWS: We have come prepared to do that today, your Honor.
THE COURT: Okay. So that was the first issue from Friday.
The second issue from Friday, when I left, I had a copy of the motion. The original, the clerk tells me from her phone call, was filed on the pro hac vice. And I did not get an order on Friday and the clerk said that an order has just been brought in on that. Anybody have a problem if I sign that order now?
MS. BELLOWS: It has been faxed to everybody for advanced notice, your Honor.
THE COURT: Okay. So the counsel from Washington are in, and I just want to make sure that before we deal with Mr. Crowe's motion, everybody's in who's supposed to be in.

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Now, Mr. Crowe, you want to leave us?
IR. CROWE: I do.
THE COURT: And, Mr. Wilson, you want to go along with him?
MR. WILSON: That's correct, your Honor. We are taking this as if it were a motion for substitution, since there is other counsel in at this point. The strictures of the Supreme Court rule regarding withdrawal we didn't feel applied here at the time because of the fact there's more than competent counsel from three law firms in two cities representing these clients.
THE COURT: And I assume that no one wants to say anything about that?
MR. CROWE: Plus, Judge, we'll assert no attorneys' lien on the file.
THE COURT: Thank you.
MS. BELLOWS: Your Honor, we have authority from our clients to enter an additional appearance.
As your Honor may recall, we began in federal court with authority to file that action by our client. Our clients, two of them, one is in Florence, the other is somewhere in Russia.

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That would be Senator Alan Simpson in Russia.
And as I indicated to your Honor at the close of court at the hearing on this matter on Friday, we do not have the ability to get authority for a substitute, only ability at least for the near future to serve as additional counsel in this matter.
THE COURT: Okay. And you've got your additional appearance on file as to the counsel from Washington. Everybody is from Washington, right? And you have leave to withdraw.
The only issue I want to deal with is or talk about is, you have a pending motion for fees, which if the settlement is approved, will be mooted. And if the settlement is not approved, it will be the first matter I deal with.
MR. CROWE: We have a petition for you today, Judge, to be filed.
THE COURT: What is that?
MR. CROWE: A petition for our fees, whether the settlement is approved or not.
THE COURT: Okay. Should that be filed with clerk of the court?
MR. CROWE: I assume it should, Judge. We'd

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give a copy to you, of course.
THE COURT: Anybody have a problem with that petition being filed at this juncture with the clerk of the court?
MR. QUINLAN: No, your Honor.
THE COURT: Okay. You can go ahead and then drop off a copy.
(WHEREUPON, Messrs. Wilson and Crowe left the proceedings.)
THE COURT: There is a motion now for an evidentiary hearing on the settlement issue. Let me hear, first of all, from counsel for the Foundation as to what happened on Friday.
And is there anything else I'm supposed to read, and does the Foundation concur that there is the need for a fairness hearing?
MS. STONE: Your Honor, on Friday there was a properly noticed, properly called board meeting. Due notice had been given. There was a meeting held, convened at approximately 12:45.
The board met, discussed the proposed settlement. There was lively debate about certain aspects of the proposed consent judgment and language of resolution that would be needed to

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amend the bylaws in order to allow the board to enter into the proposed consent judgment. After some vigorous debate, the board voted and by a vote of 6 to 2 voted to enter into the proposed consent order.
THE COURT: And that was with three individuals not present.
MS. STONE: That's correct. Those individuals were Senator Simpson, Ambassador Jacques Andreani and Madame Helene Ahrweiler. All three had been given proper notice. The Foundation administrative staff talked to all three before and after the meeting and confirmed that they had indeed been given notice of the meeting.
I do not believe — we only received the motion that the Bellows & Bellows firm is filing a few moments before court began, but I do not believe from my quick perusal of that document that they are raising any particular concerns about the way in which the notice was given. I believe notice was appropriate, and the meeting was appropriately called in strict conformity with the bylaws.

THE COURT: Was a vote taken to change the bylaws?
MS. STONE: Yes, it was, your Honor.
THE COURT: And was a vote taken to elect new directors?
MS. STONE: Yes, it was, your Honor.
THE COURT: So as far as the Foundation is concerned right now, there are how many directors?
MR. CARLSON: It doesn't change, your Honor.
THE COURT: It doesn't change anything until I sign this, right?
MR. CARLSON: That's correct, your Honor.
THE COURT: And right now the Foundation is continuing to operate as it has.
MR. CARLSON: Exactly right, your Honor.
THE COURT: Does anybody feel that we should have an oral report from the mediator? Do you want to take a brief recess and read his letter and then decide how you want to proceed? I know you all just received the Bellows & Bellows documents.
MR. CARROLL: We haven't even received the exhibits, your Honor. We just received a fax of —

in mediation that are confidential. But I can report that a vote was taken on the 19th of June on which a majority approved of a settlement agreement. That agreement was — modifications were made to it and — in order that it could be a subject of resolutions.

And it was brought before the board of the Foundation on Friday for ratification and for the election of additional members of the board, five additional members, and it has just been reported to you that took place on Friday.

The mediators were informed of this at about 2:00 o'clock in the afternoon. This morning we sent around the document to attempt to get signatures. We weren't able to get all the signatures, but that is the document which we tendered to the Court this afternoon.

THE COURT: The mediation process started on February 6th?
MR. HILLIARD: Correct.
THE COURT: And it's now the beginning of July and during this almost — what is it? — four months' period, you have had, I understand, extensive meetings with all of the parties

THE COURT: Do you have a complete copy to give counsel?
MS. BELLOWS: We do.
THE COURT: I have moved my 3:00 o'clock to 3:30 with the hopes that we would be done a little bit before — I mean relatively soon because I'm not certain this is going to be concluded today.

I want to find out what you believe is the best way that we should proceed on this, but you're not all informed because you don't all have the document. Do you want to take a few moments and look at the document and see whether an oral report is called for from the mediator today?
MR. QUINLAN: I think some sort of report from the mediator would be appropriate.
THE COURT: That was my intent. I intended to hear from him.
MR. QUINLAN: Maybe if we heard from him now, it might help us when we see the documents and where we are.
THE COURT: Okay. Mr. Hilliard, are you prepared to give us an oral report today?
MR. HILLIARD: The mediator's report is necessarily abbreviated because of the proceedings

involved and individual meetings with them, meetings with their counsel as well as group meetings of this board.
MR. HILLIARD: We've had individual meetings with all of the members of the board, all the directors of the board, and we have had group meetings in March, again in May, and again in June when we would get everyone together.
THE COURT: And when one refers to a mediated settlement, the settlement is based on a vote on the board; is that correct? I mean, there's no issue that eleven people are not 100 percent happy about this. There are dissenters?
MR. HILLIARD: That's correct.
THE COURT: But this was a proceeding in which everybody had, as far as you're concerned, a full opportunity to participate.
MR. HILLIARD: Oh, yes.
THE COURT: Do you have any concerns about the integrity off this mediation process or presenting the settlement to the court?
MR. HILLIARD: I do not.
THE COURT: Does anybody want to just take a brief recess and get the one-page letter from the

mediator, and then we will resume after you have
[2] hanged some documents?
[3] MR. GARMENT: May I say something first, your Honor?
THE COURT: Yes, sir.
[6] MR. GARMENT: And what I say is, I hope your
[7] Honor will take it in the spirit in which it is intended, which is to make a contribution to this
[9] proceeding and with respect. But I understand —
[10] I understood and still understand why your Honor would have started the mediating proceeding, mediation process, with an order that the
[13] proceedings be sealed in the hope and perhaps a
[14] reasonable expectation that this would facilitate the discussions of the parties and permit free and
[16] open discussion without the intervention of
[17] outsiders and outside pressures of one sort or another of publicity and debate.
And what happened thereafter is a very
[20] strong argument — I say respectfully — for the
[21] centrality of press access of proceedings of this nature. And I think that at this time the sealing
[23] provision should end. I can understand why the
[24] press and press comment was, in effect, prevented

in order to —
THE COURT: I don't mean to interrupt you,
] sir, but I don't think anybody is anticipating
] anything to be sealed from now on, is there?
MS. BELLOWS: Your Honor, we aren't anticipating, but we have been cautious about our
] filing today. The mediation process — it's our
] understanding the mediation process is terminated —
MR. GARMENT: Well, I can conclude very
] quickly then.
[1] THE COURT: And I didn't mean any disrespect
[in cutting you off, sir, but the order said the
] board couldn't meet until — or the board couldn't
] meet or do anything until the mediator reported
[back. And that during the course of the mediation process, the parties were supposed to be dealing
] with the mediator and working this case out.
[19] MR. GARMENT: And, of course, your Honor,
[precisely what we have alleged in the district court proceeding under the Section 1983 claims
] relating to the interventions and not only
[2 roper and unlawful interventions by the
orney General's office is precisely the reason

[1] why open, free access to the processes of law,
[2] whether in court or in a mediation proceeding are
[3] best aired publicly. And that is the nature of
[4] the First Amendment, sometimes abused but always
[5] exercised in the interest of public information.
[6] THE COURT: Were these documents that were
[7] filed in federal court filed under seal?
[8] MR. GARMENT: We filed them under seal.
[9] MS. BELLOWS: We filed them under —
[10] THE COURT: Because mine aren't marked that,
[11] so I have —
[12] MR. GARMENT: In deference to your Honor's —
[13] THE COURT: I assumed that since everyone was
[14] talking about things that have come out in the
[15] newspaper that there had been plenty of access to
[16] these documents. Because how else would anybody
[17] know about this stuff?
[18] MS. BELLOWS: Your Honor, we filed them under
[19] seal. Judge Bucklo did not accept them under
[20] seal; that's as far as the federal court
[21] proceeding.
[22] As far as the filings that we have, I
[23] have submitted a courtesy copy to your Honor this
[24] afternoon. We have pursuant to your clerk's

[1] suggestion —
[2] THE COURT: Just brought it here to court.
[3] MS. BELLOWS: — brought it to court, and
[4] assume that it will not be filed under seal. But
[5] if we have no motion to do so, we would intend to
[6] have your Honor — we would intend to file it in
[7] the normal course.
[8] But in deference to your Honor and our
[9] new place here among you, with an abundance of
[10] caution we have provided your Honor with a
[11] courtesy copy, counsel with copies by fax, and no
[12] one else.
[13] THE COURT: I am one of the strongest
[14] advocates in this building on the public's right
[15] to know, and anybody who routinely practices here
[16] knows that I virtually never seal anything in this
[17] courtroom. And the only time I do it is if I feel
[18] that there is a really important reason to have it
[19] done.
[20] And in this case the only thing that
[21] was sealed is while this case was in mediation. I
[22] wanted to give it a chance. And I didn't want the
[23] parties or anyone or the attorneys talking to
[24] anyone except the mediator about what was going

on.
Now, lots of people, as I understand it, have violated that order, and that's another issue that we're going to have to deal with about that. That's a whole separate issue.
But now the mediator has reported. That's one of the reasons I wanted to make sure you all have what the appropriate papers are here. The plaintiffs are saying they don't know what you want to file today, Ms. Bellows, because they don't have the exhibits. So I want to take a few moments and make sure that everybody sees this document, which is being sought to be filed with the clerk of the court not under seal and see if there's any objection and whether it's — whether there is a desire on behalf of anyone to file anything under seal from now on.
The proposed consent decree, that's not supposed to be sealed, is it?
MR. CARLSON: No, it is not.
THE COURT: Am I missing something here?
MR. CARLSON: No, it is not.
THE COURT: When we talked about that one, you all came to me and you wanted to have a

certain portion of the mediated settlement not public. And I said you can go ahead and try it, but I'm not signing anything that's not going to be public. And so you went back to the drawing board and talked some more.
MS. STONE: There was one aspect of the consent, proposed consent judgment, that we should draw to your Honor's attention. That the parties who are entering into this proposed consent judgment, assuming your Honor approves it —
THE COURT: This is all they're going to say.
MR. CARLSON: That's correct.
MS. STONE: — have agreed that there is a mutually agreeable statement that will be released to the press. And that is all that people will say. And that will be binding on those who — the parties who are parties to this particular agreement.
THE COURT: That's the Attorney General, Mr. Buntrock, Mr. Gidwitz, and the Foundation.
MR. CARLSON: That's correct.
THE COURT: And that's all you're going to say. And this is not binding on the three individual defendants because they haven't bought

into it.
MS. STONE: Or Mr. Michaeli.
THE COURT: Oh, Mr. Michaeli. Okay. What I would like to do if we could is, Mr. Hilliard, if you could make available to them whatever copies of the letter that you had, I would assume that I would file this letter with the clerk of the court unless someone has a problem with doing that. But I want you all to see it.
And the proposed consent judgment and order is something I'm going to have to take a little bit of time to at least read more than the 15 minutes that I was allotted today after you spent four months putting it together.
And there is a motion which is seeking an evidentiary hearing and a fairness hearing about this, and you all get to be heard as to — unless you feel that you're barred by the consent decree judgment. You're not, are you?
Okay. I want to hear what you all have to say about their proposed motion and we can go from there. But first let's just see the motion and all the attachments. And as soon as you're ready, please let me know.

(WHEREUPON, a recess was had.)
THE COURT: Anybody have any problem if we file the letter from the mediator?
SEVERAL ATTORNEYS: No, your Honor.
MR. BELLOWS: It is what it is. We have a problem with the content, but the letter itself is what it is.
THE COURT: Okay. Well, I will file that with the clerk of the court.
Has everybody had a chance to see the exhibits that are attached to the individual defendants' motion for leave to file written objections and for an evidentiary hearing?
ATTORNEYS: (Nodding.)
THE COURT: That apparently was what the concern was, that you didn't have the exhibits.
MS. BELLOWS: Your Honor, may I speak for one moment to the exhibits. The exhibits themselves were simply the original articles of incorporation, the amended articles of incorporation, and a page of the transcript.
But counsel, Mr. Quinlan, has reminded me that also referred to in our motion are portions of the exhibits that were filed with this

court that were going to be filed under seal.
Now, frankly, your Honor, there are
ce exhibits that were attached to the federal
court proceeding and are now filed under seal in
connection with our Friday's motion, three
exhibits which do have something to do with the
mediation process, Exhibits 17, 18, and 19 of
those documents attached to our motion for TRO.
Those are letters which involve the mediation
process.
Other than those, we do not believe
that there is anything else in the exhibit book
that your Honor has that should be filed under
seal. We would like to then have permission to
remove those documents and attach the exhibits as
an additional exhibit to our motion today for an
objections and evidentiary hearing.
THE COURT: You're talking removing only
Exhibits 17, 18 and 19?
MS. BELLOWS: Yes.
THE COURT: And that would be the things you
would be filing today. So what you would file
today is this motion for leave to file written
objections. Would you also be including that

memorandum from Friday or just the exhibits?
MS. BELLOWS: No, your Honor. Just the
exhibits.
THE COURT: Just the exhibits with the
exception of 17, 18 and 19. Is everybody on board
as to what Ms. Bellows is talking about?
MR. BELLOWS: Her husband's not. If I could
be heard on this. I thought I understood the
Court to say that it did not want to in any way
impede the mediation process. As you know, the
things that we have been filing with the court
have made repeated references to the mediation
process.
THE COURT: Well, as of yet, nothing's filed.
You haven't filed anything except an appearance on
Friday.
MR. BELLOWS: That doesn't have anything to
do with it.
THE COURT: Nothing made it to the clerk's
office yet. So nothing — whatever was filed in
federal court was filed in federal court. The
mediation process, as I'm seeing it, is concluded
of the report of the mediator today, is it not?
MR. CARLSON: I think it is, your Honor.

MR. BELLOWS: And then at that point is
everything released from seal? Can we feel free
to refer to it in arguments before the Court?
THE COURT: That's what I want. I want to
have an opportunity to have everyone be heard on
that also. Is there any desire to keep any of
these documents confidential for purposes of now?
MR. QUINLAN: Which — I'm sorry.
THE COURT: Any documents. The only reason
that I wanted the things filed under seal Friday
was we were still in the mediation process. And
they should have been filed Friday, and if they
were filed Friday, they should have been filed
under seal.
MR. QUINLAN: I guess the only question I
have, your Honor, is if the mediation process has
been terminated merely by filing the report of the
mediator — are we at that point or — before you
consider whether you enact the agreement of the
parties pursuant to the mediation. You have not
addressed the issue of the resolution that has
been adopted by the board.
THE COURT: Well, first of all, I haven't
seen the resolution that's been adopted by the

board.
MR. QUINLAN: Well, you've seen the consent
judgment, which is the —
THE COURT: I've seen the consent decree.
MR. QUINLAN: — which is the result of the
resolution.
THE COURT: As I indicated on Friday, I'm
going to consider anybody's argument that they may
want to present as to whether or not I should sign
this consent decree or not. Now, I didn't
anticipate an evidentiary hearing. I could
possibly see this all being done with affidavits.
It suggests that there's the need for
an evidentiary hearing, and that's what I want to
talk about today with all of you. Is anybody
going to publicly air the entire mediation
process, contemplating with your evidentiary
hearing calling the mediator as a witness? What
are we doing here?
MR. GARMENT: Indeed we do.
MR. BELLOWS: I don't see any way to avoid
that, particularly since the mediator has
recognized that the mediation could not have
succeeded without inter alia the Attorney General.

And I think that that's really the point of it.
My own feeling on this is that we don't necessarily have to take the Court's time in having a hearing as long as we are able to develop — I mean, the affidavits that we get, we can get from third parties and things of that nature by virtue of the people who would not otherwise be able to get them.
I would not be reluctant or opposed to, if the Court gave us an expedited discovery schedule, to taking their depositions and avoid having to drag this thing out in court.
THE COURT: Mr. Bellows, you say that you need to take depositions of people from all over the world on this motion. And are you talking about —
MR. BELLOWS: I don't think so.
THE COURT: Well, that's what you said in this document. You said of the people that would need to be in an evidentiary hearing, witnesses are spread throughout the world. Are you talking about board members or are you talking about people that — similar to these declarations where you're talking about Dan Terra's intent? What are

we talking about as a hearing?
MR. BELLOWS: It breaks into two parts, so the answer is yes. It breaks into two parts. The affidavits of declaration from people all over the world, obviously we don't have to depose them.
With regard to the people who were intimately involved in the mediation process itself — and I would think certainly Mr. Hilliard would be one of those persons — we could either call him as a witness if the Court wanted to be involved in the give-and-take of it, or we could take his deposition and several others and just argue from those. The people all over the world, as I say, are people from whom we would get affidavits.
THE COURT: About?
MR. BELLOWS: The various points raised in the — the various points raised in our motion as to the effect of this order on entities wishing to do business in the future in Illinois, not-for-profits most particularly, foundations.
We would also bring in people who would — the Court will recall that part of the — you see, if you don't get me right then and there.

it's gone.
The Court will recall that one of the things that was not done in this very slow rush to judgment was to find out —
THE COURT: What very slow rush to judgment? The mediation process?
MR. BELLOWS: Yes. — was to get alternatives to the arrangement that is proposed in this consent decree. And I think that, for example, and this has been a very large concern of mine, although it's not exclusively.
You've got a major asset here. You've got people on the board, particularly the named plaintiffs, who are used to disposing of assets of substantial size. I have to believe that neither of them, for that matter no one else, would really undertake to make the kind of a decision that had been presented here in the consent decree without considering alternatives.
Now, part of the problem, of course, is that if you start out with the Attorney General of the State of Illinois saying that this entity will remain here, that this will be its focus, that this is where the art will be displayed, that this

is where we're going to enter into an arrangement with another entity here in Chicago, I don't know that the board members would even appreciate the fact that it would be in the Foundation's best interest to consider alternatives from places outside of the state. And I think that that is something that the Court's entitled to consider when it determines the fairness of the result of this process.
THE COURT: Now, Mr. Bellows, I don't know how much of an opportunity you all had to discuss the history of the case with your predecessor counsel.
I know from their motion today that their client has stopped communicating with them, and I know that they did not know that you all were going into court on the motion today on Thursday until they read about it in the newspaper.
But we had in this case I would say at least half a dozen sessions with the Court and with counsel from each side to talk about whether or not this case was mediatable, and we had some pretty long sessions about that.

And one of the fiercest proponents for mediation process, one of the most vociferous, "Let's go to mediation," was from your clients' counsel who wanted this case mediated.

Well, right from the very beginning the Attorney General made the statement that they were not going to be participating in any mediated agreement if it meant that this collection would be lost to the state of Illinois. That was up front from day one.

And there were many discussions about that. And that was the ground rule from their perspective pretty much when we — not the ground rule, because I don't mean to say that it was a rule that they were setting, but that was their concern from the very beginning. And there was a full airing of that with the Court about whether or not there should be a mediation to begin with because there are unresolved legal issues here.

And the Attorney General may be right or may be wrong in its view of the law, and the plaintiffs may right or wrong. But there was a substantial concern about the cost of dragging

this litigation on for years, and there was a substantial concern about the stakes of not trying to settle this.

But everybody went into the process, as I understand it, with the understanding that the Attorney General was going to have to sign on at the end to this agreement, and in order to sign on to this agreement, there was going to have to be some kind of concession made about Illinois.

That was how it started. So when you say that things were not aired, we all had a number of discussions about where the Foundation was before this lawsuit started and about negotiations with a number of other institutions throughout the country and whether or not this was the right thing or the wrong thing to do to try and settle this case.

And a decision was made by all counsel on behalf of all parties that, yes, let's give this a chance. And this was pretty much the starting point. So I know you're shaking your head yes, but I don't understand. You're gesting that this was something that got hammered in at the last minute. Well, this was

from the very beginning.

MR. BELLOWS: Pardon me for a moment, your Honor. The reason I was nodding is I thought that was the purpose of mediation. People start out with a certain position. The Attorney General started out with a position that some concession had to be made. I don't fault our predecessors in any way for agreeing to the mediation process. That's the first point of it, and the recognition that it is the process itself that is supposed to get people to change their positions. That's the first thing.

The second thing about it is I don't think that anyone really contemplated at the beginning of the process that it could be perverted to the — and that was the word I used in our motion — to the extent that it was. So I think that on two grounds — yes, I appreciate the fact that our predecessors agreed to it. We probably would have for the same reasons that they did.

But to wind up in a position where you're saying, Well, gee, the Attorney General made its views clear at the beginning of the

process. Yes, that's why you have this kind of a process, to get them to change their position.

And during that process all kinds of things happen that were not really part of a normal mediation process. You don't have people going outside of this process to attempt to intimidate people. And it is by virtue of the conflicts that arose that there's some very, very severe problems with the validity of any agreement that would be reached.

But when I say, for example, that — and only as an example — that we would want to present the Court with evidence of alternatives of places from without the state, the Court may very well decide, after having heard that evidence or alternatively reading it by way of written submissions, that anyplace that — if it turns out to be, for example, the Art Institute, that that might be a superior way of dealing with this.

A whole bunch of things, Judge, got started with bare allegations, with allegations that we believe have no basis in fact. That Dan Terra, for example, wanted his collection here when the evidence is just the opposite.

And so I think these are things that the Court should understand and appreciate. And if you say, well, gee, there are all these people that have signed on to the result of the mediation, I would say to you, Judge, you know, when you've got the Attorney General of the State of Illinois saying, This is what the law is, this is what the rules are, this is what's going to happen here, you get these participants — I'm beginning to think, well, gee, you know, if that's where this is going to wind up, I mean if it's only going to — if it's going to wind up where the Attorney General is going to be able to keep us here in Illinois so that we can't do other things, then that's what's going to — that's the result. That's what's going to happen as a result of the mediation.

And if, in fact, that had been dispelled at the beginning, if the people who participated in the process understood that they did not have to capitulate on those points, if in fact those people did not have inherent conflicts that precluded them from taking a role in the decisional process, then, your Honor, the

will that this — and in accordance with their fiduciary duties that this was in the best interests of the Foundation as they understood it.

Now, Mr. Bellows may disagree that it's in the best interests, Mrs. Terra may disagree, you may disagree, or I may disagree, your Honor. None of that is relevant. The question is whether or not the majority's will of this board will be respected.

And, your Honor, no one ducked the issue of whether or not there was coercion. That was an issue which had been discussed in federal court on Thursday and Friday morning in front of your Honor. And that matter was specifically addressed at the board meeting.

And I would like to read your Honor a portion, a very short portion, from the transcript of the board meeting. Now, this is a rough draft and we haven't had time to refine it, but this is our best understanding of what was said at the board meeting that was taped.

Corporate counsel for the Foundation, Mr. Heatwole, Mark Heatwole of Winston & Strawn, specifically advised all of the directors of their

non-majority directors would still have the numerical majority at this point.

THE COURT: Let me hear briefly from each side. Everyone is being very silent here.

MS. STONE: May I speak on behalf of the Foundation, your Honor?

THE COURT: Yes.

MS. STONE: The Foundation's position is today what it has always been in this case, which is that the board of directors should be able to run the affairs of the Foundation without undue influence from this Court, or quite frankly, from unhappy directors who happen to be in the minority. And that's as true today as it was at the start of the case.

It doesn't matter who the individuals are who may be in the minority. The fact is that a board of directors determines the face of an organization through the majority will.

And here you have a situation where there was a duly constituted, duly called board meeting. A quorum was present. There was vigorous discussion and a vote was held. And 6 to 2, the directors voted, exercising their free

need to vote their fiduciary duty.

And he stated: In light of the allegations that have been brought forward in federal court yesterday, to a certain extent I was not there, but I understand that that sort of the same substantive comments were made in the Cook County courts this morning, about the coercion that some of the members of this board may feel or may not feel from the action of the Attorney General.

I think it's important for each of you to, I think, indicate before you take this vote, that you are voting freely and that you are voting your fiduciary obligations to this board and this institution and without that pressure. And if anyone feels they can't do that, I don't think we should vote. But if you are voting freely and if you do not feel that compulsion, then I think you are free to vote.

And this is specifically what Stephanie Pace Marshall and Dr. Ted Stebbins said in response to that.

Dr. Marshall: Just in response to what you've just said, Mark, I have felt in the past

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that despite the desire of some board members over last year or so to try to peg me into an ..ged camp or an alleged side, one side or the other, I have always walked my own path and I have always spoken with my own voice to represent the integrity of my own convictions. And I have done it throughout this arduous process, and I do so now with full knowledge of my fiduciary responsibilities.

It is true that the Attorney General's office has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation. This has not played a part in my decision-making with respect to my fiduciary responsibilities as a board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation.

And then Dr. Stebbins spoke. And it's interesting, your Honor, that in his comments he does criticize the tactics, as I believe he calls them, of the Attorney General. He specifically criticizes the Attorney General, but he says that

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that is not what is influencing his vote. And he talks about his history throughout this process, about how he has been more of a centrist or someone who is exploring different options. He talks about his history on the board.

I came to the board. I knew Dan Terra. I came to the board at the request of Jim Collins and Judith Terra. I've served as chair of the collections committee and I think I served effectively. And I brought some wonderful new paintings, helped to bring some wonderful new paintings to the Foundation collection.

I've done this without any iota of a conflict of interest. I've always felt free to form my own judgments. And either last August or early September when Paul Tucker first told me about his enthusiasm for the building in Washington and wanting to move there, I disagreed. I long argued to explore a variety of stand-alone options in Chicago. I was willing to consider as part of the strategic planning going elsewhere, but I've always been a defender of Chicago.

And then he goes on: I abhor the ...eatening tactics of the Attorney General, but I

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am voting my own conscience and for what I believe is the best interest of the Foundation for its future as an independent, viable force in Chicago and in France for the promulgation of American art.

So, your Honor, these particular directors clearly and unequivocally stated that they believed they were voting in the best interests of the Foundation and in accordance with their fiduciary duties as they understood it.

I think the board has spoken. It was a 6 to 2 vote, and I think the board process should be respected.

THE COURT: I have one question. I'm going to go on and let the plaintiffs speak in just a moment.

The consent decree which I just received, I have read again during the breaks here. This, as I read it — and tell me if I'm wrong — has a new board, once it's elected, essentially negotiating to partner with another institution in Chicago. It doesn't require it, does it?

MS. STONE: That's correct, your Honor.

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THE COURT: So if something can't be worked out, the Terra would be its own separate museum.

MS. STONE: That's absolutely an option for the board.

THE COURT: And there's absolutely nothing in here that restricts the Foundation's ability to continue to run its programs, activities, and operations in Giverny, France?

MS. STONE: That's particularly reserved for the board. The board's ability and freedom to conduct its activities, operations, and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

THE COURT: It can also lend its collection, as it always had, to other museums throughout the United States and continue its educational efforts in other places of the United States.

MS. STONE: That's correct, your Honor.

THE COURT: The only thing that this really is making a difference, as I understand it, is the Foundation can't close up shop and move outside of Illinois permanently. I mean —

MS. STONE: Right. I think —

THE COURT: — there's a number of other changes, new board members —
MS. STONE: — paragraph 5 of the consent judgment and order probably identifies what limitations may exist now with respect to the Foundation's activities for a 50-year period.
THE COURT: For a 50-year period.
MS. BELLOWS: And self-governing, your Honor. Which is one of the things that we would speak to when everyone else has a chance to be heard.
THE COURT: Okay. And this document is the board of the Terra Foundation amending its own bylaws to put some restrictions on its activities that Dan Terra didn't put in there when he set it up.
MS. STONE: That's correct, your Honor.
THE COURT: And any board can do that if it chooses to do that, can it not?
MS. STONE: That's correct, your Honor.
THE COURT: Okay. Let me hear from the plaintiffs and the need for — I really want you also to address whether you have a problem with anything being filed with the clerk of the court at this juncture. I can tell you that what I'm

there's no objection to that.
And the problem is that what they present is really a question that they would like to try in front of this Court, which they had the opportunity to try; namely, what was the intent of Mr. Terra and what was the law on these issues, et cetera.
And that's the reason we went into mediation is the parties agreed to set those things aside, put them off the table, and get together to see if we couldn't resolve this dispute in a way that didn't necessarily require addressing what were some concerns and issues on both sides.
And what we had here was an agreement to mediate by all the parties, including the defendant directors. Counsel now would like to come in and say, Let's take a look at what took place. Let's go out and take depositions. Let's depose the people that were there, including the mediator.
As your Honor knows, that would, in fact, destroy and undercut the ability to have any mediation in any case again, which they agreed to.

going to need to do is to read this very carefully. I want the transcript of the board meeting and —
MR. CARLSON: We'll be happy to give you the resolution that was passed.
THE COURT: Right. — and the resolution, the amended bylaws, whatever else that you have from Thursday. But let me hear from Plaintiff. Is it Mr. Quinlan I'm looking at?
MR. QUINLAN: Yes, your Honor. Well, first of all, the issue here is their motion for leave to file objections to this agreement or consent decree.
And the problem is that what you really have here is an agreement. I don't think there's any question — and I don't even think that the defendant directors raise the issue whether there's agreement or the terms of the agreement.
What they tell you is that they don't like the agreement and they don't like the terms of the agreement. But we have a 6 to 2 vote, which is here by the attorneys representing the Foundation who attest to the validity of that. We have the terms which are in front of your Honor;

This was a mediated process, and they were agreeing in that mediation that nothing in the mediation would be used against anybody involved in this, including anything that was ever said in there.
So the mediation statements and the reason for your order barring disclosure of this was that these couldn't be used in court or in any other proceeding against anybody. Again, a commonplace type of procedure in mediation because no one is going to get into the mediation process if, in fact, this is going to be something to be used against them. The same thing as a settlement. This is a settlement process.
Your Honor herself in a settlement process in any case would say, Ladies and gentlemen, you know that nothing said here is going to be anything that can be used one way or the other. People will make statements, compromise their positions, make offers, make proposals that can't be used later on to show that they were willing to at least agree to that or agree to something else, again, because it would never work.

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The public policy of the state, the
[2] blic policy of the United States, the public
[3] icy of the United States expressed in the
Arbitration Act are that these things are to be
encouraged, not discouraged. That's exactly what
[6] they would have here. If they want to complain
about this agreement, and if they want to complain
about this process, they can say it was fraud,
[9] they can say it was duress. They can say those
[10] things, but they need evidence of proof that's
clear and convincing.
There is nothing proffered anywhere
[13] here that even offers a scintilla of evidence that
[14] nobody agreed to this or it wasn't properly agreed
to. In fact, the people that they allege that
were somehow coerced are not here. They were not
[17] in the federal court. They don't file an
affidavit. The very people who supposedly were
intimidated or hurt not only do not file an
[20] affidavit or appear; in fact, they make a
[21] statement that their vote has nothing to do with
it. That they were not coerced into making this
vote. They make their vote because it's a hard
[24] question. And we think on a better analysis here,

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] it's the right result. And that's what they said.
] The federal district court judge said, Look,
[3] there's nothing unlawful about that.
[4] What we have as a situation is they
] complain about the lawful activity of the Attorney
] General and they complain about the lawful
[7] activity of two directors that are both lawful.
[8] And to somehow say that that is unlawful has in no
] way been demonstrated. And it has not.
] It is indicated here clearly what we
[11] have is a party who has agreed because they didn't
[12] prevail. Their views didn't win out. But it was
[13] one of those compromise decisions, and they were
[14] subject to the same requirements as everybody
[15] else. They were part of the board, and the board
[16] chose to do this.
[17] **THE COURT:** Are you saying that you're
[18] objecting to them filing a motion?
[19] **MR. QUINLAN:** I see no basis for it, your
[20] Honor. There is no proper tactic here. What
[21] they're asking in that motion is to come forward
[22] with evidence that is totally irrelevant to
[23] hether or not there was an agreement or whether
[24] not the terms were agreed to. That's what it's

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[1] about.
[2] And if they want to say this was a
[3] coerced type of thing, it requires clear and
[4] convincing evidence. And that's after they admit
[5] there's an agreement; you must have to set it
[6] aside. There is no evidence of that at all. At
[7] all. All they have is affidavits of third
[8] parties, affidavits of an individual, Mr. Tucker,
[9] who himself can't testify to what these people
[10] feel or don't feel.
[11] He said, I think they were coerced.
[12] They just told us they weren't. And in fact the
[13] federal court couldn't see any basis to this.
[14] Nothing's new. They filed the same things in the
[15] federal court. So there's nothing here in front
[16] of your Honor to warrant any kind of allowing them
[17] to file these matters or to be heard.
[18] These are things that they are just
[19] dissatisfied with. Well, they're dissatisfied
[20] with a lot of things. Frankly, we're dissatisfied
[21] with a lot of things.
[22] **THE COURT:** Do you believe that it would be
[23] different if they came forward with a motion that
[24] was seeking to have the Court not approve the

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[1] settlement because it was not a settlement, not
[2] agreed to, something wrong?
[3] **MR. QUINLAN:** They showed that it had not
[4] been agreed or not settled to, and there was
[5] substantial evidence — that is what the Illinois
[6] law requires is substantial evidence. It might
[7] require a hearing. But there's no substantial
[8] evidence of this. In fact, it's admitted.
[9] **THE COURT:** What about an argument that
[10] perhaps there's something illegal about this
[11] settlement? I know there were some statements
[12] made about that the other day, but I don't really
[13] see that necessarily here in terms of something —
[14] cases that are cited that says that there's some
[15] provision of this agreement that is contrary to
[16] Illinois law.
[17] **MR. QUINLAN:** Well, if you notice in their
[18] pleading that they have filed — actually it's a
[19] pleading, there's no complaint on file. There's
[20] actually nothing in front of your Honor other than
[21] a request to file a motion. So that there's no
[22] request to file a pleading. There's nothing that
[23] brings this case in front of the Court other than
[24] their motion.

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And, your Honor, if the illegality of this — I don't see any evidence of anything that's illegal. There's nothing here that radically changes the bylaws and says anything that's dramatic. We can never do "X" or we can never do "Y," or we immediately agree that we changed the law, the body of the law of Illinois, or whatever it might be. They're organized under the laws of the State of Illinois.

As any corporation, the laws of the state in which you are organized under are the laws that apply. They are organized under this state, and they are venued here in Illinois. Can they change it? Well, they have to look to the law of Illinois. That's where they chose to come and where they chose to do it. But they make no allegations in any way that this is wrong, illegal, or we're doing anything improper here in this particular consent decree.

All we're doing is articulating some things. That is the extent of the — to change the number of directors, to agree to do something for a period of time. That does not in any way bind them to anything else. They have voluntarily

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agreed to do certain things. Other parties have voluntarily agreed not to do things which enabled us to go forward. So there is nothing here in terms of the law that is set forward. There's nothing that would contest that. There's nothing illegal. And if they did that, they'd have to do it by some motion as set forth, some basis for an illegal act of the body.

But this was mediation. There is nothing illegal about mediation, there is nothing illegal about the topics, there is nothing illegal about what was being done. As counsel for the Foundation pointed out, this is what's done all the time. This is a typical type of thing a board would consider. It's a typical type of thing going forward that you'd look at. A decree, a mediation, a resolution of this. Boards across the world consider these type of things all the time.

And for counsel to come in here and suggest at the eleventh hour that there is something strange that's going on here and to suggest deposing the mediator, I think is just outlandish, your Honor. There is absolutely no

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basis for that. You know, the whole point here, they talk about stuff that's outside the state. We can take all of these depositions of people around the world. I don't know what they can add. I really don't. And I don't see how they can add anything to it, other than to say they have opinions about what might happen, et cetera.

I also would ask that even the documents that have been filed by architects and others and real estate brokers, all they talk about is what somebody might have wanted to do about renting property, of using property, et cetera.

As we all know from anything to dealing with the states, a lot of people met and intended to do a lot of things that they never got around to doing. And it didn't happen. Nobody changed the location of the Foundation from Illinois. Nobody changed the bylaws, nobody moved.

It was a question of what everybody was thinking. Everybody was looking for a better place and a better forum for the Terra Museum. And they had talked about that before, which all the parties admit. Can we find a better place in

Page

Chicago? How can we move this? How can we move around to get this out and get a better exposure?

And these are the things that were mediated, and these were the things that were resolved. So to suggest now that we could come in and just raise it at the eleventh hour — they say they never knew about the intent of the Attorney General. They never realized this is what he wanted.

They knew from the very beginning, your Honor. They knew throughout this. These were things that if they wanted to raise to you, if they wanted to object, they could have done so. They agreed and they entered into the order to fully participate in this mediation and never withdrew that until they came in at the eleventh hour and attempted to file these pleadings in federal court.

THE COURT: No, they gave directions to their counsel to stop participating in meetings.

MR. QUINLAN: On the 4th of June. So we're talking about something that never took place at this time. And of course we have contrary affidavits that could attest to just the contrary

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intent. That was the issue that would need to be
d and need to be resolved. But that wasn't
ly part of the mediation. The approach of
mediation is to remove the issues of which people
are in contest about and to seek those things that
you are in agreement about. And that's how you
resolve it.
THE COURT: Mr. Quinlan, have you ever heard
of a situation where there's been a court-ordered
mediation, and then everybody comes in and puts
the mediator on the stand and has all the
mediation completely aired? Have you all been
able to find any cases where that's been done?
MR. QUINLAN: No, your Honor.
THE COURT: How about you all? Have you ever
been able to —
MR. BELLOWS: I haven't researched it, your
Honor, but I would say in that regard that
certainly the Court's entitled to go beyond —
behind any settlement to determine whether it was
obtained by fraud.
If the Court feels that Mr. Hilliard
is, by virtue of his appointment, sacrosanct in
these proceedings — I'm not saying that in the

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pejorative — then I could understand that. I
could even sympathize with it. But that does not
mean in and of itself that the Court's not
entitled to some of the other information that can
be obtained from this hearing. I've heard all
kinds of things, your Honor. Well, you know,
there's really nothing fundamentally changed here.
Nothing fundamentally changed here.
THE COURT: Well, there's a lot that's
changed. There is no issue that there is a lot
that has changed. One of the most significant
things and, quite frankly, one of the things that
surprised me the most is this board agreed that
the entire board was going to resign. When I read
that, I was very surprised. But that's what was
decided and voted on by the majority. I didn't
expect that to come out of this.
MR. BELLOWS: Well, I'd like to speak to
whether it was voted on by the majority. First of
all, as the Court has heard from Mr. Hilliard, at
the very beginning of this session today,
Mr. Hilliard said the vote was taken on June 19.
as ratified on June 29th. That's what
Mr. Hilliard said.

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THE COURT: Well, perhaps it wasn't —
MR. BELLOWS: I don't know whether you agree
with it or don't agree with it, but what I'm
saying is that on June the 19th it was a 6 to 5
vote.
THE COURT: Well, it wasn't a vote of the
board because there was no board meeting. It was
a mediation session on June 19th. The board did
not meet till Friday.
MR. BELLOWS: Your Honor, I think, you know,
that Mr. Hilliard was certainly capable of
articulating what it was. His position was that
it was ratified. I don't really care, your Honor,
if it was unanimous.
I still think, your Honor,
notwithstanding the statement of counsel, that it
doesn't matter what the Court believes. That's
insane. This Court is here to determine questions
of this nature. Is this corporation acting
pursuant to its charter, to its bylaws, and just
going out and changing the charter and the bylaws?
If that action of changing the charter and the
bylaws is inappropriate, if the vote could change
the charter and the bylaws it participated in by

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people who should not have been voting, should not
have been voting. And to sit here and say, I
haven't been coerced.
But, you know, the interesting thing
about it, Judge, is that these statements were
made in the context of all this pressure has been
applied to me, but I'm voting my conscience.
That's the very point of this thing.
It doesn't make any difference whether people felt
that they were being coerced; they had something
to lose by not making that vote. And what they
had to lose, your Honor, was something that didn't
have anything to do with the business of the
Foundation. It was personal, their personal
exposure. And as a result of that, your Honor,
they should not have participated in the vote.
THE COURT: Who should not have participated?
MR. BELLOWS: I'm talking about the two
people who made the statement that they weren't
being coerced even though — it's semicolon —
however, I think that what the Attorney General
has done as far as attempting to coerce me, I
think is terrible. I'm voting this way of my own
conscience but I think it's terrible that he

attempted to coerce me.
I think that the point of it, Judge, is they should not have participated in that vote by virtue of the fact that they had an inherent conflict between being threatened personally and participating in the vote on the Foundation.
Counsel has also indicated we're going to be taking depositions around the world. I said just the opposite. That the people from around the world are people whose affidavits we can get fully and freely.
But with regard to the evidence I think that the Court should hear is the same evidence that it would hear in determining whether a settlement agreement had been procured by inappropriate means, by coercion, by fraud, by any of those things.
And I think that the Court has the responsibility, Judge, notwithstanding the fact that there has been this mediation process, to objectively review the result, notwithstanding the vote.
THE COURT: Are you suggesting that I interview those two board members to find out

Illinois the enforcement of the laws and the regulations and the proper conduct of foundations, which the citizens of Illinois are entitled to, but more to the point to enforce an intent which was not proven by any evidentiary proceeding before your Honor.
So we have the pre-mediation. We have what happened during the mediation, and counsel — Mr. Quinlan — has — and we strongly agree that evidence and proof are what are needed in this instance.
The acts which took place to which Dr. Stebbins referred, the threatening — these are not my words, counsel read them — threatening tactics of the Attorney General, the only attorney seated throughout that mediation process. When somebody states that in the same sentence that they indicate the incredible importance of the preservation of their credibility, and in the next sentence says, And I abhor the threatening tactics, but I agree of my own free will, I believe it is the Court's duty to question what that meant.
Now, you could bring Dr. Stebbins and

whether or not they were coerced?
MR. BELLOWS: That's not the issue.
THE COURT: Have you even spoken to either of them to — I have no affidavits from them. I have absolutely nothing to suggest —
MS. BELLOWS: Your Honor, if I may. We see this — and I will answer your questions directly. But we see this in two large categories at least. We see the acts that led up to the mediation process. I should say three categories; the acts which led to the mediation process to which all agreed, the decision to mediate.
But those acts involved misrepresentations to this Court which led this Court to grant a motion for intervention on the Attorney General's behalf to begin with. And those misrepresentations, it is our position, involved the intent of Dan Terra to keep the museum in Illinois.
But for that representation and the decision of this Court to give the Attorney General access to the mediation process, not so much to protect the citizens of Illinois from the — not so much to assure the citizens of

Dr. Marshall into this court and question them under oath, but it is the essence of intimidation; the better the intimidation, the less this Court will hear that they voted for anything other than by their own free will. The more successful the intimidator, the less likely the intimidatee to come forward and say, You're right, your Honor, I was intimidated. I felt I would lose 90 percent of my funding which I receive from the State of Illinois — in Dr. Stebbins' position — and perhaps be subject to continued inquiry by the Attorney General, which Dr. Marshall said right in the same sentence, probably a semicolon.
Yes, of my own free will, but I would like to acknowledge that the Attorney General has come into my academy and is in the process of making inquiries. The very same office of the Attorney General that is seated at the mediation, your Honor.
Those to me are the beginnings of pretty substantial evidence and proof that there is something wrong with the free discussion that should be taking place in the mediation.
And then I have my third category if

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you'll permit me, your Honor. And that third category is, is the agreement that was reached something that the Court should in fact sign, agree to, consent to? And for a number of reasons the answer is no.

Let's start with a simple one, the power of negotiation. One of the provisions that your Honor asked Mr. Quinlan and Ms. Stone about earlier was, is it a fact that as part of this order that I just — I saw a few minutes ago, so I'm absorbing it as we go.

But is it a fact that one of the provisions of this order is that the Terra Foundation will be asked to negotiate with some — perhaps somebody could help me with the exact wording — but some entity as to the future of the collection?

Now, the only entity in this city, the one that we regard very, very highly, but the only entity that I know of, your Honor, that would be a likely candidate to accept this collection, would be the Art Institute of Chicago. Putting aside for the moment that our esteemed mediator is in fact a well-known lover and board member committed

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to the Art Institute — and when this came up, frankly, I have to say might well have considered when the word "art" came slashed with "institute" that perhaps as far as the appearance of a fair and open discussion might have suggested that another mediator come forward.

THE COURT: This was also very fully discussed with all of the parties before the mediator was selected, and everybody agreed, including Mr. Crowe. And no mediator was even considered unless we had agreement. And Mr. Hilliard's association with the Art Institute was disclosed from day one.

MS. BELLOWS: Absolutely, your Honor. I think that Mr. Hilliard's resume is well known to everyone in the city of Chicago and his lack of bias generally accepted. However, combine that with the tactics of the Attorney General to which Mr. Hilliard could never have assumed.

I don't think that Mr. Hilliard would ever have anticipated that right smack dab toward the end of his mediation process would the Attorney General choose that time to file an inquiry directed at one of the participants in the

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mediation, specifically Dr. Marshall.

What curious timing that at the end of May, as the mediation is coming to a close, the people who have the control over the timing of that inquiry would choose to file an inquiry as opposed to two or three weeks later.

Putting that aside — not totally aside — but moving back to the power of negotiation, how difficult it is, what common sense it is, to understand that no entity has the ability to negotiate if there is only one side negotiating. If there is nothing — no other entity in the city of Chicago able to accept this collection — and they are being directed only to negotiate with an art entity for partnership in the city of Chicago, limited to that —

THE COURT: I don't read that the Art Institute is the only entity. There were lots of discussions in this mediation process. You're just assuming the Art Institute.

MS. BELLOWS: No, I am assuming the Art Institute because of the phrasing of the consent judgment, your Honor.

THE COURT: Which paragraph?

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MS. BELLOWS: If somebody could help me find it, I would.

MR. CARLSON: It's paragraph 11, your Honor, right at the end. Not to interrupt counsel in her argument, but the words there are "Chicago metropolitan area." I was involved in the drafting of the order, and it was intended to allow the corporation to talk with Northwestern University. I don't know how far the Chicago metropolitan area extends, but it was designed to be much broader than just the city of Chicago.

MS. BELLOWS: To that point, your Honor, the only entity of the caliber that would accept this collection in the metropolitan area of the city of Chicago is undeniably the Art Institute.

If I am incorrect, then again I submit that evidence and proof would be a discussion for what other entities the Terra Foundation's board would have the ability to negotiate freely so that they could determine the simple items, such as what commitment will an institution make to the Terra collection when it arrives. In what way will it be displayed and as a whole or piecemeal? What kind of money will they spend to ensure that

it is properly marketed and that it is properly — that the public not only in the city of Chicago and state of Illinois, but according to Dan Terra's intent, the global public and certainly the national public would have the opportunity.

The type of institute that if your Honor probably in her discussions relating to would be the Corcoran Museum or the National Gallery or the Philadelphia Art Museum. There are a number of museums of the caliber of the Art Institute, those in Chicago. And I would say none compare. Nonetheless, there was no beauty contest.

And this agreement forecloses the free and powerful negotiation of the kind of agreement that would be undeniably part of any situation where you would put a collection out to bid, so to speak. It is to me so much a matter of common sense that that small sentence should be read very carefully by this Court as it recognizes whether or not this Court should sign this agreement.

Let me speak to self-governance. I cannot say at this moment what the composition of the major boards of significant foundations are in

But the question is, if the Attorney General of the state of Illinois now comes into a private foundation without proof of wrongdoing in any way and takes over the governance of the foundation to the extent that they're able to negotiate an agreement which names the parties on the board, requires the Attorney General to have approval as to where the Attorney General's office — not the board, the board has given up its right to self-governance — to require the Attorney General to say yea or nay as to whether this organization can stay in the state of Illinois in the future.

MS. STONE: Your Honor, may I respond very briefly?

THE COURT: Yes.

MS. STONE: I have four points. First, let me correct a misimpression about my earlier statement. Of course, what the Court thinks about the validity of the settlement —

THE COURT: Oh, I didn't take offense at that at all. But —

MS. STONE: My point is an important —

THE COURT: — I agree with —

the Chicago area, much less the United States at this moment. Evidence and proof will show that.

I suspect, your Honor, that it will be hard to show foundations of this character who are precluded from choosing — or who are precluded from choosing board members who are not — a majority of whom are not members of the citizens of the state of Illinois.

I would submit, your Honor, though without evidence today, and that's one of the reasons we would like to go forward with this hearing, that the Field Museum, that the Art Institute itself perhaps, that the Museum of Contemporary Art, and the Science and Industry Museum, and the Aquarium do not have in their bylaws a governance position where they are required to have a majority of their members from the State of Illinois.

THE COURT: Is there anything illegal about that?

MS. BELLOWS: Is it illegal? It is certainly overreaching, and it might — I would hope that counsel for the Foundation wouldn't draft something that they thought was illegal.

MS. STONE: — board should run the organization.

THE COURT: Right. As long as they're doing it properly.

MS. STONE: Right. And the point is that your Honor cannot substitute her business judgment; none of us can substitute our business judgment or the business judgment of the directors of the Foundation. That's point one, and that was all I intended, your Honor.

Number two, as your Honor pointed out, a corporation can through the majority of its directors, decide to actually limit its powers by voting amendments to its bylaws. And we do believe, your Honor, that what the board has agreed to is indeed a further restriction of its powers far beyond what existed when this case was first filed.

The Foundation has never agreed with the very crabbed and limited and, quite frankly, far-fetched interpretation that the plaintiffs in the AG had of the bylaws that were in existence at the time this case was filed.

At the time this case was filed, this

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Foundation was free to operate outside of
[2] Illinois. However, the board of directors,
[3] exercising its business judgment, has agreed to
this agreement, this settlement, that does
contemplate certain restrictions for
[6] 50 years.
The third point, your Honor — and
included within that restriction is also the
[9] residency requirement. Again, Ms. Bellows points
[10] out that this is somewhat unusual. It may be,
your Honor, but it is what the board of directors
exercising their business judgment has decided to
[13] do.
The third point, your Honor, is that
the Court should not, and counsel in their zeal
[16] should not, impose further restrictions upon the
[17] board and the board has agreed. The board has not
agreed to partner with the Art Institute. That
should be very clear.
[20] All the board has done is to set up a
strategic planning committee with certain
directors and shall try to negotiate a partnership
[23] with another Chicago metropolitan area institution
[24] with the goal of ceasing to operate a stand-alone

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museum in Chicago. There is no guarantee it's
going to be the Art Institute, there's no
guarantee it's going to be with anyone. And that
should be abundantly clear to this Court, and that
should be understood by everyone. That was the
deal that was struck. An attempt to arrange a
forced marriage with the Art Institute was not the
end result of the mediation process.
And then the final point, your Honor,
has to do with the comments of Dr. Marshall and
Dr. Stebbins at the board meeting. I believe it
was Ms. Bellows, and perhaps Mr. Bellows as well,
who made the point that you can't really trust
what these directors are saying because they are
so intimidated that they're not going to 'fess up
to the fact that they're being coerced.
I think that, your Honor, you need to
look at the totality of what they said.
[19] Dr. Marshall readily admitted to the fact-finding
investigation, and Dr. Stebbins took specific
pointed issue with the tactics — his words —
[22] used by the Attorney General.
I think that sort of vigorous attack on
the Attorney General shows that, in fact, he was

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[1] not cowed, he was not silenced. He felt that he
[2] could indeed express his free will and point out
[3] that he did not appreciate the way the Attorney
[4] General has conducted himself during this
[5] litigation and during the mediation, but that
[6] nevertheless, for all of the reasons he
[7] articulated, for all the reasons he thought it was
[8] important to remain in Chicago, he thought this
[9] was the best outcome for the Foundation.
[10] Again, it's not what I think, it's not
[11] what anyone else thinks. It's what Dr. Stebbins,
[12] Dr. Marshall, and the four other people who voted
[13] for this think. We had a vote, it was 6 to 2.
[14] This is what the board wants to do.
[15] **MR. TODD:** Your Honor —
[16] **THE COURT:** One second. Very briefly, I'm
[17] just about to wrap this up. But I realize I
[18] haven't heard from the Attorney General, but I'm
[19] even going to hold off on doing that unless
[20] Mr. Perkins strongly objects.
[21] But go ahead.
[22] **MR. TODD:** Your Honor, may I just reply to
[23] the issue of coercion and the fact that
[24] Dr. Stebbins and Dr. Marshall have both apparently

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[1] said that they were not coerced; this was of their
[2] free will.
[3] It is rare, indeed exceedingly rare,
[4] that one who has been the victim of coercion,
[5] particularly coercion by a state and a state
[6] prosecutor then says, after having been victimized
[7] in that sense and their free will been taken away
[8] from them and they're both corrupted and deluded,
[9] then to come in and say, And by the way,
[10] effectively I didn't have the moral courage to
[11] stand up to the pressures that brought to bear on
[12] me by the Attorney General of the State of
[13] Illinois.
[14] You, I submit, are not going to hear in
[15] either sworn testimony or through affidavits or
[16] declarations Dr. Stebbins or Dr. Marshall saying
[17] that. That brings us to the fact that that is a
[18] fact issue for this Court, as are many issues that
[19] we have raised in the pleadings, fact issues for
[20] the Court.
[21] For example, the Attorney General
[22] injected himself into this case in what I submit
[23] was merely a misrepresentation to the Court that,
[24] namely, that Dan Terra wanted this Foundation to

remain here in Chicago or in Illinois. The overwhelming evidence is to the contrary.
Let me just show you, hand up to the Court, this is a change of address that Dan Terra —
THE COURT: I've seen that document, yes.
MR. TODD: Well, I submit to you, your Honor, that Mr. Quinlan argues that there's no evidence on these fact issues. There is already substantial evidence on each one of the fact issues on coercion, the fact that this vote that occurred last Friday was, as a matter of law, under Illinois law, a nullity.
It was unlawful, and therefore the purported change in the bylaws is also unlawful. It requires six people on that board to vote in favor of a change in bylaws, i.e. the settlement.
That didn't happen if Dr. Marshall and Dr. Stebbins were coerced. And that's the evidence that we merely want an opportunity to present to the Court.
THE COURT: And how are you going to develop that further than what you have? You have the two individuals who have said, We are not coerced.

Certainly deposing a mediator isn't going to get you anything on the coercion issue. So what are you talking about as far as proceeding on coercion?
MR. TODD: For one thing, we have heard from Dr. Marshall and Dr. Stebbins — apparently, we only have it secondhand — of what their position was at the board meeting. We haven't gotten sworn testimony and/or a declaration from them that, Yes, indeed, that is my position. That's what happened.
We also haven't examined the circumstances surrounding how they purportedly came from a position of opposing such a settlement which had such a draconian difference in the intent of Dan Terra to one of, Okay, lock it up in Illinois, we're switching gears.
Okay. Take all the board members that are here now and change them completely and make sure that the Attorney General — make sure that only people — that a majority are from the state of Illinois. That I submit to you, the force of the common sense of the difference between the original position and their position last Friday

MR. BELLOWS: It doesn't matter, Judge.
THE COURT: Well, what else are you going to do? What are you planning to do?
MR. BELLOWS: I think it's important for the Court to understand what kind of power was brought to bear against them, okay? And then the Court will determine whether there was a conflict. Whether the person acknowledges it, understands it, appreciates what happened, there is a purpose that is contrary —
THE COURT: But how are you going to present —
MR. BELLOWS: — to the purpose of the Foundation. A fiduciary cannot serve the Foundation if he or she has a personal interest that is 180 degrees opposed to their responsibility as a fiduciary. Counsel —
THE COURT: I understand that. I'm trying to figure out. You've got two people saying, We were not coerced. Most of the affidavits, declarations, things you've given me, have nothing to do with that issue; they have to do with Dan Terra's intent.
I'm talking about the coercion issue.

despite the fact that they say, Well, the Attorney General's threats to me, which I abhor, didn't have anything to do with it, is a fact issue for this Court. And the circumstances around the change have to be aired and have to be aired publicly in this proceeding.
Secondly, we have proof or we develop proof about what the Attorney General did and when he did it and why he did it. And the proof before the Court right now is, that yes, mediation originally was agreed to, but it became clear to the Attorney General during that mediation that he may not or did not have the votes to force through a lockup in Illinois. And then, and only then, do we see the intimidation that was brought to bear against Dr. Stebbins and Dr. Marshall.
And then, again, as I say, a change in, I would submit, heart and mind, at least objectively — but I submit it was only a change in what these people did, not in their hearts, and it was not a change in their mind; that was of their own free will. And that's what makes this vote unlawful.
MS. BELLOWS: On what basis, for instance,

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did the Attorney General commence its inquiry against the Academy?

THE COURT: Has anybody spoken to the Attorney General? Have you all even talked to Mr. Perkins about any of this?

MS. BELLOWS: Mr. Perkins, remember, was in Canada last week.

THE COURT: Well, he's back now, and you've been making an awful lot of very serious allegations. And I don't know whether you've even — as far as I know, and I know nothing about this — they have been contemplating some action of what — against this Academy or thinking about looking into whatever they were looking into — and I don't know even know what they've done — for quite sometime.

You know, you've come into court and you've filed a number of things, and they sound very, very dramatic. But I don't see anything here supported by affidavit. I don't see anything here supportive of any substance. You've got lots of affidavits about Dan Terra's intent. That's how this whole lawsuit started out.

And I rejected James Terra from coming

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into this case and said he couldn't because we were going to go to mediation. And I was going to let him come in in the event mediation didn't work out, and we were going to talk about Dan Terra's intent. Maybe.

And there were some other issues in this case, much, much — equally as significant as Mr. Terra's intent. And that was the plaintiff and the Attorney General's verified pleadings about waste and mismanagement here. Those issues were very much the subject of the mediation also. So there were — everything ended up going in and being talked about in this mediation —

MR. BELLOWS: But not business judgment, your Honor. Ms. Stone is sitting there saying the board was exercising its business judgment. Your Honor, of all of the numbered paragraphs, fourteen numbered paragraphs, with the exception of the jurisdictional statement, what business judgment, what did the Terra Foundation get for the agreement for a 50-year lockup? What did it get for agreeing that the Foundation conduct its affairs in accordance with the wishes of the Attorney General? What did it get for at least

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50 years that the Foundation shall maintain and exhibit the Terra collection of American art either by itself or through partnerships with institutions in the Chicago area?

THE COURT: Mr. Bellows, I don't want to speak right now to the Foundation's — the board members who voted, but it seems obvious to me that what this foundation may get from an approval of this mediation is the ability to move on and the ability to keep an important collection together to avoid what is starting out very slowly, but would go years before this litigation would be done.

There are issues right now of this board not even being able to meet, not even being able to have an executive committee meeting, not even being able to go on with its business. There's a lot that it would have gotten.

But this is what I need to do based on the pleadings that I have right now. And I realize that I haven't even asked the Attorney General to speak.

So I don't think anybody's spoken to you, and I don't think it's fair for you to have

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to defend yourself without them even having spoken to you about this first.

I need a motion to approve the consent decree because I don't have that. I have a one-page letter from the mediator, and I have a proposed consent decree. And attached to that motion I need the copies of whatever the bylaw changes were and the transcript.

And I'm going to allow any party to this case to file a written objection supported by affidavits as to why the consent decree should not be approved. However, the issues are coercion and illegality and those issues only.

I do not want to hear anything more about intent of the original founder or anything about any of these affidavits from people all over the world and change of address and all of that. That is not before the Court on this motion to approve the consent decree, so the defendants do not have leave to file these objections.

So this motion for leave to file these objections is going to be denied. Let's get the proposed consent decree. Let's get the attachments to it, whatever is to be read. When

you get those, by all means, Mr. Perkins isn't under any kind of a gag order.
Are you willing to speak to counsel for the defendants about this?
MR. PERKINS: I'll be glad to, Judge.
MS. BELLOWS: About the investigation that's taking place against himself?
MR. PERKINS: To the extent I can, Judge, I'll be glad to share some information. However, that's a private person who has a right to be protected.
THE COURT: I understand.
MR. PERKINS: And these people perhaps have no basis or they obviously have no knowledge about what's going on. So we'll get to that. But I'll be glad to answer some questions.
THE COURT: Okay. And then the other thing that I just want to make sure. I want to make it absolutely clear, we are not at any time in this proceeding deposing the mediator in this case.
And as of right now, the documents that were granted leave to be filed under seal on Friday, they're going to stay that way for now. You don't have leave to file these documents today

implications to fasten the property here in the state of Illinois, make no suggestion that it would not be properly administered in the state of Illinois. But it is a taking of property of a very serious order involving acts, undeniable acts on the part of the Attorney General's Office at the time that the question of the exercise of discretion was being considered by the crucial parties —
THE COURT: I'm sorry, counsel, you're saying "undeniable act." We haven't even let him talk.
MR. GARMENT: Your Honor, may I just finish? We are entitled as a matter of law to take testimony to have people testify about the circumstances in which this dramatic shift, which spells the extinction of a long-standing foundation, which destroys its ability to operate freely, which sends a message to the world that if you bring a foundation to Illinois, you are subject to the intervention of the Attorney General to fasten those assets in the state of Illinois on pretext. And so far it's all pretext.
There has not been an evidentiary hearing with respect to the central issues since

because let's get their motion. I think it would be very, very helpful before you file a motion objecting to what went on Friday, you really knew what went on Friday. So why don't you get the transcript because I assume that hasn't been made available to any one of —
MS. STONE: No, it's not. We only have a very rough draft, your Honor.
MR. GARMENT: We have heard the tape recording of it. I mean, it was recorded.
Your Honor, may I just say this. The Attorney General said he does not want to get into the matter of something involving a private person. I think your Honor is right, that issues such as Dan Terra's intent are secondary to what is the central issue in this case. And that is whether or not crucial votes were obtained by the improper intervention by the Attorney General.
We are entitled to examine the Attorney General representative and the persons who were involved in the initiation under these more than coincidental circumstances in the switch of the crucial votes that turned this Foundation from one level of management to another. With all of its

the beginning of this case nor has the public through the press been empowered to make its own judgments about what is going on in this case.
THE COURT: This entire record with the exception of the mediation has been fully open to the press and —
MR. GARMENT: But the mediation is the heart of the problem. The mediation has been infected by the actions of the Attorney General. That is our allegation, and we are entitled to have a day in court to prove it.
THE COURT: And I'm not saying that you may or you may not have a day in court. I'm saying you need to have a verified pleading directed to these issues before the Court. And once I see a verified pleading directed to the issues of intimidation from the Attorney General, it will determine whether or not there needs to be some additional discovery regarding those allegations.
But that's not this document. I don't have any affidavits in this document. I don't have anything from anybody that suggests that the Attorney General has exercised pressure. I have a hearsay affidavit that was attached or a

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declaration that was attached in a federal court
[2] paper from the defendant Tucker. And I think
[3] that's essentially it.
MR. GARMENT: We may ask the Attorney General who is here whether or not these proceedings were
[6] started and that draft complaint circulated under
[7] the circumstances —
MR. QUINLAN: Your Honor —
[9] **MR. GARMENT:** — contained in our pleading.
[10] **MR. QUINLAN:** Your Honor, we object. This maligning of the Attorney General —
THE COURT: Okay. Rather than ask him —
[13] **MR. QUINLAN:** — without any basis whatsoever
[14] is really outlandish. And, first of —
THE COURT: Slow down.
[16] **MR. QUINLAN:** — all, those documents —
[17] **THE COURT:** I said slow down. She didn't get that and you want this in the transcript. Slow down.
[20] **MR. QUINLAN:** The documents that he's talking
[21] about and the contentions he's talking about were found to be lawful acts by the federal court and also were the changing of the vote found to be
[24] lawful acts.

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MR. GARMENT: Not right.
MR. QUINLAN: I don't know what the burden of
[3] proof is elsewhere, your Honor, but the burden of
[4] proof here is on Mr. Garment, not on the Attorney General to disavow something. We're talking about a McCarthy type of proceeding here. We come and
[7] make an accusation and the Attorney General is
[8] supposed to now come up and disavow himself of doing anything wrong in his life.
THE COURT: The Attorney — just one
[11] second —
MR. GARMENT: It is not an accusation. Your Honor, it is —
[14] **THE COURT:** Counsel. The Attorney General —
[15] **MR. GARMENT:** — not an accusation. It is an admission on the part of the Attorney General —
THE COURT: You can stop the transcript if
[18] you want. She's not taking any of that down.
[19] There have been some very serious allegations lodged against the Attorney General in this case. These documents were filed in federal
[22] court presumably on Thursday when Mr. Perkins
[23] wasn't even in the country. He has not had an opportunity because you all have not even talked

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[1] to him about any of this. And he does not have to
[2] defend himself in any way today in front of this
[3] Court based on the status of what I have in front
[4] of me. Because right now there's nothing in front
[5] of me verified to defend.
[6] You will have an opportunity to file
[7] something. Once they file — and that means the
[8] Foundation — a petition to approve the consent
[9] decree, the only thing I need to talk to you about
[10] is the scheduling of this. I'm only here for a
[11] couple of weeks. How long will it take the
[12] Foundation to make the motion for me to approve
[13] the consent decree?
[14] **MS. STONE:** Your Honor, in order to — the
[15] mechanics, in order to file that motion, we need
[16] the original signatures from Messrs. Buntrock and
[17] Gidwitz and the Attorney General before anyone
[18] from the Foundation is authorized to sign. That
[19] is what the resolution states.
[20] So I see that the mediator, I think,
[21] tried to kind of cut to the chase in terms of what
[22] he submitted to you, and he has something that
[23] purports to be Stephanie Pace Marshall's signature
[24] on it. That's not actually accurate as a matter

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[1] of corporate law. She's not actually empowered to
[2] sign it yet until we have the signatures from all
[3] three of the other signing parties.
[4] **THE COURT:** Is that going to be a big deal?
[5] Can we just get their signatures?
[6] **MS. STONE:** We have a clean form here. We
[7] could get — well, I think we need Mr. Buntrock's
[8] and Mr. Gidwitz's signatures.
[9] **MR. CARLSON:** Would it be faxed around to
[10] counsel for all of the parties this morning, your
[11] Honor? Or — yes, a copy of the consent judgment,
[12] the decree. And if we get signatures, we can have
[13] it on file Friday, Monday, whenever it's —
[14] **THE COURT:** So by Friday perhaps can you get
[15] on file a petition to approve the consent decree
[16] with the transcript and everything ready?
[17] **MS. STONE:** Yes, your Honor.
[18] **THE COURT:** Okay. And then I assume —
[19] **MS. STONE:** Assuming we get the signatures.
[20] **THE COURT:** And I assume that the only
[21] parties that want to file any objections to this
[22] are the defendants. And when — I don't know who
[23] to look to because there have been so many of you.
[24] When do you wish to file objections to the

proposed consent degree?
MR. BELLOWS: 21 days.
THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while — perhaps while I was gone.
This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.
MR. BELLOWS: Are you ordering the Attorney General to submit himself — or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.
THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

will cooperate with you as fully as he can and answer any concerns you have.
MR. BELLOWS: You have that on the record. Not your statements, his statement.
THE COURT: Well, I have no doubt that Mr. Perkins is going to cooperate and answer whatever questions you have without compromising ongoing investigations.
MR. PERKINS: That's correct, Judge.
THE COURT: Now, can you within a week of — I mean, this isn't any big surprise here. You know what they're going to file. Within a week can you file some type of a verified document to see whether or not we even need to have —
MR. TODD: Your Honor, may we have two weeks for this reason? I'm scheduled to leave on Thursday for a long, planned trip, a business trip, where I'm going to be meeting with over 200 of my clients in the Mideast, and it would be extremely difficult for me to change that. I will be back here July 12th, so if your Honor could compromise and give us two weeks from Friday and we will get it done.
MR. CARLSON: Your Honor, as far as we're

concerned, all our petition is going to be is a petition for the Court to approve the consent judgment, the decree, and I will attach probably the resolution that was passed by the board. To get all the formalities done, I would probably like until Friday to do it, but counsel can assume — he already knows what we're going to be filing, and if two weeks from today is some time in which he can be done with whatever he wants, maybe we could speed it up a little bit.
MR. QUINLAN: Your Honor, there are things under the consent decree that are expected to be done speedily so that the board can continue to operate and operate appropriately.
We also note there's three different sets of counsel here. I would imagine that somebody could pick up for counsel who's not available.
MR. GARMENT: Your Honor, may I just make a brief statement?
THE COURT: Yes.
MR. GARMENT: I know I've spoken with a certain amount of vehemence today, but this case started with some demonstrably false and very

serious allegations against the defendants. They have not been proved. There has not been a hearing to present a bit of evidence in support of those allegations.
THE COURT: And they remain unproven.
MR. GARMENT: And it is our intention, and we ask leave to file an amended answer which will raise those issues in terms of — our present contemplation is to assert counterclaims, which we are entitled to do under an amended pleading.
These issues have never come into focus, and what has happened is through the intervention of the Attorney General, in cooperation with Messrs. Gidwitz and Buntrock, who were the dissenting directors who did not want consideration given to any kind of change in the venue of the museum activities, this process was brought to a halt.
Your Honor understandably tried to find a solution through a mediation process. That mediation process stopped everything except the actions that were necessary in the view of the Attorney General to bring the process to the conclusion he wanted.

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And we have standing out inexplicably, [2] [illegible]t clearly demonstrated, the fact of two crucial [3] [illegible]es being switched in the last few weeks on the basis or in absolute concurrence with [5] interventions on the part of the Attorney General [6] that were threatening to these two directors.

That I submit is enough for us to ask leave to present evidence, to ask for witnesses to [9] come forward and testify about the circumstances [10] of their intervention, Messrs. Gidwitz and Buntrock, the Attorney General, and the votes that were switched. That will not take much time. [13] That does not involve affidavits from all over the [14] world. That involves a discrete hearing process under oath where people have to explain why they [16] did it, when they did it, so that your Honor can [17] determine whether or not this is a free voluntary action of a majority of the board of a huge and extremely important national art collection that [20] happens to be temporarily lodged in Chicago.

[21] **MR. QUINLAN:** Your Honor, first of all —

THE COURT: I'm sorry, what you really were [23] saying was two different things. If you're at [24] this point asking leave to file additional

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pleadings in this case, as far as a counterclaim, that leave is not granted. You would have to come [3] in the way we normally do it here on a motion for [4] leave to file with a document proposed. I need to know who it is against and what the cause of action is, and whether or not it's affected one [7] way or the other by this mediated settlement. [8] That's a totally separate issue.

What you've said about the opportunity [10] to take discovery, I have not foreclosed that. [11] I'm saying based on what you filed, there's [12] nothing to take discovery on right now. I have [13] nothing verified from these defendants to suggest [14] that this Court should not approve this [15] settlement, and I am willing to let you file [16] something.

[17] But the date that I have available to [18] hear this is — the date I have is July 24th in [19] the afternoon, and that's moving a case that I [20] already have. And I want to be able to seriously [21] consider anything that you're going to file. And [22] I don't want, like I had today, ten minutes before [23] [illegible]ave to come out here and be given a document. [24] [illegible]ould like to be able to take it home and review

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[1] it.

[2] So you can file the motion to approve [3] the consent decree by July 6th, and if you can all [4] get a response filed on time by the 19th of [5] July — can you do July 19th?

[6] **MS. BELLOWS:** May I remind the Court that one [7] of our clients, Dr. Tucker, is in Italy and the [8] second of our clients is available; Judith Terra [9] is in Washington, D.C. But the third of our [10] clients is presently somewhere in Russia. So I do [11] not want to make the setting of the date a cause [12] celebre. On the other hand, I do believe that we [13] should be able to be in touch with those clients [14] prior to filing.

[15] **THE COURT:** Well, today is the 2nd, and your [16] response would not be due until the 19th. And if [17] you can't get in touch with your clients by the [18] 19th, then there's a big problem.

[19] **MS. BELLOWS:** Oh, I'm sorry, your Honor. I [20] thought that you were looking to us to file a [21] pleading on July 6th.

[22] **THE COURT:** No. Just the —

[23] **MS. BELLOWS:** I apologize, your Honor.

[24] **THE COURT:** — and your response would be the

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[1] 19th, and if the plaintiffs or the parties seeking [2] to enforce this settlement want to file any kind [3] of reply, because I would expect whatever the [4] response is, it's going to have case law. It's [5] going to have an affidavit. There's going to be [6] some type of a firsthand affidavit that says the [7] Attorney General's done something wrong here.

[8] And there's going to be case law that [9] there might be something illegal about this [10] settlement. Because I haven't even seen a trace [11] of that yet. And any case law that you give or [12] that you cite, you've got to give me a copy of the [13] cases because I'm going to have to take them home.

[14] And everybody else, if you want to [15] respond to their cases or whatever, I'm going to [16] give you until noon of the 23rd. I'm sorry it's [17] going to wreck a weekend in July, but it's the [18] best I can do for you. And I would see you [19] July 24th at 2:00 o'clock. And I need somebody to [20] draw an order.

[21] In the meantime, those documents that [22] were filed in Court on Friday, or were supposed to [23] be filed, can just still be filed as they were [24] supposed to have been on file, under seal.

I do not want to have any of the papers that relate to the mediation process made public at this time. I don't see any reason why we need to have that. I will entertain any kind of a motion to open them. Is there anything that — I mean, if you all want it opened, then that's another thing.

MR. GARMENT: It should be opened.

THE COURT: Mr. Carlson, you wanted to say something?

MR. CARLSON: I was going to say now maybe this motion is moot in light of the fact that the individual defendants apparently have changed counsel. But previous counsel — you know, they had a motion they noticed up for today for an order referring the matter to the State's Attorney of Cook County for investigation relating to breaches of the confidentiality provision, your Honor's order of February 5th.

THE COURT: I haven't seen that. I never got that motion.

MR. CARLSON: Oh, you didn't?

THE COURT: No. Nobody ever gave it to me.

MR. CARLSON: Well, we may very well file a

We'd object to that from a procedure point —

THE COURT: Well, he's not going to file it without a motion for leave, and you'd have a chance to see it and then come and tell me what —

MR. QUINLAN: Plus it would be procedurally out of place at this time because the mediation process obviously substituted here, and any motion for a counterclaim frankly is not timely. They never answered to this, so that any answer they'd have to seek —

MR. GARMENT: The injunction took the place of an answer.

MR. QUINLAN: No, the injunction didn't take the place —

THE COURT: There are individual defendants I don't believe ever filed an answer.

MR. QUINLAN: Never filed an answer.

MR. CARLSON: Dr. Tucker did.

MR. QUINLAN: Only Tucker did. But there was no counterclaim filed at that time. But no counterclaim would be appropriate at this time because the mediation process stopped all that.

So to get to that point, you'd have to set aside all the mediation process, the consent

motion on behalf of the Foundation, your Honor, relating to what are apparent breaches of your Honor's February 5th confidentiality order. There are articles that appeared in Crain, Chicago Business, and elsewhere suggesting that certain members of the board perhaps have been violating the confidentiality provisions that are currently in place. And that is of concern to the Foundation, getting the confidentiality provisions that are included in the consent judgment, which we hope to have that. I just want to alert the Court to the fact that we'll take a look at it and prepare an appropriate motion.

THE COURT: Okay. Please file that other document like you were supposed to have filed it on Friday. And the document you seek to file today, I'm not going to grant leave to file it. There's nothing objectionable or unconfidential in it; it's just that let's get their motion, and most of what this is all about is Dan Terra's intent. That's not what I'm going to look at when I either approve or not approve the settlement.

MR. QUINLAN: Your Honor, one other thing. You had mentioned about filing a counterclaim.

decree, the mediation, et cetera, and then if you wanted to file a counterclaim, we'd be back to square one to file this.

My only reason for raising this is that we're going to have enough to respond to in this short period of time, and I'd prefer we don't get into these collateral issues before they're appropriately in front of the Court.

MS. STONE: Your Honor, I do want to again — we would have to object whenever anyone tries to seek to impose additional limitations on the proposed consent decree. The proposed consent decree does not release — I'm sorry, does not in any way force the individual defendants to release any claims or rights they might have. I just need to point that out to the Court.

MR. QUINLAN: That has nothing to do with the counterclaim.

MS. BELLOWS: Well, your Honor, clearly you're correct. I mean, in such time as we file a motion for a counterclaim and attach a counterclaim if that's what we decide to do.

THE COURT: That's my 9:15 call. You give them notice. You bring it in and — they'll have

a chance to file a written response and objection to that.

Before we adjourn today, I want to express my sincere appreciation to Mr. Hilliard.

Mr. Hilliard, you've done a yeoman's effort since February, and I know it hasn't been easy. And I don't know whether or not you've ever been paid because I don't have access to that. But I assume that you are sending your bills to the Foundation, and in due course someone will have a vote and approve the payment of that if that's necessary.

And I want to make it clear if anybody — I assume that if any counsel wants to have any discussion with Mr. Hilliard — Mr. Hilliard, how do you feel about informal discussions with any counsel, or have you just about had it at this point?

MR. HILLIARD: They should meet me in my hotel room in London. I'm leaving tonight.

THE COURT: Good for you. Have a wonderful trip.

MR. KENNEDY: Just one last housekeeping matter. The September 25 is scheduled to expire

today. We recommend until this is resolved to extend it to the 24th of July.

THE COURT: That's fine. Make it 5:00 o'clock. And if you'd draw me up some orders. And I would ask if you could kind of maybe do that in the conference room.

(WHICH WERE ALL THE PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE ON THIS DATE.)

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

I, KAY A. LEVINE, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had at the hearing aforesaid, and that the foregoing is a true, complete and correct transcript of the proceedings of said hearing as appears from my stenographic notes so taken and transcribed under my personal direction.

IN WITNESS WHEREOF, I do hereunto set my hand at Chicago, Illinois, this 3rd day of July 2001.

Certified Shorthand Reporter
Registered Professional Reporter

C.S.R. Certificate No. 84-3654.
CSR Certificate No. 84-3654.

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RESTATED BYLAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these bylaws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess business holdings, as defined in Section 4943(c), from making any investments in such manner as to

---

The bylaws of the corporation were restated on July 18, 1994, amended on August 17, 1996 and amended on January 27, 1998.

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to Bylaws

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a majority of the directors then in office and present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new Bylaws at such meeting.

BELL, BOYD & LLOYD

MEMORANDUM

TO: Board of Directors of the Terra Foundation For The Arts
Officers of the Terra Foundation For The Arts
Directors and Assistant/Deputy Directors of
Terra Museum of American Art and Musée d'Art Americain Giverny

FROM: Richard L. Sevcik
Bell, Boyd & Lloyd

DATE: October 29, 1999

SUBJECT: Conflicts of Interest Policy

At its November 6, 1998 meeting, the Board of Directors of the Terra Foundation For The Arts adopted a conflicts of interest policy. This policy applies to the officers, directors and key employees of the Foundation and its constituent museums. At that meeting, the Board specifically designated the directors and assistant/deputy directors of the two museums as subject to this policy. A copy of this policy is enclosed again for your reference.

Article V of this policy provides for an annual statement, a copy of which is enclosed. Prior to the annual meeting, Chairman Hartman asked that I distribute the annual statement after the meeting, even though I had the statements with me at that time. Catherine Stevens later confirmed that request. Please complete this statement and return it to me at your earliest convenience.

If you have any questions regarding the interpretation of this policy or have any reason to believe you have a potential conflict, please contact me at (312) 807-4332.

Enclosures
RLS:sms

TERRA FOUNDATION FOR THE ARTS
CONFLICTS OF INTEREST POLICY

ARTICLE I

Purpose

The purpose of this conflicts of interest policy is to protect the Terra Foundation For The Arts' (the "Foundation") interest when it is contemplating entering into a transaction or arrangement that might benefit the interest of an officer, director or key employee of the Foundation. The Foundation recognizes that both real and apparent conflicts of interest sometimes naturally occur in the course of conducting the Foundation's affairs. These conflicts occur because of the individuals associated with the Foundation and the talents which they can offer to the Foundation and their multiple interests, affiliations and various positions of responsibility. By the adoption of this policy, the Foundation will have a prescribed and effective method and procedure to address these interests and conflicts.

ARTICLE II

Definitions

1. Interested Person

Any director, officer, member of a committee with board delegated powers or key employee designated by the board of directors of the Foundation who has a direct or indirect financial interest, as defined below, is an interested person.

2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment or family --

(a) an ownership or investment interest in any entity with which the Foundation has a transaction or arrangement, or

(b) a compensation arrangement with the Foundation or with any entity or individual with which the Foundation has a transaction or arrangement, or

(c) a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Foundation is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are substantial in nature.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate board or committee decides that a conflict of interest exists.

ARTICLE III

Procedures

1. Duty to Disclose

In connection with any actual or possible conflicts of interest, an interested person must disclose the existence of his or her financial interest and all material facts to the directors and members of committees with board delegated powers considering the proposed transaction or arrangement.

2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest, and all material facts, and after any discussion with the interested person, he or she shall leave the board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

3. Procedures for Addressing the Conflict of Interest

(a) An interested person may make a presentation at the board or committee meeting, but after such presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement that results in the conflict of interest.

(b) The board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Foundation's best interest and for its own benefit and whether the transaction is fair and reasonable to the Foundation and shall make its decision as to whether to enter into the transaction or arrangement in conformity with such determination.

4. Violations of the Conflicts of Interest Policy

(a) If the board or committee has reasonable cause to believe that a person has failed to disclose actual or possible conflicts of interest, it shall inform the person of the basis for such belief and afford the person an opportunity to explain the alleged failure to disclose.

(b) If, after hearing the response of the person and making such further investigation as may be warranted in the circumstances, the board or committee determines that the person has in fact failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

ARTICLE IV

Records of Proceedings

The minutes of the board and all committees with board-delegated powers shall contain --

(a) the names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the board's or committee's decision as to whether a conflict of interest in fact existed.

(b) the names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, and a record of any votes taken in connection therewith.

ARTICLE V

Annual Statements

Each interested person shall annually sign a statement which affirms that such person --

(a) has received a copy of the conflicts of interest policy,

(b) has read and understands the policy,

(c) has agreed to comply with the policy, and

(d) understands that the Foundation is a charitable organization and that in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

ARTICLE VI

Other Laws

This policy is intended to supplement but not replace any applicable state laws governing conflicts of interest applicable to not-for-profit corporations under the Illinois Not-For-Profit Corporation Act or under the Internal Revenue Code of 1986, as amended.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN,) Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

PLAINTIFFS' AND ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE A BRIEF IN EXCESS OF 15 PAGES, *INSTANTER*

Plaintiffs, Dean L. Buntrock and Ronald Gidwitz, by their attorneys Quinlan & Crisham, Ltd., and the People of the State of Illinois *ex rel.* James E. Ryan move for leave to file their respective briefs in excess of 15 pages in response to the defendant directors' objections to settlement, *instanter*. The length of Plaintiff's response and the length of Attorney General's brief is necessary because the Defendant-Directors filed a 27 page objection (without leave of Court) and 30 exhibits thereto.

16di-001627

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
EX REL. JAMES E. RYAN, ATTORNEY
GENERAL OF ILLINOIS

By: _____
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DEAN L. BUNTROCK and RONALD GIDWITZ

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July 23, 2001

VIA MESSENGER
The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Buntrock and Gidwitz v. Terra, Tucker, Simpson, Michaeli, and the Terra Foundation for the Arts*, No. 00 CH 13859**

Dear Judge Kinnaird:

Enclosed please find a courtesy copy of the Plaintiffs' & Attorney Generals' Motion for Leave to File a Brief in Excess of 15 Pages, Instanter, Plaintiffs' Response to Defendant Directors' Objections to Settlement, Exhibits to Plaintiffs' Response and Authority Cited in Support of Plaintiffs' Response. Consistent with the Court's statements on July 20, 2001, we have filed with the Clerk of the Court the Motion For Leave to File a Brief in Excess of 15 Pages and Plaintiffs' Response to Defendant Directors' Objections to Settlement with the Clerk of the Court. We will seek the Court's direction on whether to file the Exhibits to Plaintiff's Response under seal at the hearing on this matter currently set for 2:00 p.m. on July 24, 2001.

Very truly yours,

William R. Quinlan

cc: Service List Attached

Doc:179142

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN,) Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on **July 24, 2001** at **2:00 p.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Dorothy J. Kinnaird, or any judge sitting in her stead, in the courtroom usually occupied by her in Room 2302 of the Richard J. Daley Center, and shall then and there present the attached **Motion for Leave to File a Brief in Excess of 15 Pages, Instanter**, a copy of which is attached and hereby served upon you.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

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Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

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CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and Correct Copies of the Attached **Notice of Motion** and **Motion for Leave to File a Brief in Excess of 15 Pages, Instanter,** to be served on **July 23, 2001**, as indicated on the attached service list.

SUBSCRIBED AND SWORN to before me this 23rd day of July, 2001.

Mary Butler
NOTARY PUBLIC

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Doc:179131

16di-001633

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and tl
FOUNDATION F
Illinois Not-For-Pr

No. 00 CH 13859

34

THE PEOPLE OF
ILLINOIS ex rel. J
Attorney General of

vs.

JUDITH TERRA, a l
Terra Foundation for
HAYES TUCKER, a
Terra Foundation for
SIMPSON, a Director
Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

PEOPLE'S RESPONSE TO DEFENDANTS' OBJECTIONS TO THE PROPOSED SETTLEMENT

NOW COMES the Plaintiff PEOPLE OF THE STATE OF ILLINOIS by JAMES E. RYAN, Attorney General of Illinois and responds to the written Objections Of Defendants Judith Terra, Paul

16di-001635

Tucker and Alan Simpson To The Proposed Settlement and state:

1) The Objections of Defendants Paul Tucker, Alan Simpson and Judith Tucker are baseless diatribe, mistaken in both law and fact. The Objections despite their massive volume are replete with redundant speculation, surmise, conjecture and improper conclusion, and in sum, are unsupported by allegations of ultimate fact essential to a right of action and/or supportive of lawful objection to the settlement.

2) The erroneous theme of the Objections is that Terra Foundation Board members, Dr. Ted Stebbins and Dr. Stephanie Pace-Marshall breached their fiduciary duty by voting for the settlement. The Defendants, by virtue of hyperbolic reasoning and the use of half-truths and outright misstatement of fact, surmise and accuse Dr. Stebbins and Dr. Marshall of casting affirmative vote in favor of the subject settlement in exchange for purported wrongful personal benefits that the Defendants have no evidence were exchanged. The Defendants accuse Assistant Attorney General Floyd Perkins of offering and exchanging said benefits with Dr. Stebbins and Dr. Marshall charging that by such he abused his office and engaged in improper conduct. The Defendants suggests these imagined events as the basis for the court rejecting the settlement.

3) Dr. Stebbins and Dr. Marshall both denied the baseless charges at the Terra Foundation board meeting on June 29, 2001. The charges were put directly to Drs. Stebbins and Marshall and they unequivocally denied same. The June 29 Board meeting was taped and its content shows that throughout the meeting both Dr. Stebbins and Dr. Marshall are poised capable individuals clearly speaking and acting their own mind. Both Dr. Stebbins and Dr. Marshall make clear they were then acting as proper fiduciaries and were setting the terms of the settlement and voting for the settlement with a free will and were not under any duress. A taped copy of that meeting is made Respondent Exhibit A hereto. A written copy of that Board meeting has been submitted by Defendants as Objections Exhibit 26. The audio tape is made an exhibit hereto because the tone and delivery of Drs. Stebbins and Marshall's remarks makes clear they are acting freely.

4) On July 16, 2001 Assistant Attorney General Floyd Perkins met with counsel upon this court's direction of July 2 and denied then, and denies now, the allegations of duress and abuse of authority made in said Objections. Assistant Attorney General Floyd Perkins denies all accusations of wrongdoing and states that no secret promises, exchanges, wrongdoing or intimidation occurred, and further states the charges contained in the Objections are without basis in law or fact.

5) Much of what these Defendants state is half-truths. The Objections misquote, misstate and attribute remarks out of context, and otherwise suggest facts that have no basis in reality. The purported rendition of remarks made by Assistant Attorney General Floyd Perkins is in parts inaccurate and the statements are presented in part out of correct sequence making it appear certain remarks were made in follow-up to previous questions or remarks when such is not the case. Thus to keep this record accurate, Respondent must address certain inaccuracies although for the most part such is without relevance.

6) The Defendants' Objections are without merit because:

a) The Defendants in their Objections simply misrepresent the law, citing unrelated cases and erroneously reference irrelevant authorities. The Defendants' assertion that the settlement is contrary to the FOUNDATION's charter is simply false. The Defendants erroneously attempt to shift the burden by stating there is a burden on the movants to show the settlement is fair is un-supported in law. In fact and law, the Settlement here is a just and proper settlement. The law is that the burden to show the settlement here is improper, rests with the Defendants and their filing and its many accompanying foundation-less submissions are irrelevant and/or are controverted and do not establish the settlement here is improper. Defendants assertion that this matter is akin to a class action is mis-guided and has no acceptance in law. The need to protect class members relative to the actions of representative class members as found in some class action matters has no basis here. Each and every party is fully represented in this case. The Defendants further bluster

16di-001637

about the role of the Attorney General in this case being an abuse is made upon inaccurate facts and half truths which are inapposite with well-established principles of law. Defendants stalking-horse fixation on the wording of the TERRA FOUNDATION's charter demonstrates the Defendants misapprehend the argument of the Attorney General as to the applicability of common law charitable trust law principles herein (which was the reason that during mediation defense counsel were given the Attorney General's draft First Amended Complaint) as opposed to the scope authority and provisions of the corporate Articles.

b) Defendants Tucker, Terra and Simpson were the parties who suggested in January 2001 that the expedited discovery and emergency hearings being pressed by the Attorney General and Plaintiffs be stayed and that mediation instead take place. At that time Assistant Attorney General Perkins stated and made clear to all Defendants' counsel and the Court, that the People of the State of Illinois would engage in mediation, but only if was understood the People would require any settlement agreement to provide that the TERRA FOUNDATION would not leave Illinois. The exhibits the Defendants attach show this was the People's position from the start of mediation. To state they hoped the People would relent in mediation is not a proper Objection now. Moreover, the Defendants ,and specifically Defendants Tucker, Terra and Simpson , by their counsel, made clear that as a condition to mediation any settlement would require a global resolution of TERRA matters and full release of all matters at issue regrading the TERRA FOUNDATION. Indeed, the very issue of including full releases in mediation was discussed with the Assistant Attorneys General by counsel of Defendants Tucker, Terra and Simpson in order to obtain assurance from the People that the request for and inclusion of releases in mediation by Defendants would not be used by the Attorney General as a claim of further breach. It was expressly agreed that the issue of global and complete releases for TERRA related matters would be a condition of mediation and would not be used as a suggestion of a breach of duty by the directors of the FOUNDATION.

16di-001638

c) Therefore based upon the conditions imposed by the Defendants from the start of mediation if a settlement could be reached, it was clear all Defendants, directors and agents of the TERRA would be given a release relative to TERRA FOUNDATION activities. The FOUNDATION also required full releases, because it did not want to be faced with indemnification representation costs.

d) The issues relative to the conduct of Dr. Stebbins were known to all and had been raised in documents filed prior to the start of considering mediation. The Attorney General in his filings made in December 2000 and January 2001 set forth allegations seeking to disqualify Dr. Stebbins from the litigation committee. The issues raised relative to Dr. Stebbins were denied by the Defendants. At the end of January 2001, the Dr. Stebbins matters, as well as others, were at issue in a preliminary injunction proceeding set for an emergency hearing, and expedited discovery related thereto had been allowed. When Defendants suggested mediation at the end of January 2001 and set the conditions for a global full release of all TERRA matters as a condition of mediation, the Defendants not only were securing such for themselves but also on behalf of and for Dr. Stebbins. Thereafter from the start of mediation in February the condition of full release for all directors was an assumed term in every mediation settlement proposal and non-negotiable. While the Attorney General's draft First Amended Complaint did name Dr. Stebbins, it was with reference to matters that had already been alleged in the preliminary injunction motion and related pleadings filed prior to mediation. The purpose in supplying the First Amended Complaint was to show counsel for Defendants the further expanded pleading relative to the Attorney General's position that the TERRA FOUNDATION should remain in Illinois.

e) Noteworthy also is the fact that the Defendants Tucker, Terra and Simpson had counsel representing them and securing the release agreement term specifically for themselves, including a mediation condition agreement that the release request in mediation would not be a raisable conflict. Dr. Stebbins did not have separate counsel to seek such and Dr. Stebbins never independently communicated a request for a release to the Attorney

General's staff as a pre-requisite or otherwise. In fact Dr. Stebbins and the staff of the Attorney General's office have never spoken or communicated except for an exchange of pleasantries upon meeting in a group at mediation session and listening to each other in two mediation sessions with Defendants Tucker and Terra and others present.

f) The court order of February 5, 2001 directing mediation came about because of the Defendants' request for mediation. The court also asked the parties to suggest mediators. The mediator chosen, attorney David Hilliard, was in fact suggested by counsel for the Defendants Tucker, Terra and Simpson (the resume supplied by the Defendants fully disclosed his relationship with the Art Institute. A copy of counsel's letters relative thereto are attached as Group Exhibit B.

g) The court's order of February 5, 2001 ordering mediation also provides that " No statements made by participants in the mediation will be admissible in evidence or otherwise useable in any way in any further proceedings in connection with this case".

h) The foregoing conditions and understandings in mediation were in place with the agreement of all parties and the approval of the court. The Defendants' assertions that Dr. Stebbins acted improperly in mediation and in voting for the settlement are baseless. The release for Dr. Stebbins was negotiated for and sought by these Defendants and was not obtained by Dr. Stebbins.

i) The Objections' allegations of wrongdoing by Dr. Marshall are equally imagined and meritless. A sequence of events led to a limited inquiry of Dr. Marshall and a school at which she is employed (This inquiry is not classified as an investigation, it is simply an inquiry allowed by the Charitable Solicitation Act to permit the Attorney General on behalf of the beneficiaries of charitable trusts to obtain documents relative to solicited charitable funds). That inquiry related to her role with another charity and that school. The response thereto was handled by counsel and not Dr. Marshall. The facts are that neither Dr.

Marshall nor the Assistant Attorneys Generals have ever spoken or communicated with each other except for an exchange of pleasantries upon meeting in a group at mediation session and listening to each other in two mediation sessions with Defendants Tucker and Terra and others present. The facts are that said inquiry matter is independent of the TERRA FOUNDATION and the releases in the TERRA settlement do not provide any benefit to Dr. Marshall in the inquiry matter. The facts are Dr. Marshall was not promised nor has she been given a release relative to the inquiry matter nor will she be given a release relative to that matter at any time (It should be fully understood that there is no reason to surmise she would need such a release). The inquiry was a simple request which was met in sum even before the June 19 mediation settlement meeting , and nothing is outstanding.

j) Neither Dr. Marshall nor the staff of the Attorney General's Office offered or accepted to tie matters from that inquiry to the TERRA FOUNDATION mediation directly or indirectly. Moreover, Dr. Marshall voted without securing any favor or release relative to that inquiry matter. Neither the staff of the Attorney General nor Dr. Marshall offered or tried to tie the matters together. Moreover by Dr. Marshall voting to settle this matter she gave up her purported item of exchange the " vote for settlement " without obtaining a quid pro quo . Dr. Marshall was not offered an opportunity to try and trade her vote for release or consideration relative to another matter, nor does she have such.

k) Moreover, the sequence and detail of mediation related later herein shows that before the inquiry on the unrelated matter was initiated Dr. Marshall had outlined adjustments to the May 11 mediated settlement, all of which were ultimately incorporated into the final settlement. Indeed while Defendants Tucker, Terra and Simpson sought and secured non-negotiable releases for themselves, they now imagine without basis that Dr. Marshall would be like they and seek self-interested releases. Dr. Marshall put self interest aside and did not try and tie the matters together or secure a release in an unrelated matter and has no agreement, condition or release from the Attorney General. (Again, there is no reason to

suggest that Dr. Marshall, or anyone else for that matter, needs a release relative to the unrelated inquiry). Dr. Marshall chaired the June 29, 2001 TERRA Board meeting, and at that meeting, she addressed the charges and explained her actions and made it quite clear she was acting without duress and of a free will.

THE PROPOSED SETTLEMENT IS NOT INCONSISTENT WITH THE TERRA FOUNDATION'S CHARTER AND ARTICLES OF INCORPORATION

7) Defendants Tucker, Simpson and Terra state in their Objections the exaggerated claim that the mediated settlement is inconsistent with the Foundation's Charter and Articles. Such is simply untrue. The mediated settlement agreement does not by its terms include any provision or provisions that are contrary to the "Charter" Amended Articles of Incorporation of the TERRA FOUNDATION (see the Charter at Defendants' Objections Exhibit 5). (A copy of the Settlement agreement is attached as Defendant Objections Exhibit 27.) The Amended Articles of Incorporation of the TERRA FOUNDATION in sum, provides it is organized exclusively for charitable purposes (See Objections Exhibit 5). The Amended Articles by the terms therein have no limit on the type of charitable purpose the FOUNDATION might engage upon. The mediated settlement does not seek to alter the Articles in any way and its terms impose and require that the FOUNDATION continue to engage in only exclusively charitable purposes within the limits of the Articles. Indeed, the language of the Amended Articles would permit the FOUNDATION to operate a hospital or animal shelter, and /or abandon all activities relative to art. However, to the extent that the settlement has any impact on the FOUNDATION's charitable purpose, the settlement reinforces and requires the FOUNDATION to engage in the promotion of American Art as the FOUNDATION has done to date and as Daniel Terra intended, as an exclusively charitable purpose. Indeed, the portions of the Amended Articles of the FOUNDATION which Defendants reference and quote in their Objections are portions about the "United States and abroad" are found under a limiting provision in the Articles that such is merely illustration and not binding on the FOUNDATION, indeed the Amended Articles make quite clear there is no restriction in the Articles providing that further detail is " For illustrative purposes only." (See Objections Exhibit

5). The Defendants' contention that the settlement violates the Charter is indicative of the inaccuracies and exaggeration found throughout the Objections.

8) These Defendants also assert that the settlement is contrary to the founder's intention because the TERRA FOUNDATION under the settlement is not free to completely leave Chicago. Indeed these Defendants fail to explain why their conduct of operating the FOUNDATION here in Chicago since Daniel Terra's death in 1996, or why their efforts at exploring a partnership with the Art Institute during the last year is any different than the proposed settlement. In sum, what the Defendants show at best is that from time to time Daniel Terra's efforts were a work in progress, but through it all he stuck with his first choice, his home town, Chicago. The Defendants fill this record with contentions without test or foundation and by way of purported affidavits which violate Supreme Court Rule 191 and fail to state they are made upon personal knowledge, fail to state with particularity the facts necessary to support the Objections, and which are, for the most part, statements of conclusion, surmise and conjecture, and based upon purported inadmissible hearsay statements. In sum, the Exhibits and affidavits attached to Defendants' Objections are without sufficient foundation and otherwise not facts admissible in evidence. In sum, the Defendants' Exhibits are not evidence of anything; rather they are inadequate conclusions and conjectures replete with unreliable hearsay.

9) The Defendants earlier actions in filing herein on June 29 with their motion for TRO, a copy of their complaint from their dismissed federal lawsuit included in that filing a binder of exhibit documents. Among the Defendants' binder exhibits accompanying their dismissed federal suit is an affidavit of James Terra., the son of Daniel Terra . James Terra in his affidavit states he was an original founder of the FOUNDATION and a Terra Board member from the inception of the FOUNDATION through his father's death. He further contends in his affidavit that the founders had always intended that the FOUNDATION remain in Chicago. James Terra's affidavit which the Defendants have filed states : "When the museum was opened it was clear that it was always meant to have a presence in the Chicagoland area. At no time during all of my discussions with my father about Museum or FOUNDATION matters, did he ever express any intent to move the

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Museum from Chicago." This is Exhibit "16" in the documents filed by Defendants. (James Terra's affidavit September 25, 2000, Defendants' Federal lawsuit Exhibit "16") The James Terra affidavit is also attached hereto as Respondents Exhibit C.

10) James Terra believes the FOUNDATION should remain in Chicago and he has filed a lawsuit in this court which contends the FOUNDATION articles should be reformed to restrict the FOUNDATION to Chicago. A copy of James Terra's lawsuit is attached as Exhibit D.

11) The Defendants provide as Exhibits to their Objection untested foundation-less documents and affidavit statements from various persons to purportedly support their assertion that Daniel Terra had considered alternatives to a Chicago location for his museum. They argue without logic or citation to authority that such prevents the FOUNDATION's board from entering into the mediated settlement. In addition to such being hearsay, the Defendants' filings herein cite statements by several real estate professionals who claim Daniel Terra considered buildings in Washington D.C. for the FOUNDATION. In fact nothing shows he caused the FOUNDATION to act or consider Washington D.C. property. All of what is suggested by the Defendants' attachments involves purported actions by Mr. Terra in his personal affairs. In stark contrast is the fact that for 18 years Daniel Terra establish his intent to have the TERRA FOUNDATION here in Chicago by conduct and numerous public solicitation statements. The 18 years of conduct can not be disputed and are sufficiently established facts to support the right of the TERRA FOUNDATION to remain in Chicago, and support the right to the entry of the mediated settlement.

12) What the Defendants do not supply and cannot supply are records showing the FOUNDATION board considered or paid for any of the purported Washington DC real estate matters, or was involved in same. Moreover upon Daniel Terra's death, despite the fact that all of the residue of his estate was left to the FOUNDATION, these purported real properties in Washington DC were never delivered to the FOUNDATION. A true and correct copy of Mr. Terra's last will and testament is attached as Exhibit E. From 1996 to 2000 the FOUNDATION continued to operate in Chicago, with no consideration or regard to these so called Washington D.C. desires of Mr.

Terra. In fact the very FOUNDATION documents which Defendants supply to show the FOUNDATION's planning for the future lack any reference to the purported Washington D.C. real estate desires of Daniel Terra that Defendants urge in their Objections. The February 11, 1997 "Report to the Trustees of the Terra Foundation for the Arts" (Exhibit 18 in the Defendants' Objections) states it is a report by an advisory committee to explore the future and operational provisions of the FOUNDATION. The Report by its text makes clear it was commissioned as a advisory committee to make recommendations on the future and long term mission and location of the FOUNDATION, and while the report expressly references Daniel Terra's death, no mention of these Washington DC building plans is mentioned in the report. Also see strategic planning committee meeting notes Defendants Objections Exhibits 2 and 20.

13) The affidavits of the Washington real estate folks and the architect are hearsay and violate provisions required of affidavits as set forth in S.Ct Rule 191 and their contents are therefore subject to doubt and simply under the law what they purport to relate has no presumption of veracity and the Attorney General objects to consideration thereof. Moreover, there was no requirement that Daniel Terra fully or accurately explain his thoughts to real estate professionals. These reported hearsay statements reflected in the real estate people's statements, if true and accurate , are at best casual hearsay conversations in a setting where the speaker has no reason to reveal or make known all of his thoughts or to be fully truthful. Such casual commentary has no probative value here at this juncture in establishing Mr. Terra's charitable intent relative to the use of $450 million dollars of charitable assets held by this FOUNDATION. Clearly it is not uncommon for a person to look at real estate to see what is available without having a decided course. Often the real estate professionals are not provided accurate information by the person with whom they are working. Daniel Terra in 1996 before his death still personally owned approximately $79 million worth of art, and at his death his personal net worth was several hundred million dollars, and left all the art and funds except for approximately $ 7 million to the FOUNDATION. A true and correct copy of select pages of Daniel Terra's federal estate tax return Form 706 is attached hereto as Exhibit F, which shows on page 3 his assets and distributions , and schedule A thereto shows he personally owned the several parcels of real estate which

Objectors claim were for the FOUNDATION. (See Schedule A to Form 706 attached hereto as part of Exhibit F.)

14) As Defendants own Objections show Daniel Terra was acting not on behalf of the FOUNDATION, but rather personally. The Objections by inadmissible hearsay purport to show he personally was looking at the Washington D.C. real estate, personally bought the real estate, and personally commissioned plans. The FOUNDATION records reflect no intent in 1996 to move to Washington D.C. nor did the FOUNDATION pay for any of these Washington D.C. real estate matters. It might have been his intent to place his personal art in Washington D.C. or make a further gift to the FOUNDATION and build offices in Washington D.C., or a further small gallery or maybe he was just considering options and exploring real estate. It is all conjecture, surmise and hearsay.

15) The untested informal discussions reflected in the affidavits Defendants attach include a sheet of paper with a hand written note and a logo at Exhibit 14 and the Attorney General objects to its consideration. Who made and/or wrote such and under what conditions is without foundation it is meaningless as evidence here. Even if its foundation could be laid, it is not unusual when a charity's president has a personal change of address that he has some of the charity's mail re-directed to his home. The note seems to say forward my personal mail at my old personal address along with FOUNDATION mail that comes to you to this new location. Certainly the note did not concern the main mail for the FOUNDATION, for there is no indication that the FOUNDATION's mail actually started to go to this new address. Moreover none of this establishes Daniel Terra's intent to move the FOUNDATION to Washington D.C. These allegations fly in the face of years of conduct and are not evidence as submitted nor supported by FOUNDATION records or reflected in actions by the FOUNDATION, and they certainly are not documented plans by Daniel Terra as a fiduciary.

16) The affidavits of affiants Levy and Solmssen not only suffer from failing to meet the obligations of Supreme Court Rule 191 , they are hearsay and inadmissible and the Attorney General objects

to consideration thereof. Moreover they generally reflect what Daniel Terra was considering in 1990, 1991 or 1992, and explain the plans did not work out. Solmssen does reference 1996 and although his contention is hearsay he suggests Mr. Terra may have wished to have offices in Washington D.C. and some galleries. It is incomplete hearsay which does not establish Daniel Terra's charitable intent, and as referenced above it could be interpreted to mean many things and whether Mr. Terra wanted to or would reveal all the FOUNDATION's operational plans to the affiant is clearly not established and highly improbable.

17) Finally the Defendants's Objections do not meet the burden on showing the settlement is unlawful or improper. Rather, the Objections show and establish facts that show the mediated settlement is not contrary to the charitable intent of the FOUNDATION. There is no evidence this FOUNDATION must be located outside Chicago and/or in Washington D.C. to meet Daniel Terra's intent. Indeed these very Defendants have stated this FOUNDATION's location was something the Board could properly decide. The very documents Tucker points to in his affidavit and the strategic planning meeting notes Defendants attach to their Objections all show that Chicago is a viable option under a variety of ideas. Therefore the actions of the Board in reaching the mediated settlement to keep this FOUNDATION in Chicago are not contrary to the testator's intent, rather they are squarely within what had been being considered by the Board and these very Defendants prior to litigation.

18) Indeed, several of Defendants' attachments to the Objections show a variety of Board and committee considerations at various times and in almost each instance one of the considerations set forth is a possible plan for the FOUNDATION and/or the collection and programs to remain in Chicago. Thus the Defendants' documents attached to the Objections show the Board believed it was proper to stay in Chicago. Defendants' Objection Exhibit 18 shows consideration of partnering or standing alone in Chicago in February 1997. Defendants' Objection Exhibit 20 discloses that on May 10, 2000 the strategic planning committee was recommending the FOUNDATION engage in partnering and a had a short list of potential partners including the Art Institute. Indeed, the list is contrary to the exaggerated claims of the Objectors as to the purported

beauty contest Defendants claim they would have conducted. The Defendants Objection Exhibit 2 shows the strategic planning committee continued to consider on August 2000 partnering with the Art Institute of Chicago. These documents show the Board and committee thought it would be permissible to stay in Chicago and to partner with institutions in this city expressly mentioning the Art Institute and Northwestern University. The Defendants exaggerate and misstate when they claim the settlement will violate Daniel Terra's intent. These several Board and committee meeting minutes show that Defendants Tucker and Terra participated in discussions of placing this FOUNDATION on the very course the mediated settlement now places it. It is clearly within Daniel Terra's intent and within past Board considerations..

19) The Defendants attachment of the April 1990 minutes of the Museum involves remarks by Mr. Terra when the FOUNDATION was one eighth its current size. (Defendants' Objection Exhibit 1) The 1990 minute show the FOUNDATION to be much smaller in 1990, a book value of only $50 million (Objection Exhibit 1, minute- page 7). It is undisputed Mr. Terra continued the FOUNDATION in Chicago after 1990 and thereafter placed several hundred millions of dollars of assets into the FOUNDATION through his death in 1996, with it current worth in excess of $430 million. A true and correct copy of the FOUNDATION's June 30, 2000 balance sheet is attached hereto as Respondent's Exhibit G. While Mr. Terra might have given a thought in 1990 about where his museum ought to be, there are other explanations for his statements, and no evidence he truly considered moving. More importantly clearly after his 1990 remarks, Daniel Terra's conduct for six years thereafter was to have the FOUNDATION stay in Chicago.

20) The terms of the mediation settlement do not violate the purposes set forth in the Articles of Incorporation nor do the terms of settlement change the operation of the FOUNDATION from that which existed when the founder Daniel Terra was alive. Two of the complaining Defendants Tucker and Simpson were not with the FOUNDATION when Mr. Terra was alive. The other Defendant Judith Terra was originally restricted from being involved with the FOUNDATION under the terms of the TERRA Prenuptial agreement signed in 1986, and she only became a director of the FOUNDATION in 1993.

THE ATTORNEY GENERAL HAD A DUTY TO PARTICIPATE IN THIS LITIGATION AND PROPERLY DISCHARGED THAT DUTY

21) The Defendants' filing takes issue with and objects to the very involvement of the Attorney General in this case calling it an abuse. Clearly these Defendants misunderstand the law of Illinois and the role of the Attorney General with regard to charitable trusts. The Defendants make it appear that the Attorney General's litigation and settlement position that the TERRA FOUNDATION remain in Illinois is baseless and/or was a surprise at mediation. The record is clear that said position was taken in the initial pleadings, stated at court sessions and put in writing by the Attorney General on several occasions and was spelled out when mediation commenced. From the initial involvement in this case it has been the position of the People that the FOUNDATION is obligated to remain in Illinois. The Defendants supply attachments showing the Attorney General had this position from the start of mediation, and they should be estopped from complaining four months into mediation.

22) When this litigation was commenced in September 2000 by the Plaintiffs and the Attorney General there was a plan being implemented to move this FOUNDATION from Chicago to Washington D.C. and/or France, and the lawsuits herein were filed to, among other things, stop the move and deal with certain matters of breach of duty.

23) Defendant Tucker who was the president of the FOUNDATION in furtherance of the plan to move the FOUNDATION just prior to the September 2000 annual board in follow up to a board meeting of August 24, 2000 and building upon his remarks in the strategic planning committee meetings of May 2000 and August 2000, set forth his vision for the Terra Foundation in a position paper circulated to the Terra Board for use at the annual meting, entitled a Vision For the Future (the Vision statement is Exhibit C to the Atty General's complaint which Complaint is at Defendant Objectors Exhibit 4) (the August 24 Board meeting minutes is Exhibit D to the Atty General's complaint which complaint is at Defendant Objectors Exhibit 4) (the strategic planning committee

meetings of May 2000 and August 2000 are Defendant Objection Exhibits 2 and 20) **Defendant Tucker in his vision paper on the eve of the annual meeting of the FOUNDATION board states that the Terra FOUNDATION and its collection belongs in only one place, Washington D.C.** The vision statement in pertinent part provides:

> "From the lengthy strategic planning discussions that we have had as a Board over the last ten months, I believe we have all come to recognize that we are at a critical point "..."I also believe that we will have the opportunity at our Board meeting in Giverny to make some of the most important decisions about our future" ... " I know that we all understand the weight of our responsibilities and the concurrent seriousness of our deliberations." ... "Given these unique circumstances, and several recent developments that I will review in greater detail in Giverny, I thought I should share with you my sense of how we should proceed." (Tucker's: A Vision for the Future (white paper) Page 1)... "I believe there is really only one (city) that would serve the center's needs in the fullest, most effective manner. That is Washington D.C." (Tucker white paper Page 3). "I am completely convinced that the Terra FOUNDATION collection should be in the same city as the FOUNDATION itself." (Tucker white paper Page 5). (The White Paper Vision Statement is Exhibit C to the Atty General's complaint, which complaint is Defendant s' Objection Exhibit 4)

24) The Attorney General of Illinois filed suit in this case to protect the common law rights and interests of the PEOPLE OF THE STATE OF ILLINOIS in preventing their divestment of the beneficial rights in the TERRA FOUNDATION. The Illinois Common Law Act (5 ILCS 50/1 (1991).) expressly adopts the common law of England as the law of Illinois. Under the English common law the People of the Sovereign are the ultimate beneficiaries of each and every charitable trust. Under the common law the Attorney General's power to enforce charitable trusts stems from the underlying fact that the PEOPLE are the ultimate beneficiaries of all assets devoted to causes that promote the welfare of the society as a whole and which benefit an indefinite number of persons. (Kerner v. Thompson (1936), 365 Ill. 149, 153; Stowell v. Prentiss (1926), 323 Ill. 309,

318 and 321-22; People *ex rel.* Smith v. Braucher (1913), 258 Ill. 604, 608; Attorney General v. Newberry Library (1894), 150 Ill. 229, 236.)

25) Under Illinois law, the Attorney General is the sole officer constitutionally authorized to represent the PEOPLE of this State in any litigation in which the PEOPLE OF THE STATE are the real party in interest. (People v. Briceland, 65 Ill. 2d 485, 495 (1976); In re Estate of Stern, 240 Ill. App. 3d 834, 837 (1st Dist.1992).); at common law, the PEOPLE OF ILLINOIS are the ultimate beneficiary or *cestui que trust* of all Illinois charitable bequests (In re Estate of Laas, 171 Ill. App. 3d 916, 920 (1st Dist. 1988)), and the Attorney General has been judicially recognized as the proper representative of the PEOPLE in all actions concerning the enforcement or administration of Illinois charitable trusts. (In re Estate of Tomlinson, 65 Ill. 2d 382, 387 (1976); In re Estate of Laas, 171 Ill. App. 3d at 920).) The Attorney General is therefore vested with the authority to participate in any action to protect a charitable trust and its property either defensively, where an attack is made on its validity, or by action as plaintiff. (In re Estate of Tomlinson, 65 Ill. 2d at 387; In re Estate of Stern, 240 Ill. App. 3d at 837).) In a suit by others where the validity or the enforcement of a charitable trust may come into question, the Attorney General is generally a necessary party and should be joined as a party. (Estate of Tomlinson, 65 Ill. 2d at 387; In re Estate of Stern, 240 Ill. App. 3d at 837; Bogert, The Law of Trusts and Trustees sec. 411 (2d ed. 1964).) The assets are held subject to a trust for the benefit of the public which is enforceable in the public's name by the Attorney General (In re Estate of Tomlinson (1976), 65 Ill.2d 382, 387; In re Estate of Muhammad (1st Dist. 1987), 165 Ill. App. 3d 890, 896-98.) The PEOPLE's beneficial interest in charitable trust is described by the Appellate Court in People *ex rel.* Scott v. George F. Harding Museum (1st Dist. 1978), 58 Ill. App. 3d 408, 417.), the court stating:

> While the courts often talk of individuals who are to get charitable benefits as 'beneficiaries', strictly speaking the state is the only party having a legal interest in enforcement, and the human beings who are favorably affected by the execution of the trust are merely the medium through whom the social advantages flow to the public. If a trust has as its object the care of the poor, those persons who are chosen to secure the necessities of life under it are not in reality beneficiaries of the trust but

only the instrumentalities through which the state receives the social advantages of seeing that its citizens do not suffer want. That this is true is shown by the rule that only the attorney general of the state can sue for enforcement, since he is the legal officer whose duty it is to represent the interests of the state and its citizens.(at 58 Ill. App. 3d 417.)

26) It is well established that the courts of this state have recognized and held that there is a substantial public right and interest in charitable funds vested in the PEOPLE OF THE STATE OF ILLINOIS and which the Illinois Attorney General has a duty and obligation to protect. In fact the Attorney General has a duty to act to protect the PEOPLE's interest and he must investigate matters of concern with regard to charitable organizations. Here the Attorney General properly sought to protect the PEOPLE OF THE STATE OF ILLINOIS interest in the Illinois charitable trust the TERRA FOUNDATION.

27) The common law is the evolved rule of decision from case law and English statutes such as the Statute of Uses. "Trust law" evolved at common law to govern property which is delivered by a settlor/grantor to another "as trustee" to hold said property "in trust" for the benefit of others "beneficiaries". The terms by which the trustee holds the property may be written or oral, but a trust to be valid must have a trustee and beneficiar(ies).

28) At common law a charitable trust was special and unique because the identity of the beneficiaries are not named persons or specific individuals but rather benefit the public. The common law provides that the PEOPLE, the citizens of the Sovereign of the jurisdiction where the trust is formed, are the fully vested beneficiaries as equitable owners of a fee simple interest of the charitable trust estate, as a matter of law. Where a trustee in Illinois receives property upon a promise of charitable use or upon a gift for charitable use the vested beneficiary of each and every charitable asset so delivered is the PEOPLE OF THE STATE OF ILLINOIS.

29) The TERRA FOUNDATION as a separate legal person, is itself a trustee. It received and accepted

charitable gifts, contributions and benefits while in Illinois. The charitable gifts given to the TERRA FOUNDATION as a trustee now amount to more than $450 million in assets. There is no doubt the TERRA FOUNDATION is a legal person and that the assets given to it were made in trust, for charitable purposes and thus it is a charitable trustee. Consequently, by operation of law, the PEOPLE OF THE STATE OF ILLINOIS are the sole and exclusive vested beneficiaries of the charitable assets held by the Defendant FOUNDATION.

30) The FOUNDATION was incorporated in December 1978 under the Illinois General Not-For-Profit Corporation Act by Daniel Terra (now deceased), James Terra, Daniel's son, and Robert Sugrue under its original name "FOUNDATION For The Daniel J. Terra Museum". The FOUNDATION's first board was comprised of Daniel Terra, James Terra, and Robert Sugrue. The FOUNDATION was created in 1978 under the direction of Daniel Terra, a successful Chicago area businessman, and was formed as a philanthropic endeavor supported by Daniel Terra and his first wife Adeline, to whom he had been married since 1937, to establish a museum in the Chicago area to promote, display and educate the public about early American Art. From the date of its formation through to the present, FOUNDATION has engaged in the charitable activity of establishing and operating a public museum in Illinois, first in Evanston and then in Chicago.

31) Daniel Terra contributed over $200 million to the FOUNDATION while he was alive and he stated from time to time when making gifts to the FOUNDATION that the gifts be used to establish and operate an art museum facility in the Chicago area. In fact Daniel Terra as the chief executive officer and a director of the FOUNDATION caused it to establish a museum in Chicago, and acted and caused the FOUNDATION to develop and maintain a permanent collection of American Art, display works from that collection, and provide and sponsor exhibits, programs, and activities designed to promote an appreciation of American Art here in Chicago.

32) Daniel Terra and the FOUNDATION in soliciting public participation and support, publicly stated and represented that the FOUNDATION was committed to the charitable purpose of building and operating an art museum in the Chicagoland area to promote an appreciation of American Art in

Chicagoland area.

33) In 1978, at the direction of its founder of Daniel Terra, the FOUNDATION acquired property in Evanston, Illinois at 2600 Central Street, Evanston, Illinois which it refurbished and used as its art display museum and center of educational activities through 1987. In 1985, at the direction of Daniel Terra, the FOUNDATION purchased properties at 644-670 Michigan Avenue, Chicago for the purpose of expanding its art museum activities and in 1986 or 1987 it established a public museum facility at that location opening under the name Terra Museum of American Art (Terra Museum).[1]

34) At all times since it moved to 664 N. Michigan Avenue through the death of Daniel Terra in 1996, the FOUNDATION under the direction and by actions of Daniel Terra has continued to operate a public museum called the Terra Museum of American Art at the Michigan Avenue location.

35) In addition to other public education efforts at its Chicago location, the FOUNDATION under the direction and actions of Daniel Terra created and sponsored art education programs for Chicago school children, providing access to art and art education to thousands of Chicago area school children each year.

36) For more than 20 years the FOUNDATION has publicly promoted the FOUNDATION's Chicagoland museum purposes and activities, issuing numerous public relations communications, brochures, press releases, and public advertisements, including a recent 2001 ad stating that the Terra Museum is here to stay, soliciting support and contributions as a facility for Chicago. In response to, and in reliance on, the aforesaid representation and actions by the FOUNDATION, over the past 20 years in addition to Daniel Terra, Illinois businesses and citizens have donated

[1]While it is true that in 1990, the FOUNDATION formed a subsidiary French corporation/association with the FOUNDATION's name and under the French corporation opened a small museum facility in Giverney, France where works of American art on loan from the FOUNDATION have been displayed. Unlike the Terra Museum in Chicago which is open all year, the Giverney facility is open on a seasonal basis, typically from April 1st through October 31st each year and none of the works in the FOUNDATION's collection are permanently maintained in Giverney, France.

millions of dollars in contributions and paid membership dues to the FOUNDATION to support its operation of the Terra Museum of American Art in Chicago.

37) In addition, during the period 1978 through to the present, as a result of its charitable purposes here in Illinois, the FOUNDATION has received substantial benefits from the PEOPLE OF THE STATE OF ILLINOIS in the form of substantial special tax relief, specifically exemption from Illinois income tax on its operational profits and stock sales gains, real estate tax exemption for its real estate at both its Evanston and Michigan Avenue locations, exemption from millions of dollars in State of Illinois Use/Sales taxes which would have been due on the millions of dollars spent on the purchase/use of art and equipment by the FOUNDATION here in Illinois.

38) From the date of its incorporation through to the present, the FOUNDATION has acted to establish and continuously maintain a public museum facility in the Chicagoland area where it houses and displays works of the FOUNDATION's permanent collection of American art, and where it sponsors exhibits, programs and activities designed to educate the public in the Chicagoland area about American art and promote an appreciation thereof. The FOUNDATION's museum activities have a geographical connection and indicates a use tied to its location and establishment in Illinois. The unique nature of a public museum and its tie to its location is such that its charitable mission, purpose, and intended beneficiaries are integrally linked to its physical service area location.

39) By and through its own express representations, as well as those of Daniel Terra, and through its continuous and uninterrupted operation and public promotion of its museum facility in the Chicago area, as well as its repeated and continual acceptance of gifts, grants and benefits from Illinois businesses and citizens, the FOUNDATION has represented that it intended to be a museum and educational institution for Chicagoland residents. Further, the FOUNDATION publicly demonstrated and affirmed by its actions in establishing and operating a museum and educational institution in Chicago, as aforesaid, and having further committed its operation to Illinois by operating within Illinois and accepting millions of dollars in public contributions from Illinois citizens and accepting millions of dollars of Illinois tax reduction benefits available only to Illinois

charitable organizations, that its intended beneficiaries are exclusively the PEOPLE OF THE STATE OF ILLINOIS.

40) The Defendants attempt to support their claim of abuse with an unverified legal declaration by attorney Evelyn Brody. Her theories found in her declaration are made on mere conclusions and are not properly considered by this court. Professor Brody asserts that the Attorney General's participation in and procurement of the Proposed Settlement are inconsistent with the legal framework for the operation of charitable not-for-profit corporations. Yet in a recent law review article on charity governance, Professor Brody asserts a decidedly different view of state court and Attorney General involvement in charitable trusts. In her article, *A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?* (21 U. Haw. L. Rev. 537 (1999) Symposium Issue of the Bishop Estate Controversy; reprinted at 29 Exempt Org. Tax. Rev. 397 (Sept. 2000)), Professor Brody unequivocally states at page 543, "I believe that Congress generally intended that investigations of charity fiduciary behavior be a state, not a federal, case." Furthermore, she discussed with approval, the actions taken by an Hawaii State Court Probate Judge in an action filed by the Hawaii Attorney General seeking to remove Trustees and impose governance reforms on the famous Bishop Trust. In her Review, Professor Brody praised the Probate Court's decisive action in appointing new trustees, instituting new court procedures for selecting replacement trustees, and approving reforms on the governance and management structure of the Bishop Trust. Professor Brody supported the extraordinary measures taken by the State Court in exercising its common law powers of removing trustees and imposing institutional reforms on a charitable not-for-profit corporation, stating that the century-old Hawaiian institution [emerged] from crisis strengthened and renewed. She stated that the State Court's decisive act in appointing new Trustees and approving reforms to the governance and management of the Bishop Trust promised "a happy end to this long, sad story." (Id at 541.) A copy of the Brody Review is attached as Respondent Exhibit H. Professor Brody's statements, in her article reviewing the Bishop Estate, appear to support the intervention of the State Court and the State Attorney General to protect a charitable trust and, as her article a shows, she supports such there on the mere allegation of wrongdoing . The Attorney General assumes her remarks as supplied herein come

upon a lack of familiarity with all of the facts. The TERRA settlement agreement here appoints new trustees and institutes reforms in the management and governance of the TERRA FOUNDATION very much like the result in the Bishop Estate, and this Court's approval of the Settlement here, will also bring about a happy end .

41) Defendants' threats that this position of protecting Illinois based charitable trusts will chill the establishment of FOUNDATION's in Illinois is an attempt to persuade the Attorney General from his position by implying some harm will befall Illinois by this position. However, the People respond and state that those who establish charitable trusts in Illinois will have their intended purposes fulfilled and not supplanted by the desires of those who come later after the settlor's death. The Attorney General cites to The Restatement 2d and Restatement 3d of Trusts at 348 Definition of Charitable Trust as further support for his position. A copy of the text of said Restatement is attached as Respondents Exhibit I. The position of the Attorney General protects the founder of an institution from the wishes and/or "visions" of those who come later and attempt to impose their vision and seek to alter the trust to promote their own purpose rather than continue to promote the programs established and continuously supported by the founder. However, this case at this juncture does not require a resolution of the position of the Attorney General on charitable trusts leaving this state. The FOUNDATION's board mediated the dispute, and, by and through a properly called board meeting, resolved this litigation compromising the matters in dispute. No proper challenge can be made to the settlement.

MEDIATION WAS PROPER AND DONE AT THESE DEFENDANTS SUGGESTION

42) These Defendants have in their July 2 Motion implied that mediation here was not a proper process(See: Page 2 and footnote 1). In fact, it was these very Defendants Tucker, Simpson and Terra, by their counsel, that first suggested and urged the parties and the court to stop the ongoing preparation for emergency hearings and consider mediation to settle and resolve this case. T he Defendants also charge earlier that the mediator might have a conflict by a relationship with the

Art Institute . However, it was the Defendants not the Plaintiffs or the Attorney General who suggested Mr. Hilliard as the mediator. Indeed, the transmittal letter sent by these Defendants to the court for selection of the mediator had Mr. Hilliard's resume, which stated and fully disclosed his Art Institute involvement. Further a review of Defendant Tuckers May 24, 2001 new revised settlement proposal contains his suggestion of the TERRA partnering with the Art Institute (See Tucker's May 24 letter proposal attached hereto as Respondents Exhibit J). Thus, these Defendants requested mediation and embraced Mr. Hilliard and have no right to complain about imagined conflicts (See letter from Tucker, Simpson and Terra counsel dated February 1, 2001 suggesting Hilliard as a mediator Respondent Group Exhibit B).[2]

43) The Defendants also attempt, by half truths, to make it appear that Assistant Attorney General Floyd Perkins improperly attended mediation sessions and/or that he acted in an threatening manner at mediation sessions. Both assertions are untrue and without basis in fact. At no time since mediation commenced whether at a mediation session or otherwise has Floyd Perkins threatened, discussed or promised anything with regard to any of the individual directors, save the initial agreement for releases sought by these very Defendants that now complain. At no time did Assistant Attorney General Floyd Perkins speak about releases to Dr. Stebbins or Dr. Marshall.

44) Mediation, the process, and attendance were controlled by the mediator. The Attorney General's staff never called or wrote to Directors Stebbins or Marshall. The first mediation session involved the Plaintiffs, the Defendants, and the Attorney General staff in three separate rooms. The parties did not meet each other; the mediator traveled between the rooms. After the first mediation session the mediator reported he was in contact with parties, counsel and board members, and from time to time, he asked the Attorney General's assistants about terms, but he did not provide specifics regarding other persons terms. The mediator appeared to be blending the various parties terms together seeking to find a possible consensus among the varied points of view. A second

[2] Moreover, the Art Institute is not mentioned within nor is it a part of this mediated settlement. There are no provisions that grant any rights or interest to the Art Institute.The mediated settlement places control of the FOUNDATION in the hands of its Board.

mediation session involved just a meeting of attorneys with no directors present. At both the first and the second meeting the Attorney General's staff stated its position on settlement which included that the PEOPLE OF THE STATE OF ILLINOIS would not agree to any settlement that allowed the FOUNDATION to leave Illinois.

45) Because the individual Defendants Tucker, Simpson and Terra and the FOUNDATION required that any settlement resolve all issues, during mediation there was never further discussion about actions against individuals it was always a condition the directors would get a full release from TERRA related matters.

46) Mediation was ordered on February 5, 2001. At the time mediation was being considered there were several emergency hearings set and a dozen or more depositions scheduled, as well as, a half dozen document production requests. The attorneys for the Defendant FOUNDATION and the Plaintiffs were expending on average an estimated 600 to 700 hours of lawyers service hours per month at a cost of $ 150,000 to $200,000 per month per side. The staff of the Attorney General were involved in all of the same matters and the service hours required were substantial.

47) By mid-March 2001 it did not look to the Attorney General's staff that settlement would occur. It had never been contemplated that mediation would go on past March. The staff assigned to the Terra file at the Attorney General's office had a limited amount of resources available. The attorneys assigned had many other cases and the ability to match the efforts of competing law firms required creative time and service management. Of necessity to keep pace with competing law firms, during the mediation period the staff of the Attorney General continued to prepare in the event litigation and the emergency proceedings would again commence. Towards mid-March the Attorney General staff began to draft an amendment to its complaint to add the facts that had been developed and were at issue before the court on the emergency hearings regarding Mr. Neff and Dr. Stebbins. In addition, the FOUNDATION lawyers had been questioning the PEOPLE's position on the law relative to keeping the FOUNDATION in Illinois and the Attorney General at mid-March began to add and amend the complaint to add facts making its position and contention

on the obligation to remain in Illinois more exact. Preparation of the draft amended complaint was being done to conform the pleadings to the proof, and if the matter did not settle, the Attorney General's office would be ready to proceed.

48) Because there had been a question raised at mediation about the Attorney General's position about the FOUNDATION leaving Illinois, at some point the staff of the Attorney General advised the mediator it had a draft amended complaint that further sets forth the facts and basis for its position and that it would be filing such if the case did not settle. Counsel for the parties were given a copy of the draft amended complaint. This was done in March 2001. The Assistant Attorneys General did not distribute copies of the draft to the directors.

49) Despite the Attorney General's belief at the end of March that settlement was unlikely the mediator assured all that he thought settlement might be possible. Counsel for all parties, including these Defendants, expressed a desire to continue to try to reach settlement. Scheduling the board members to mediate in person was reported to be a difficult process. It was reported by the mediator and the FOUNDATION that scheduling would take weeks. Finally another mediation session was scheduled for May 11, 2001, and the mediator advised that some Board members would like to hear from the Attorney General's staff directly. The mediator asked that Floyd Perkins and Therese Harris attend the mediation session on May 11, 2001. This was fully discussed with the court and all counsel for all parties and it was agreed by all that the Attorney General's staff could attend mediation meetings without the other counsel present.

50) Floyd Perkins and Therese Harris went to the mediator's office on May 11 and entered a conference room with the mediator, a number of Board members and with other board members connected by phone. At some point the mediator asked Floyd Perkins to state the Attorney General's position on settlement and basis for the position. Floyd Perkins explained the Attorney General's position and that any settlement required that the FOUNDATION remain in Illinois. Board members asked questions. A number of variations of settlement terms were proffered and discussed. At that time

the Attorney General was asking that the parties agree to the FOUNDATION remaining in Illinois in perpetuity. The Board members were asking if a term of years restriction was something the Attorney General could accept. A number of variations on settlement terms were discussed. When the lunch break came although invited to stay and eat with those attending, the Assistant Attorneys General left, ate lunch on their own, and did not return until requested some time later by the mediator.

51) Throughout the mediation conference on May 11 no discussion of the individual Defendants' conduct or issues were raised or mentioned by anyone. The gist of the mediation discussions concerned why and upon what basis the Attorney General maintained the People's position about the FOUNDATION remaining in Illinois and what might be reasonable acceptable terms of settlement as to FOUNDATION governance. Often the discussions did not involve the Assistant Attorneys General. At the end of the day May 11 the parties present agreed to settlement terms. There had been no hostile remarks, threats or private promises at the May 11 meeting. Thereafter the mediator sent a written settlement document which contained the terms agreed to on May 11, 2001 a copy of the mediators May 15, 2001 settlement draft is attached as Exhibit "K".

52) After the May 11 meeting, it was generally believed there was a settlement. However shortly thereafter the mediator advised that certain terms of the agreement were in dispute. After the May 11 mediation meeting, Defendant Tucker sent a letter suggesting a completely different set of terms from that discussed May 11. A copy of Tucker's May 24 letter settlement proposal has been previously attached as Exhibit "J".

53) Director Marshall also sent a May 21 letter stating that she wanted to continue settlement discussions but had some issues with the mediator's May 14 proposal and in her letter she set forth a number of changes and suggestions. In her May 21 letter Dr. Marshall suggested that: the agreement requiring the FOUNDATION remain in Illinois for at least 50 years was acceptable but she did not agree with the provision that the Attorney General would have to authorize a leave by

the FOUNDATION after the 50 year period; she also questioned the May 11 document's provision that the majority of the Board be forever from Illinois; she had concerns about the agreement requiring and totally empowering a committee to negotiate a further partnership for the FOUNDATION; and she raised concern about a provision that allowed the new chairman certain power per the settlement. Dr. Marshall explained her reasons in her letter and urged consideration of her issues and stated she would continue to discuss settlement. A copy of Dr. Marshall's letter of May 21, 2001 is attached as Exhibit "L".

54) The mediator thereafter advised he thought settlement might still be achieved. A number of letters were circulated by Directors. The court ordered that the parties continue with mediation and empowered the mediator to schedule another mediation session. The court directed that the parties and the directors physically attend another mediation session or attend by phone if circumstances did not permit actual attendance. The mediator appeared to be speaking regularly with various persons, parties and directors. The staff of the Attorney General were told by the mediator that he was working on modified draft settlement terms with the FOUNDATION's counsel. On or about June 15 the mediator mailed out a proposed adjusted mediation agreement and the parties and directors met on June 19, 2001 to discuss settlement further. The mediator requested that the Assistant Attorneys General attend the session. Assistants Attorney General Floyd Perkins and Therese Harris attended the June 19 mediation session. At that session the parties did not discuss issues with regard to the individuals, and the agreement continued to provide a release for all directors on all Terra related matters. The mediation session on June 19 did not involve threats, but rather concerns and discussions on the terms of the settlement agreement.

55) On June 19, the parties addressed each of the issues Dr. Marshall raised in her May 21 letter. The May 11 provision requiring the Attorney General to authorize a move from Illinois was changed to providing the Attorney General with only notice if the FOUNDATION in 50 years wants to leave Illinois. The compromised agreement was that the issue of the FOUNDATION leaving Illinois was postponed and will only be dealt with if the FOUNDATION after 50 years decides to

leave Illinois. The May 11 requirement that a majority of Board members must be from Illinois was compromised and reduced from a permanent requirement, to a requirement for only 25 years. The May 11 process for selecting the five new board members was modified and instead a group of 12 persons was placed for the election to be conducted by the board upon an election on June 29. Ms. Marshall's concerns about the agreement giving unusual powers to the chairman and the strategic planning committee were also addressed and compromised. Dr. Marshall's May 21 letter requests that the Attorney General recognize that the Giverny museum was a proper and acceptable activity for the FOUNDATION was addressed and such was included. Dr. Marshall's May 21 letter request that the right of the FOUNDATION to control its affairs freely was acknowledged in the settlement. The mediated settlement on June 19 was reached in an all day discussion of give and take and involved the efforts of the many participants to reach a majority and party consensus. There were no threats made in mediation. A copy of the June 19 settlement agreement signed by the parties and six directors that day is attached as Exhibit "M".

DR. STEBBINS AND DR. MARSHALL WERE NOT SUBJECTED TO WRONGFUL DURESS

56) The Defendants in their filings attempt to make it appear that the Attorney General's staff introduced issues concerning Mr. Stebbins during mediation. The matters concerning Dr. Stebbins are those matters stated in matters filed prior to mediation commencing. Those matters were the subject of planned emergency hearings when this case went to mediation. Mr. Stebbins denied those allegations, as did the FOUNDATION and the Defendants themselves. Those matters were being worked into the draft amended complaint of the Attorney General, but the allegations were already of record and the draft complaint being developed was in that regard only conforming the complaint to the proofs as the Attorney General asserts. These Defendants Paul Tucker, Alan Simpson and Judith Terra participated in settlement knowing that all Terra matters were going to be resolved including the issues and allegations raised against them as individual Defendants. They knew when they started the mediation that a release of Stebbins and all directors was something they requested.

57) The Defendants Paul Tucker, Alan Simpson and Judith Terra requested and obtained the agreement at the start of mediation, that settlement should / could resolve all related claims and issues and it was clear from the start such included issues related to all directors. It is only now when these Defendants did not prevail in settlement that they raise these red herring issues.

58) The staff of the Attorney General's office, including Mr. Perkins never discussed, talked or communicated with Dr. Stebbins other than to exchange hello at two mediation sessions, and participated in those sessions only with the others present. At no time was Dr. Stebbins' conduct mentioned or discussed at mediation by anyone. Nor at any time did Dr. Stebbins ask the Attorney General's staff about the issues raised with regard to him nor did the Assistant Attorneys General speak or communicate with Mr. Stebbins about matters related to his conduct.

59) Dr. Marshall by her May 21 letter clearly was trying to keep the mediation process going. However, at that time Defendant Tucker and others were seeking vastly different settlement terms. As evidenced by Tucker's new mediation proposal of May 24, 2001 a copy is attached as Exhibit J. The staff of the Attorney General, upon learning that Defendant Tucker was suggesting very new and different terms than those agreed to on May 11 again became concerned that settlement might not occur. Having halted work on the draft complaint after what had appeared to have been a successful May 11 settlement session, the Attorney General's staff on or about May 22 again began to prepare for litigation. It began again with drafting the amended complaint and began looking at additional facts and matters to include in the draft amended complaint.

60) From December 2000 until mediation commenced in February 2001 concerns over the supervision and operation of the FOUNDATION arose and those concerns were in part set forth in the filings pending before the court when mediation commenced. It was thought some might need to be added to the amended complaint. The facts were that many of the long term supervisory personnel for the FOUNDATION were no longer on staff. The FOUNDATION's two curator directors had left abruptly. The emergency matters before the court when mediation intervened concerned the end

of employment for long time curator John Neff and issues of management concerns. The FOUNDATION's day to day supervisors had been on staff little more than a year and a part time director/curator was hired and serving where the FOUNDATION had had two curators in the past. A review of the financial records of the TERRA FOUNDATION had raised a number of financial matters to be looked at if litigation went forward. For example: Travel and Entertainment expense had risen from $50,000 in 1996 when Mr. Terra was alive to over $300,000 in each fiscal year 1999 and 2000; in 1999 miscellaneous expense was listed as $88,000, but in fiscal year ended June 30, 2000 miscellaneous expense was $1,500,000; a footnote to the FOUNDATION financial statements stated " The documentation of the educational program plans and the decision to use endowment (restricted) earnings was not maintained." Copies of related FOUNDATION financial records showing these financial facts are attached as Group Exhibit N .

61) These concerns over the day to day operations of the FOUNDATION could not be ignored and required the Attorney General's staff to examine the financial records and to determine if the FOUNDATION was being properly managed and safeguarded. Of concern was the fact that the FOUNDATION's president was only serving part-time, his full time position was as a professor of art in Boston, Massachusetts. The curator /director was only part-time and new and working out of New York. The FOUNDATION has staff and substantial assets to protect in Chicago and also in Giverny , France. The curator from France had resigned. The question of who was controlling the FOUNDATION personnel, affairs, expenses and operational needs day to day was of necessity being reviewed by the Assistant Attorneys General in preparation for further litigation. The staff of the Attorney General at the end of May, began to re-look at these matters to determine if any needed to be alleged in the draft amended complaint and who from the FOUNDATION was responsible, and/or subject to deposition, etc. relative thereto, if and when litigation re-commenced.

62) The FOUNDATION's officers at the time were Tucker as president, Marshall as Treasurer and Terra as vice-president. The staff of the Attorney General were reviewing the limited financial records in their possession and sought to assess who was supervising the FOUNDATION's affair

and financial activities day to day. Dr. Marshall was the treasurer and an assessment of her function, scope of responsibility and ability to discharge financial supervisory oversight was begun by the staff of the Attorney General at the end of May. Months before the staff of the Attorney General had been told Dr.. Marshall was a state employee at a special state school. It was known she received compensation from the Terra FOUNDATION. It was shortly determined she was also being paid to be a director of another charity.

63) An examination of the state school web-site was made. The web-site stated Dr. Marshall was the president of both the school and a separate charitable organization Fund, which Fund supported the school. Whether Dr. Marshall's employment contract at the school restricted her from other paid positions had been raised and discussed in prior discovery planning conferences but not resolved. A visit to a public web-site that lists all teachers salaries showed Dr. Marshall was receiving substantial pay as a state school employee.

64) Having become aware of Dr. Marshall's several competing obligations on several boards, the fact Dr. Marshall was listed as the president of the separately incorporated charitable Fund , that the separately incorporated fund raised money solely for the school, that the reports of the Fund on file with the Charitable Trust Bureau of the Illinois Attorney General's office reported that the Fund made donations to the school, that said reports showed that a portion of the money transferred to the school by the Fund were restricted in use to paying compensation at the school, aware the web-site listed Dr. Marshall as president of the Fund and after noting that certain restrictions existed on employees of the school controlling a separate organization which supports the school, Floyd Perkins as Bureau Chief of the Charitable Trust Bureau issued an administrative statutory order under the Charitable Trust Act and Charitable Solicitation Act to the school and Dr. Marshall to cause review of certain matters by the production of Dr. Marshall's employment contract on matters wholly unrelated to the TERRA FOUNDATION. These non-Terra related facts were discovered on or about May 23 to May 25 as set forth above and the order to produce was mailed on May 25, 2001.

65) Dr. Marshall's employment contract was produced by counsel on or about June 15 and it content expressly permitted her to have other employment. She did not appear or otherwise make communication with the Attorney General's staff at any time. Counsel for the school informed the Attorney General's staff that the web-site was in error, and that Dr. Marshall was not the president of the separately incorporated supporting charitable Fund.

66) No one from the staff of the Attorney General spoke with Dr. Marshall or otherwise communicated with her at any time except for common courtesies at her attendance at the June 19, 2001 mediation session. No one made or offered to involve issues from the school and related supporting Fund with the matters concerning the TERRA FOUNDATION.

67) The type of inquiry made by the Attorney General's Office relative to the school and its related charitable Fund would be classified by this Office not as an investigation but a review and inquiry. The Attorney General's staff makes numerous inquiries, conducts many audits and reviews many charitable organizations each year. Often when reviewing a matter other issues regarding other entities result in a further and additional review. Reviews by the staff of the Charitable Trust Bureau does not indicate that the law has been violated. Said reviews are done under the authority of the Charitable Trust Act and the Solicitation of Charity Act to allow the Attorney General on behalf of the People as beneficiaries of charitable trusts to examine the affairs and operations of charitable trusts. It is the duty of the staff of the Attorney General Charitable Trust Bureau to review matters when they become aware of facts and issues that create questions concerning the use of charitable funds.

68) Dr. Stebbins and Dr. Marshall were asked at the June 29, 2001 TERRA FOUNDATION board meeting if their votes were obtained by duress. Counsel for the FOUNDATION read in open court the statements made by both Mr. Stebbins and Ms. Marshall made by them at the Board meeting on June 29, 2001. In sum, both Drs. Marshall and Stebbins stated they were not coerced or

intimidated and that in voting for Terra FOUNDATION mediation settlement they were acting as responsible fiduciaries. A copy of the transcript of the board minutes is attached to Defendants Objections as Exhibit 26. A copy of the tape of the board meeting is attached as Respondents Exhibit A.

69) There had been no contact with Dr. Stebbins of any sort. Dr. Marshall's May 21 letter concerns were all written before the Attorney General's order to produce was mailed. The issue of her employment contract restriction and role as to the separate fund was resolved before the June 19 mediation session. The June 19 proposed settlement resolves and deals with Dr. Marshall's issues regarding the FOUNDATION as expressed in her May 21 letter. Moreover this court is aware that Dr. Marshall wrote a letter on June 5, 2001 criticizing part of the process and demanding that the mediator adjust the process. Her letter of June 5, 2001 shows she was not intimidated and shows she was participating in the process. A copy of Dr. Marshall letter of June 5, 2001 is attached hereto as Respondents Exhibit O. Moreover the only items requested by the discreet inquiry of Dr. Marshall's school was her employment contract and she knew it allowed her to have other paid positions. There was never any issue raised concerning the state's support of the school.

70) The FOUNDATION board meeting was chaired by Dr. Marshall, and her voice and remarks at that meeting when heard on tape leave no doubt she was proceeding without coercion. At the June 29, 2001 Board meeting counsel for the FOUNDATION raised the concerns about the Attorney General's review of Dr. Marshall's school and asked if Dr. Marshall or Dr. Stebbins were coerced or were under some form of duress. Both Dr. Marshall and Dr. Stebbins explained at length that they were under no duress and were acting of their free will and were properly discharging their fiduciary duty. Both stated they believed the mediated settlement was in the best interest of the FOUNDATION. A review of the taped recorded Board meeting leaves no doubt that both Dr. Marshall and Dr. Stebbins were acting of their own will and under no duress and the Defendants Judith Terra and Paul Tucker were present at said meeting and heard said remarks and their actions of presenting their motion herein is a violation of Supreme Curt Rule 137.

71) In fact no one was intimidated or coerced by Floyd Perkins or anyone else at the Attorney General's office. All actions taken were done professionally and with full and proper legal authority. No promises or inducements outside of the terms found in the four corners of the negotiated settlement agreement were offered or made to Dr. Stebbins or Dr. Marshall by anyone.

72) The fact is the right to TERRA related releases was obtained by these Objecting Defendants and any complaint about their effect was waived by these Defendants in seeking mediation and in obtaining the terms of TERRA related releases for all directors. The Defendants do not explain the facts laying out what they have termed intimidation and coercion, because if they did it would be clear they have no facts to show unlawful conduct. Not only were there no unlawful exchanges, there were no promises at all provided to Dr. Marshall. Further the action of preparing to move forward in a case is not unlawful. The institution of the review and inquiry into the unrelated matters concerning Dr. Marshall were lawful and proper and done with full and proper authority.

The Illinois Appellate Court in Towne v Town of Libertyville , 190 Ill.App.3d 563, 546 NE 2d 810 (2nd Dist., 1989) , rejected as baseless the Plaintiffs claim that Libertyville had engaged in a wrongful act or duress in settling one condemnation claim by purportedly initiating a separate condemnation claim against a separate parcel which plaintiff claimed was not properly subject to condemnation. The court there providing:

> "Neither is there any basis in plaintiff's complaint that defendants instituted a baseless lawsuit which effectively placed plaintiff under duress, forcing him to settle the litigation. Duress is defined as "a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will." ... It is not duress to institute or threaten to institute legal actions, nor is it duress for a person to assert his legal rights. ... Plaintiff has failed to provide any specific facts which would support a claim of duress. Plaintiff merely concludes that it was an abuse of process for the township to institute legal proceedings because of his subjective belief that his property did not qualify for condemnation under the Open Space Act. It is clear that the

township could, in good faith, institute such proceedings even where there was doubt as to whether the property was exempt under the 50-acre minimum or the agricultural exceptions to the act." (190 Ill. App. 3d at 569.)

73) In Regenold v. Baby Fold, Inc., 68 Ill.2d 419, 369 NE2d 858 (1977) the Supreme Court of Illinois in discussing the meaning of duress citing to its decision in People ex. Rel. Drury v. Catholic Home Bureau , 68 Ill.2d 433 states:

> The Restatement (of Contracts section 492 in defining "duress") does not use the term "unlawful act" that this court used in Drury, but instead uses "wrongful" as the descriptive adjective. This appears to be the meaning generally applied to "unlawful" in modern cases involving duress. (See 25 Am.Jur.2d Duress and (68 Ill.2d 434) Undue Influence sec. 3 (1966).)

74) In People ex. Rel. Drury v. Catholic Home Bureau , 34 Ill. 2d 84 (1966) the Illinois Supreme Court adopted the definition that had been applied in cases involving conveyances and commercial transaction defining duress " as a condition which exists where one is induced by the unlawful act of another to make a contract or perform or forego an act under circumstances which will deprive him of the exercise of his free will" 34 Ill. 2d 84.

75) There is no basis to negate the rights of Dr. Stebbins and Dr. Marshall to vote on the subject settlement and there is no basis to have an evidentiary hearing. If there is any doubt, the court should play and listen to the taped June 29 , 2001 FOUNDATION board meeting in open court, and then there will be no doubt.

THE PLAINTIFFS HAVE NO BURDEN OF PROOF AS TO THE FAIRNESS OF THE PROPOSED SETTLEMENT OF THIS CASE; RATHER, THE BURDEN IS ON THE DEFENDANTS TO SHOW THAT THE SETTLEMENT IS UNFAIR.

76) The Defendants contend, as a threshold matter, that the Plaintiffs (and in particular the Attorney

General) bear the burden of affirmatively proving that the proposed settlement, reached by the FOUNDATION's Board of Directors itself pursuant to this Court's directive that the case be mediated, is fair to everyone, and that the settlement must be held for naught if there is any doubt on that score. That notion is fundamentally mistaken, and it stems from a body of law applicable to private class-action lawsuits which has no application to the instant case.

77) As a general rule, the public policy of this State favors compromise, and it encourages settlement of cases as an alternative to the consumption of judicial resources that a full-blown trial would entail. (*E.g.*, McCracken v. R.L. DePrizio & Associates, 122 Ill. App. 3d 680, 683 (1st Dist. 1984) ('[as] an effective means of promoting judicial economy, settlements are favored and, in the absence of material mistake or fraud, are conclusive on the parties as to all matters included therein and will not be lightly altered or set aside"); Willis v. Reum, 64 Ill. App. 3d 146, 147 (2nd Dist. 1978); Opper v. Brotz, 277 Ill. App. 3d 1024, 1026 (3rd Dist. 1996).) As such, where a settlement or compromise of litigation has been reached between the parties, the burden is on objectors to show that the proposed settlement is materially unfair, not on the proponents to show that it is fair. (*Id.*) This idea applies with especial force in the instant case, for the Court itself has not only urged the parties and the FOUNDATION to settle the case but has specifically ordered the mediation process whereunder the proposed settlement was reached.

78) In arguing that the burden should instead be on the Plaintiffs (and in particular on the PEOPLE OF ILLINOIS) to affirmatively prove that the resolution reached by the FOUNDATION's Board is fair to all interested parties including "absent" ones, the Defendants cite a litany of authorities which

involved private class-action lawsuits brought on behalf of a "class" of allegedly similarly-situated plaintiffs by one of their alleged number. (*E.g.*, Waters v. City of Chicago, 95 Ill. App. 3d 919 (1st Dist. 1981); Metropolitan Sanitary District of Greater Chicago v. Ingram Corp., 85 Ill. 2d 458 (1981); Steinberg v. System Software Associates, 306 Ill. App. 3d 157 (1st Dist. 1999); In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3rd Cir. 1995); see 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions sec. 11.42 (3rd ed. 1992).) As such, they are inapposite to the instant case, which is brought on behalf of the PEOPLE OF THE STATE OF ILLINOIS **not** by one of their number who merely purportedly has a representative interest in the outcome but **by their Constitutionally-designated legal representative, the Attorney General of Illinois, who represents the collective interests of the PEOPLE OF ILLINOIS in charitable trusts and charitable assets by operation of law and to the exclusion of all others, including members of the public seeking to sue individually.** (*E.g.*, Holden Hospital Corp. v. Southern Illinois Hospital Corp., 22 Ill. 2d 150, 157 (1961); Art Institute of Chicago v. Castle, 9 Ill. App. 2d 473, 478-79 (1st Dist. 1956); Kolin v. Leitch, 343 Ill. App. 622, 628 (1st Dist. 1951); People *ex rel.* Courtney v. Wilson, 327 Ill. App. 231, 242-43 (1st Dist. 1945); G. Bogert, The Law of Trusts and Trustees sec. 414 (rev. 2nd ed. 1991).)

79) This distinction is vital. The theory behind requiring a definitive showing of fairness of proposed settlements in the private-class-action context is based on the fact that typically the members of a private class of plaintiffs **each have an individual right and cause of action in their own right which, but for their aggregation within a court-certified class, they would otherwise be able to assert one by one against the defendant.** Because their inclusion in the class might result in

their losing otherwise-protectable individual rights should the class representative prove not to be truly representative of their interests, the class members must be afforded a full opportunity to opt out of the class action and courts must be vigilant in ensuring, through appropriate inquiry, whether the purported "class" really has enough in common to constitute a class for purposes of the lawsuit and whether the purported class "representative" really does represent the interests of the class members as opposed to having an agenda of his own which might conflict with the interests of other members of the class. (*See, e.g.*, Metropolitan Sanitary District of Greater Chicago v. Ingram Corp., 85 Ill. 2d 458, 471-73 (1981) (holding that, because of this, a class representative must be held to a strict fiduciary standard on behalf of those he purports to represent).) None of these considerations are present in the instant context, however. As noted in the cases cited above (Holden Hospital Corp. v. Southern Illinois Hospital Corp., 22 Ill. 2d 150, 157 (1961); Art Institute of Chicago v. Castle, 9 Ill. App. 2d 473, 478-79 (1st Dist. 1956); Kolin v. Leitch, 343 Ill. App. 622, 628 (1st Dist. 1951); People *ex rel.* Courtney v. Wilson, 327 Ill. App. 231, 242-43 (1st Dist. 1945)), actions such as the instant one brought by the Attorney General to protect a charitable trust in the name of the PEOPLE OF ILLINOIS proceed from the theory --- rooted in the definition of the Attorney General's office in the Constitution of Illinois --- that **the Attorney General is the only party who can bring such actions** and that the rights of the citizenry in enforcing charitable trusts, though quite real, is a **collective right** which is merged into the right of the public as a whole.[3] That right is represented by the Attorney General **as a matter of law — not** as a result of any class

[3] Indeed, Professor George Bogert, the noted commentator on charitable trusts, has emphasized that representation of the public interest by the State's Attorney General is a necessary feature of the law of charitable trusts: "[Whereas] [i]n the case of private trusts the dangers of long continued neglect or other breaches are not great [because] [d]efinite or ascertainable persons have a financial interest in enforcement and can bring suit against the trustee .... in the case of charitable trusts there are usually no private persons who are the equitable owners of the trust property and who can take the lead in suits for enforcement." (G. Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 Mich. L. Rev. 633, at p. 633 (1954).)

certification as to which detailed fact finding by the Court would be appropriate — and (at least absent convincing evidence of specific wrongdoing brought forward by the objectors) it must be presumed that the Attorney General acts properly and in accordance with the law when he acts in the discharge of his duties (United States v. Morgan, 313 U.S. 409, 421, 61 S. Ct. 999, 1004 (1941); Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 55-56 (1981)).

81) For the foregoing reasons, the Defendants are incorrect both in their contention that the burden is on the Plaintiffs to prove the fairness of the proffered settlement (which, it is worth reiterating, was reached by the FOUNDATION's own Board pursuant to a process of mediation that this Court itself ordered) and in asserting that there are "absent parties" whose interests the Court must take into account. While the Defendants purport to identify those "absent parties" as members of the art-appreciating public who might prefer to have the FOUNDATION's collection located elsewhere, the fact remains that, as members of the general public, their interests could never be pursued individually on a one-by-one basis but --- arising as they do from a charitable trust based and incorporated in the State of Illinois --- are subsumed collectively into and represented by the Attorney General of Illinois as a matter of law. Therefore, as in every other case where the interested parties are properly represented before the court, the proposed settlement in this case should be presumed to be acceptable to the public beneficiaries of the FOUNDATION's charitable trust based on the Attorney General's acquiescence therein, and the Defendants should be held to a strict burden of proving unfairness if they wish this Court to reject the proffered settlement.

THE DEFENDANTS PROVIDE A NUMBER OF HALF TRUTHS, MISSTATEMENTS OF FACT AND MISCHARACTERIZATION

82) Defendant Paul Tucker provides several affidavits in support of his specious charges in the Objections. (Tucker affidavits are Defendants Objection Exhibits 9 and 19). The Tucker affidavits like all others submitted by the Defendants fail to comport with proper affidavit requirements, are not made on personal knowledge , do not recite facts to conform to Rule 191, and contain surmise, conclusions and speculations instead of admissible facts, and his affidavits are objected to and should not be considered herein. During mediation (prior to May 11, 2001 mediation meeting), proposals being circulated provided among other terms for Tucker and several board members to withdraw from the FOUNDATION, in exchange provisions for making Paul Tucker a compensated member of an advisory committee to the FOUNDATION was interjected into mediation discussions for consideration, that term came from the Defendants not the Attorney General. A copy of the March 6, 2001 mediation proposal is attached as Respondent's Exhibit P. Defendant Tucker at the May 11, 2001 mediation session when the discussion of some board members leaving including Tucker. Tucker again raised the compensated advisory board position as a concern at the May 11 mediation session. As the mediator's May 14, 2001 mediated settlement shows that provision for a paid role for Tucker was not included in the May 11 proposal. (See Mediator Hilliard's proposal of May 15, 2001, Exhibit K). A cynical person might suggest that Tucker thereafter rejected the May 11 settlement because it removed him from his role as a compensated officer and did not provide the advisory committee role he sought in mediation to receive.

83) Defendant Tucker in his affidavit attached as Objectors' Exhibit 19 and Defendants contend the

current settlement limits the FOUNDATION's future making it a captive of the Art Institute. It fact the mediation agreement does not obligate the FOUNDATION to the Art institute. Indeed, as stated earlier the mediated agreement provides a course specifically considered and discussed in the several strategic planning committees. Moreover Defendant Tucker in rejecting the May 11 settlement (reported by the mediator's document dated May 14, 2001) Sent his own new settlement proposal on May 24, 2001 which expressly seeks to lock the FOUNDATION into a relationship with the Art Institute (See Tucker's proposal terms of May 24, 2001 , attached as Respondent's Exhibit J.)

84) Attorney John Longwell supplies an affidavit purporting to be a record of a discussions between counsel, said affidavit does not meet Supreme court rule 191 and is filled with conclusions and in several respects misstatements facts and in other points contains out of context attributions. Longwell asserts Mr. Perkins generally refused to discuss matters. He does not say Mr. Perkins participated in a 2 ½ hour interrogation demanded by Defendants counsel. Longwell misrepresents the positions of Mr. Perkins as to discussing the theories of the cases and issues regarding Dr. Stebbins. What was aid was the theory of the case is no longer relevant and a debate of our various items of evidence not something this office wishes to spend time since the case is settled. The matter of Dr. Stebbins was fully discussed , and it was made quite clear the basis of issues regarding Dr. Stebbins was made in the filed filings in December 2000 and January 2001. Mr. Longwell attempts to place great importance on my offices position that our internal attorney work product would not be shared, clearly he is unfamiliar with Illinois law on that subject. Longwell's affidavit at page 2 bottom references purported remarks made by Floyd Perkins about

relying upon the directors verified facts for filing the initial lawsuit, but it was not in response to what Longwell sets forth there above regarding Dr. Stebbins. The purported restatement of remarks on the top of page 3 are likewise out of sequence. When asked how we came to learn of the initial case, Floyd Perkins advised he received the filings. When asked if he spoke with Plaintiff's counsel over the weekend between the plaintiff's filing of a complaint and the Attorney General's filing the following Monday, Floyd Perkins advised he did speak with Plaintiff's counsel , but not the Plaintiffs (Longwell gets this wrong in his note taking) , and further advised that he, Floyd Perkins had conducted an investigation of this FOUNDATION in 1989 and had also been significantly involved in the Estate of Dan Terra and the matters that related to the FOUNDATION then. A true and correct copy of a letter sent by the FOUNDATION to Floyd Perkins in 1989 is attached hereto as Respondent's Exhibit Q, which from its content shows that Floyd Perkins long before September 2000 knew about the TERRA FOUNDATION and its purposes. Thereafter as Defendants counsel began to badger Mr. Perkins and repeat questions, they were advised those matters are closed and settled and what this office knew or did to prepare for suit was none of Defendants business. Mr. Longwell's simplifies the discussion about Dr. Marshall. The details of what was done are set forth above, and the matters of looking at Dr. Marshall were not to make charges against her, but rather to ascertain who and in what manner the part-time officers and depleted staff operated the FOUNDATION. There are further misstatement and out of sequence attributions in Longwell's submission but insufficient time and space for respondent to resolve here.

85) The Defendants raise certain issue relative to the existence of Amended Articles of Incorporation of the FOUNDATION. The Attorney General attached the un-amended Articles of incorporation

to his complaint, the amended articles which defendants banter about when compared to those attached to the Attorney General's complaint bring nothing legally significant to this matter, and as stated above it is the restriction made by gifts from the founder which effects and controls the type and scope of charitable activity for the FOUNDATION .

86) This court's order of February 5, 2001 ordered that nothing stated in mediation would be admitted or useable in evidence. The defendants have by their Objections attempted to use mediation actions and activities and submited such herein. Respondents have set forth the forgoing to defend themselves against the outrageous remarks made against them, and to assure and satisfy this court that the settlement was entered into freely and properly. Respondent and Floyd Perkins do not waive or agree that the activities and remarks of mediation can be used in evidence and assert and contend that the defendants Objections are in direct violation of that order and its provisions and is a violation of the agreement of the partics to mediate and that these Defendants have waived and are foreclosed from raising same or using same as evidence.

Wherefore the People contend there is no evidence to support not approving the settlement; the Defendants by calling for mediation and actively participating in such for months without objection waived all rights to claim and alleged consequential personal benefits are a breach of fiduciary, particularly here where the provision for a global settlement of TERRA matters was first requested and interjected into mediation by these Defendants Paul Tucker, Alan Simpson and Judith Terra. The Court should find there in no evidence of duress, no evidence of breach of duty, no basis in fact or law to prevent this settlement,

that said settlement is squarely within the purposes of the FOUNDATION's Charter and there is no showing it is not within the past operations of the FOUNDATION (in fact it is within past operations of the FOUNDATION and in fact merely continues the past operation of the FOUNDATION) and deny the Objections to the settlement and approve the mediated settlement and enter the Consent Decree.

Respectfully submitted,
THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN, Attorney General of Illinois

BY: Assistant Attorney General

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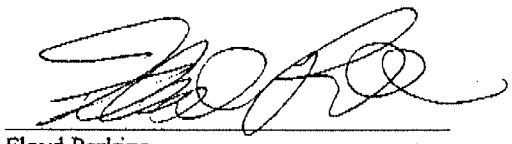
THERESE HARRIS
Assistant Attorneys General
Bureau of Charitable Trusts and Solicitations
100 West Randolph St., 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

CERTIFICATION

I, Floyd Perkins, certify and state under penalty of perjury pursuant to section 5/1-109 of the Illinois Code of Civil Procedure upon personal knowledge, that I am an adult and competent to testify and if called to testify would upon oath testify that the facts are true as stated and related in the following paragraphs of the People's Response to the Defendants Objection to the Settlement and such is known to me to be true said paragraphs being paragraphs 4 through 7, paragraphs 42 through 71 and paragraph 84.



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

DEAN BUNTROCK,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	00 CH 13859
	)	
TERRA MUSEUM,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DOROTHY KINNAIRD, Judge of said court, on the 24th day of July, 2001.

APPEARANCES: MESSRS: JAMES CARROLL, JOHN F. KENNEDY and WILLIAM R. QUINLAN, on behalf of Plaintiffs;

MESSRS: FLOYD PERKINS and THOMAS IOPPOLO, Assistant Attorney Generals.

MISS SUSAN STONE, on behalf of the Terra Foundation;

MESSRA: ROBERT CUMMINS and CHRIS TODD, on behalf of Defendants.

Josephine Raines
Official Court Reporter
Circuit Court of Cook County
County Department-Chancery Division

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THE CLERK: Buntrock versus Terra, 00 CH 13859.

THE COURT: The attorneys planning to address the Court, please step up. Identify yourselves for the court reporter. I'd like to start first with plaintiff's counsel.

MR. CARROLL: Good afternoon, your Honor. James Carroll on behalf of Plaintiffs.

MR. KENNEDY: Good afternoon. John F. Kennedy on behalf of Plaintiffs.

MR. QUINLAN: Good afternoon, your Honor. William R. Quinlan on behalf of Plaintiffs.

MR. IOPPOLO: On behalf of the State of Illinois Thomas Ioppolo from the Attorney General's office. And Mr. Perkins will be here momentarily.

MISS STONE: Good afternoon, your Honor. Susan Stone, S-T-O-N-E, from Sidley Austin Brown & Wood on behalf of the Terra Foundation for the Arts.

MR. CUMMINS: Robert Cummins and Chris Todd for the defendants, your Honor.

THE COURT: I'm certain this is going to be a long afternoon. I don't want everybody to be uncomfortable. So you are welcome to sit at counsel

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table.

I have pretty much an order of proceeding I'd like to go through today. I want to go through, first of all, the pleadings that I have received to make sure that I have everything. And I am also going to want to go through the proposed consent decree. I have a lot of questions. I was just presented with the decree just a few minutes before you were here the last time. I didn't have the opportunity to analyze it, but I would have liked to before July 2nd. So I have many of my own questions.

And then we have to get to the issues that are up today which are issues that are presented by the objectors.

If you can find yourselves comfortable places at counsel table. If you want to take a few moments to unshuffle and set up the way you want. It's going to be really long and you're going to be really tired very soon.

MR. CUMMINS: Your Honor, I do have one preliminary matter once we get through what you wanted to go through in terms of housekeeping, I'd like to address that. It may shorten the proceedings.

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THE COURT: What kind of matter?

MR. CUMMINS: Well your Honor, we believe in the interest of justice and consistent with the record that is now before the Court, that particularly given our pending motion for discovery, that this hearing ought to be adjourned until we get that discovery accomplished.

THE COURT: I understand what you're about to say, but you're miles ahead of me. That's down here at the bottom of the pile. And I've got to do it in order or I'm going to lose track of it.

MR. CUMMINS: If I may though I'd be happy to explain in short terms how we might get there.

MISS STONE: Another housekeeping matter, your Honor. When you're done making it clear for the record what you've received, and after you've asked whatever questions you want to ask about the proposed consent judgment, I do believe it would be appropriate at that time to allow the Foundation to go first, since it is our motion.

THE COURT: Everybody just make yourselves comfortable. I'd like main counsel at counsel table. I'm sorry we don't have a large enough

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courtoom. I'm sorry we don't have enough chairs. There may be some in the conference, if anybody wants to pull one out.

MR. IOPPOLO: Mr. Perkins is here now.

THE COURT: Mr. Perkins, it's going to be a long afternoon. They may be pulling some chairs out of the conference room. I'm sure you don't want to stand.

When this case was last in front of me, July 2nd, it was in front of me for status to find out whether or not the mediation that had been progressing for approximately four months had concluded.

About twenty five minutes before court was to open I received the one page letter from Mr. Hilliard saying that there had been a mediated agreement. And just a couple of moments before court was to start I received from the Foundation a proposed consent judgment and order. And at that time it was not signed by anybody. There was no indication that it was in final form. And there was no motion being made to approve it.

We had an extended proceeding because there were objections that were being raised before the

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court. And those objections were being presented by counsel from Washington as well as the law firm of Bellows and Bellows.

The Court heard those objections and at the end of the day determined that the orderly way to go about this was a formal motion from someone, which turned out to be the Foundation, to approve a settlement agreement, and an opportunity to respond to those objections.

I set a briefing schedule. And this matter was then set for today for me to determine whether or not there needs to be any kind of an evidentiary hearing, or whether we can go ahead and consider the approval of the proposed consent decree.

Since you were all here the last time I have received a number of things. And many of those documents have either been presented to the Court in sealed envelopes or filed with the clerk under seal. And we need to clear that up before we start and do anything here.

I want to go document by document and talk about unsealing as much as we possibly can because I'm not quite sure what's filed under seal and what

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is not filed under seal.

On July 2nd when we were here the last time the Bellows firm presented me with an order which was directing the clerk to accept the documents which they had presented the preceding week, on June 29th, directing the clerk to accept those documents under seal. And I granted that. And I nunc pro tunced that order essentially allowing the clerk to accept those documents.

Those documents were the original objections that were being propounded by the Bellows firm and they included most of the documents that were filed in the Federal Court.

After the hearing on July 2nd, at the conclusion, however, I determined that the defendants, the objectors, should not be granted leave to file those objections because we didn't even have a motion at that point to accept the settlement agreement. And before objections were formally filed I wanted to see what it is the Court was being asked to do.

So those documents remain sitting there under seal, but technically they haven't been granted leave to file them. And I just propose at this time that

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we leave those documents where they are, unless there is a strong objection, which I'll be glad to hear at the end, and just go one by one through everything that has been filed since, I think everything that has been filed since was included in those original documents anyway. I hope that was clear.

Since you were in court I've received a notice of motion from the Terra Foundation. Now my copy was blank and it just said please take notice that on such and such a day, blank, we're going to appear and present the motion for the entry of a consent judgment.

On the copy of the motion for consent judgment that I have is not filed stamped. Now I'm assuming, Miss Stone, that the Foundation filed this.

MISS STONE: Yes, that's correct, your Honor. It was merely a courtesy copy for you. I apologize that the date of the hearing was not on there.

THE COURT: It says you're going to present it on a certain day. And I assume that today is the day that you're going to present it. I just want to be sure. This had been filed, has it not?

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MISS STONE: Yes.

THE COURT: It was filed openly. Anybody who wants to see it can see it.

MISS STONE: That's correct.

THE COURT: After that was filed I received from Mr. Cummins objections of Judith Terra, Paul Tucker and Alan Simpson. And as counsel on those I received these objections late in the afternoon on July 19th. I had a question as to what was going on. And my paralegal called everyone and you all appeared on July 20th. At that time the Bellows and Bellows law firm was granted leave to withdraw and Mr. Cummins firm, Cummins and Crocin was granted leave to substitute as local counsel with the Washington counsel remaining as before.

Now those objections, and as I indicated to you all when you were here, as far as I was concerned those could be public. There doesn't seem to be anything too terribly secret in those objections or sensitive. It's the exhibits to those objections that were of concern.

Did you file those under seal, sir?

MR. CUMMINS: Judge, we filed the transcript and

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the exhibits under seal. But after you ruled the brief was not treated under seal. And your Honor, our position is none of this should be under seal.

THE COURT: I understand. We're going to try to unseal everything that can possibly be unsealed today.

The objections of Judity Terra, Paul Tucker and Alan Simpson have been filed with the clerk. They're public?

MR. CUMMINS: Yes, your Honor.

THE COURT: Now we've got the 35 exhibits to the objections. I'd like to go through them one by one. Does everybody have them with them? That's the second document that I got.

The Board minutes from April 25th of 1990. That's some of the most interesting reading I've ever had. Any reason why we can't have that in the court record?

MR. CUMMINS: No.

THE COURT: As far as the Foundation is concerned?

MISS STONE: No, your Honor, there is no reason why it cannot be.

THE COURT: The Planning Committee meeting of

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August 7th, Exhibit 2. Now I understand that those minutes, as some of the others here, have never been approved by the Board. And with that caveat I don't see any reason that those can't be made a public record. Is there something secret in those strategic planning--

MR. CUMMINS: No, your Honor. We would recommend they be made part of the public record.

MISS STONE: We have no objection.

MR. KENNEDY: We have no objection.

THE COURT: I want to go through the rest of them pretty quickly, 3,4,5,6 should all be unsealed. Those are pleadings in this case, articles of amendment, the restated bylaws. None of that should be sealed.

Number 7 is the Longwell affidavit. And that goes to Dan Terra's intent. I think that should be unsealed. I assume there is no problem with that.

MR. CUMMINS: No objection.

MISS STONE: Your Honor, without admitting to the accuracy of the transcription we have no objection.

THE COURT: Mr. Perkins, do you have any problems with that?

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MR. PERKINS: Except for the accuracy, no problem Judge.

THE COURT: And number 8 I have a little problem with. It's a letter from James Collins who had been the attorney of the Foundation from Bell Boyd to Dan Terra. That is a December 6th, 1989 letter. It's kind of old and everything. But is this attorney client privilege, is this something we should be concerned about here? On behalf of the Foundation, Miss Stone?

MISS STONE: It obviously raises an issue, your Honor, of attorney client privilege, which of course the Foundation does not waive.

I am not precisely clear how it was that the individual defendants came in possession of this. They may indeed have come into possession of this by virtually their role as directors of the Foundation. I don't believe any particular individual director can however waive a right of privilege which the Foundation as a corporate entity possesses.

THE COURT: This says confidential in big letters up on the top. And it looks like it was written by the attorney for the Foundation to the

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chairman of the Foundation in his capacity as chairman. It really doesn't have a lot of exciting stuff. A lot of this stuff is old or whatever, but still I think we probably should keep this sealed under attorney client privilege, unless Mr. Cummins you want to convince me otherwise.

MR. CUMMINS: I don't know that anyone can assert that it's been protected as privilege. I do see it says confidential, but the subject matter and the substance in this letter has been argued back and forth in all kinds of papers well before I arrived at the scene of this accident.

So I don't see any reason that it ought to be kept confidential. And I don't think that there is any serious compromise of any interest as a result of its publication.

It clearly reflects the intention of Mr. Terra is clearly inconsistent with the position of the AGA and the Foundation at the present time.

MR. PERKINS: Judge, I have to object.

MR. CUMMINS: Well the AGA doesn't have any position to object.

MISS STONE: Your Honor, again on behalf of the

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Foundation the Foundation does assert attorney client privilege over any communications going either way from an attorney for the Foundation, which Mr. Collins was at this point in time, to Mr. Terra who was then chairman of the Terra Museum.

THE COURT: I don't want to get hung up on this letter forever. Mr. Cummins, how did you all get this?

MR. CUMMINS: I can't answer that question, Judge. I'll find out. One of the preliminary things I was going to address, and I am relying largely on papers that were previously filed by Mr. Quinlan on behalf of his clients Buntrock and Gidwitz. I'm going to object to anything Sidley and Austin does in this case today because based upon the assertions of Mr. Quinlan and his clients they are conflicted in this proceeding. That is one of the reasons we want to adjourn it. We believe Winston and Strawn is conflicted, We believe Sidley is conflicted. And we think that these are serious issues that have to be addressed by the Court as a premise to this entire proceeding.

I just want to make that of record.

THE COURT: It's on the record. And to the extent it's an objection, it's going to be overruled.

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We have been through the Sidley issue so many times I don't even want to think about it. The Appellate Court reviewed it. I know that Mr. Quinlan probably totally agrees with you generally on the whole subject matter, but maybe today he disagrees.

But Sidley is here, they are representing the Foundation and they have not been removed and I don't see a conflict so let's just move on.

I'm going to keep this letter, it really doesn't do much. I've read it all, I'm going to keep it sealed for now. If you want to come in later and have it unsealed. If you concede that this was somehow in the public domain, attached to a pleading, that somewhere along the line the attorney client privilege got waived we'll open it up. For those of you who have not seen this letter, it's really nothing heavy anyway.

The next thing, Exhibits 9, 10,11, 12, 13 are all documents that relate to Dan Terra's intent. They were declarations filed in Federal Court. They should all be unsealed.

Fourteen I want to unseal. That's a mailing address announcement. The Simpson declaration in Federal Court is 15. That should be unsealed.

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Now we have the documents in mediation. And I want to keep those sealed at this point. They are the Attorney General's draft terms, that's number 16. The modification, I've read all of these by the way. Number 17, the second modified red line version. That should stay sealed.

Number 18, that's the letter from Mr. Stebbins to Collins. I don't see any reason not to have that one unsealed. Does anybody think that that one should stay sealed? Okay, that one is unsealed.

Mr. Tucker's affidavit in Chancery, which is number 19, is unsealed.

Strategic planning minutes of May 10th, with the same caveat, I don't think those have ever been approved, but I think they should be unsealed.

Number 21 Miss Marshall's correspondence about mediation, her position, I think that should remain sealed.

Twenty two, unseal.

Twenty three, AG's first amended complaint in Chancery. I want to keep that one sealed. That was never filed. And there is no issue that it was circulated. We're going to unseal the fax

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transmission, 24, but not the document itself. I don't see that it's going to serve any purpose.

Number 25 is going to stay sealed. Once again, that's a document from mediation.

MISS STONE: I believe it's also attorney client privilege. It's from Mr. Stebbins to Mr. Carlson and myself in our capacity as Foundation counsel.

THE COURT: Thank you.Number 26, a transcript of the Board meeting conference call. Now that's the one that I got first. That's the one that I read. I just want to clear up one other thing here. I got this transcript and I read it over this weekend. I marked it all up. Then yesterday I got the tape and so I listened to the tape with the transcript. And I caught at least one big thing that kind of jumped out at me.

And so I had my paralegal call Miss Stone today to verify that was not Mr. Stebbins talking. I'm on the version of the transcript that was attached to the objectors' exhibits. I'm on the version of the transcript that was pages 18 and 19. Where it says male voice and it's Dr. Stebbins, Dr. Stebbins again and the part where he presumably

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said I want protection. Well when I read it that wasn't Mr. Stebbins's voice at all. And I went back and compared voices and spent a lot of time with the tape and realized that was Mr. Gidwitz talking.

Again I realize after I had done all of this and after a telephone call had been made to Sidley that there was another version of this whole thing. Remember Sidley was supposed to give me at the time you gave me the motion to approve the settlement agreement you were suppoed to give me the transcript. I never got that transcript.

MISS STONE: It is attached to the brief we filed yesterday. We apologize we did not get it to you sooner. I have an additional copy.

THE COURT: I saw it just within the last half hour attached to your thing yesterday. And I didn't realize the two versions were different.

MISS STONE: We made it available to all counsel.

THE COURT: Does everybody agree that the version that is attached to the Sidley papers is the correct version?

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MR. CUMMINS: I know it's different in that respect. I noticed that myself. I haven't heard the tape, Judge. I'll take your word for it.

THE COURT: It's definately different. And I figured out without knowing about the other transcript it's Mr. Gidwitz.

MR. TODD: Your Honor, that portion of it you're absolutely correct.

THE COURT: So I don't see any reason why that can't be unsealed. We are dealing with Exhibit 26 now, the transcript.

Moving on down, the motion for--number 27 unsealed.

Twenty eight unsealed.

Twenty nine unsealed.

Thirty unsealed.

Mr. Perkin's letter, 31, is sealed. That relates to the mediation.

The Tribune article on the Ragenstein Settlement, unsealed.

And the last three letters, 33, 34 and 35, unsealed.

The objector has leave at the close of today to file the unsealed exhibits with the clerk as a

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separate document.

The next thing that I received were documents that came in yesterday. And they are the Terra Foundation's objections. And I should mention for the record that the original objections that were filed in this case were 28 pages long. And I thank the counsel for the Terra Foundation. You are the only counsel that complied with this Court's standing order of the15 page limit on all filings.

MISS STONE: If you're right, you can be brief, your Honor.

THE COURT: And I appreciate that very much. There were no separate set of exhibits from the Terra Foundation.

MISS STONE: That is correct, your Honor. We did submit under seal, and I presume you would have one unsealed, the transcript of the Board meeting, the correct version.

THE COURT: I didn't get that. It should be unsealed. There is no reason for it to be sealed.

MISS STONE: And we did attach a few pages of the transcript from the last hearing.

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THE COURT: Right, and that wasn't sealed So your documents were not sealed, is that correct?

MISS STONE: Our brief was not sealed. We have now, today, filed an unsealed version of the transcript of the Board meeting on June 29th.

THE COURT: All right, because what I got was this sealed document here.

MISS STONE: That is the transcript.

THE COURT: That is the transcript. Okay, I thought that was an extra copy of your reply. It doesn't say it on the outside. It says on the outside--now I'm reading it correct, it is the transcript. So there is no reason to file this with the clerk.

MISS STONE: We did file it in an unsealed version with the clerk of the court.

THE COURT: Diane, this is not to be sealed. Take it out of the envelope and refile it. Consider it filed.

MISS STONE: Thank you.

THE COURT: The Quinlan documents that came in yesterday from the plaintiff, in that regard we have a motion for leave to file in excess of 15 pages. And they have a document which is 25 pages

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long with exhibits. And attached thereto are Exhibits (a) through (L), and I'd like to go through them one by one.

The first set of them are the documents we spoke about the other day, relate to the documents, about appointing a mediator and those names. I have no problem if you unseal that provided that you take out all the other names with the exception of Mr. Hilliard in that last paragraph. I just don't want to have all these other names about proposed mediators out there.

The letter from Mr. Crow, which is Exhibit (b) unsealed taking out the other three names and leave Mr. Hilliard's name in. That's the important thing there.

MISS STONE: I'm sorry, your Honor, just for clarification, the previous indication about what could be unsealed with the deletion of other names would be Exhibit (b)?

THE COURT: No, the first one is Exhibit (a) unseal that, but in the last paragraph take out all the other names with the exception of Mr. Hilliard. Does that make sense?

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MISS STONE: Yes. Would that also be true with (b)?

THE COURT: (B) we're going to take off all the names except Mr. Hilliard.

Exhibit (c) can be unsealed. Exhibit (d) is unsealed. (e) is unsealed. (f) is unsealed, (g) unsealed.

(H) that's the correct transcript, or the correct transcript that was filed already. That's unsealed..

The proposed consent judgment (i) is unsealed. (j) is unsealed, (k) is unsealed. And as far as I'm concerned (L) should be unsealed.

So the only thing in this whole group of stuff that should be sealed are the other mediators names, proposed mediators names. The rest of it is all open.

MISS STONE: Your Honor, may I just have one moment to closely study (L) which is the communication from the Foundation's attorney to members of the Board?

THE COURT: It's the conflict policy.

MISS STONE: I understand the conflict policy

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itself is probably an appropriate matter of open communication. I'm just merely pausing a moment to read the memorandum itself.

THE COURT: Sure. Take your time.

MISS STONE: Just as long as it appears, your Honor, the Foundation is in no way generally waiving the attorney client privilege, we will not object.

THE COURT: Fine, leave that one unsealed. Now I have the People's response. Mr. Perkins outdid everybody with 45 pages coming in yesterday. And we don't have, I think, a leave to file, separate motion for leave to file on Mr. Perkins' one. And I have the various exhibits to Mr. Perkins. And a couple of these I am really looking for some guidance here as to what to do.

So let's go from the beginning. As far as I'm concerned the tapes can be a public record. I don't have a problem with the tapes. Does anyone have a problem with the tape?

MR. CUMMINS: No, Judge.

THE COURT: Well right now it's back in my tape machine and I will be giving it to the clerk. And it will go down to the clerk's office today. But we will unseal that.

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The defendant's counsel's letters regarding the mediators I would just simply say the same thing. I would say, and once again this is Mr. Perkins, so you're going to be in charge of your own exhibits. Did you file this all under seal?

MR. PERKINS: Yes.

THE COURT: Okay, well most of it is going to come unsealed. The letters, take out all the other names and take out all the resumes of the other people. And that's on your Exhibit (b).

I've gone ahead and tabbed all of these. And I realize your versions, counsel, are probably like mine and they are not tabbed. So if I'm going too fast and you're trying to find these just tell me to slow down.

James Terra's affidavit, unsealed. James Terra's lawsuit, unsealed. Daniel Terra's Will, I assume that's public because it's been filed. That's unsealed.

Okay, what are we going to do with this tax return?

MISS STONE: Could you give me a moment, your Honor.

THE COURT: That's Exhibit (f).

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MISS STONE: Your Honor, we obviously as counsel for the Foundation did not represent the deceased, Daniel Terra, nor do we represent his estate, nor do we represent his executor James Terra. However, none of those individuals are in court today. I imagine that if they were here they would argue that indeed there is some confidentiality which adheres to the IRS tax return.

THE COURT: How did they get it?

MISS STONE: I'm not sure, your Honor. I believe it was the AG that filed this.

THE COURT: Oh the AG got it, I'm sorry. How did you get it?

MR. PERKINS: Judge, we have been participating in the estate of Dan Terra since it initially started. This is part of the closing report of the estate.

THE COURT: Is it filed with the clerk of the court?

MR. PERKINS: I don't believe it is, Judge.

THE COURT: Does anybody think this should even be in our record as far as the public record?

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MR. PERKINS: There's no privilege attached to it, but it should remain sealed.

THE COURT: Anybody want this public? Okay, I'm going to leave it sealed unless there is some reason to make it public.

What about the balance sheet of the Terra Foundation as of June 30th, 2000? Is that a secret?

MR. PERKINS: It's a public record in our files, Judge.

THE COURT: Okay, it's unsealed. Professor Broday's article is unsealed, the statement of trust, if anybody really wants to read it, is unsealed. Dr. Tucker's May 24th letter, let me get to that one. That's a mediation letter, is it not, we're going to keep that one sealed?

(K) keep that one sealed. That's the letter, that's the thing from the mediator, is it not, his draft after the first settlement. So keep that one sealed.

(L) Dr. Marshall's May 20th letter.

MISS STONE: Mediation.

THE COURT: Keep that one sealed. (M) the June 19th settlement agreement. That one was already

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unsealed.

(M) The Foundation's financial records. Are those also you got from your file, Mr. Perkins, that's a public record? Anybody can go to your office and find out?

MR. PERKINS: All but one page.

THE COURT: Which one page can the public not find out?

MR. PERKINS: I believe it says draft on this.

THE COURT: Endowment income?

MR. PERKINS: Endowment income.

MISS STONE: Your Honor, on behalf of the Foundation I have not had a chance to consult with any representative of the Foundation to verify what the Attorney General is saying with respect to the public nature of these documents.

They were initially filed under seal. I didn't realize that today we would be engaging in this unsealing process. If we could with respect just to this document and also the other document.

THE COURT: The June 30th balance sheet?

MISS STONE: If I could have a moment to consult with the client and report back to your Honor within

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a day or two.

THE COURT: I don't have any problem. Just make it before Thursday if we're going to unseal it. I assume that there is not going to be a problem about unsealing them. I hope you give me an order saying they're going to be unsealed. If they are going to remain sealed, you better give them notice and tell them why.

That is exhibit (M) we were just talking about. Dr. Marshall's June 5th letter remains sealed. Exhibit (P) remains sealed.

And what do we do with the 1989 Foundation letter to Mr. Perkins? Have you all looked at that thing? That's got all kinds of stuff in it.

MISS STONE: Your Honor, it was a confidential communication between the Foundation and Mr. Perkins. At the time, it was drafted back in 1989, the draftor of the letter comtemplated that it would be used for litigation purposes.

I think that it is stamped confidential. Quite frankly I have not gone through it on a line by line basis to find out what would be objectionable from an unsealing point of view because it was

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under seal. And again I wasn't aware that your Honor was going to engage in this analysis today. I would also like leave to consider this and report back by Thursday.

THE COURT: Okay I don't have a problem with that. But this one I think probably should be unsealed. But I don't know. I mean there's a lot of stuff in here. Mr. Cummins, what about this letter?

MR. CUMMINS: We think it ought to be a part of the public record, Judge. In fact with respect to some of the other exhibits that you tentatively identified as remaining under seal we would like to address those. Because we're going to ask you to reconsider on some of them, particularly given the narration of facts that is set forth in Mr. Perkins' submission. He lays all kinds of stuff out about who said what to whom in these proceedings that were supposed to be confidential.

I think the whole question of confidentiality has been rendered moot.

THE COURT: Well Mr. Perkins' brief is not being filed under seal, is it?

MR. PERKINS: It was originally, Judge, because

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of the nature of what we put in there in light of mentioning things that occurred in mediation. We took the safe road and filed it under seal. We would like to have it released. We are not asking that it remain under seal, but that's to be decided.

THE COURT: Let me just check from everybody. Plaintiffs, how do you feel about the Attorney General's brief being under seal or not under seal?

MR. QUINLAN: I guess our position would be it's pretty hard to have a brief that's under seal.

MISS STONE: I would agree with that as a general proposition. I would note that at points in his brief the Attorney General sees fit to describe some of the details of his inquiry into the Illinois Math and Science Academy. Again, I don't represent that Academy. I don't represent Dr. Marshall in his capacity of president of that academy.

I would note it would not be at all surprising if the Academy feels there is some privacy concerns or confidentiality concerns which are raised by

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that filing. I don't have any standing to raise those, but I bring that to your attention as an officer of the Court.

THE COURT: Okay and I know you all want everything unsealed,

MR. CUMMINS: Yes, your Honor. One other thing maybe I should fall on my sword for this one. I did not perceive that the objections fell technically within the purview of your 15 page limitation.

I would like leave to file the extended documents nunc pro tunc.

THE COURT: Okay, you have leave to do that. I am concerned and I was concerned about the Illinois Math and Science Adademy allegations and the things that are in the Attorney General document. I'm going to keep the Attorney General's brief sealed for now. And maybe most if not all of it can be released. It was hard enough getting through it, because when I say 45 pages it's not even the normal type and the normal spacing. It's much much longer. It will take us much much longer here to identify what should come out and what should not. And I don't think we should take that time today. Leave

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that one under seal. That is all of the documents that I want to talk about as being sealed or not sealed. Do you want to be heard on objections to those?

MR. CUMMINS: Judge, we will, for example the first amended complaint of the Attorney General was circulated to a lot of folks. It is not subject to any consept of confidentiality that I'm aware of. And that is an example of one of the documents that should not be subject to any protection.

Let me say this, I want to argue strenuously why this document in particular is the predicate for our, among other things, request for discovery and our predicate for suggesting that there are conflicts that have not been addressed with this Court as yet.

So there is just no legitimate bases for contending that this document should be protected and confidential.

THE COURT: Miss Stone, do you want to be heard on that one? I'm concerned about Dr. Stebbins. I'm concerned that there are allegations that the Attorney General decided to put on paper but decided not to file. And they have never been filed.

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And what purpose would there be to have this public now?

MISS STONE: I couldn't say it any better, your Honor. This is a matter involving a Board member. This pleading, proposed pleading, was not actually filed. We don't know if it would meet the strictures of Rule 137.

The Attorney General, for whatever reason, chose not to file it. It's really a question of whether at this late date, this 11th hour we are in the process of trying to get the Court to enter an agreed settlement, whether something which has once been contemplated by one party in the thick of litigation should now be made part of the official record.

THE COURT: Does the plaintiff have any position on the filing of that document?

MR. QUINLAN: Your Honor, our position would be similar in that generally that document would probably be public. In this instance Miss Stone makes a good point, there are allegations in there that may not be a-if this proceeds we can revisit the issue at that time. I do agree there are some

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interests that perhaps don't need to be invaded.

MR. PERKINS: Your Honor, your February 5th order said that communication with regard to mediation purposes remain private, private among the parties. That was the document that was sent to the lawyers. It is a transmittal letter. It makes clear it is in regards to settlement. It was transmitted in mediation. To suggest there are certain theories, set forth in our response, is thoughtless.

In addition the reason it wasn't filed we were in the middle of mediation, your Honor. We were not allowed to file any additional pleadings. It was the hope of the parties it would be settled and not be employed in litigation. So it was sent in the communicated position with regard to what we were alleging with regard to certain issues. And it was part of the settlement.

THE COURT: Mr. Cummins, I just need to understand this. There have been a lot of reputations of prominent people in this case, not the least of which is your client, that have been brought shall we say brought into question, perhaps wrongfully, in this case.

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And is there any reason to add more to that? It is stipulated that, it's an agreement here that while the case was in mediation the Illinois Attorney General prepared the document and circulated it among counsel. And that document contained some allegations about one of the other directors on this Foundation. And sought to add him as a party defendant, it was not done. Isn't that enough?

You've all seen it. I've seen it. You can argue from it all you want to argue from it, but do we have anything else put out there?

MR. CUMMINS: Here's theproblem. Number 1) it is our position that was nothing but a litigation ploy to force Dr. Stebbins to take a position that he didn't intend to take, or want to take. And that remains subject to him being cross examined I would respectfully suggest.

Let me make one other point, Judge. Those allegations go right to the issue of his disinterestedness or lack thereof. That's the conflict, putting aside coersion and all this other stuff. That's right at the heart of why this gentleman could not legitimately vote on this proposed settlement.

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And what we have here is another problem. When you directed that Dr. Marshall and Dr. Stebbins and Mr. Perkins might be available to be interviewed after these issues came up. it was at your suggestion. When my colleagues attempted to pursue that Sidley and Austin stepped in on behalf of Dr. Stebbins and said he ain't going to be interviewed.

THE COURT: I requested that Mr. Perkins meet with you all. I don't think I said anything about the other two.

MR. CUMMINS: Okay. If I've overstated it, I apologize. The point is this, we now have Sidley and Austin wearing the hat of the Terra Foundation. We have Sidley and Austin wearing the hat of Dr. Stebbins' lawyer with respect to these issues of conflict. This is among the issues, we think, are critical to your fair and adequate review of this proceeding.

So it's important for us, and we're going to argue, you know the essence of the allegations involving Stebbins was the following. He used confidential information, this is the allegation, I assume the Attorney General didn't do this in bad faith. He alleges that Dr. Stebbins used

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confidential information of the Terra Foundation to the advantage of some other foundation incident to other--

MISS STONE: I'm sorry, I don't--

MR. CUMMINS: Excuse me, Miss Stone, may I finish? May I finish, Judge?

THE COURT: To ahead.

MR. CUMMINS: The allegation is, and I'm not buying into this stuff necessarily.

THE COURT: Then why are you saying it?

MR. CUMMINS: Because, Judge--

THE COURT: We have had it here before in a little bit more oblique nature on the motion to disqualify Dr. Stebbins from the special litigation. And none of that has been presented. If you look at the complaint the Attorney General wants to file, the complaint seeks Dr. Stebbins removal, that's what it does. Nothing else. It seeks the removal of Mrs. Terra, Dr. Tucker, the amended complaint. It seeks his removal as a Board member.

MR. CUMMINS: Your Honor, I--

MR. QUINLAN: Your Honor, I object to any discussion whatsoever. If there's going to be any

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discussion, this ought to be in chambers, your Honor.

MR. CUMMINS: Well your Honor, here's the problem. According to the Attorney General there is a significant public interest here. Now we want to say don't let the public know about what the attorney general has done, but what they allege.

THE COURT: They have not filed it, and it is not a public pleading. I don't know whether or not it was in final form. I don't know whether or not Mr. Perkins has decided to file it. I don't know whether at the end of the day Mr. Perkins thought there was any merit to it.

MR. CUMMINS: Well, your Honor--

MISS STONE: I don't mean to interrupt counsel I'm just curious, are we arguing about whether or not this document should be unsealed?

THE COURT: He would like to have it unsealed. I'll let you argue about that issue. But at this point I am going to keep the documents sealed.

MISS STONE: With respect to Sidley and Austin's role, your Honor, we are here, as we've always been, representing the Foundation. We do not represent Dr. Stebbins personally, we do not represent Dr. Marshall personally. We represent the directors of

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the Foundation.

THE COURT: Let's get to the proposed consent decree, because I have quite a few questions about that. Do you want me to sign my name to the piece of paper that is entitled consent judgment and order, is that correct?

MISS STONE: That's correct, your Honor.

THE COURT: And attached thereto the resolutions, or would it just be the consent judgment?

MISS STONE: I do not believe the resolutions are themselves part of the consent judgment order. I believe only Exhibit (a) which is the press release.

THE COURT: Okay, I am going to retain jurisdiction to enforce this. And one of the reasons that I'm asking all these questions is because I need to have a clear understanding of what this consent judgment does and doesn't do. In the event that I sign it I need to know how to interpret it in the future. And I have recently gotten a consent judgment back from 1975 that was done by four to five predecessors ago who was handeling this calendar.

And sometimes these transcripts of these

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proceedings and what the parties were thinking about at the time these consent judgments were entered into is very important for future people in order to interpret any problems that may come up.

Now I know that when this case was sent to mediation by agreement of the parties there were some motions pending, not the least of which was a motion to remove Dr. Stebbins from the special litigation committee. There was a motion to appoint a receiver for the foundation. I believe that there was also a motion for judgment on the pleadings pending, but I'm not certain, from the Foundation.

So in the preamble here you have the Terra Foundation having moved to dismiss those counts. Did I not rule on those two? Didn't I deny that motion to dismiss?

MISS STONE: You did, your Honor, that's an accurate representation of the history of the case.

THE COURT: It sounds like that's the pending motion and it hasn't been decided and there was a pending motion to dismiss those two counts.

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MISS STONE: I believe, your Honor, if you feel it's more appropriate, more accurate to say the Terra Foundation for the Arts having moved for judgment on the pleadings, we can simply keep a list of all those suggested changes or revisions, and if necessary we believe as a matter of corporate law we need to take that back to the Board and resecure a vote, we can do that.

I believe that that sort of administrative modification would fall within the purview of what the Court authorized Miss Marshall to do when they authorized her to sign it.

THE COURT: When I read that it sounded like an unresolved motion to dismiss, that's the one that I did resolve. It's the motion for judgment on the pleadings that I didn't. I went back to my pleadings file and I'm pretty sure that one was done.

MR. CUMMINS: Simpson filed a 2-619 motion.

MR. CARROLL: There was a motion pending besides the Foundation's motion.

THE COURT: So I'm going to ask counsel, counsel is going to have to make that paragraph accurate as to what exactly was pending at the time we went into

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mediation.

MR. CUMMINS: And of course we filed an answer and--

THE COURT: You filed a motion for leave to file.

MR. CUMMINS: I did that, your Honor, in deference to your direction. We don't think the motion is appropriate.

THE COURT: Okay.

MISS STONE: Your Honor, that does not accurately reflect what the state of the record was at the time the Board voted on. The motion for leave to file a counterclaim had not been made at that point.

THE COURT: Okay. This may open a whole new hornet's nest, but is there any problem with the defendants filing their answer, just their answer, not the counterclaim?

MR.QUINLAN: Yes.

THE COURT: What?

MR. QUINLAN: First of all you have a motion on file, which is a motion for judgment on the pleadings and several defendants have joined that. They have to withdraw that motion before--

MR. CUMMINS: Withdrawn.

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MR. QUINLAN: Well, you have to ask leave to do that, sir. And first of all we're not there.

THE COURT: So are you saying there was a formal joinder by the defendants in the Foundations' motion for judgment on the pleadings?

MR. KENNEDY: Correct. And there is a motion to dismiss by defendant Simpson.

THE COURT: My problem with the intro paragraph was that it reflected a motion that had already been adjudicated and did not reflect it was pending at the time you went into mediation.

MR. QUINLAN: There is another issue here too, the motion to accept the consent decree and accept the agreement. That's the first issue you have to address, if you address that and you rule in our favor there is nothing left to consider.

THE COURT: That's what I'm getting to next. Let's just assume I just decided I was going to sign this piece of paper and you have your consent judgment, I'm not quite sure what you have because this does not do anything with the cause of action against Mr. Michaeli. Mr. Michaeli was sued in the plaintiff's case. This releases officers, directors,

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agents or employees of the Foundation. Plaintiffs plead that he was a friend of Mrs. Terra and had no fficial position. This doesn't release him.

MR. QUINLAN: It does because it would dismiss our cause of action. He is only answering as a defendant, your Honor. Paragraph 13 dismisses these actions with prejudice. So that action would be dismissed against him. He suffers no harm. He is released. There is nothing that he stands in jeopardy of so that there is no interest that he has.

THE COURT: So it's dismissing everything you have, it's gone as of the date I sign this, including Mr. Michaelis's cause of action.'

MR. QUINLAN: Yes.

THE COURT: Okay, how can I say in the first paragraph, parties having reached an agreement? You don't define the parties. And as I understand the parties to this case they include Judith Terra and Alan Simpson and Dr. Tucker and they haven't agreed to anything.

MISS STONE: That is an important issue, your Honor. I think parties here refers to parties to this agreement not the totality of all the parties.

THE COURT: You need to say that. If you listen

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to that tape, do you remember that motion that Miss Marshall wouldn't vote for on the tape that went on and on and on? That was all about this issue too. This document as it's written doesn't even reflect what happened in that meeting.

MISS STONE: That's not correct, your Honor. The attempt to change, articulated by Mr. Stebbins which Dr. Marshall did not support was the idea of somehow forcing the individual defendants to release their right. Well the individual defendants have chosen not to join in the settlement agreement, that's their legal right. They cannot be forced to relinquish whatever legal rights they may have.

So the language that was not added was to say that the Plaintiff Directors hreby release everybody and the Foundation and the individual defendants hereby releast everybody.

That was the change Dr. Stebbins was suggesting. It was denied. I do believe for clarification purposes though, your Honor, it would be helpful to amend this to say the parties rather than hereto, it would be wise to say the parties to this agreement.

THE COURT: Could you say the plaintiffs, the Attorney General and the Foundation having reached

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an agreement. And then in paragraph 2 where it says the parties desire, and it says the parties hereto, make it clear who they are that's desiring to settle it.

MR. CUMMINS: Judge, can I just raise a question. I think that these matters that you are addressing are substantive in nature. It cannot be that this Board dealt with these issues in arriving, even assuming arguendo, you give any credence to that vote, this Board didn't have these things in mind, and I'm sure there's more questions.

THE COURT: I don't think that's a substantive thing. I did it for clarification.

MISS STONE: It is clarification. And it was particularly and vigorously debated at the meeting. And there was not a consensus by six directors to force somehow, even if they could, the individuals to give up any rights.

THE COURT: I do have a substantive one coming up. This one I don't consider substantive. There is one that may cause a little bit more problem.

Paragraph 3 of the consent decree the last phrase where it says which shall be available to the

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Attorney General. They're available for the Attorney General anyway, aren't they? It's not changing anything is it, Mr. Perkins or Miss Stone?

MISS STONE: I think you have to read the sentence in its totality. They're saying for 50 years the Foundation shall also maintain not only its principal office, but its books and records.

THE COURT: Which shall be available to the Attorney General, that was the which part that I just wanted to ask. Are there books and records available to the Attorney General anyway?

MISS STONE: There are right now. What this in effect does is precludes the Foundation from moving books and records to let's say Washington, D.C. for 50 years.

MR. CUMMINS: I don't know, Judge. The folks contemplated when they drafted this was what if this Foundation runs out of money. What kind of an order is this? What kind of a decree is this that some entity has to be in existence for 50 years. God forbid if something untoward happens. This provision doesn't make any sense to me.

MISS STONE: I think it's safe to say we can

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leave that argument for another day, your Honor. I understand your Honor is seeking clarification for certain paragraphs.

THE COURT: Paragraph 14. I don't have any problem with the first sentence. But why should I sign my name to that second sentence? If you all agree that the only thing you're going to say is this release, Exhibit (a), the directors all agree that that's what they're going to do and they're not going to talk to anybody, that's fine. But why should I order that? Is there any reason that one can't be changed to say that the plaintiff Directors, Attorney General and Foundation have agreed that no other public statement?

Here's my problem. You're setting me up for contempt proceedings if you all talk to people. And I don't want to sign an order that says you can't talk to people.

MISS STONE: I appreciate the Court's perspective on that. I think there are two points that have to be made. First we are here merely trying to communicate to you what the will of the majority of the Board is. I do believe that a majority of the Board believes

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as do the other settling parties, that it would be in the interest of everyone to finally put this to an end.

As you know, the reputation of this Foundation as well as the reputation of certain individuals, has been tarnished in this litigation. I dare say there are reporters in the courtroom today, as there have been in prior instances, and so I believe that the people who entered into this agreement were trying to get to put some teeth into this.

The second point. This is really not very different from what your Honor has done in the past. In the past you have entered orders saying there should be no public statements made about mediation.

THE COURT: That's all, period. You all went into mediation. I talked to all counsel. You all came up with that idea, let's keep the mediation confidential. And you all gave me an order by agreement of everybody to keep the mediation confidential.

But this, you don't want the agents, the employees of the Foundation to talk even about the

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litigation?

MISS STONE: I think the sentiment here, your Honor, and again it was shared by the various people who are advocates of this agreement, is that enough is enough. It was time to put this litigation behind the Foundation and allow the Foundation to get back to the business of art appreciation rather than the slings and arrows of litigations and PR battles.

And I believe that that was something that the Board members desired. Do I know to what degree of intensity they would want to adhere to that? I don't. I don't think there was extensive debate about this particular sentence at the Board meeting, your Honor.

MR. CUMMINS: As a matter of fact it was not extensive debate it wasn't discussed. Read the transcript.

THE COURT: I have.

MR. CUMMINS: Well Judge, this is a provision that no Board has passed on. And quite aside from the fact that I just want it clear that our defendants intend to say whatever they have to say

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to protect their interests.

THE COURT: I understand, your defendants are going to say whatever they have to say and we have a First Amendment and they can do that. This is really directed to them. They made an agreement. This document was circulated well in advance of the Board meeting. They all had it in front of them. Everybody was talking at the Board meeting about they had the right copy, the documents were in front of them.

Everybody had that. And I assume that was all part of what everybody anticipated was going to be approved.

MISS STONE: It was circulated to all of the directors. Your Honor, I would think if anything the individual defendants would revel in the fact that the Foundation is agreeing to be quiet on this and the settling parties are agreeing to be quiet on this. The individual defendants can speak at length to the press about this if they so chose. They are not in any way bound by this or gagged by this.

Again your Honor, I think this is really not

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too different from what parties do from time to time at the culmination of litigation where they say let's let bygones be bygones. We'll agree to keep this confidential and not talk about this ad nausaem with the press. Let's move on.

If your Honor is uncomfortable with this provision, we can communicate that back to the Board and the Board will pass it without that sentence being included.

THE COURT: You can all agree not to say something if you want to. That's all up to you. I have a problem ordering that no other public statement should be made by any of you, including the Attorney General. He might agree not to say anything, but why should I order him?

MR. QUINLAN: We find ourselves in a difficult position. I think that is what everybody agreed on. I do think if there is a problem with your Honor siging this order. But the intent is not to say anything about this lawsuit now. Whether it's 20 years from now or 15 years from now that's up to them. It's an agreement.

MISS STONE: Your Honor, you will do what you

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abviously think is advisable. I do believe as a corporate law matter it would be necessary for us, as Foundation's counsel, to go back to the Board with whatever revisions your Honor would insist on. I don't think I can unilaterally say oh, yes the Board is in favor of this settlement agreement modified. That would have to be put back to a Board vote.

I'm not saying that's impossible. I'm just pointing out a practicality.

MR. QUINLAN: Your Honor, the only thing I disagree on is Miss Stone's indication she thinks she has to go back to the Board. This is an interpretation of the law. I don't think it has anything to do with going back to the Board. Everybody has agreed. We still agree. That has not changed.

But the point is I don't think we need to go any further. Your Honor has expressed your opinion. I frankly have, I think everybody has a problem with how you would enforce in the future. What we're saying is at least for ten years we'd have a mutual agreement that this is going to be our press statement. This is going to be our statement and that's it.

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THE COURT: Then why can't that last two sentences be changed to a combined sentence that says the plaintiff direcots, the Attorney General and the Foundation agree to the mutually accepted press release attached as Exhibit (a). And agree that no other public statement shall be made. I mean that's real simple. Think about it.

MISS STONE: I think that's a good solution, your Honor. I don't think that will require further Board action.

THE COURT: Okay, those were the first set of questions I have. I have a lot of questions about what this consent decree means, about what the Foundation can do and not do world wide, United States wide, or whatever. But my goal is also not to wipe out my court reporter. So I'm going to ask if you want to take a break right now or do you want to go for about another fifteen minutes?

THE COURT REPORTER: Another fifteen minutes is okay.

THE COURT: Okay.

MR. CUMMINS: Your Honor, in making your comments is it correct for me to assume that you have not made any determination as to whether or not the

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underlying vote is valid?

THE COURT: No. I've read everything that you've written. In fact I've read every exhibit. I can't say that I have read absolutely every word of everything they have given. But I have read everything that you have done.

MR. CUMMINS: That's all that's necessary.

THE COURT: And I am willing to hear whatever argument you want to make. And I have not made up my mind. But I do have a lot of questions. And the answers to these questions have to do with whether or not I am going to sign my name or not. So I need to get the answers to some of these questions.

MR. CUMMINS: Thank you.

THE COURT: The directors, Section 2 (b) of the resolution, if you look at the Board resolution. Section 2 (b) says that the class one directors may not stand for reelection at any time. And they use the word there may not stand for election at any time.

The consent decree, paragaph 8, says will not stand for reelection. I'm signing my name to

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the consent decree, if I approve your motion. So I'm siging it it says will not stand for reelection. Is that clear that that means election at any time? As opposed to reelection at the end of their term? Boards have people go off. They go off for six years or whatever and they come back.

And is the idea that the entirety of the 11 people that are on this Board will never come back for election at any time?

MISS STONE: I believe that is the intent of the majority of the directors of the Foundation.

THE COURT: So you don't see that as inconsistent with the resolution. Should we make paragraph 8, if it needs to be signed, consistent with the resolution? Which says may not stand for election at any time.

MISS STONE: Yes, your Honor.

THE COURT: Okay. That one is changed. That will clear things up. Who is in the best position to give me a little bit of information about the issues of the five proposed new directors? Would that be Miss Stone? Would that be Mr. Quinlan? Who knows something, just tell me something about

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each one of these five individuals?

MR. CUMMINS: Would this include their political affiliation?

THE COURT: No. I don't want to tell you which ones I don't know who they are because it sounds like I don't know a lot of people. But I just want to know who these people are. Tell me who they all are.

MISS STONE: Sure. Your Honor, on behalf of the Foundation it probably is appropriate for us to give you a quick overview of these various individuals. This was a very much compromised state. I do not claim to know any of these individuals' backround in great detail.

My partner Mr. Sabel, corporate law partner is with us today especially assisting us with corporate law matters. I think he is more intimately familiary. With the Court's indulgence I would like to ask him give that.

THE COURT: Sure. Would you just state you name and spell your last name for the court reporter.

MR. SABL: Sure it's Charlie Sabl.

THE COURT: Tell me who each of these five are.

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MR. SABL: Mr. James Donnelley is a retired executive of the R.R. Donnelley Company. He is active currently in personal investing and has been active in a number of charitable activies in the Chicago area.

Again I would point out that resumes for these individuals were circulated to the Board members in advance of the meeting.

Marshall Field, V has been active in a number of charitable organizations. He used to be the chairman of Field Enterprises and Communications had a media firm headquarters in Chicago, which was subsequently sold. He also has been active in quite a number of charitable organizations in the Chicago area, past chairman of the Board of the Art Institute of Chicago.

Dr. Kathleen Foster is a professor at Indiana University in Bloomington in art. My understanding is she is or has great familiarity with the Foundation.

THE COURT: She's a resident of Indiana?

MR. SABL: Yes, she is. And she has consulted with the Foundation on art matters in the past. And has a good knowledge with respect to the collection

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of the collection the Foundation has.

Professor Robert Hamada is the outgoing Dean of the University of Chicago graduate school of business.

Frederick Krehbiel, I believe his title is president, I think he's chairman and chief executive officer of Molex, which is an electrical components company, headquarters in Chicago area. And he also has been very active in arts organizations and other charitable activities in the Chicago area and elsewhere.

THE COURT: Dr. Foster is the only one not from Illinois?

MR. SABL: That is correct, your Honor.

THE COURT: Thank you. If you would go please to page 2 of the resolution the Board passed. The Board has passed a resolution that has changed Article 3 of its by-laws, sections 2 and 8. And those have to do with the Board and their tenure and their terms and vacancies.

Now do I understand correctly that these five we just talked about are going to be called class 2 directors. And they are going to hold office, if this is approved, starting August 1st

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of this year until September of next year. And then they each get one four-year term more, is that correct?

MR. SABL: Your Honor, they would be elected now for a four-year term so they would serve without coming up for reelection until the annual meeting of 2005.

THE COURT: So they're on until 2005. And then we have some class 1 Board members. This gets a little confusing because we have the pre 2002 class 1 members and the post ones. So I'm talking about the post 2002 class 1 and class 3 members. They're going to get staggered terms. There's going to be one term that ends in 02, one in 04, one in 05 and one in 06.

And my question is on the post 2002 class 1 members and class 3 directors, how long do they get to sit? Do they get two full terms after they're, like the class 1 people, end in the year 2003. Do they get two full terms after that, or are they only eligible for one full term?

MR. SABL: They're eligible for 8 years, your Honor, which means they might be elected for a term

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which is of a class that goes longer but would have to agree to resign before that to comply with this agreement. To stagger the Board you actually have to divide the directors and the class.

And I believe that the mediation contemplated that there would be a limit on any director serving for more than 8 years. For that reason you would have to have either some directors leave before the end of the terms.

So if a director was elected for 3 years and and director elected for three and could be elected for another 4 year term and at that point would only serve one year thereafter.

THE COURT: I just want to make it clear because believe it or not this issue comes up in the future. The provision of this decree that says the limit, the term limit is 8 years, that supercedes anything else as far as class. I just want to make sure that's clear, and that's it.

MISS STONE: Yes, your Honor.

THE COURT: Okay. Now there were no amendments made to Article 1 of the by-laws, am I correct? You only amended Article 111. And it might help if you look at the objections that have been filed by

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the objectors. And you have the restated by-laws in there. That's Exhibit 6. And you've got Article 1. The purposes of the Foundation. That has not changed, has it?

MISS STONE: That's correct. It remains the broadly stated, general purpose that brings it within the 501 (c) 3 characterization. And includes for illustrative purposes only the various purposes that are set forth there.

THE COURT: So it is still the purpose of this Foundation to operate museums and schools both in the United States and Abroad?

MISS STONE: Correct, your Honor. That is still the purpose and that is precisely why with explicit clarity the Attorney General acknowledges this proposed consent decree, consent judgment, that the Foundation has the right to conduct all of its activities in Giverny, France.

That is also why it is specifically spelled out in the proposed consent decree that the Terra Foundation gets to loan its works of art, or exhibit, or for scholarly use, not limited to the United States, not limited to Chicago.

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THE COURT: Originally, when the original complaints were filed these restated by-laws I don't believe were referred to in the original complaint. It was the original by-laws that were referred to, is that correct?

MR. SABL: That is correct, your Honor.

THE COURT: And we all can agree that the original Articles of Incorporation and the original by-laws of this Foundation never mentioned where the museum was going to be, is that correct? There is no where in there. Can everybody agree to that? Or do we have to pull those out? I couldn't find it anywhere. It doesn't say Chicago, it doesn't say Chicagoland, it doesn't say the world, it doesn't say the United States. It doesn't say.

We have a separate lawsuit pending in another calendar in this court where we have James Terra saying as one of the incorporators they meant to put the phrase in in the Chicagoland area or in the State of Illinois. That was never put in there.

Then in 1994 when Mr. Terra, Dan Terra, was

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still alive the by-laws were amended and the Articles of Incorporation were amended and the words were added, among other things, operate museums and schools both in the United States and Abroad. Can we all agree to that? Those have been the two changes.

MR. PERKINS: Just so that we can be very clear if one were to look at that, that was changed to provide for illustrative purposes only. If one looks at the difference between the original by-laws and the 1994 version, after the very first sentence the new version says for illustrative purposes only and it goes on and explains. I'm not sure what it all means in the sense that both of them start out with the very same first sentence, and both of them say it's exclusively charitable. The first one has a whole bunch of specific remarks, the original has specific remarks about what it can do.

The 1994 one says illustrative purposes only. I'm not sure we're saying there is a big difference there but there is a difference.

THE COURT: But at no time has there been anything in the by-laws or articles of incorporation

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that specifically Illinois, Chicago, anything like that. The only thing that has ever been put in is operate museums and schools both in the United States and Abroad. And that is not changing by this consent decree.

So now I need to figure out what this means. If you could please turn to Exhibit 9 of the objectors' exhibits, which is the declaration of Dr. Tucker in regard to the Temporary Restraining Order.

Please turn to page 3, the last sentence: Examples of major non Chicago projects include the recent award of a $500,000.00 grant to a New York production company for a documentry on American Art. Now I'm going to the top of page 4 and the sponsership for the research for the Huntington Museum and Gardens in Pasadena, California.

Is there anything in this consent decree, or this proposed judgment that would prevent the Foundation from continuing to do that? That kine of activity.

MISS STONE: Absolutely not, your Honor.

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That's a very important point. The consent decree, consent judgment states that the Foundation shall conduct its affairs in accordance with its articles and by-laws, including promoting American Art in the U.S. and Abroad.

It further states it is the Foundation, not the Attorney General, the Foundation who remains free to determine how best to achieve its goals including where and to whom to make grants.

THE COURT: So the answer is there is nothing--just for the record I want to make sure in the future if this consent decree is approved that there aren't going to be a whole bunch of issues, that this Board can pretty much continue to operate the way it has operated as far as its charitable grants and its activities.

MISS STONE: I'd like to state for the record the Foundation has retained through this proposed consent judgment a broad aray of rights. It is the broad awray of rights, and now with the force of a court order, if you approve it, and it has the Attorney General's specific adherence and acknowledgment of. In may ways it garners freedom or confirmation

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of the freedon and independence of this Foundation. It says the Foundation can make grants wherever it wants, conduct operations wherever it wants, although for 50 years it must of course keep its main headquarter books and records, principal office here in the Chicagoland area..

It says it may acquire works of art. It may exhibit and loan anywhere its works of art, including but not limited to Giverny.

It particularly enshrines the protection of the museum in Giverny. This Foundation has preserved for itself a very broad power and freedom, through this proposed consent judgment.

THE COURT: Let's go to the declaration of Peter Solmssen, Exhibit 10. There were some discussions Mr. Somnssen had with Dan Terra the year before Mr. Terra died. There was discussion about the Foundation and the University of Arts doing some things together and making a three million dollar grant to the university.

Is that the kind of thing that could still be done with other universities outside the Chicago area? I'm on the objection 11. It starts

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at the bottom of the page, paragraph 6 going on to the next page.

MISS STONE: The Foundation can engage in the purchase of real estate outside of the Chicagoland area. The Foundation can make grants outside of the Chicagoland area.

Your Honor, for the record, it might be helpful not only to have me as Foundation counsel attest to this, I think it would be very worthwhile to have the Attorney General stand up and also signify his agreement to this as well.

THE COURT: Well Mr. Perkins is being very silent. And when Mr. Perkins is silent I'm taking that as he's agreeing because if he doesn't agree he always tells us.

MR. PERKINS: That's correct, Judge.

MISS STONE: For the purposes of the record, for the purposes of conflicts which may arise in the next decade or two decades, would we have Mr. Perkins stand up and say that he agrees that this Foundation may make grants outside of Chicago.

THE COURT: I think he's saying that. He'll tell us if he disagrees.

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I have one last, and this one really intrigues me, it is Exhibit 19 of the affidavit of Dr. Tucker in support of the objections. He's talking on the bottom of the second page, these pages are not numbered, paragraph 5, he's talking about the way the Guggenheim Museum had some exhibit space in Berlin and it supplied members a limited amount of its collection to other museums.

I'm sorry, where is Bilbao?

MISS STONE: Spain, your Honor.

THE COURT: Can this Foundation purchase real estate elsewhere, loan its collection elsewhere, portions of it, as long as the main portion of the collection is based here?

There could be many museums. Everyone keeps throwing out the four hundred fifty million dollar figure that's been in the pleadings here. If funds are available, can the museums in Chicago and France need not be the only museums in this Foundation?

MISS STONE: That's correct, your Honor. And the consent judgment specifically states, while stating that the Foundation shall for fifty years retain and exhibit the Terra collection of American

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Arts either by itself or through partnership arrangements with other institutions in the Chicago metropolitan area, the document also goes on to say that the Foundation shall continue to be able to carry out the act of promoting American art in the U.S. and Abroad and it remains free to determine how best to achieve its goals. That it can manage the collection as it deems appropriate, including providing art for display in Giverny and for special exhibits, programs and scholarly use, to make loans from the collection. So it can indeed loan its art work to other institutions.

THE COURT: I'm going to give the court reporter a break. I'm willing to go as late as you want to go to hear whatever it is that anybody wants to hear. I have to let the court reporter leave at 4:30. So during this break I would appreciate it if someone makes arrangements for a late court reporter.

My next set of questions is going to be talking about the role of the directors that are currently on this Board and what their role can be and not be in the future.

Then I'm pretty much done with my list. I'm

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going to also just take a look at this to make sure I hit all the things that were of most concern to me. And then I want to hear about the objections after I talk a little bit about these directors when I come back.

I'm going to give the court reporter a break. Is ten minutes enough? Who's going to take the responsibility to try to get a late reporter? Mr. Kennedy?

(At which time in the Proceedings a short recess was had.)

THE COURT: I understand we will have a court reporter here at four thirty.

MR. KENNEDY: Yes, Judge.

THE COURT: So we will take a brief break at four thirty to make that switch.

One of the things that disturbed me about the consent decree is the loss of some of these very very fine people to this Board. And I know that Miss Stone will be the first to jump up and say what I think about it or don't think about it isn't important, it's the business judgment of the Board and they all mediated and they decided that

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this is the way it's going to be.

We have some individuals on this Board who have served a very-very long time, the longest being Arthur Hartman, former Ambassador to France and Helene Ahrweiler. I am disturbed about the loss of all of what we have referred to here as the independent Board members in particular to this Foundation. In addition to Ambassador Hartman and Ahriweiler, Mrs. Daley , Stephanie Pace Marshall, Dr. Stebbins and Ambassador Andreani.

Apparently the Board decided in the mediation process that everybody was going to have to go. And that would be at the end of one year, Everybody would serve and then at the end of one year they would all go.

I want to pursue this issue a little more based on the wording here. May Foundations and corporations and not for profit organizations as we know invite people to come back and participate in other capacities. Some Boards have things like Fellows Boards, they have individuals that help raise money. They invite non board members to serve on the committees or to serve as advisors.

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And I want to make sure there isn't anyone that this consent decree that is being tendered to the Court who is saying this consent decree precludes any of these fine eleven individuals from participating in the future in the activities of the Foundation provided that they do not participate as a member of the Board of Directors.

MISS STONE: Your Honor, you are absolutely right that these eleven individuals have worked long and hard for this Foundation, some of them for a number of years. And it is a loss that they have decided collectively to leave the Board after one year.

Your Honor has correctly predicted what at least some of my argument would be. This is a matter particularly within the purview of the Board. This is an exercise of the business judgment of directors which should not be second guessed by me, by the objectors, by your Honor.

This was, without in any way delving into the mediation process, because I don't think it is appropriate that individuals are now seeking to use a confidential mediation process to further

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litigation ends. So I don't want to delve into the intricacies of this, but suffice it to say in mediation the composition of the Board was an issue that was discussed at length.

There were various proposals floated. This finally was a proposal that would allow the Board to enter into a resolution which would put an end to protracted, devisive, distractive litigation.

Your Honor is absolutely right that there is no prohibition whatsoever on any of these fine individuals from coming back and being affiliated with the Terra Foundation in some other way, either as an interested patron, as an honorary, non voting Board member, as a member of some sort of advisory committee, there is no prohibition on that.

Indeed it would be my hope that once the dust is settled and once emotions cool and with the passage of time that the newly constituted Board might indeed see fit to see if it could interest some of these fine individuals to once again devote some of their energies in a non voting capacity to the Terra Foundation.

THE COURT: There is also one other capacity

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that I was thinking about also. In all the materials that I've read there have been discussions over the years about partnering with other institutions. Some of the proposals in the materials have talked about institutions such as a university or the Art Institute, or the Museum of Contempory Art that might be partners with, in the future, here in this area.

And that if such a partnership were established it might be that certain representatives of the Foundation would also be asked to sit on the Boards of Directors of that organization that you're partnering with.

My question is does anything preclude any of these individuals from being the designated representative of the Foundation in that kind of a partnership arrangement, as long as they're not Board members?

MISS STONE: I don't think anything would prevent any of these fine individuals from being emmisaries to any other institution, to be ambassadors of good will for the Terra Foundation.

THE COURT: To be the Foundation's representative

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on a partnership Board.

MISS STONE: That's correct, your Honor. May I also add, your Honor, when I make the point that we should not engage now in second guessing, it is important to recognize that this was an unusual mediation. This was not a mediation where it was only counsel for the parties that were involved. The individual directors themselves actively participated in a myriad of mediation sessions. So they all had the right to weigh in on this issue. They all did. The issue was vigorously debated and this was the final consensus resolution of those parties that were free to enter into this proposed settlement.

THE COURT: Anybody else want to be heard? Is there any disagreement that all of the eleven Board members who will be leaving the Board in the year 2002 continue to be active participants in the activities of this Foundation, with the exception that they cannot hold seats on the Board of directors, but they can do almost anything else that the Board would direct them to do.

MR. QUINLAN: There is no prohibition of them doing any of those things.

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THE COURT: Okay, now we have a multitude of objections. And I spent my whole weekend going through them. I've read them, even the back sides of all your 35 exhibits.

So Mr. Cummins, I don't know how you intend to proceed today. I want to hold off your counter-claim business until the end. I would assume the first thing you need to talk about, or you want to talk about, is discovery. You can't do anything without discovery. Is that correct?

MISS STONE: Again, just as an order of procedure I do think it's more appropriate , since we are moving for the entry of a consent judgment here to be heard on the issue.

THE COURT: Just one second. You wanted to talk about discovery, and you also want to talk about, or do you not, about the burden of proof?

MR. CUMMINS: Yes.

THE COURT: And you believe that the burden of proof is on them, right?

MR. CUMMINS: Manifestly.

THE COURT: Without any question.

MR. CUMMINS: Not a doubt at all.

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THE COURT: It sounds like they should go first. What do you think?

MR. CUMMINS: Yeah, absolutely. There seems to be a suggestion in the record that we consider to be a grossly inappropriate statement, that it somehow gives this Foundation all of the rights and privileges it once maintained.

Well, that's clearly not the case. As a matter of fact if you take a look at this consent judgment and decree, Terra's collection of American Art will never exhibited for fifty years any place other than Chicago.

That means concepts that were discussed that would really give some value and benefit, not only to the collection, but to those who are interested in the collection, things like common territorial management, that can't be done.

To suggest on the record, oh gee, this is just great and just like apple pie and motherhood and the Foundation can proceed without any limitation is just simply dead wrong, Judge.

THE COURT: I'm trying to figure out what--I went through all of your objections, if what you

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want to talk about is one portion of your objections, I'll be glad to. But if you want to talk about response to my questions about what they can do and what they can't do. Identify certain things, other than picking up and moving the entire collection out of Illinois, what is it that you are saying they are not going to be able to do?

MR. CUMMINS: If you can tell me what paragraph 5 means, I'd like to be enlightened. It states for at least 50 years from the entry of the order the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago Metropolitan area. That means it ain't going to be exhibited any place else.

And if that's not a major inhibition on the value of this collection and on the goals and intentions of Mr. Terra when he created this Foundation, nothing could be more inconsistent with his intentions. Nothing could be more inconsistent.

THE COURT: Let me just ask them to answer that, as to what you believe that that means. Shall we define the Terra Collection of American Art and what that means?

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MISS STONE: Your Honor, I would be happy to answer the question, and I will do so. I think I need to clarify at the beginning that we certainly disagree over the burden of proof.

It is clear here, under Illinois law, there is a presumptively valid settlement agreement. They are now seeking to upset the settlement agreement which they don't agree with, arguing that it should be set aside for some sort of supposed duress or coersion.

The law makes it quite clear that they have to meet a very high burden of proof and they must show by clear and convincing evidence that there was some sort of wrongful or illegal act which completely destroyed the free will of the individuals who are alleged to have been coerced, Dr. Stebbins and Mrs. Marshall.

And we would submit, your Honor, they simply cannot or have not met this very high showing.

There is a reason why the law requires such a high showing. First of all the law favors compromise and resolution and it gives presumptive validity when parties are able to finally resolve

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their differences and come to a meeting of the minds.

In addition, allegations of these sorts, coercion, intimindation, selling out your vote, are very serious, very pernicious accusations. And if you're going to make these allegations the law says you better have the goods to back them up. That is why the burden is so high.

And your Honor, we think it's quite telling that they are trying in essence shirk their burden rather than embraceing it, rather than saying yes, we recognize we have a very high standard and by golly we can meet it, they are trying to divert this Court by citing to a clearly inapplicable class action cases, which have no bearing here.

We are not in a class action context, your Honor. We are not in a fairness hearing where we have to protect absentee class members.

We have a situation where eleven Board members have come together and debated this for months and months. And the collective will of the Board is to have this agreement approved.

Now to answer counsel's question more specifically. Your Honor, you cannot pick out bits and pieces of

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of this consent judgment and read them in isolation. To do so really violates the entire spirit, meaning and language of the consent judgment.

Reading the consent judgment in its totality what does it do? First of all it does obligate the Foundation to maintain its principle office and books and records in Illinois for fifty year. It does require that a majority of the directors be residents of Illinois for 25 years, with an exception for the first year, or it does need to be a majority, it could be fifty fifty.

What else this consent decree does, it preserves and formally recognizes essential freedoms for the Foundation. I would like to enumerate those. And they are contained in paragraph 5 and in other places in the proposed consent judgment.

Number 1) it states the Foundation has the right to conduct its affairs in accordance with its articles and by-laws, including promoting American Arts through the U.S. and Abroad.

Number 2) it states that the Foundation, not a regulator, not disgruntled Board members of whatever stripe, but the Foundation has the right to determine

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for itself how to best achieve its goals.

3) it preserves for the Foundation the freedom to make grants wherever and to whomever it so chooses.

4) it give the Foundation the right to manage its own collection as it pleases. Again, without interference from outside forces.

Number 5) it give the Foundation the right to make loans, to acquire works and to deassess works as it sees fit.

Number 6) it specifically give the Foundation the right ti display art in Giverny and elsewhere in the world in connection with special exhibits or loans for scholarly use.

Number 7) it give the Foundation the right and freedom to conduct its activities at its museum in Giverny. And that freedom the AG is specifically acknowledging and agreeing to in this consent judgment.

Your Honor, I think you have to put the individual defendant's challenge in perspective. These individual defendants have determined that it is not, in their judgment, in their best judgment to enter into this agreement.

As named parties to this lawsuit they have every

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right to say this agreement is not for us and we don't want to participate. They have also exercised their rights as directors to say in their judgment this agreement is not in the best interest of the Foundation. They have every right to do that, your Honor. There may be others in this courtroom who agree with them personally, that this is not a good deal for the Foundation.

The point, your Honor, is that these individual directors cannot now come in and try to run rough shot over the considered judgment, an exercise of business judgment by other directors of the Foundation. That is not their right.

THE COURT: The Terra Collection, can you define it.

MISS STONE: It is a collection of arts that is now currently in existence at both the Terra Museum here in Chicago and the museum in Giverny. And it is that collection as it ebbs and flows over the years.

THE COURT: And this consent decree allows the Foundation to set up museums worldwide if it wants to and display portions--portions, what about

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all of the collection? Can they move the whole thing to Giverny?

MISS STONE: No, I don't think that would be appropriate for the first 50 years. They cannot leave, take everything lot stock and barrel and move it outside of Chicago. But it can conduct freely its activities in Giverny, France and that includes a very big risk loan program from the collection, which is predominately displayed in Chicago, but which is also displayed in Giverny.

THE COURT: How big is the collection right now. I know it's a fluid thing. I know it is somewhere in these papers and I remember reading it. It's hundreds of paintings, is it not?

MISS STONE: It is hundreds. I believe it is roughly in the neighborhood of 800, though I am seeking guidance from an officer of the Foundation, who is not in this agreement.

THE COURT: So about 800 or so pieces of art.

MISS STONE: That is correct.

THE COURT: And as long as there is a place to house it and take care of it here in the State of Illinois and bring it back to, could it loan fifty

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percent of the collection to other museums at certain times as long as everybody new at the Foundation stays here? The Foundation is a lot more than just the art collection. So as long as it stays here fifty percent of it could be elsewhere.

MISS STONE: Your Honor, it's very difficult to get into a finely calibrated parsing of how many can cross the state border and how many cannot. I think the spirit and intent of this agreement is that for 50 years the collection, the bulk of the collection should remain, should be made available for viewing here.

But at the same time works of art from that collection can be shown elsewhere, they can be housed elsewhere, can be exhibited elsewhere and can be loaned elsewhere, but the bulk of the collection should remain here.

As your Honor points out, it is not just art that this Foundation is about. It is also about education, educational programs can take place elsewhere. This Foundation is also about grant making to encourage scholarships in American art.

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THE COURT: So I take it that this means, as I read it, means a large portion of the collection could go like, you know we get the Monet exhibition here or Renior or something here, a large portion of it could be a moving collection and go to museums all over the world. And I would assume even as much as a half as long as its coming back here.

There is nothing in this one way or the other. I mean this is open to interpretation in the future, is it not?

MR. PERKINS: From the Attorney General's standpoint we think of it as based here. Based here doesn't mean it's always here. It means it's loaned out from here. It could be on the road for years.

Many times museums trade pieces. Terra might be exhibiting pieces from other Museums. The Attorney General of Illinois recognizes that. There may be at some times only a little bit will physically be in Illinois at a point in time, the Board deciding that it had five exhibits across the world.

We are not saying that it is prohibited from

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doing that. We are saying however it's based here. It's under the control of the Board here. And we leave it to the Board to work under that direction. These remarks are here. I can't speak for what a Board will do down the road. It is our hope that they will make appropriate decisions.

The whole agreement was premised on the idea that this Board will go forth and do what it thinks it can under the articles and under the terms of this agreement to act pretty freely without much interference from the State.

THE COURT: Leave it to the Board to make that decision is that you're saying, Mr. Perkins. So it's really up to the Board to make those decisions. And I would assume that this matter would only come back to this Court or some future Court sitting here, if something really outrageous happened.

In other words, if 80 percent of the collection got put under some kind of agreement for 40 years outside of the State of Illinois, something that was clearly a violation of this agreement. Other than that we're not doing things very much different than what was done before. The Foundation

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can pretty much run its affairs the way it has.

MISS STONE: That's true. It's a very important and I think it t's up one of the main arguments that the objectors are making. They are arguing that this consent decree is, to use their word, antithetical to the mission of the Foundation.

What is the mission of the Foundation? The mission of the Foundation is very broadly stated charitable and educational purposes, including illustrative purposes such things as promoting appreciation of American art to the growing art public, running museums and schools both in the U.S. and Abroad.

Entering into this consent decree is not antithetical to that. This consent decree allows the museum in Giverny, it allows the loaning of art through the U.S. and abroad.

What would be antithetical is if we came in with a consent decree saying we are going to burn the paintings. This is not antithetical. This is something under the descretion and the purview of the Board of Directors in its exercise and use of business judgment.

THE COURT: What about the argument that has been

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made by the defendants that by not being free to partner, and I assume that means like a permanent patnership, with out of state organizations, that the Foundation has lost its bidding position, lost its bargaining chips. It's essentially saying we are stuck here in Illinois so we didn't get the best deal.

MISS STONE: That is certainly a consideration for this Board. That was certainly a consideration that prompted this Board during this litigation to vigorously oppose what the Foundation perceived what the Attorney General was trying to do. However that is one consideration that the Board members have struggled with.

Another consideration the Board members have struggled with is the hemorrhaging of money to pay lawyers in this case. You merely need to look around this courtroom today to get some sort of idea of what this litigation is costing this Foundation.

Another consideration is the tarnishing of the Foundation's reputation from being in the newspaper every day.

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Another consideration is the distraction of the folks from matters of art to matters of litigation. These are all matters which the Board of Directors have weighed. And each of them have weighed them in different manners, and each of them assessed different values to these considerations. I may come out differently on that question, Judge. You may come out differently. We are not elected directors of this Board.

And what the individual defendants fail to recognize is that it doesn't have to be coercion, it doesn't have to be fraud, it doesn't have to be someone selling out their vote to come out in a different place, to come to an alternative conclusion at the end of the day.

It could be that individual directors acted honestly, acting legitmately, acting in good faith simply come to a different conclusion, just as Mrs. Terra and Dr. Tucker and Mr. Simpson did.

It doesn't have to be that Dr. Stebbins and Dr. Marshall sold out their soul to get this deal done.

THE COURT: Does the Foundation want to say

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anything else in support of the approval.

MISS STONE: Yes, we would, your Honor.

MR. CUMMINS: Judge, there has been a long soliloquy here. May I just observe something?

THE COURT: Yes, sir.

MR. CUMMINS: What has just been discussed is absolutely contradicted by the plain language. I asked a simple question. I said this language says the Terra Collection of American Art shall be exhibited in the Chicago Metropolitan area.

And if you don't think, Judge, that two years from now if we get another Attorney General who decides that sending fifty percent of the art to Courtney for two years violates this agreement then you're going to have people coming in here.

They better change the language of paragraph 5.

THE COURT: I don't think sending fifty percent of this collection violates this agreement.

MR. CUMMINS: Well then let's say that.

THE COURT: Attorney General, do you think sending fifty percent of the collection to Courtney for two years, knowing it's going to come back here violates this agreement?

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MR. PERKINS: I don't think so, Judge.

MR. CUMMINS: How many permeations do we have to go through to clarify this agreement?

THE COURT: That's what you have--that's why I'm having this on-the-record discussion to interpret some of these issues today. I don't see this as a oppresive seeking or keeping of this art as set forth in the objections.

MR. CUMMINS: If you don't interpret the language literally I guess that's right, Judge. But the language ought to be clarified, in the consent judgment.

THE COURT: The parties have agreed to this. Tell me if I'm wrong, the Attorney General, the plaintiffs and the Foundation, the ones that have agreed to this are saying on the record that this doesn't mean that even the bulk of the collection has to at all times stay in the State of Illinois physically for the next 50 years.

MISS STONE: That's correct, your Honor. That's why it says we can manage the collection, loan the collection, exhibit the collection.

MR. QUINLAN: Your Honor, we believe it has to be

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based in Chicago, the books and records here. It is an Illinois Corporation, subject to the laws in Illinois. That means it can't close the foundation here. It can't close the exhibit here. Can't close the museum and have nothing of the art to be shown. So when you say exhibits the art must be exhibited here.

But it is clear that every museum that operates here in the State of Illinois sends their art around the world to different places on a variety of different occasions. We surely are not suggesting that doesn't happen. It is not our agenda to prohibit that.

THE COURT: Is there another example, Mr. Cummins, you're concerned about.

MR. CUMMINS: Judge, I wasn't in the room with these folks, but I would have given them Miranda warnings not to execute the document that has this kind of literal, express prohibition because we can sit here all day and suggest well they can do this and they can do that.

But you asked a pointed question, what about moving the whole exhibit to France for a period of

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time. Oh, can't do that, that wouldn't be right. You suggested, well there is this inhibition with respect to partnering with outstanding museums, the Courtney and the Whitney. Oh, can't do that.

Now I can't believe that somebody is going to stand up here and try to defend this language and say its literal meaning is meaningless. And that's exactly what we're hearing.

THE COURT: I believe that what was agreed to here, maybe I'm wrong, but I'm interpreting this as if I'm being asked to sign it is that this pretty much means that this collection can be operated in the way it always has been with the exception that the entirety of the collection cannot permanently be moved out of the state and housed out of the state.

MR. CUMMINS: Why don't we say that then?

MISS STONE: That is correct, your Honor. And in addition there is the residency requirement as well.

Your Honor, the objectors keep saying why don't we day this, why don't we say this. What I would say in response is why don't they read the entire document. They like to focus again only on one

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sentence in the top of paragraph 5. I would say read the entirety of paragraph 5. I would say read paragraph 4. I would say read the other paragraphs in this document, which do indeed preserve the fundamental freedoms and independence for this Foundation and for the Terra Museum.

MR. QUINLAN: Your Honor, I will say we are the parties who participated in this very hearing that took place at the time that this was adopted. They never raised any questions. They never suggested there was anything wrong with the terms. They never suggested they didn't understand the terms. They voted no. But they participated. They were there. That's all you're entitled to get.

They participated. They didn't have a problem with what was said and they voted no, never suggesting anything else.

THE COURT: These questions were not raised at the Board meeting.

MR. QUINLAN: Not by them. Nobody had any kind of disagreement as to what was intended. Surely we all have given you our consents here. Everybody is in agreement on our side in terms of what we

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believes this means. It reads as it reads. It's a clear document.

That's the reason you retain jurisdiction. It's this Court who makes those interpretations. It is this Court that consistently rules in a way that furthers the interest of the parties in the sense of what was intended and what was meant.

Sure we can read this in a lot of different ways, we can rewrite it in suggested different ways. Their people never suggested that. Their people did not do any of those kind of things and merely chose to go against it. They chose not to participate in the agreement.

THE COURT: Let me hear from Mr. Perkins on this and then we can move on and Miss Stone can finish and then we can hear from the objectors.

MR. PERKINS: Judge, with regard to everything that has been said about this equitably will be handled, how this collection will be managed, how it will be based here, I think the Court has made remarks that reflect our belief of what is going to happen in the future. It will be based it. It will move around. The majority of the collection could be gone at one point in time based on what

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what would be reasonable accomodations as to how the art world deals with this kind of art.

In addition these terms didn't come about in a vacuum, even though they weren't discussed at a particular Board meeting. There have been long mediation sessions. There have been discussions among counsel as to issues with regard to whether about the language, what was going to be the restrictions, whether it was going to be in perpetuity or fifty years issue, the very language that we're looking at.

This doesn't come about in one day. This has been discussed over several months time period with people working on that language to try to make it clear that the Foundation would be free to operate as it had operated in the past with its collection with the least restrictions, but for what we placed here that basically it's based here in Chicago for fifty years, hopefully forever.

That was the spirit on which this was put together. It's an equitable consideration. This Court retains jurisdiction. If it comes back before this Court your Honor, or those who come after your Honor, and we have this record now.

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That makes clear what the Attorney General believes it to mean, what the plaintiffs believe it to mean, what the Foundation expects it to mean.

But at this point we are pretty clear that this Foundation is free to do what it's been doing up to this point in time.

THE COURT: And you're not going to be looking over its shoulder and second guessing its decision about loaning its collection around the world, unless you see shuttered its museum here and there is no place for it to come back to, right?

MR. PERKINS: Your Honor, there are 25,000 charities in Illinois and we're very busy. We're hoping the new Board will take care of this. We don't have any intention of monitering this.

THE COURT: Miss Stone, did you have anything else you want to say in support? I know you said you don't think it's your burden.

MISS STONE: Yes. I understand, but in light of the objections I do feel we need to have the opportunity to make a few statements for the record.

First, your Honor, it is important to acknowledge what is not in dispute here. It is not disputed that

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corporate formalities were adhered to, that notice was given, that the meeting was properly conducted, a forum was present, debate was held the proposed langague was distributed to all directors beforehand. Any director who wanted to make him or herself available to participate in the meeting was there and had an opportunity to vote. A vote was held.

And six to two, the majority of the Board said they wanted to do this. Now in light of this actual presumtively valid agreement, between the Foundation the Attorney General and the plaintiffs, the defendants are now trying to upset the agreement by mounting a variety of scattershot or arguments. And I would like to have the opportunity to address each of these because they're serious charges which have been made against some individual directors that require response.

I know your Honor has read her papers, I know you're very diligent about that. But I do need to address this.

First, with regard to the coercion argument. What the objectors would have to prove by clear and convincing evidence is that the Attorney General took

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took some unlawful action, which as a matter of fact caused Dr. Stebbins and Dr. Marshall to lose their free will, to become mere handmaidens of the Attorney General, to vote his bidding.

They have not come up with anything near the required evidence to meet this burden. Not even close.

As a general proposition, your Honor, there is nothing wrong in and of itself with any party, that would include the Attorney General, deciding to add additional parties to their pleadings.

Now the Foundation has always denied that there was any merit whatsoever to any proposed claim against Dr. Stebbins. The Foundation would have moved to dismiss it or Dr. Stebbins' own attorney would have done that. But in and of itself that was not an action by the Attorney General.

The defendants would have to show that that action in and of itself was done to intimidate rather than for some other reason.

Also as a general proposition there is nothing in and of itself wrong with the Attorney General deciding to issue an administrative subpoena

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to some entity. Again the Attorney General decided there is no basis for any further investigation into the Illinois Academy. But again it's the defendants that would have to show that there was no good faith basis for Mr. Perkins' actions and that he was doing this just to intimidate Dr. Marshall.

That is not all they would have to show. Here is where they really fall down on the task. They have to show that in fact Dr. Stebbins and Dr. Marshall's will was overcome. And there is just no there there to paraphrase Yogi Berra. They just don't have the goods.

First of all, they point to the fact that Dr. Marshall and Dr. Stebbins voted in favor of the settlement. That in and of itself is not illegal, it's not unlawful. The objectors don't challenge the votes of Mrs. Daley or Hartman. There is nothing in and of itself wrong with voting yes instead of no. And there could be many reasons why a director would decide it makes sense to resolve this litigation and get back to the business of promoting art appreciation.

THE COURT: Excuse me one moment. You keep saying

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that they haven't shown. Well part of what they want to be able to do is be able to show . And part of what they want to be able to do is get discovery. And you have said they haven't shown that the Attorney General didn't have a good faith basis for looking into Illinois Science and Math Academy. They haven't shown anything else. Well, how can they show, if they don't get discovery?

MISS STONE: Well I think there are really two questions you have to ask yourself , your Honor. Have they even made the threshhold showing necessary to reopen this case at this point in the face of an agreed settlement and take us off on another whirlwind of discovery.

And the second question you have to ask is what would the possible outcome of that be? What could they possibly hope to achieve by that?

You have the Attorney General who sat for an interview for two and a half hours answering questions. You have Dr. Stebbins and Dr. Marshall who gave testimony who made statements at the Board meeting that specifically addresses that issue. They said we voted our conscience. We were not coerced. They addressed this question.

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We indicated to counsel , that although your Honor had not ordered Dr. Stebbins and Dr. Marshall to sit for depositions yet, counsel should be aware that Dr. Stebbins would give the same testimony at a deposition that he gave at the Board meeting. So what would you end up with at the end of the day?

We go through this discovery and once again you have a situation where you have Dr. Stebbins and Dr. Marshall saying we vehemently deny that we sold out the Foundation. We're insulted by that accusation. We voted our conscience. And you have Dr. Tucker saying well I don't really believe them. That's not enough to meet a clear and convincing burden.

So what are we doing? It would be an exercise in futility.

THE COURT: During the mediation process the six independent Board members, and by that I mean everybody but the two plaintiffs and the three main defendants, were represented by counsel?

MISS STONE: By the Foundation's counsel.

THE COURT: Okay. They all had an opportunity to

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talk to at any time, to write letters to you, to send proposals, to discuss with you any problems or any reservations that they had?

MISS STONE: Correct.

THE COURT: And at the time of the meeting, if I remember correctly from listening to the tape and reading it, you were present with Miss Marshall in the room throughout the whole meeting which she chaired?

MISS STONE: Correct.

THE COURT: Who was with Dr. Stebbins?

MISS STONE: Dr. Stebbins was calling in, I believe.

THE COURT: He was calling in from Boston and he was by himself?

MISS STONE: I can't recall, but I believe that's correct, your Honor.

THE COURT: But I take it that--

MISS STONE: Mr. Carlson was present at the Foundation headquarters and several of the directors were persent there.

THE COURT: You had plenty of opportunity to discuss with Dr. Stebbins before and after the entire issue of he didn't need to vote for this?

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MISS STONE: You're right. Your Honor, without in any way waiving attorney client privilege, your Honor should assume that all of the directors when represented were advised of their fiduciary duties.

THE COURT: I know that they were advised at the meeting. I know that they were specifically told by Mr. Heatwall (phonetic spelling) if I remember that one correctly, that even though they had made this agreement at the mediation session, if they didn't feel that they could vote it freely and in light of everything else, they should abstain or vote no.

MISS STONE: Correct.

THE COURT: I'm sorry, I interrupted you, You were talking about --

MISS STONE: I was talking about what they would need to prove and what they're pointing to to try to support their coercion case, or their speculative coercion case.

They try to make the argument that Dr. Stebbins and Dr. Marshall flipped, as they so ineloquently phrase it. Your Honor, that ignores the fact

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the reality that Dr. Stebbins and Dr. Marshall have always been on the Board. Both sides of this battle of the Foundation have tried at certain times to adopt, in particular Dr. Marshall. And she has resisted those efforts.

At the Board meeting Dr. Stebbins in particular talked about how there were many matters he disagreed with Dr. Tucker about, including the location of the museum.

THE COURT: Isn't he the one who said when he got to the meeting on September 25th that he thought that everybody should resign?

MISS STONE: Correct.

THE COURT: And that he always believed that the collection and the Foundation should stay in Chicago?

MISS STONE: Yes. And he is an art historian who has reasons to believe it would be most advantageous for the collection to be coupled with the collection here in Chicago.

In addition Dr. Marshall has always been neutral. in fact your Honor at one hearing you yourself remarked that after reading the minutes you thought she was the most neutral of anyone.

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THE COURT: I wanted her on the special litigation committee.

MISS STONE: I understand.

THE COURT: She didn't want to be on it.

MISS STONE: That is correct. So what are they left with in the face of these, this history of neutrality and independence by those two directors?

On the face of their statements, which we read to you last time, which everybody quoted in the briefs, and I'll not read them again to you, but which you know where they said we're voting our conscience, we're voting freely, we are not voting for any extraneous reasons, we are not selling out to this Foundation. We are adhering to our fiduciary duty and this is how we vote.

What are they left with in the face of that? They are left with one or two affidavits from Dr. Tucker. He says you know I don't have a good feeling about that. I just don't really believe them. And he doesn't even really come out and say they sold out. They sold this Foundation down the river. He doesn't go that far. He talks about how it was inconsistent with prior positions. But

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even if he believes that, that is still only his subjective belief. And that comes no where near clear and convincing evidence, affirmative concrete evidence, that they have to present.

And I think it bears saying, your Honor, fundamentally what is being portrayed by the objectors, this notion that Dr. Stebbins and Dr. Marshall could somehow be brow beaten, intimidated, cowed, cowerd to use their word, by the Attorney General. These people are, as your Honor as remarked in the past, very intelligent, well educated, sophisicated people who had the benefit of counsel throughout this process. Dr. Stebbins is a Harvard educated lawyer, not that that means anything in and of itself, who is affiliated with the --Dr. Marshall is a PHD, president of an academy. To think that they would somehow be brow beaten by some assistant attorney general is really--with all due respect to Mr. Perkins, but it's really an insult to their integrity and to their reputation in the community to indicate that they could so easily be bought.

And your Honor, I think in essence what it boils down to is you've got Dr. Tucker and Mrs. Terra and

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Senator Simpson saying, don't believe them, they sold out, they're lying, they're trying to cover up, believe us. That's not enough. Further discovery will not help them prove their case. And I think we should put an end to it.

Let me address a few other allegations they they're making as a way to try to upset this settlement agreement. They use this notion of conflict of interest, which is really I think an inappropriate notion here.

THE COURT: Did you get their latest filing? It came about a half hour before, it's a seven page document and they address the conflict again in that. And I didn't mention that I received that. And I did review that.

MISS STONE: I don't believe they had leave to file that brief. We weren't expecting that brief. We did try to review it quickly and I will try to respond to that as well.

In support of their conflict of interest argument they are saying that somehow that Dr. Stebbins and Dr. Marshall shouldn't have voted because they were conflicted. But the Illinois Not for Profit Corporation Act has a very specific

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section dealing with conflict of interest. It specifically addresses this. And it says how do you know if there is a conflict? You look to see whether the director who is voting is a direct or indirect party to the transaction at issue, that's being discussed.

And it's clear they are not direct parties. They didn't sign in their individual capacity this consent decree. They weren't individually named in this litigation. So they weren't parties direct. And they are not indirect parties because Illinois Not For Profit Corporation Act says you have to have a material, financial interest in the proposed transaction. You have to have an interest in the other entity that's a party to the transaction, in order to have this indirect conflict.

THE COURT: They say as a matter of law that's wrong, in their response.

MISS STONE: They do two things. First they cite to inapplicable For Profit Corporation law. That's not relevant here. And I think they sort of acknowledge that in their reply brief when they

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say well let's look at the Illinois Not For Profit Corporation Act if we've got to, but we can stretch the meaning of that, we can sort of pervert the language of the statute to try to wiggle out case in there. Well they are really stretching it beyond all appropriate bounds.

If you were to accept their argument, any settlement would be up for grabs and no one could vote on it because in very many litigation cases involving corporations there are potential claims against various directors that are floating out there.

So their argument, an incredibly over passive argument would be to lead to very difficult and illogical consequences. And it's just not the plain language of the statute.

So we would argue that they are citing you inapplicable law or misciting and misapplying the governing law.

The fact is here that there was no conflict of interest thatDr. Stebbins or Dr. Marshall had.

Their next challenge, your Honor, is to the allegedly improper actions of the Attorney General.

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And what's wrong with their analysis here is that they go so far then they stop. They miss a crucial step. They say the Attorney General acted improperly therefore this agreement has to be vitiated.

Well under the law of coercion what the Attorney General allegedly did had to have had an actual affect on Dr. Stebbins and Dr. Marshall. It had to have actually overcome their free will.

You've heard them on the tape now, your Honor, you've read the transcript. Their free will was not overcome. In fact at the 11th hour at the meeting itself Dr. Marshall said, well if you all make this new contemplated change to this resolution I'm not going to vote for this. The deal of off. You need my vote and I am not going to go along with that and this whole thing might blow up. See you later and we're back in litigation.

She was not acting like a cowed intimidated victim who was fearful of the Attorney General. She was exercising her free will vigorously, the way she always did.

In fact if you, without getting into the details of mediation, if your Honor will look at

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some of the letters presented to your Honor, you will see that many of Dr. Marshall's proposals were in fact incorporated in the final end product. He was a vigorous campaigner, a vigorous participant in this debate, so was Dr. Stebbins. They were not intimidated, quaking victims here of the Attorney General.

Finally, your Honor, I have already alluded somewhat to why their antithetical argument to the best interest of the Foundation argument doesn't wash.

What they have really done here is fail to recognize that other directors can act in good faith and can come to an opposite conclusion.

I think the central irony in the case--well there are several--one is it seems to be only the Foundation who is always coming before you and saying you know what, allow the Foundation to be a Foundation, respect our integrity, respect our independence. Don't allow yourself to be used by disgruntled detractors on either side of the political fence here to use you. Let the will of the majority speak for this Foundation and respect that.

There is an irony that Mr. Buntfock and

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Mr. Gidvitz have reaped and sowed they are not reaping through this attack from the objectors.

There is another irony here, your Honor. The irony is that maybe it would have been better from the objectors' perspective if this thing had been a trust. This is not a trust despite what the Attorney General says, and despite what the Attorney General says as recently as yesterday afternoon in his filing, this is not a public charitable trust, whatever that term supposedly means.

This is, Dan Terra, if he had set up a trust to exhibit art in Washington, D.C., New York, Boston and Chicago for time immemorial that may have been better from the perspective of the objectors. But he did not do that. What he did he set up a not for profit corporation that had a Board of Directors. He set up a charter and said this is your broad mission, this is your broad constitution. You as directors are now impowered to make decisions about what is in the best interest of this Foundation going forward.

And therefore the directors can, in their

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wisdon, in their exercise of best judgment, decide what is in the best interest of the Foundation. It is not imperative, it is not absolute, it is not a mandate from a grantor of some trust that this art be shown in D.C., or New York. The Board of Directors has this degree of independence.

I think in conclusion, your Honor, I would simply say this is a case, really these are two cases against the Foundation which have been pending now for about ten months. We've been through five months of mediation. It has been a very expensive process for the Foundation. The majority of the directors have spoken. They want to put an end to this. They think this is indeed in the best interest of the Foundation. The Board has spoken. The Board should be heeded.

MR. QUINLAN. Your Honor, just a couple of things. I think what we have here is a premature attack on the consent decree by the objectors. First of all we're here today to ask your Honor to sign that consent decree. And what's at issue here in your signing the consent decree is whether or not this is an agreement of the parties and the terms are properly reflected in the agreement.

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It's undisputed the parties have entered into this and these terms are the terms that were intended.

THE COURT: You lost me for a second. You say it's premature. Are you saying the procedure is it should be signed?

MR. QUINLAN: Yes.

THE COURT: The case should be dismissed, they should be denied discovery, they should be denied leave to file any pleadings, case is over. We have a consent decree. And then what is the next step?

MR. QUINLAN: The next step would be a 2-1401 to challenge the consent decree, your Honor, on the basis that coercion took place. I think what counsel has demonstrated here is there is no basis even for that allegation of coercion.

What we're talking about here really is a presentation to you a settlement. And that settlement whether the Court should sign that settlement or enter the order only requires a determination by you as to whether or not this is an agreement and whether or not this reflects the terms of the agreement.

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THE COURT: Where do you come up with this 2-1401? And the reason that I ask that is I looked at all their cases and they're pretty much class action type things. And they're pretty much situation where, you know, you've got one of these public hearings like we have all the time to approve a class settlement. And it's a totally different thing.

I'm looking at the cases that you've cited, or that the Foundation has cited in its brief about the clear and convincing standard. One is a marriage case and some other issues. I'm looking for something where you got any of these cases, any of them, deal with court ordered mediation, or a mediation of case and someone is coming in and challenging that mediated settlement.

MR. QUINLAN: It really doesn't make any difference, for your purposes here, whether it's a mediated settlement or not. The issue is it's a settlement. Let's assume we didn't mediate but we said your Honor, would you delay this case for a couple of weeks, we believe we can work this out.

THE COURT: Okay, and we've got a settlement. You come and you've got a settlement.

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MR. QUINLAN: We come in and present it. And there are people who say, wait a minute, wait a minute, that's not the settlement. That's what they might be saying. But they are not saying that here. They're saying they don't like the settlement, that they don't want the settlement, they don't believe the settlement is proper. That's not a challenge.

They're saying the Attorney General, by his actions, coerced them. That's only a challenge to the consent decree after it has been entered.

THE COURT: Okay, but see you're talking about a settlement where everybody settled. We're talking about a situation here that is somewhat different. These folks aren't settling. They are not part of the settlement.

MR. CUMMINS: It is also a derivative case and they ought to address that.

MR. QUINLAN: It is not derivative at all. We sue under the provisions of 103.15 (a). I'd advise you to read our pleadings that we did file.

THE COURT : I just reread today your complaint and you don't say it's derivative. And I reread the

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Attorney General's complaint today because I was trying to go back in history.

MR. QUINLAN: And he doesn't say it's derivative. We have our standing and he has his own standing by statute.

THE COURT: Would you then be saying you had the settlement and I signed the consent decree and it's done, and this case is dismissed, they're going to come back and file a 2-1401. Now what standing do they have to come back in and file a 2-1401?

MR. QUINLAN: That's a good question. I don't know if they have any standing here at all. But that's not my problem. That's their problem.

The real issue here today is this is the same as if it were a divorce decree. They had a divorce decree and came in here and both of the parties to the divorce decree asked you to sign it. You don't hold a fairness hearing. You don't hold an evidentiary hearing. You sign it.

This is the agreement. Is there any question that this is the agreement, or is there any question that these are the terms? No. That is what's to be signed. It is not a derivative action,

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this is not a class action.

If your Honor read the statement by Judge Posner in the Mars case there is a total difference between class actions and --Judge Posner says look, the normal thing is you look at this and you say did the parties agree to this. Okay, that's what it is. We don't look any further.

The only reason we look further in a class action is because those parties are only represented by an attorney whose maybe interest is not the same as the real parties in interest here, who are not present.

THE COURT: We need to do a reporter switch here.

(At which time in the Proceedings another reporter reported the remaining proceedings for this day.)

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, Josephine Raines, an Official Court Reporter for the Circuit Court of Cook County, County Department-Chancery Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause. that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable DOROTHY KINNAIRD, Judge of said court.

Josephine Raines
Official Court Reporter
License 084-001740

Dated this 3rd day
of July, 2001

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16di-001805

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, the Honorable DOROTHY KINNAIRD, Judge of the Circuit Court of Cook County, presiding judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise fully appear of record, and attorney for the _____tenders this Report of Proceedings and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made and provided.

WHICH IS ACCORDINGLY DONE this_____day of _____,2001.

_____
HONORABLE DOROTHY KINNAIRD
Circuit Court of Cook County,
Illinois

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STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.
AND
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

No. 00 CH 13859

REPORT OF PROCEEDINGS had in the above-entitled cause, before the HONORABLE DOROTHY KIRIE KINNAIRD, Judge of said Court, in Courtroom 2302, on the 24th day of July, A.D. 2001, at the approximate hour of 4:30 o'clock p.m.

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APPEARANCES CONTINUED:

VERNER, LIIPFERT, BERNHARD, MC PHERSON & HAND
901 - 15th Street, N.W., Suite 700
Washington, D.C. 20005
BY: MR. LEONARD GARMENT
Appeared on behalf of the Defendants;

PATTISHALL, MC AULIFFE, NEWBURY, HILLIARD & GERALDSON
311 South Wacker Drive, Suite 5600
Chicago, Illinois 60606
BY: MR. DAVID C. HILLIARD, Mediator, and
MR. BRETT A. AUGUST, Deputy.

THE COURT: And who will be speaking at this table besides Mr. Cummins?

MR. TODD: Chris Todd. I don't know whether Mr. Garment will have that much to say or not, Judge.

THE COURT: Okay. Mr. Quinlan, I am trying to get a handle on the case law issue about something that's close to here.

Let's assume we have a regular law-suit which this, of course, is not. And some of the parties settle with others of the parties and they come to the Court and they say, "Please approve this settlement."

Usually they come and they say, "Give us a good faith finding that this settlement is in good faith or whatever," and they proceed against the others. You don't have that situation here.

MR. QUINLAN: You don't have that. That's only a contribution.

THE COURT: Right, and in this case you are dismissing everything in regard to everybody else.

MR. QUINLAN: That's correct.

THE COURT: So any of the cases that have

of this information to be circulated or to go forward any further.

It was their clients who sought, participated in, and negotiated throughout this process.

Only when it didn't end up with the result that they wanted do they now attempt to object. So they withdraw from the agreement, refuse to be part of it, refuse, even though they participate in the hearing, a Board meeting which was lawfully called, as pointed out by Ms. Stone. And everybody had notice and they participated.

Eight members were there and their two people were there and they did participate and they did object to certain things.

They didn't object to the agreement. They didn't object and say it wasn't the agreement. They didn't say the terms weren't right. They didn't say the terms should be changed.

We are now here to present that agreement to your Honor to be signed. There is no fairness hearing that has to be held here. There is nothing of that nature to take place.

What these people are doing is they

beyond is this -- the agreement of the party and the needs reflected in terms of the party are almost nonexistent, because the parties determine the fairness and the appropriateness of the settlement.

By the parties agreeing to it, by the Board voting for this, determines the fairness. They were exercising their business judgment when they did that.

I would call your Honor's -- yes, Posner's decision: "Fairness of a settlement of a legal dispute is like the adequacy of consideration supporting contractual funds, a matter best left to negotiation between the parties."

And only in class actions is that a different setting and he points out that's only because the lawyer is the principal here. And the lawyer himself is acting not only supposedly on everybody else's behalf but only on his own behalf. They often conflict.

And the case is the Marco case that we cited to you, which is a divorce case, and in that case they said you don't have to have an evidentiary hearing. You don't have to even go

It was all coercion. None of it goes to coercion.

All we have here is people who have speculated before, Mr. Tucker, about he thinks they may have been coerced.

THE COURT: How about some case law on coercion?

MR. QUINLAN: On coercion?

THE COURT: And who was normally the party who is bringing the coercion issue?

MR. QUINLAN: The people who have been coerced, your Honor.

THE COURT: Okay. Do we have any cases cited in this mass of cases that you have all given me --

MR. QUINLAN: Sure.

THE COURT: -- that talk about someone other than the person who was conversed -- coerced coming forward and saying somebody else was coerced?

MR. QUINLAN: I don't see that, your Honor. I think Judge Bucklo didn't really address that.

She said, "They are asking me to --" First of all, she said, "Where is Mr. Stebbins and where is Ms. Marshall? They are not here. They do not offer any affidavits."

Your Honor, this was only the potential of lawsuits here, the potential against Mr. Stebbins and to Ms. Marshall; but, in fact, their clients have the suit against them.

How in God's name under their theory could they participate? They are already in suit here. How can anybody in a settlement ever participate? Because they are sued. That's how you settle cases. Those are the people who sit down and settle.

How could you ever settle a divorce case? Because on the one side is the husband, who is either bringing the suit or has a suit brought against him and vice versa with the wife. And both of those people are the people that come forward to settle.

Those are conflicts? They are not conflicts under the law, your Honor, and surely we can't torture this alleged charge of coercion into a conflict and it doesn't make a conflict.

As we point out in our papers, it requires a wrongful or illegal act or a threat against the person which deprives of them of their free will.

And they suggest that it supports their position. But if you look at it, it is a class action, a totally different situation.

Each one of their alleged conflict cases, in fact, involve for the most part pecuniary conflicts. Other situations are conflicts involving lawyers. It's a lawyer's conflict that they had.

In some of the situations it didn't even involve the Board of Directors, so that none of the situations -- frankly, they are the ones that are throwing out the cases on the basis that there is a conflict and it's a pecuniary conflict. And that's why they couldn't participate.

So those cases really support our position, but the issue here, really, your Honor, is not whether or not they can set aside this Consent Decree.

It's whether your Honor can sign it. And they don't even challenge the terms. They don't even challenge whether it's an agreement, because they can't.

They were there. They participated in the mediation. They were there and participated in the Board hearing. They know that this is the

THE COURT: And you are saying these three are essentially strangers?

MR. QUINLAN: They are strangers to the agreement.

THE COURT: So you would be saying that they wouldn't be able to bring the 21401?

MR. QUINLAN: Absolutely. I don't see it. I mean, it's their burden to show you. I don't see how they can do it, but they have a long process here. First of all, they don't --

THE COURT: What's the right process? What can they do?

MR. QUINLAN: They can challenge the agreement after it's been entered.

THE COURT: Yes, but how? You said they couldn't bring the 21401, so --

MR. QUINLAN: I don't think they can. That's the process.

THE COURT: So how can they?

MR. QUINLAN: They can't. Well, if you don't have standing, your Honor, you can't bring it. You can't bring a lawsuit without standing.

THE COURT: Okay.

MR. QUINLAN: So without standing to

what they are complaining about.

Their lawsuit is dismissed, for they are no longer parties to a lawsuit and will not be, as soon as your Honor signs it. They are out of the case. They suffer no harm from that.

What you have here are disgruntled directors who participated in a vote and lost, which was legal, which was proper. They participated in mediation and they lost. Mediation --

THE COURT: Well, you don't lose in mediation. You just don't agree.

MR. QUINLAN: Pardon?

THE COURT: You don't --

MR. QUINLAN: Well, you don't lose; you don't agree. That's the point. And that's why they are saying I am not supporting this.

And it's the same as in any other settlement. You have two of the parties, three of the parties, four of the parties settle it. They are just not party to it.

And so I don't know what standing they have here to complain about anything.

On the other hand, --

THE COURT: Okay. Mr. Quinlan, I really

MR. PERKINS: Judge, I just -- I am not going to repeat.

THE COURT: Okay.

MR. PERKINS: I do think it's important to note that mediation started at the defendants' request, that mediation was conditioned by these defendants by coming to us and saying, "Can we give full releases in a total global Terra-related settlement?"

They came to us, the Attorney General's office, in the middle of expedited hearings and expedited discovery, and said, "Stop litigation. Let's mediate."

So they were the ones who first came to us and said, "Can we get individual releases? Can we settle everything?" And that was the start of mediation.

We never talked to Dr. Stebbins ever. We have never had a conversation with him. We've never sent him a separate communication. We never sent him our First Amended Complaint. He must have gotten it through counsel.

That was sent --

THE COURT: You did meet him. When you

couldn't leave Illinois, which was a real reason it was given to them. That was given to them in March of 2001.

We then went and spent April, May, and June mediating. Now, if they were concerned that Dr. Stebbins had changed his mind or he was going to have these conflicts, they certainly didn't do anything for all that time period. That's because they all expected to get releases. They wanted releases for themselves. It was part of the mediated plan.

THE COURT: And part of this settlement is to give them those releases.

MR. PERKINS: They have got it, Judge.

THE COURT: Only them. What do you mean by "them," "they have gotten them"?

MR. PERKINS: All the directors of the Foundation, everybody is released.

THE COURT: Okay.

MR. PERKINS: The releases -- The cause is dismissed with prejudice. They have gotten really what they were seeking.

Due to the fact that in the end of May we thought settlement was over and we have set

any duress. We participated in mediation.

The contentions about Dr. Stebbins were the releases that everybody was going to get. And it's just convenient now to complain about those.

We don't agree with counsel from Sidley and Austin whether the Foundation is a charitable trust or not.

THE COURT: Let's not get into that.

MR. PERKINS: We put that in our papers. It's moot, Judge, and we agree. However, the objectors have made an issue of it. We placed our arguments in the papers. As is the issue of what Dan Terra's intent was.

There is all kinds of remarks bandied about about what it is. We disagree. However, that also is moot.

We acquiesce to letting the Foundation run as it has and certainly the Foundation running as it has is clearly within its past intent and clearly within its Articles of Incorporation.

So the contention that this settlement is causing it to act contrary to its history is preposterous. It's precisely going to act as it

in the State of Illinois. It is a critical issue in this community. No question about it.

The Attorney General, in his complaint, where he is complaining that folks on the Board weren't doing the right thing, he says, paragraph one: "This cause is brought for and on behalf of the People of the State of Illinois by and through the Attorney General," and citing the Charitable Trust Act, "and his common law power and duty to protect the interests of the People of Illinois and pertaining to charitable assets."

Now, that's the context in which this litigation from the AG's standpoint was initiated.

This is a court of equity and I am going to suggest a couple of things. The decision that you are called upon to make on this settlement, which by any objective standard has some questionable aspects to it, is a critical decision.

You invested a lot of time and effort, the folks who sat through mediation with my colleague, Mr. Cronin.

Judge, there is no need for you to resolve this matter today. And I am not suggesting

should not have participated in the vote, either?

MR. CUMMINS: Well, Judge, let me answer it this way.

My clients -- My clients were not during the course of mediation, put in a position where they were threatened with the possibility of additional protracted litigation, as was the case of Stebbins.

They were not in the position of allegations that they were engaging in possible conflicted employment positions with the State of Illinois, as with Dr. Marshall.

There was not a word said, with all of the great Foundation guidance and counsel, read those transcripts. There was not --

When the folks from Winston & Strawn asked them about, "Are you sure you are making this vote, you are conducting this vote independent of any pressure or coercion --" you know, the Miranda warnings that he gave them -- there was not a word said about the fact that, "Hey, wait a minute, we have to decide whether or not these people, given their posture in this matter, are conflicted."

THE COURT: Well, your clients didn't

I know they said they couldn't be on the line, but there sure is an awful lot of whispering on that tape with people.

MR. CUMMINS: Well, there were folks from Sidley, folks from Winston.

THE COURT: So --

MR. CUMMINS: That's who was there. That's all. Those are the only lawyers. They can tell me if I am wrong. I know I am not wrong.

THE COURT: Okay.

MR. CUMMINS: Now, Judge, here is the simple proposition. You are going to be gone for three weeks.

THE COURT: Yes.

MR. CUMMINS: There is no reason for you to rush this thing to a conclusion today. I am just trying to be pragmatic. We don't need to go across the street and go through all the, you know, monkey business.

And if they think that we are going to walk away from this and have these counterclaims just filed away, this litigation isn't over, Judge, but it ought to get over but it ought to get over fair and right.

at those facts, and a member of the public would say, "Wait a minute. Something is rotten here."

And all I am asking you to do, in simple sense of simple fairness, consistent with the stakes that are at issue here, give us a chance to vent these things.

And as officers of the court, we are not going to come back here and protract this, if we don't -- if we don't back up what we are saying.

We will make an offer of proof. I will make an offer of proof on what exactly we expect to show.

And I will bet you this: With Dr. Marshall's and Dr. Stebbins' cross examination, they will not be able to utter a word to suggest that anyone reviewed with them the implications of these activities and the impact that it had on them.

Now, if --

THE COURT: On the cases that you cited, and that I did spend a lot of time with over the weekend, your cases, do we have anything that comes close, a non-class-action case where parties to a settlement or a nonparty to a settlement in which your clients are not parties to a settlement,

an answer, never filed a counterclaim. You have two other clients --

MR. CUMMINS: Okay. Blame me, Judge. I wasn't there.

THE COURT: I know. You have two other clients that never answered. One had a motion to dismiss pending and the other one I don't think any responsive pleadings were --

MR. CUMMINS: Well, now you have it all in front of you.

THE COURT: And so, you know, there is a time in Illinois procedure to file a counterclaim. And if you don't file it when you file your answer, I think you have to come in on a motion for leave to file it.

MR. CUMMINS: Judge, you -- No, your Honor directed no further pleadings be filed. That stopped the clock. The only reason --

And when I talked to Jim Wilson, the only reason that they were able to get that one pleading on file was they had the opportunity before you closed the case on pleadings.

Your Honor, it would be --

THE COURT: When we went to -- When you

lawyers, but that doesn't mean we have to compromise our clients' interests.

And, Judge, you know, I don't want to -- I don't want to get off side-tracked on that, because maybe some of these issues -- I said to you the last time a lot of this can get simplified.

One way to get simplified is to give us a fair opportunity to present our position. And most respectfully, you have given us an opportunity to present a lot of our views and legal arguments. But the critical element, the critical element, the role of these folks and the implications that the Attorney General's conduct has not been dealt with and to leave this record open, your Honor, on that subject is what I am addressing in the first instance.

You -- Your order specifically said, and I am quoting from Paragraph 5 of the order entered on February 5th, 2001: "All motions and matters herein, all matters herein are hereby stayed, pending the further order of court, with the exception of directing the defendants' motion for advancement of fees and emergency motion and so forth, respectfully."

anything.

MR. CUMMINS: Well, since last Thursday -- Since last Thursday, having -- We are a group of lawyers, all of whom came to this case relatively recently, as you know.

THE COURT: For somebody who came relatively recently, you put together a fine bit of work here.

MR. CUMMINS: Yes. I don't take credit for that. It's all these folks.

THE COURT: Okay. Well, then they did.

MR. CUMMINS: I just say this: We will supplement our submission in response to precise questions that you want. We will be happy to do that. And Chris Todd may have a comment on that.

But I come back to where we are in this proceeding and I can't imagine you being rushed to conclude this matter, without giving us the opportunity to investigate these issues as we have suggested.

THE COURT: And what you want to file, I guess you already have with leave, but what you are asking leave of Court to file as a counterclaim, where you want to sue Mr. Perkins and you want to

properly filed, but if you want to finesse that issue for a moment.

THE COURT: I don't want to finesse anything. I would like to deal with what I have got in front of me. And I have got a motion which you have motioned-up for today --

MR. CUMMINS: Right.

THE COURT: -- along with all the rest of this stuff --

MR. CUMMINS: Right.

THE COURT: -- for leave to file counter-claims and which you want to sue the parties that have entered into this Settlement Agreement.

MR. CUMMINS: Right.

THE COURT: I have that right?

MR. CUMMINS: Right.

THE COURT: Okay. And so you want to sue all the directors who are presenting this individually?

MR. CUMMINS: For the reasons that we articulate in those pleadings.

THE COURT: Okay. And let's assume you file that when you are -- when the day is done and you have totally proven up all of your facts here

Now, lawyers, like everybody else that does this, tack on all kinds of other claims for relief. And they are serious. We are not saying they are not serious.

But what's the focal point of this? The focal point is what I am talking about here, which is the problems with the settlement and we can -- If you want me to address the pleadings, I will be happy to do that.

But I come back to where I think we ought to be, if reason prevails here. And that is afford us a limited opportunity. I am asking for a limited opportunity to conduct some decisive discovery with respect to these very serious circumstances, which clearly taint this process, Judge.

You know, I am not going to start repeating what I said. You know that this isn't coincidental that these things happened. You know that.

THE COURT: You had about a two-and-a-half- hour meeting with the Attorney General, is that correct?

MR. CUMMINS: My colleagues did.

MR. TODD: If you will look at page two, about the middle of the page, I showed Mr. Perkins the exhibits, what were marked FT2 through 7, which are the -- if I recall correctly, were the declarations of various individuals who had spoken to Dan Terra before his death about moving the collection from Chicago to either Philadelphia, New York, or Washington.

THE COURT: Yes.

MR. TODD: The architect that had drawn up the plans in Washington to build the new museum, the real estate agent that had taken him on a helicopter ride to look at places appropriate for a museum in Washington, D.C.

THE COURT: Okay. That all goes to Dan Terra's intent. Now, that wasn't what we were supposed to be talking about.

MR. TODD: I asked Mr. Perkins if he would tell us whether or not he knew about the facts contained in those declarations before he came into this court and represented to your Honor that there was no doubt that Dan Terra intended to lock up this Foundation's collection here in Chicago.

the test, that's not the issue. That's not the standard of review. That's not the law in Illinois or any other State, I submit."

What is the issue is what Mr. Perkins did under the circumstances. Those are objective facts. And then what -- Not subjectively, but what Dr. Stebbins and what Dr. Marshall did after Mr. Perkins did what he did, and those are all objective facts that we can determine.

It doesn't -- It is not, as Ms. Stone and Mr. Quinlan have represented to the Court, that you have to do an analysis of the mental state of Dr. Stebbins and Dr. Marshall. That's not the analysis. That's not the law.

THE COURT: We pretty much know what they did or they didn't do, based on this mediation record that we have?

There is an abundance of correspondence to and from the mediator and in the various sessions here.

And if you put them in order and you put them in order by date, could you highlight for me where you think the point in time came where they switched gears so dramatically in regard to

declined to make Mr. Stebbins available for any kind of examination or interview.

Now, all of us who have tried cases know that what folks do when they are sitting down talking and what they do when they are sitting in that stand having raised their hand to tell the truth, the whole truth, and nothing but the truth and incisively interrogated about facts and circumstances, can turn out to be 180 degrees out of phase with the story they were telling before they hit that stand.

Now, all we are asking you to do is afford us the opportunity to conduct these limited interrogations of these people and come back to you and establish, as I believe we will, and which we offered to prove, that the timing of the Stebbins-Marshall incidents were not fortuitous, coincidental or happenstance, that these individuals did indeed, whether or not they would say that it affected their judgment, felt threatened and intimidated by these activities. They said this much on the record.

And whether or not in that circumstance, as a matter of law, they were conflicted

THE COURT: And that exhibit that circulated that -- Someone help me out on the exhibit number. I am not finding --

MR. CARROLL: Twenty-four?

THE COURT: Twenty-four of the objections exhibit. That was done on March 21st. That was done early on in the mediation process.

Now, do we have between March 21st of that year, of this year, and the time that the mediation concluded or some major shift that's attributable timewise?

Is there anything that I have in any of these minutes where Dr. Stebbins had a certain position in the mediation that changed or was different after that?

Can you point to anything?

MR. CUMMINS: No, I can't.

THE COURT: Because I know you have a lot of -- Well, you have all the same things that I have, which are all these communications to and from counsel and from the mediator.

Do we have anything that shows that the ultimate position that he took in this case at the end was any different than something that

be in Chicago.

And while he willing to work with Dr. Tucker -- I am doing this from memory. While he was willing to work with Dr. Tucker to talk about various partnerships elsewhere, he always thought that this should be a Chicago based deal.

MR. TODD: Your Honor, if you will also look, I will find it for you, there is a letter from Dr. Stebbins, it's 1997, was written to the Board before he was even on the Board. And he was recommending to the Board -- I think the letter was -- is Exhibit 18.

THE COURT: Your Exhibit 18, sir?

MR. TODD: Yes.

THE COURT: Okay. I have got it.

MR. TODD: Okay. This is from Dr. Stebbins to Mr. Collins, who was then the attorney for the Foundation.

And then if you will look on Page 4 --

THE COURT: He is talking about various alternatives here.

And on Page 4 he says, under A, "We strongly feel the present building in Chicago is inappropriate as a museum and the building

cooperative relationship.

And they cite the Corcoran and the Pennsylvania Academy, which are precisely a couple of the issues that we addressed earlier today, which depending upon how one wants to interpret paragraph five, the Consent Decree may or may not be appropriate.

But, your Honor, to answer your question straight up, until we get a chance to cross-examine Mr. Stebbins, I would like to find out what he understands this settlement is supposed to be, what he understands the limitations on this collection are, whether or not he understands it as folks were describing the real meaning of the Consent Decree.

And also what kind of advice or guidance he was given, if any, concerning the implications of these allegations by the Attorney General.

And who were his lawyers? Were they the same lawyers that purport to represent the Foundation, whose interest he is alleged to have compromised?

These are questions, Judge, that

have had a fair shot. That's all we want, is a fair shot.

This is a court of equity. And I am asking you to exercise your equitable discretion and give us that opportunity.

THE COURT: And can we go back, just for the last time, before I hear from them again, unless there is something else you wanted to add?

Is there any case where a party in a non-- why don't we call it a nonderivative case or a non-class-action case or a nonparty to a settlement that has had an opportunity to get this kind of discovery before the Court approves the settlement?

MR. CUMMINS: I am sure if their interests are being affected or compromised that, yes, there are cases. To stand here and tell you that I have got it in my hip pocket would be silly. I don't have it, but I --

THE COURT: And the interests that are compromised, isn't it a fact that these three Board members are bound by this settlement to leave the Board? Is that really the --

MR. CUMMINS: That's the long -- That's

down because of my schedule. I set this ahead of a whole bunch of other cases and moved cases for a couple of days so I could read this and get through it today --

MR. CUMMINS: Well, Judge, --

THE COURT: -- and make this Decision, so --

MR. CUMMINS: The time we spent here today won't be wasted. It is now focused. You put us on our mark. If we come back, if we come back and we are short on our proofs, then we have had an opportunity to present our position. That's all we are asking for.

THE COURT: I think we have one more defense counsel here.

MR. GARMENT: May I?

THE COURT: Sure.

MR. GARMENT: Your Honor, I listened to the proceedings today with care and interest, with a partisan interest as one of the lawyers, but with a certain amount of, I think, of objective sadness to hear some of the things that have been said by counsel and the nature of the case, the importance of the case that Mr. Cummins has stressed in his

The first issue involves an abuse of power. And these are fighting words in modern law and politics, and rightly so. I am talking about the intervention under the collar of law by the highest law enforcement office of this State, using the power of that office to constrain the free and unimpaired exercise of personal judgment by the directors of Terra Foundation.

That is our allegation. It is our contention that there is sufficient evidence, circumstances that are not coincidental, that require the test of testimony.

There is, I went on to write, in any event, abundant justification for further and precise evidentiary discovery under oath.

Second, the second paramount issue involves the plain abuse of that State power to aggrandize the State itself by the assertion that the heart of this case of a categorical self-proclaimed right to appropriate the property of a private charitable foundation, its assets, its art collection, its fundamental constitutional right of self-government, particularly to determine venues for the use of its property and to appropriate that

than the message that might be sent as a result of this case, if it's concluded with us -- without us having a full opportunity to develop a record. That might be the message that is sent to other folks: "Don't come to Illinois if you don't want the State to take over and hijack your operation." That's what we need to avoid.

THE COURT: Isn't your objection more to the whole notion of the 50 years and the whole notion to this Board having predominant Illinois representation?

If you do your discovery and you find that there is absolutely no coercion on behalf of the two -- or involving the two individuals, you still have Professor Brody's affidavit. And isn't her affidavit or her declaration simply saying, even if there wasn't that kind of coercion, this settlement itself shouldn't be -- is that the public policy dictates that this settlement shouldn't be approved?

MR. CUMMINS: Well, the answer to that is, first of all, there has been such a great emphasis on coercion, if as a matter of law and fact under the circumstances that people develop in this

please, Mr. Todd?

MR. TODD: Yes. It's Chris Todd.

And Dr. Tucker submitted the Second Declaration, which is attached as Exhibit 19. And in paragraph eight he speaks directly to a Dr. Stebbins' issue stating that, starting with his first report to the Board as an advisor in 1997, there were strategic planning sessions in 2000. Dr. Stebbins encouraged a review of both in-state and out-of-state options.

He has been an especially strong advocate of maintaining a stand-alone museum.

So I submit that to your Honor as further evidence of Dr. Stebbins' position prior to the draft complaint that the Attorney General showed Dr. Stebbins.

THE COURT: Okay. But it goes on and it says right after that that, when Mr. Perkins and the plaintiffs turned their focus on threatening him, that's when he started wanting to spearhead the idea of mediation.

Now, wasn't he a proponent of the mediation from the beginning? Am I wrong on this one?

direct communication. The ILC was composed of Jacque Adreani --

THE COURT: And Dr. Stebbins.

MS. STONE: -- and Ted Stebbins. They were equal members of the Independent Litigation Committee.

Without in any way waiving the attorney-client privilege, I will state that the Independent Litigation Committee authorized us to explore the possibility of mediation.

I believe, even before this time, Mr. Crowe had already started to make noises about mediation to your Honor, but they might have been more closely linked to time. I am not precisely certain on that point.

THE COURT: I remember even recessing some of our discussions, so that Mr. Conlon -- to get on the phone and try to get direction from the client, who wanted -- I remember one day in particular, particularly wanted the mediation idea to be explored, because it was the plaintiffs who originally didn't want anything to do with mediation.

MR. TODD: But, your Honor, this points

question before his?

THE COURT: Yes.

MR. TODD: This has mystified me since I have entered this case. We have this extraordinary situation where you -- we are all proponents of mediation and your Honor is one of the -- I am led to believe, the foremost proponents of mediation.

It is a good thing, but I have never seen nor would I submit we would ever want a mediation where one of the parties, in this case the Attorney General of the State of Illinois, during the course of the mediation, step aside and uses a very powerful weapon that the Attorney General has. He says unrelated to the mediation.

He says, "I didn't really -- I didn't speak to Mr. Stebbins about the draft complaint."

That wasn't -- It's like coming into a settlement conference and putting a .357 Magnum on the table and saying, "I never talked about the gun," or whether it would go off or whether someone could get hurt.

It's nonsense. I have never heard of a mediation where in the middle of the mediation,

and regaled this Court with the critical analysis of the law that demanded independent and disinterested members of this Board, in order to reach decisions about litigation decisions.

Judge, the very folks that are not suggesting to you that whether or not folks are disinterested or independent or whether or not we can establish the necessary elements to have this settlement seen for what it is are the folks who are arguing 180 degrees out of phase on that issue earlier.

And it comes down to one simple proposition: Let us please develop the record.

THE COURT: Okay. I assume that Ms. Stone wants to be heard, because she is standing.

I assume, and tell me if I am wrong, that Mr. Perkins may want to say something or is that a wrong assumption?

MR. PERKINS: Judge, I will wait until after Ms. Stone has to say.

THE COURT: What about you, Mr. Quinlan or Mr. Kennedy?

MR. QUINLAN: I would like to say something. Let her speak.

or under seal.

THE COURT: Okay.

MS. STONE: Including the three that we have asked for more time to that.

MR. TODD: I don't mention those.

THE COURT: Okay. So I am going to need -- when you present me with the orders, to take a few moments and make sure that they correspond with what my understanding of what everything was. And I would like to make sure that we are covering everything, because my goal here is to unseal as much as we possibly can get unsealed and so that all of this can be made available to the public.

So we need to -- I would really like to sign those orders today so that overnight you can give whatever is needed to be given.

Ms. Stone.

MS. STONE: Your Honor, several points.

First, your Honor asked pointedly of the objectors: Is there any case where someone who is not a party to the hearing has come in to court and successfully blocked the agreement that the agreeing parties want to enter into?

They have not been able to find

Chicago. And there was no inconsistency with that position and the documents he agreed to at the Board meeting.

Whatever Dr. Tucker may say in paragraph eight of his Exhibit 19 about thinking that this is a serious tension with Dr. Stebbins' long-stated views about the Foundation's best interest, that's not what Dr. Stebbins himself believes.

With respect to Dr. Marshall, they have not been able to show you the switch, the coercion, the intimidation, because once again they don't have the facts to support it.

The settlement -- Excuse me. The mediation documents before you show that in May Dr. Marshall said that she wouldn't be able to accept the current proposal under debate. She thought that certain changes should be made.

You can tell, your Honor, by looking at the document that the Board agreed to, that those changes were, in fact, made so that Dr. Marshall, if anything, was a vigorous advocate for the Foundation's interest.

And, in fact, the deal did get better

statement that -- the first part of the sentence that says they would consider keeping the collection in Chicago while perhaps considering a merger with the Art Institute or Northwestern or moving it to another city.

So they are citing to you half of a sentence from a document authored by three people several years ago and using that as their clear and convincing evidence of coercion. It just doesn't wash, your Honor.

Number three, they use a lot of hyperbole. They talk about abuse of power, a gun pointing at someone on the settlement team, something rotten here. It's a lot of very sexy, highly charged language. But when you strip away the hyperbole and look at what they really have, there just isn't any evidence, let alone any clear and convincing evidence of something rotten.

Your Honor has given them an opportunity to come forward. You said at the last hearing, "What you said about the opportunity to take discovery, I have not foreclosed that."

I am saying that based on what you filed, there is nothing to take discovery on right

And that gets to their -- my fourth point, their argument that sounds so appealing on its face, which is, Judge, all we are asking for is six hours. You are going to be gone for three weeks. What's the problem?

I mean, it does sound very reasonable, your Honor, and given your attention to detail, I'm sure it hasn't appealed to you, but your Honor has to stop and think about the equities for everyone involved here.

First of all, look at what the resolution is. Look at what the Consent Judgment says. It says that by August 1st we have a deadline the Board has to meet -- if you approve this, the Board has to meet to elect a new Chairman, elect new officers, elect new committee heads, elect a new Executive Committee, elect a new Strategic Planning Committee. These are real deadlines.

THE COURT: Okay. They are real deadlines, but are they hard and fast deadlines?

Are you trying to say that the Board is going to say there is no deal if the Consent Decree is not signed before that day?

they should be afforded an opportunity to discover.

Fifth point, your Honor. They are advocating really a very dangerous reading of this proposed Consent Judgment.

When Mr. Garment, a noted lawyer, gets up and speaks about appropriation of Foundation property, that's a very scary reading of this document. It is not supported by a literal reading of this document.

I would think that the individual defendants would not want this document to be screwed -- to be construed in such a way as to hamstring the Foundation's going forward.

And I would submit that, if your Honor carefully reads the Consent Judgment, asks all the questions you have asked during these several hours of hearings, you will recognize that the Foundation has preserved to itself full rights to operate its own affairs and businesses, with the few restrictions we have identified, but that there has been no appropriation of Foundation property, that the property remains the Foundation's and the Foundation Board will decide how to use that property.

But we simply don't think that they should be granted leave to file a counter-claim when there is nothing to be counter to, if the Consent Decree is entered.

THE COURT: I do have one question for you, Ms. Stone.

Defendant's objections are four-part. And the first of the four part I never quite was clear on and that's the business about the number of directors, the four, the five, counting the votes.

Let me just start with the beginning. This meeting was held that approved the Consent Decree with Ms. -- or Dr. Marshall chairing the meeting.

MS. STONE: Correct.

THE COURT: Let's start with that. How did she get to be the chair?

MS. STONE: Your Honor, she has chaired several meetings as an officer, who is not a named party, the only officer of the Foundation who is not a named party.

Ever since your Honor ruled that you didn't think it was appropriate for Dr. Tucker to

fuzzy --

MS. STONE: Your Honor, --

THE COURT: -- because they are talking about five lawful votes and I am not quite sure what your position is on that one.

MS. STONE: Yes. I think it's fair to say that there is some ambiguity in the bylaws, your Honor. And as to whether it would require five or six votes.

We believe out of an abundance of caution to make sure that this bylaw change is airtight from the Foundation's perspective that six members should vote for it, because that would constitute a majority of the directors in office, you know, on the Board.

The individual defendants have said, well, they believe it was -- only five is necessary, given the fact that only eight people showed up at the meeting.

So they said -- because they are saying it's a two-part test, the majority present -- the majority who are in office, plus a majority who are present in the meeting and they say, because there are only eight people present at

need six votes? So --

MR. PERKINS: No, your Honor.

THE COURT: We have some headshaking.

MR. QUINLAN: Well, your Honor, --

THE COURT: How many votes do you need, Mr. Quinlan?

MR. QUINLAN: Your Honor, we raised the possibility under the Statute of 108.60. I think all this is academic, because there is no conflict. But we have raised even under the worst possible scenario under 108.60, which is the Statute, a not-for-profit, and the articles don't address their attention to that. Surely no -- address their attention to situations where there is interest. Strike it. Strike that.

Excuse me. That they don't address the situation where there is an interest, a director who has voted, but the article date does, and it specifically provides that, if there is enough people for a quorum, including the directors who are interested, the quorum stands.

Then the only question after that is the majority of people, when you remove the interested directors. The majority vote would

they were aware of those things. They acted upon it and acted upon it, in any event.

THE COURT: And so then the vote is four-two and that's enough to carry the day, is that what you are saying?

MR. QUINLAN: Right, right. Four of the six would be voting and that would be enough under the Statute to do it.

We would argue the Statute applies. On the other hand, we only cite that because we are saying under that scenario, even if they were right, which they are not right, still it would pass, it would be valid, and we could still go forward. So there is no basis for that.

THE COURT: Okay.

MR. QUINLAN: If counsel is finished, I have a couple of other comments.

THE COURT: Okay.

MR. QUINLAN: Your Honor, here we had several things.

First of all, there is no subsequent pleading in front of your Honor of any kind.

THE COURT: They want to.

MR. QUINLAN: They want to, but there

This is all this time. Now they have filed merely an objection, which is not a substantive pleading.

In all of this, these things, they have made no showing of any standard. They have no cases of authority to support their contentions or any of their requests. They have not addressed the matters that we have raised in our response to their objections and our cases and authorities. They have done nothing.

All we have here, your Honor, is rhetoric. They talk about abuse of power. The issue here is there would be an abuse of power if, in fact, we get into a situation where this leads to discovery.

And what we are doing here is putting ourselves at risk here of having discovery taking place when there is no pleading on file. And I will address the counterclaim in a second.

We talk about policy. They cite Professor Brody. Professor Brody's comments are very interesting, but they are all her own opinions. Her background is in teaching, somewhat of the charitable trusts and not-for-profit, but tax,

of this, over ten months. Five months, nothing has been filed.

THE COURT: But you do recognize that from February 5th on there was this order that pretty much everybody wasn't supposed to file anything.

MR. QUINLAN: But they had over five months from the time that the answer was due. In all of that time, they did not file.

Some other things that I think are worth noting, as well, here is if we look at the situation, first of all, if we look -- what can you do if you don't have a complaint on file? The only thing you can do is you file under 5402, which is respondents in discovery. That only allows you to identify the parties.

Rule 181 requires that the answer be filed in 30 days. Under 240 -- Excuse me. Under 52608, the counterclaim is required to be filed, with the answer. No counterclaim has been filed. They haven't asked leave to file the counterclaim. There has to be something that would be meritorious.

We have a situation here that the real thing and the only thing that's in front of your Honor is the motion to file on the Consent

with discovery here. They are asking for a discovery. The only basis for this will be going into mediation matters.

THE COURT: I'm sorry. You need to slow down, because I am not even getting the words, they are coming so fast. So I can't imagine that the court reporter is getting them all.

MR. QUINLAN: Okay.

THE COURT: Slow it down a little bit.

The mediation --

MR. QUINLAN: They are asking for discovery and the discovery that they are asking for will necessarily invade mediation. And they have agreed mediation statements or process would be private and that nothing that is said there could be used by anybody in any litigation for any purpose outside the mediation.

They asked for the mediation. They participated in the mediation. They agreed to that.

The only basis for getting -- interdicting the mediation is where a criminal act may have taken place. Beyond that, there is no authority to get in to invade discovery.

But the real bottom line here is

nothing other than agreement, the agreement of the parties and being the right terms. And that's what it is.

So that we dismiss -- The case will be dismissed. It is dismissed pursuant to the terms of that agreement. There is no case pending.

If they have any rights, those rights are out there like anybody else has a right if there is a case to be filed, if there is something that can be filed, a complaint that can be filed, that's wonderful. I doubt that there is any. I can't see that any grievance has been foisted upon them as a result of this, other than they are dissatisfied with the result.

In every situation where you have a resolution there are always dissatisfied parties. That does not give you a right to complain. It surely doesn't give you any right to discovery.

THE COURT: One of the counts of the counterclaim is the 1983 action. Now, there was a 1983 action filed in Federal Court.

MR. QUINLAN: Right.

THE COURT: That's been dismissed with prejudice?

abstention rulings, Judge, and it was done on the 29th, so it was within 30 days.

MR. QUINLAN: Your Honor, --

THE COURT: Okay. So it was the 29th of June. Okay.

MR. QUINLAN: The plan -- She does base it on abstention, but she goes on and also addresses the substance of the 1983 action.

THE COURT: She essentially says that there wasn't any 1983 violation here.

MR. QUINLAN: 1983 action, that is correct. And they talk about --

MR. CUMMINS: Well, that's a nisi prius judge that you don't have to refer to, with all due respect to Judge Bucklo.

MR. QUINLAN: Your Honor, -- First of all, let me finish. Would you like counsel --

All I am trying to say is the Court dismissed it, did look at the merits of it, dismissed it. It was out there. It's dismissed.

They say -- They came back here and they brought their action here.

I would like to find it. There is no 1983 action pending here. They are trying --

Mr. Cummins?

MR. CUMMINS: It's a printed opinion of Judge Bucklo's.

THE COURT: Oh, okay. I've got the other one all marked up.

MR. QUINLAN: Page ten of the other one is the slip.

THE COURT: Yes, that's the one I have all marked up, so.

MR. CUMMINS: It's just easier to read those, Judge, at least at my age.

MR. QUINLAN: Your Honor, on that basis, we would ask that you sign the order today and that order is the order that should be signed here.

As I indicated before, the process -- nobody has objected to this being the agreement. Nobody has objected to this being the terms.

And on that basis, I think we are entitled to have the order.

THE COURT: Ms. Stone, you don't want it signed today?

MS. STONE: Well, I don't think it's a matter of corporate formality. It should be signed today.

I believe she is in Wisconsin tonight. I will make every opportunity to fax the red line version to her and get her to sign it. But I think it would be more appropriate for us, then, to present it to you tomorrow.

Alternatively, we could handmark the version to your Honor, present it to you tonight, with the idea that Stephanie Pace Marshall's signature only would become binding tomorrow if she agreed to it.

I think the cleaner way to do it is to give a chance to reach out to Ms. Marshall tonight.

MR. QUINLAN: Your Honor, the only thing I would say is it, in fact, is administrative. It is really just a scrivener type of thing. It's making the clarifications that your Honor indicated. That doesn't require anybody's approval, because that says the agreement is the agreement.

It would seem to me that we could do that by interlineating between the lines as to what -- these matters being re-added. I don't see that anybody has to approve it or not approve it. But at the same time I think it's something that

These defendants came and said and conditioned, "Only if you will do a global release of us and everybody else, because we want it to be over with. We don't want to settle with the Foundation and litigate against the directors."

So they came knowing what the Stebbins issues were, trying to get more releases. And they sought those rights for themselves.

And Dr. Stebbins -- and from February 5th to the end of May and through June, they thought they were going to get releases. And they participated in mediation.

And it's only now, when at the last minute they didn't get what they wanted, that these defendants didn't have to get the terms they like, that they now try to point -- maybe Mr. Dobbins and/or Mr. Stebbins is the person who shouldn't have been able to vote, because he has some kind of conflict.

It's ridiculous, Judge. It was the process of mediation. It was their very terms. They are the ones that waived the right to complain about Dr. Stebbins' time.

Coincidence. They want to talk about

MR. PERKINS: Judge, it was a very discrete -- It's over now. We don't even call it an investigation, because that terminology displayed to the public is something we would never have said. We would have called it review or inquiry, because it's too derogatory to call it an investigation.

We investigate and look into cases when we have charges. We review and do inquiries when we have matters that we need to attend to.

The Attorney General is charged with protecting the public interest, the beneficial interest of 25,000 charities. By Illinois law, he is the only person who can look at what charities do, what charities are doing and question them.

THE COURT: So you made a factual inquiry. You are making no investigation into the Academy or in regard to Ms. -- Dr. Marshall; is that correct?

MR. PERKINS: That's correct, Judge. There were no charges made. There were no attempts to -- There is no proceedings involved, an inquiry, "please produce this," a question to them. That was the extent of it. And those matters were quickly resolved.

that took place, Mr. Perkins, in the mediation scheme of things was when?

MR. PERKINS: At the end of May, when the parties threatened that they weren't going to continue with mediation, we started to look at the preparer, because we had certain matters to look at.

And on May 25th, we issued what's called an Order to Produce, a statutory order to produce, produce a particular document to Ms. Marshall and her school. And that was resolved probably by June 12th, 14th, something like that.

THE COURT: And right before that happened, had Ms. Marshall taken any position in the mediation that reflects that she wasn't -- didn't want to settle this case? Did her position change?

Is there anything in these documents that reflects a change in her position?

MR. PERKINS: Judge, as you know, what we have given you in the exhibits is her May 21st transmittal letter saying she didn't particularly -- though she didn't like everything, she had a laundry list of things she wanted to change with

She was -- In her letter of May 21, at the end paragraph she says, "I am interested in continuing mediation, where these defendants were not."

But, Judge, you asked this question. You said, you know, what do they do now?

Well, Judge, they have no evidence and we are really -- Where are we? We are in a part -- a point where they don't really have any right to discover at all.

Where we are at is there is a settlement proposal before your Honor. Maybe they have a counterclaim on file. Maybe they don't. We can all argue about that.

But if they do, it's not timely for discovery to take place under their counterclaim. And their objections don't have evidence, that they have any proof of wrongdoing.

Your Honor, duress has been universally defined as a condition which exists where one is induced by the unlawful act of another. That's Illinois Supreme Court law in our State. That's People vs. Catholic Homes Bureau at 68 Ill 2d, 433. It's in our papers, unlawful.

out and they will have to figure out another way.

There is no right to go on a fishing expedition in the hope that maybe they will find evidence that will then give them rights to have a cause of action. That's not how it's done. You don't get expedited discovery to go on a fishing expedition in the hope.

They just don't have a position here that allows them to get the expedited discovery. And they don't have any pleadings on file that would stand in the way of your Honor entering a Consent Decree.

THE COURT: Thank you.

MR. TODD: Your Honor, may I just respond?

THE COURT: Sure.

MR. TODD: Could I direct your Honor's attention to Exhibit 21, since your Honor has kept that under seal? This is Dr. Marshall's May twenty--

THE COURT: Hold it one second. I need to get -- It's your Exhibit 21, right?

MR. TODD: Correct, yes.

THE COURT: Okay.

MR. TODD: You asked the question, did

MR. TODD: Okay. That's --

THE COURT: There wasn't -- Just wait one second.

There was a meeting of -- with the mediator on May 11th? Is that a Friday?

MS. STONE: Correct.

THE COURT: An all-day session with mediator on May 11th. And at the conclusion of that day, parties walked away with the idea that there was a settlement.

MS. STONE: Well, --

MR. PERKINS: Some parties, Judge.

THE COURT: Some parties.

MS. STONE: Not all parties.

THE COURT: Well, some parties went away with the idea that there was a supplement and then all the mediator had to do that day was put it in writing and pass it around.

MS. STONE: Well, no, the Foundation always believed that a properly convened Board meeting would be necessary, in effect.

THE COURT: Well, yes, but in other words, the mediator was going to put it into writing. It was put into writing. It was then distributed to

-- Excuse me. She is talking about the Attorney General's version of the proposal.

MR. TODD: Correct.

THE COURT: Now, somebody give me the exhibit number, please, because it's getting very late and I'm getting a little bit tired. Tell me the exhibit number of Mr. Hilliard's proposal.

MS. STONE: Well, --

THE COURT: We have that here.

MS. STONE: Which proposal, your Honor?

THE COURT: The one after May 11th.

MS. STONE: As long as your Honor understands that the proposal being discussed back in May is not the proposal which found form in the Consent Judgment.

THE COURT: Okay. Wait one second.

MS. STONE: Two technically different proposals.

THE COURT: Right. I've got -- I am just trying to understand counsel's argument and in order for me to understand it, I have got to put it in context. And that's Exhibit K of the Attorney General, has got what --

Is this what Mr. Hilliard was

THE COURT: And she is saying, "I am going to make my comments on David Hilliard's version."

MR. PERKINS: That's correct.

THE COURT: Okay. Now, go ahead.

MR. TODD: Your Honor, it speaks for itself.

And in reply to the last comment, that's why we need some evidence, why we need Dr. Marshall to clarify what was in her mind. I know Mr. Perkins from our last conversation, he conceded he doesn't read minds. He is telling you what was in Mrs. -- Dr. Marshall's mind. We need for her to tell us.

MR. PERKINS: I think the last paragraph of Dr. Marshall's May 20th document, your Honor, says, "I am very interested in continuing working on mediation." I really wasn't reading her mind. I was reading her words.

MS. STONE: And, your Honor, you have her words. You have her words at the Board meeting, where she said she is voting her free will. She is not being coerced.

And, again, your Honor, it makes no

from attending.

MS. STONE: And some people were not even able to participate on the phone, your Honor, like Madame Ahweiler.

MR. PERKINS: Most were, Judge. Most of the Board members participated.

THE COURT: And there was a circulation of what -- right before that meeting, of what was a latest draft, which also embodied subsequent input from Ms. Marshall?

MS. STONE: That's correct.

THE COURT: And the bottom line, as you see these progress, is the Foundation came out better at the end, did it not, because of this?

MS. STONE: It did, your Honor, and, you know, again, I thought we were not supposed to get into the intricacies of mediation. I didn't think we were supposed to be able to use what was said in mediation to further their litigation strategy.

THE COURT: They were real simple. They didn't say what she said. They just asked me to read it.

MS. STONE: Well, without myself violating

hardly getting better.

I think it's probably time to wrap it up. I would just say this, your Honor. When Mr. Perkins was speaking and explaining who said what to whom, what happened when, without any record, that's precisely why we need this discovery. And I am not going to put you through the same arguments once again.

I just ask you to grant us the limited relief that we are requesting.

I think there is more than ample evidence before you to justify that relief and not give us that will in our judgment compromise this entire process that you spent so long and hard on.

And we ask you to rule in our favor on that matter, Judge, and simply defer, do what they say is alleged housekeeping. And we dispute that, as well. Defer ruling on this matter until we have had an opportunity to present you with the evidence that we said we will present.

Thank you very much.

THE COURT: Thank you.

Counsel, we have had a long day today

their cases.

This case has had a very, very contested and, shall we say, tortuous history since last September when it was filed.

I believe there have been three appeals, there may have been more, with cross appeals and further appeals. There have been -- There has been a contest along the line of virtually every issue that has been raised in the case and it's an important Foundation and it's an important case and it needs to have careful and deliberate consideration. And I have tried to do that.

I have found nothing in these papers that have been cited by the objectors that should cause me not to approve this settlement. I really don't see it as a close call with respect to counsel and with the fine amount of work that was done here.

I have thought about the process of where we were when we went to mediation and the history of the case and what we were facing and why we went. It was a very difficult process to even get the parties to go to mediation. And the

and again today in Chambers.

And after you get through all the music and all the stuff in the beginning of getting everybody on the line and you try to get to that first motion, which is an interminable motion to change the documents, which never got changed, I listened and relistened to the section of the tape when counsel for the Foundation advised everyone about their fiduciary obligations and their votes.

And I listened to the way Ms. Marshall voted and what she said and how she said it, as well as Dr. Stebbins and what he said and how he said it.

This was a lady who was in control. She was running that meeting and she was controlling some very difficult situations and early on in this meeting she said, without any hesitation, that if they made a change she wasn't going to go for this thing.

She didn't like the change that had been advanced by Dr. Stebbins and she wasn't going to go along with it. And this was not a lady who was being intimidated by anybody.

I also did not feel that there was

Foundation.

But I don't read this Consent Decree as the restrictive document that counsel for the defendant has said that it is.

I think this collection can be moved around and loaned and shown throughout the world and everybody, including the people of the State of Illinois, are going to benefit from that.

I do have a very severe problem. And I won't sign a piece of paper that has that last sentence on it, that says no other public statement shall be made. So that has to be changed with combining the two sentences and putting in the words, "and these parties have agreed."

And I won't sign it unless -- I don't want to sign a red line or a sloppily-written document today. I want that first paragraph corrected so that it says who filed answers, including defendant Michaeli, who is not mentioned in here. Everybody who has filed a current responsive pleading.

And as far as I am concerned, I have no problem allowing these defendants leave to file their answer and that can be put in there,

this action. And that's without prejudice to them bringing any other separate lawsuit that they may see may be appropriate in any valid cause of action that they may have against any individual. But it's not part of this case.

This Foundation was lucky enough to have one of the most experienced and capable mediators. I did not really believe that this case could be mediated successfully to conclusion.

At the time that it went out, I had some very, very strong doubts. I believe this is a just and appropriate conclusion. I do not see it as a case in which there has been abuse of power and I definitely don't see it as a case in which the State has tried and succeeded to take control of a charitable foundation.

The Attorney General is not controlling this Foundation, as being alleged in the papers. And this Court is going to be able to continue to operate the way they have.

The big difference is that this Board is now going to be able to operate. There will be a functional Board, which there has not been for almost a year now. And the Board will be able to

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THE COURT: On the what, sir?

MR. CUMMINS: On the counterclaim, the denial of the counterclaim.

THE COURT: Well, once I sign that, I don't have to certify anything. You have got a final order and you can go up to the Appellate Court tomorrow. I will be signing all of these tomorrow, with the exception of the question of the unsealing. And I want to do the unsealing tonight.

MR. CUMMINS: And you are making a specific finding, I gather, that there is no conflict with respect to those two directors?

THE COURT: I am not putting any Findings of Fact in the order that I am signing, but I am telling you that I do not see anything in the papers that have been presented to me. And I have read all the mediation papers that have been as attachments here. All the sealed documents.

I have not seen anything here that would defeat the entry of this Consent Decree.

MR. CUMMINS: The reason I want a clarification, Judge, you made a ruling with respect to your perception that they didn't seem to feel coerced, which is --

members that should not have participated.

Is that what you are saying?

MR. CUMMINS: I am wanting you to make a ruling on that, yes, Judge.

THE COURT: They could properly participate in this decision and they did properly participate in the decision.

MR. CUMMINS: I just want to clarify that finding, because that's an issue.

MR. GARMENT: May I, your Honor, --

THE COURT: Yes, sir.

MR. GARMENT: -- express my disappointment at your Honor's ruling, understanding what you articulated.

It is a very long distance from the commencement of this proceeding and I would like on the record to simply have it appear once again that this case started with a suit that was brought by two dissident directors, Mr. Buntrock and Mr. Gidwitz, which were not privileged documents, it would have been a very clear, very flagrant slander, because it was filled with false allegations that have been known to be false.

On the basis of that pleading,

out of all of the cosmetic changes and alterations that have nothing to do with the fundamental defect in this case that started right at its beginning, continued all the way through, and it's now finally solidified in the Judgment of the Court.

MR. QUINLAN: Your Honor, I have to object and ask the comments be stricken. Counsel has no basis to make those comments. Frankly, the only test of this has been where your Honor denied the motion to dismiss.

And they have filed an answer today, which admits there is a cause of action. So I don't know how counsel can stand in front of this Court and make his grand speech of the basis that there is something here that is totally unfounded.

The complaint was proper. It was found proper by this Court and it's now been found proper by filing an answer. And I object and ask it be stricken.

MR. CUMMINS: Well, Judge, --

THE COURT: I am not going to be striking any remarks of counsel. All of counsel's remarks may stay on the record.

And there were -- There was no

THE COURT: Which one, about the Special Litigation Committee?

MR. CUMMINS: Yes, about all the conflicts, Judge.

THE COURT: Okay.

MR. CUMMINS: All the conflicts, which quite frankly no one has addressed in resolution of this matter at any time, including the fact that lawyers who purport to represent the Foundation can currently represent folks individually who purport to be taking actions inconsistent with the Foundation.

But I just assume, when folks made those pleadings, they believed it to be true.

THE COURT: Mr. Cummins, there comes a time that all litigation has to be ended. And this litigation is going to be ended tomorrow in this Court with the signing of these orders.

And the only thing that is going to remain is the Petitions for Attorney's fees, which the Consent Decree requires me to adjudicate. And if I am wrong, I am sure the Appellate Court is going to tell me I am wrong and I will see you all back here.

MS. STONE: I believe it's necessary to respond to the last salvo by counsel for the objectors.

Sidley, Austin, Brown & Wood solely represented the Foundation. We do not represent any of the defendants in their -- any of the directors in their individual capacity. We do not represent Dr. Stebbins in his individual capacity. He has another lawyer for that purpose.

We do not represent Dr. Marshall in her individual capacity. We represent merely the Foundation. We give advice to the six non-named, nonparty directors. That includes Dr. Stebbins and Dr. Marshall.

There is no conflict by Sidley, Austin, Brown & Wood at any point in this case. There is no conflict anywhere.

Thank you.

MR. QUINLAN: Judge, I would like to reserve my comments for the lounge across the street after the proceedings here.

Thank you.

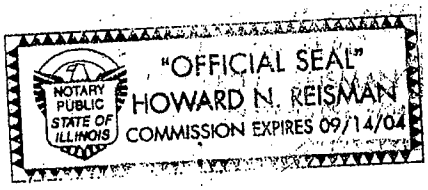
THE COURT: We are in recess. Thank you.

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, HOWARD N. REISMAN, being first duly sworn on oath, says that he is a court reporter doing business in the City of Chicago, County of Cook, and State of Illinois, and that he reported in shorthand the proceedings had in the matter of the above-entitled cause, to the best of his knowledge, skill, and ability, and that the foregoing is a true and correct transcript of his shorthand notes so taken as aforesaid and contains all the proceedings had at the hearing of the said matter.

Howard N. Reisman

HOWARD N. REISMAN, CSR and Notary Public, Cook County, Illinois
License #084-000411 7-31-01
Expires 5/31/03



16di-001878

RPC _____
TCC _____
FILE _____
DOCKETED _____ LCG-N002

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean Buntock

v.

Judith Terra

NO. 00 CH ~~1359~~ 13859

ORDER

This matter coming on the Court's ruling to unseal certain exhibits, the parties having notice and the Court being fully advised in the premises; IT IS HEREBY ORDERED:

(1) All exhibits filed in support of the Objections of Judith Terra, Paul Hayes Tucker and Alan Simpson shall be unsealed except for exhibits #3, 16, 17, #21, #23, #25 and #31, which shall remain under seal.

(2) All exhibits filed in support of Plaintiffs' Response to Director Defendants' Objections to the Settlement shall be unsealed except that the names of all proposed mediators contained in exhibits A and B, except for the name of David C. Hillard, shall remain under seal.

Atty No. 33745
Name Quinlan & Crisham
Attorney for Plaintiffs
Address 30 N. LaSalle Suite 2902
City / Zip Chicago, IL 60602
Telephone 263-0902

ENTER:

_____, _____
Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Page 1 of 2

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean Buntrock

v.

Judith Terra, et al.

NO. 00 CH 13594

ORDER

3. All exhibits filed in support of the People's Response to Defendants' Objections to the Proposed Settlement shall be unsealed except for exhibits F, G, J, K, L, N, O, P, Q, which exhibits shall remain under seal. With respect to exhibit B, the names of all mediators and observers proposed shall remain under seal except for that of Harold Hellerd.

4. The People's Response to Defendants' Objections to the Proposed Settlement shall remain under seal.

5. As to exhibits G, N and Q to People's Response, counsel for Terra Foundation shall inform the court by Thursday, July 26, 2001 as to whether Terra Foundation objects to these exhibits being unsealed.

Atty No. 33745
Name Gailen A Crohan
Attorney for Plaintiffs
Address 30 N. LaSalle Suite 2502
City / Zip Chicago, IL 60602
Telephone 263-0903

7/24, 01

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 24 2001

Judge **Judge's No.** 276

JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

By:

JUL-25-01 09:18AM FROM-CHANCERY DIVISION OF CIRCUIT COURT CLERK + T-588 P.02/03 F-319

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN BURCOCK et al

v.

JUDITH TENKA, et. al.

NO. 00 CH 13959

ORDER

THIS COMING COMING BEFORE THE COURT ON THE PLAINTIFF'S & ATTORNEY GENERALS MOTION TO FILE A BRIEF IN EXCESS OF 15-PAGES INTANTER AND THE DEFENDANT DIRECTORS OMNIBUS MOTION TO FILE A BRIEF IN EXCESS OF 15-PAGES IT IS HEREBY ORDERED THAT THE PLAINTIFF'S, THE ATTORNEY GENERAL'S AND THE DIRECTOR DEFENDANTS MOTIONS ARE HEREBY GRANTED.

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7/24, 01

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 24 2001
JUDGE DOROTHY KINNAIRD-276
DEPUTY CLERK

Judge 276
Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

JUL-25-01 09:18AM FROM-CHANCERY DIVISION OF CIRCUIT COURT CLERK + T-588 P.03/03 F-318

16di-001882

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

16di-001885

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-001886

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:05 A.M.

16di-001888

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date:_____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By:_____

Its_____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____
Assistant Attorney General (Title)
State of Illinois

Print Name: Floyd Perkins

Date: 7/6/01

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Pace Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

prospective relief incorporated into the extended collective bargaining agreement. The extended collective bargaining agreement would bind its signatories to the terms of the settlement. The plaintiffs agreed to settle these actions and forego their claims for back pay and attorney's fees in exchange for wage and job classification concessions made explicitly enforceable by a collective bargaining agreement. But because Essex House was not a signatory to the extended collective bargaining agreement, it was not bound to honor the prospective relief. As a result, the arbitrator reasoned that Essex House gave no consideration to the union for the settlement and was not covered by the memorandum of understanding.

After the arbitrator's decision, the parties petitioned this Court to approve the settlement, even without Essex House. This Court scheduled a hearing for July 19, 1990, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to (1) consider the terms of the proposed settlement, (2) discuss the sufficiency of the notice provisions to the plaintiff classes, and (3) set a date for hearing objections to the settlement. Fifteen minutes before the 3:00 p.m. hearing time, this Court received a letter from new counsel for Marriott, Proskauer, Rose, Goetz & Mendelsohn, by signature of Bettina Plevan, objecting to the settlement (the "Marriott letter"). The Marriott letter indicated that Marriott had retained the Proskauer firm just days before to represent Marriott in connection with the proceedings regarding the settlement before this Court. The basis of Marriott's objection was that defendants' counsel pursued the settlement even though it excluded Marriott, which it had represented up until Marriott retained the Proskauer firm. As a result, Marriott alleged that defendants' counsel had been in a conflict of interest with respect to the settlement. Marriott asked the Court not to approve the settlement, and for time to investigate their conflict of interest allegation.

At the July 19, 1990 hearing, the Court heard argument and colloquy on Marriott's allegations. Marriott represented that it only objected to its exclusion from the settlement, not to its terms. Marriott conceded they would settle on the exact same terms, except that since they no longer owned the Essex House, they could not sign the extended collective bargaining agreement. Nikko, the current owner of Essex House, refused to sign the collective bargaining agreement. The Court recessed the hearing until the next day for counsel to discuss settlement of Marriott's claims.

At the hearing held July 20, 1990, the Court determined that the Marriott letter provided an insufficient basis to proceed ***1077** with an investigation of the charges against defendants' counsel. The Court then considered the notice provision, and ordered that publication of the settlement be expanded from the union trade paper to also include two weeks of daily publication in the New York *Daily News* and *El Diario*. Further, the Court set September 10, 1990 as the final hearing date for objections to the settlement. In connection with the September 10, 1990 hearing, the Court received only one set of objections, from Marriott.

II. Discussion

A. Settlement of the Actions

[1][2] In approving this settlement of these class actions, this Court should determine whether the settlement is "fair, reasonable, and adequate." *Ross v. A.H. Robbins Co., Inc.*, 700 F.Supp. 682, 683 (S.D.N.Y.1988); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir.1982), *cert. denied*, 464 U.S. 818, 104 S.Ct. 77, 78 L.Ed.2d 89 (1983); Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 1797.1 at 378. In this circuit, a presumption in favor of settlement exists where (1) the settlement was reached after arms-length negotiations; (2) the proponents are counsel experienced in similar cases; (3) there has been sufficient discovery to enable counsel to act intelligently; and (4) the number of objectants or their relative interest is small. *Ross v. A.H. Robbins, supra*, 700 F.Supp. at 683; *Munsey Trust v. Sycor, Inc.*, 457 F.Supp. 924, 926 (S.D.N.Y.1978); *see Weinberger v. Kendrick, supra*, 698 F.2d at 73-74. In applying these criteria, this Court will first and foremost consider the interests of the absentee class members. *See State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.1971); Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 1797.1 at 392-93; 3B *Moore's Federal Practice* ¶ 23.80[4] at 23-487.

[3] In this instance, the plaintiffs and settling defendants have met the burden of sustaining this presumption in favor of the settlement. First, this settlement was consummated after five years of litigation as a part of contract negotiations for a new collective bargaining agreement. The collective

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bargaining agreement negotiations were themselves "arms-length" negotiations, evidenced by the months of negotiations undertaken to extend the existing collective bargaining agreement. It undoubtedly follows that the subsumed settlement negotiations were conducted at arms-length. Second, counsel for plaintiffs and defendants are experienced labor lawyers who have represented their respective parties for years. Third, these cases have been litigated for many years, and have undergone extensive discovery and much legal maneuvering. Finally, not one single plaintiff in any of the classes objected to a single term of this settlement. That no plaintiff out of the several thousand involved in these suits objected to the terms of this settlement is a testimony to its fairness and sufficiency. As stated earlier, it is their rights that are the primary concern of this Court in evaluating this settlement.

As stated earlier, only one set of objections was received, namely, those from defendant Marriott Essex House.

B. Marriott's Objections

[4] Defendant Marriott objects to the proposed settlement on two grounds; (1) that the notice was insufficient, and (2) that defendants' counsel was in a conflict of interest by pursuing the settlement even though it did not include Marriott. Both of these objections are without merit and must be dismissed.

1. Notice

This Court squarely considered the content of the notice and the extent of its publication before approval. The transcript of the July 20, 1990 hearing reveals that form of the notice and extent of its publication were discussed extensively. The Court only approved the notice after expanding the publication to include two weeks of daily publication in the New York *Daily News* and *El Diario*. At that time, the Court explicitly determined that the notice form and its expanded publication ***1078** were sufficient to inform the class members of the settlement and its terms. Further, it is utterly disingenuous for Marriott to raise insufficiency of notice at this late time. Counsel for Marriott received the proposed notice of settlement in advance of the hearings held July 19 and 20, 1990. Marriott at that time did not raise any objection to the proposed notice form, even though they had every opportunity to voice their concerns.

2. Conflict of Interest

Marriott's conflict of interest objection can only be considered if it meets two threshold requirements. First, as a non-settling defendant, Marriott only has standing to object if it demonstrates that they will suffer "formal" or "plain legal prejudice" as a result of this settlement. [FN1] *Waller v. Financial Corporation of America,* 828 F.2d 579, 583 (9th Cir.1987); *Quad/Graphics, Inc. v. Fass,* 724 F.2d 1230, 1232 (7th Cir.1983); *In Re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 209 (5th Cir.1981); Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 1797.1 at 408. Second, Marriott's conflict of interest allegation can only be a valid objection if the settlement terms were negotiated while any potential conflict existed. *In re Corrugated Contained Antitrust Litigation, supra,* 643 F.2d at 208. Since Marriott cannot meet either part of this test, its objection must be dismissed.

> FN1. There is substantial authority to support the association and the union's proposition that Marriott *per se* has no standing to object to this settlement at all. First, the association argues that Marriott is not even a party to the settlement since these suits are separate actions later consolidated. Second, some courts have held that non-settling defendants *per se* do not have standing to have their objections considered. *See, e.g., In re Fine Paper Litigation State of Washington,* 632 F.2d 1081, 1087 (3d Cir., 1980); *Wainright v. Krafico,* 53 F.R.D. 78, 81 (N.D.Ga.1971). This Court need not reach these arguments in determining these matters.

First, Marriott argues that it stands to suffer formal legal prejudice because settlement of the other suits puts Marriott at a disadvantage with respect to its own settlement discussions with the union. Marriott's contention in this regard is at best highly speculative, and of doubtful relevance to the question of formal legal prejudice.

With respect to 85 Civ. 0216, Marriott's legal rights exist independent of the disposition of the other suits or other defendants. The suit against Essex House was brought as a separate action. The class of plaintiffs seeking relief from Marriott is distinct from the settling classes. Whatever financial liability that Marriott may incur after a trial on the merits is independent of the disposition of the other suits. Marriott may still raise every single legal theory in its defense now that it could have without the settlement. Marriott cannot demonstrate

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that it stands to suffer any legal prejudice at all from the settlement of the other suits.

With respect to 85 Civ. 9925, the dismissal of the other hotels and the association similarly does not prejudice Marriott's legal rights. The Essex House was operated as an independent entity, and whatever actions might be proved against it only relate to its own conduct. Essex House's potential liability is also not related to the other defendants.

Second, a review of the sequence of events surrounding this settlement reveals that the alleged conflict, if it existed at all, only arose after determination of the settlement terms. The union and the association opened negotiations on the extension of the collective bargaining agreement in September, 1989. The memorandum of understanding setting out the terms of the settlement was executed on January 30, 1990. During the settlement negotiations, defendants' counsel represented all of the defendants and executed the agreement on behalf of all of the defendants. When the dispute arose over whether Essex House was included in the settlement, defendants' counsel maintained that Essex House was, and argued on behalf of Essex House at the arbitration hearing.

Up until the May 10, 1990 decision of the arbitrator holding that Essex House was ***1079** not included in the settlement, Marriott's interests and the interests of the other defendants were one and the same. By Marriott's own logic, the potential conflict only arose after May 10, 1990, when the other ten defendants decided to pursue the settlement without Marriott. But this divergence of interests occurred over three months after the final terms of the settlement were memorialized into the memorandum of understanding. Given this sequence of events, it was impossible for the settlement negotiations to have been tainted by any conflict. Indeed, the record shows that the association and defendants' counsel fought vigorously for Marriott's rights.

In sum, it is most revealing that neither Marriott nor any other party to this entire litigation objects to the terms of the settlement. After considering the terms set out in the stipulation of settlement, the arguments of counsel, and that no objections from the classes has been received, this Court finds the settlement fair, adequate and reasonable under the circumstances, and should be approved.

III. Conclusion

The Court hereby approves the settlement of the above-captioned as set out in the stipulation of settlement dated July 11, 1990. For the reasons discussed, Marriott's objections to the settlement of the above captioned cases are hereby denied in all respects. Contemporaneous with this order, the Court will sign the order of settlement previously submitted to the Court as exhibit D to the stipulation of settlement.

So Ordered.

END OF DOCUMENT

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United States District Court, N.D. Illinois, Eastern Division.

Ruth PANTER et al., Richard Weiss, Alan Markovitz, Paul Kriendler, David H. Greenstein, Ronald Egnor, William Saltiel et al., Michael DeBartolo, Joseph Berke, Plaintiffs,
v.
MARSHALL FIELD & COMPANY et al., Defendants.

Nos. 78 C 537, 78 C 620, 78 C 1179, 78 C 1141, 78 C 1700, 78 C 2556, 78 C 2067, 78 C 2373 and 78 C 2480.

March 3, 1980.

Class actions were brought by department store shareholders against the department store and its officers and directors for alleged violations of securities laws and of corporate fiduciary duties in connection with withdrawn proposed exchange offer made by another department store. On defendant's motion for dismissal, or in alternative, for directed verdicts, the District Court, Leighton, J., held that: (1) defendants did not violate provision of Securities Exchange Act of 1934 proscribing use of manipulative or deceptive device or contrivance in purchase or sale of any security, nor did they violate rule promulgated by Securities and Exchange Commission pursuant to such statute; (2) defendants did not violate provision of the Act proscribing engaging in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer; and (3) directors did not breach fiduciary duties, existing under Delaware law, by resisting take-over attempt solely to perpetuate themselves in office.

Judgment entered on directed verdicts.

West Headnotes

[1] Federal Civil Procedure ⚿2111
170Ak2111

[1] Federal Civil Procedure ⚿2126.1
170Ak2126.1
(Formerly 170Ak2126)

Since directed verdict deprives plaintiff of determination of facts by jury, motion therefor should be sparingly granted; nevertheless, if facts and inferences point so strongly and overwhelmingly in favor of defendants that trial court is convinced reasonable men cannot arrive at verdict contrary to one in defendants' favor, granting of the motion is proper. Fed.Rules Civ.Proc. Rule 50(a), 28 U.S.C.A.

[2] Federal Civil Procedure ⚿2152
170Ak2152

When evidence in case is such that without weighing credibility of witnesses there can be but one reasonable conclusion as to verdict to be reached, district judge should determine the proceeding by directing verdict, without submission to jury. Fed.Rules Civ.Proc. Rule 50(a), 28 U.S.C.A.

[3] Federal Civil Procedure ⚿2142.1
170Ak2142.1
(Formerly 170Ak2142)

District judge should direct verdict where evidence, with all justifiably deducible inferences, will not support verdict in favor of party deducing it. Fed.Rules Civ.Proc. Rule 50(a), 28 U.S.C.A.

[4] Corporations ⚿310(1)
101k310(1)

General authority and power of department store directors, who allegedly violated securities laws and corporate fiduciary duties in connection with withdrawn proposed exchange offer made by another department store, was to manage corporate business and affairs for department store shareholders, and the directors' authority at all times was absolute, as long as they acted within the law; questions of policy and internal management were, in absence of nonfeasance, misfeasance, or malfeasance, to be left wholly to their decision.

[5] Corporations ⚿310(1)
101k310(1)

Under Delaware law, directors of publicly owned corporation do not act outside the law when they, in good faith, decide that it is in best interest of company and its shareholders that it remain independent business entity. 8 Del.C. § 141(a).

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[6] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

Acquisitions, expansions, and purchase of new stores are management decisions which, even though some shareholders may consider them breaches of fiduciary duty, are not grounds for liability under provision of Securities Exchange Act of 1934 proscribing purchase or sale of security by any manipulative or deceptive device or contrivance in contravention of Securities and Exchange Commission rules and regulations, or rule prescribed by the Commission pursuant to such statute, unless there is deception, misrepresentation, or nondisclosure in violation of the statute and rule. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

[7] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

There can be no violation of provision of Securities Exchange Act of 1934 proscribing purchase or sale of any security by manipulative or deceptive device or contrivance in contravention of rules and regulations promulgated by Securities and Exchange Commission or of rule promulgated by the Commission pursuant to such statute, unless evidence establishes that person or persons charged with such violation used mail or other instrumentality of interstate commerce, purchased or sold security, or sought to effect purchase or sale of security, and used manipulative or deceptive device. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

[8] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

Exchange of shares in connection with merger or sale of corporate assets constitutes "purchase or sale of security" within provision of Securities Exchange Act of 1934 proscribing purchase or sale of security by manipulative or deceptive device or contrivance in contravention of such rules and regulations as Securities and Exchange Commission may promulgate and within rule Commission promulgated pursuant to such statute. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

[9] Securities Regulation ⚿60.63(1)
349Bk60.63(1)
(Formerly 349Bk146)

In cases concerning alleged violation of provision of Securities Exchange Act of 1934 proscribing purchase or sale of security by manipulative or deceptive device or violation of Securities and Exchange Commission rule promulgated pursuant to such section, evidence, in order to establish violation, must prove that person or persons engaged in such sale or purchase did so with intent to deceive, manipulate or defraud, and expression "any manipulative or deceptive device or contrivance," as used in the statute and the rule, proscribes knowing or intentional misconduct. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

[10] Securities Regulation ⚿60.63(1)
349Bk60.63(1)
(Formerly 349Bk146)

Absent showing that department store, its officers, or its directors engaged in purchase or sale of any security during period from time acquisition negotiations initiated by another department store began until proposed exchange offer made by the other department store was withdrawn, and absent showing that the officers or directors in any way acted with intent to deceive investors by controlling or artificially affecting price of securities, no liability could be imposed, under provision of Securities Exchange Act of 1934 proscribing use of manipulative or deceptive device or contrivance in purchase or sale of any security, or rule promulgated by Securities and Exchange Commission pursuant to such statute, on basis that alleged intentional and deceptive failure to disclose policy of remaining independent resulted in manipulation of price of stock of the department store. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

[11] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

In order for provision of Securities Exchange Act of 1934 proscribing fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer to become operative, there must be exchange or tender offer, or at least announcement of one. Securities Exchange Act of 1934, § 14(d, e) as amended 15 U.S.C.A. § 78n(d, e).

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[12] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

For purposes of provision of Securities Exchange Act of 1934 proscribing fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer, phrase "tender offer" means any proposal, by individual, group or corporation, made through public announcements or other means of communication, to purchase securities made in manner likely to pressure shareholders into making uninformed, ill-considered decisions to sell. Securities Exchange Act of 1934, § 14(d, e) as amended 15 U.S.C.A. § 78n(d, e).

[13] Corporations ⚿585
101k585

Under Delaware law, directors have benefit of presumption that their judgment in dealing with any plan of merger was made in good faith and attributable to rational business purpose.

[14] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

Conduct of department store directors was not "in connection with any tender offer," within meaning of provision of Securities Exchange Act of 1934 proscribing engaging in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer, and thus their conduct was not in violation of such statute, where letter from another department store desiring to acquire the department store was only request that the directors and officers of the department store engage in merger negotiations, the proposed exchange offer was subject to condition, and the other department store never purchased any of the first department store's shares nor did it in any way solicit or urge shareholders of the first department store to sell. Securities Exchange Act of 1934, § 14(d, e) as amended 15 U.S.C.A. § 78n(d, e).

[15] Securities Regulation ⚿60.16
349Bk60.16
(Formerly 349Bk64)

Absent showing that directors of department store made untrue statement of material fact or omitted statement of material fact necessary in order to make statements made not misleading, the directors could not have violated provision of Securities Exchange Act of 1934 proscribing engaging in fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer in connection with attempt by another department store to initiate merger negotiations and in connection with proposed exchange offer made by the other department store. Securities Exchange Act of 1934, § 14(d, e) as amended 15 U.S.C.A. § 78n(d, e).

[16] Federal Courts ⚿17
170Bk17

In class action brought by department store shareholders against the department store and its officers and directors for alleged violations of securities laws and of corporate fiduciary duties in connection with withdrawn proposed exchange offer made by another department store, it was appropriate for district court to exercise its discretion to retain pendent jurisdiction over the claims of alleged violation of fiduciary duties and to determine whether the shareholders had established prima facie case, even though the shareholders failed to establish prima facie case of federal securities law violation.

[17] Corporations ⚿307
101k307

[17] Corporations ⚿312(5)
101k312(5)

As fiduciaries, corporate directors owe, under Delaware law, corporation and its shareholders duties of honesty, loyalty, good faith, diligence and fairness; they must act for benefit of the corporation and its shareholders, and never use their fiduciary positions to further their personal interests; corporate directors who negligently waste assets of company in buying stock of another corporation, and thus interfere with rights of shareholders, commit breaches of their fiduciary duties.

[18] Corporations ⚿182.3
101k182.3

Under Delaware law, majority of shareholders of corporation owe fiduciary duty to minority.

[19] Corporations ⚿182.3
101k182.3

Under Delaware law, it is inequitable, and hence

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breach of fiduciary duties, for corporation acting at instigation of majority of its shareholders to issue stock, without consideration, solely to prevent minority shareholder from completing tender offer that is proceeding in accordance with law.

[20] Corporations ⚿585
101k585

Where directors of department store decided, as exercise of business judgment, that suggested acquisition or proposed merger with another department store was not in best interest of the department store, the directors had valid reasons to believe that any merger of the stores would violate antitrust laws, and acquisitions which the directors authorized management of the department store to make were each consummated after directors considered business projections by management, received advice of lawyers and experts, and consulted with accountants and investment bankers, and reasonable ground existed for litigation brought against the other department store to resolve the antitrust questions, the directors did not breach fiduciary duty, existing under Delaware law, by resisting take-over offer solely to perpetuate themselves in office.

[21] Corporations ⚿310(1)
101k310(1)

Under Delaware law, directors of corporations discharge their fiduciary duties when in good faith they exercise business judgment in making decisions regarding the corporation, and when the directors act in good faith, they enjoy presumption of sound business judgment, reposed in them as directors, which courts will not disturb if any rational business purpose can be attributed to their decisions.

[22] Corporations ⚿310(1)
101k310(1)

In absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not, under Delaware law, interfere with exercise of business judgment by corporate directors.

[23] Corporations ⚿585
101k585

Under Delaware law, corporate directors have duty to oppose take-over which they have determined would be detrimental to interests of corporation and its shareholders.

*1171 Robert S. Atkins, Freeman, Atkins & Coleman, Ltd., Alan L. Unikel, Rosenberg, *1172 Savner & Unikel, Chicago, Ill., Donald H. Weinberg, Kohn, Savett, Marion & Graf, Philadelphia, Pa., Arthur T. Susman, Richard Prins, Robert D. Allison, Prins, Flamm & Susman, Ltd., Harry A. Young, Jr., Bilandic, Neistein, Richman, Hauslinger & Young, Ltd., Lawrence H. Eiger, Much, Shelist, Freed, Denenberg, Amend & Eiger, P. C., Chicago, Ill., George P. Birnbaum, Ira B. Rose, Phillips, Nizer, Benjamin, Krim & Ballon, Stuart D. Wechsler, Robert Harwood, Edward Labaton, Kass, Goodkind, Wechsler & Labaton, New York City, Sherrie R. Savett, Berger & Montague, P. C., Steven Kapustin, Mitchell Kramer, Kramer & Salus, Philadelphia, Pa., Hugh J. Schwartzberg, Schwartzberg, Barnett & Cohen, Max Sherman, Dvorkin & Sherman, Chicago, Ill., for plaintiffs.

Bryson Burnham, Tyrone Fahner, Charles W. Mulaney, Jr., Kelly R. Welsh, Mayer, Brown & Platt, Hammond E. Chaffetz, Joseph DuCoeur, Donald G. Kempf, Jr., Kirkland & Ellis, Michael W. Coffield, Daniel J. Pope, Charles W. Deuser, II, Coffield, Ungaretti, Harris & Slavin, Lowell E. Sachnoff, Marvin A. Tenenbaum, Sachnoff, Schrager, Jones, Weaver & Rubenstein, Chicago, Ill., for defendants.

MEMORANDUM

LEIGHTON, District Judge.

This is a consolidated jury trial of four out of nine related class suits in which the complaints allege violations of Sections 10b, 14d, and 14e of the 1934 Securities and Exchange Act. Twenty-one plaintiffs, on their behalf and representing four subclasses of 16,662 shareholders who own 9,054,065 shares of common stock of Marshall Field & Company, a Chicago based department store, sue for preliminary and permanent injunction, damages, and other relief. The suits are brought under federal securities laws and rules and regulations of the Securities and Exchange Commission. Plaintiffs invoke the jurisdiction of this court pursuant to 15 U.S.C. s 78aa; and they allege pendent claims based on doctrines of the common law.

In the earliest suit filed in this court, 78 C 537, plaintiffs and class representatives are Alice D. Sinsheimer,[FN1] Sam Brown, Arnold Kamerling,

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Julius Green, George A. Levitt, Jack Stacey, Jr., Estelle A. Stacey, Anita H. Johnson, Donald E. Tracy, Barber J. Tracy, Irving J. Hillman and Stanley Bernstein; in the next, 78 C 620, Richard Weiss; in the next, 78 C 1141, Paul Kriendler of New Jersey; [FN2] in the next, 79 C 1179, Allen J. Markovitz of Pennsylvania; in the next, 78 C 1700, David H. Greenstein; in the next, 78 C 2067, William Saltiel and Clarice Saltiel; in the next, 78 C 2373, Michael DeBartolo of New York; in the next 78 C 2480, Joseph Berke; and in the last filed of these cases, 78 C 2556, Ronald Egnor of New York. Plaintiffs, in varying amounts, are owners of the common stock of Marshall Field & Company, a Delaware corporation with its principal offices in Chicago, Illinois.

FN1. Ruth Panter, the original plaintiff in 78 C 537, was dismissed from the suit during the pretrial phase of the case.

FN2. Where the citizenship of a plaintiff is not stated, it is because he or she is a citizen of Illinois.

The defendants are Marshall Field & Company, [FN3] Angelo R. Arena, George C. Rinder, and Arthur E. Osborne, president and chief executive officer, executive vice president, and senior vice president, respectively, of Marshall Field; Jean Allard, Edward McCormick Blair, John M. Budd, Albert B. Dick, III, Howard M. Packard, John M. Simpson and Harold Byron Smith, Jr., directors of the company.[FN4] Each defendant, also in varying amounts, is a Marshall Field shareholder.

FN3. Marshall Field & Company is only a nominal party. Plaintiffs have stated that they seek no judgment or relief against it since they are its shareholders, and thus owners of the corporation.

FN4. The death of John M. Budd, prior to this trial, has been suggested; but no attempt has been made by plaintiff to substitute his legal representative as a defendant in these proceedings. See Rule 25(a), Fed.R.Civ.P.

In a stipulation of the parties approved by this court in a pretrial order, it has been ***1173** agreed that trial on the pleadings in Weiss, 78 C 620, Egnor, 78 C 2556, and Berke, 78 C 2480, will be binding on all parties in these consolidated cases with the exception of the plaintiffs in Panter, 78 C 537.

In each of these consolidated class suits, after the jurisdictional, venue, and general class allegations, plaintiffs complain [FN5] that in early October, 1977, a California corporation named Carter Hawley Hale, through certain members of its board of directors, approached Marshall Field & Company and expressed an interest in the two companies beginning to negotiate a merger; that this interest continued from that time through and including February 21, 1978; that on December 12, 1977, Carter Hawley Hale delivered a letter to Field proposing that it consider a transaction whereby Carter Hawley Hale would exchange a quantity of its common stock for outstanding stock of Field; that included in the proposal was the understanding that Field shareholders would have the option of receiving cash up to 49% of the total transaction; that on the same day, Carter Hawley Hale issued a press release announcing this communication that was transmitted by it to Field; that from time to time prior to that date, substantial, listed companies, other than Carter Hawley Hale, also approached Field proposing a merger or other form of permanent relationship between Field and those companies; that in February, 1978, Carter Hawley Hale announced that a specific tender offer would be made for Field's common stock under the terms of which Carter Hawley Hale would acquire outstanding common stock of Field for cash and stock amounting to approximately $42.00 per share; that Section 14(e) of the Securities and Exchange Act of 1934, 15 U.S.C. s 78n(e), provides in its pertinent part that:

FN5. This summary of the conduct about which the complaint is made, and of the unlawful course of conduct alleged, is taken from the first amended complaint in Panter, 78 C 537 and the amended complaint for injunction and other relief in Weiss, 78 C 620 because, when examined, it can be seen that the allegations in the other complaints are either identical or substantially similar to those in these two cases.

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in

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opposition to or in favor of any such offer, request, or invitation.

It is further alleged that, in spite of the prohibitions contained in Section 14(e), defendants, the directors of Marshall Field, conspired to and did embark on a course of conduct designed to deceive plaintiff(s) and other class members in order to induce plaintiff(s) and other class members to oppose the tender offer. It is also alleged that defendants conspired and embarked upon a course of manipulative acts and practices designed substantially to inhibit plaintiff(s) and other class members from accepting the tender offer. Plaintiffs allege a course of conduct, followed by defendants, aimed at defeating the tender offer of Carter Hawley Hale, and misleading and deceiving Field's shareholders and the public with regard to the company's plans for corporate expansion. In other counts of the complaints, it is alleged that the same course of conduct unlawfully violates Section 10(b) of the Securities and Exchange Act of 1934, and Rule 10(b)-5 promulgated thereunder by the Securities and Exchange Commission; and further, that the acts of the defendants about which plaintiffs complain, and which they allege are unlawful, were breaches of fiduciary obligations which defendants, as Marshall Field directors, owed to the stockholders of the company, including plaintiffs and other members of the class. Plaintiffs pray for injunctive relief, damages which one plaintiff claims exceed $200 million, the award of attorneys' fees and costs, and such other relief as the court may deem just and proper.

***1174** Defendants have answered each complaint, and they deny all allegations which charge that they, in any way, have violated any of the provisions of the Securities and Exchange Act of 1934, Section 10b or 14(e), or any fiduciary duty owed to the stockholders of Marshall Field & Company. They admit, however, that on or about December 12, 1977, Carter Hawley Hale delivered a letter to Field, but state that the letter speaks for itself; that in connection with the letter, defendants caused to be published a communication in the Chicago Tribune that incorporated a letter to Field employees; that they mailed a letter to Field's shareholders; that they filed a lawsuit in the United States District Court for the Northern District of Illinois against Carter Hawley Hale; that thereafter they agreed to acquire five former Liberty House Stores in Washington and Oregon, and announced plans to open and operate a store in Houston, Texas; and that Field is considering the establishment of other stores in other areas of the country including Northbrook, Illinois, and the southwest United States. They further admit that Field has discussed with others the possible acquisition of other stores.

In addition, defendants have pled affirmative defenses, including their allegation that plaintiffs' complaints fail to state a claim on which relief can be granted by this court; that the complaints fail to satisfy the requirements of Rule 23, Federal Rules of Civil Procedure, precluding plaintiffs from proceeding in these class suits; that the complaints fail to satisfy the requirements of Rule 23.1 of the Federal Rules of Civil Procedure, and thus plaintiffs cannot proceed with a derivative suit; and that the complaints are barred in whole or in part by the applicable statutes of limitations. Defendants request the court to dismiss plaintiffs' complaints, award them costs and fees, and grant them such other and further relief as may be appropriate.

After four weeks in which the jury has heard evidence consisting of testimony of thirteen witnesses, excerpts from four depositions, a vast number of exhibits, and several stipulations, plaintiffs have rested their case in chief; defendants now move for dismissal pursuant to Rule 41(b), or in the alternative, for directed verdicts pursuant to Rule 50(a), Federal Rules of Civil Procedure. These motions require the court to view the evidence in the light most favorable to the plaintiffs; [FN6] and all reasonable inferences which can be drawn from the evidence must be in their favor.[FN7] Accordingly, the court determines that the following are the facts most favorable to the plaintiff which the jury in this case could find from the testimony, the deposition excerpts, the stipulations, and the exhibits in the record.

FN6. Duriso v. K-Mart No. 4195, Div. of S. S. Kresge Co., 559 F.2d 1274, 1277 (5th Cir. 1977); Lescher Building Service, Inc. V. Local Union No. 133, etc., 310 F.2d 331 (7th Cir. 1962).

FN7. Gehrhardt v. General Motors Corp., 581 F.2d 7 (2d Cir. 1978); Hackett v. Reynolds and Co., 577 F.2d 948 (5th Cir. 1978).

I.

Marshall Field & Company [FN8] is a full line, high quality department store which has sold general merchandise, apparel, and furniture in Chicago and

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other large cities of the country. It was founded in 1852 by the Chicago merchant, Marshall Field, and the company expanded gradually over the next century. By the end of 1976, it was the eighth largest department store chain in the United States, with 31 stores, 15 of them in the Chicago area and others in Cleveland, Ohio, and in Seattle and Spokane, Washington. The company is today a publicly owned corporation, with more than 16,000 shareholders having purchased in excess of 9,000,000 shares of its common stock sold on the New York and Midwest Stock Exchanges. Its board of directors at the end of 1976 consisted of twelve persons with extensive industrial, financial, business and ***1175** professional backgrounds; five of them were executives of the company. It had five corporate and subsidiary divisions and employed thousands of persons in various capacities, but no member of the Field family either occupied a management position or was a director of the company. For the year 1976, Marshall Field reported to its shareholders that it had made sales totaling $609.9 million.

FN8. Hereafter in this Memorandum, Marshall Field & Company will be referred to as Marshall Field, Field, or company, as the context may require.

Despite this growth, Field's expansion did not match that of other department store chains. It was an attractive combination of stores and was highly regarded for the quality of its name, one which industry leaders thought could be taken anywhere in the country. But because of its accumulated worth, the strength of its balance sheet, its large cash reserves, and its borrowing potential, leaders of the department store business considered Field vulnerable to a takeover by another company. In fact, investing shareholders studied Field's earning reports, researched its performance "and determined that (Field in mid-1976) was a good company for a takeover." [FN9] This evaluation had become known to Field, its management and directors as early as the late 1960s.

FN9. This was the testimony of Joseph Berke, the plaintiff and class representative in one of the related suits, 78 C 2480, and is found in Transcript p. 3510.

In 1967, one of the companies that expressed an interest in a merger with Field was Carter Hawley Hale,[FN10] a nationwide, multi-division chain of department stores with corporate offices in Los Angeles, California. Nothing came of this expression because the directors of Field decided that the company's future lay in remaining an independent corporation. Carter's interest, however, was significant. It had operated traditional department stores since 1946. It was a large company with locations in several cities and operations covering northern California and the southwestern United States. Carter constantly analyzed potential markets throughout this country and Canada; it acquired several stores each year from the origin of its business. By 1977 it had increased its operations to 71 traditional stores, 30 specialty stores, and 433 book stores. It continued to expand by acquisitions throughout the time the controversy in these suits arose.

FN10. Hereafter in this Memorandum, Carter Hawley Hale will be referred to either as Carter, or by the acronym CHH, as the context may require.

Being an attractive company, one vulnerable to a takeover, presents many problems to the management, the directors, and the shareholders of a publicly owned American corporation. A takeover can be either friendly or unfriendly. It is friendly when solicited or welcomed by the target company. It is unfriendly when the target company is the object of acquisition by a raider who, complying with state and federal securities laws, makes the required disclosures and proposes an exchange or tender offer for the number of outstanding common shares of the company that will result in control of the target. A takeover, when unfriendly, has a disruptive effect on the management of a target company and its board of directors. It may be welcomed by some, but not all of the target company's shareholders. A takeover can be expensive; it often raises questions of possible violations of the antitrust laws; and it presents problems under the securities statutes and the rules and regulations adopted thereunder. Consequently, a company vulnerable to a takeover must have guidance from lawyers, investment bankers, accountants, and business consultants.

For a long period of time prior to December 10, 1977, Marshall Field was such a company. In each instance when approaches were made to its directors by anyone interested in acquiring it, or by another corporation that desired a merger, the directors considered the matter but concluded in each case that

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they did not want the company's uniqueness among its customers diluted by affiliation or merger with another retailer. Pressed, however, by the problem of the company's continued vulnerability to a takeover, Field's directors sought the advice of legal counsel. They consulted ***1176** the New York law firm of Skadden, Arps, Slate, Meagher & Flom. On December 9, 1969, they employed the services of Joseph H. Flom of that firm, a lawyer whose expertise was in proxy contests, mergers and acquisitions, tender offers and going- private transactions. Flom, after becoming acquainted with Field's position in the department store industry, including its financial standing and potential, gave the directors his advice on what they should do when the company was confronted with any inquiry or expression of interest in being acquired or being the subject of a merger. He also advised the company's executives on how to react to the prospect of a takeover.

He told the directors, and through them the executives, that in each instance when an acquirer expressed interest or the proposer of a merger made an approach to Field, representatives of management should listen, bearing in mind that the interests of the company's shareholders were paramount. They were to respond by indicating that Field was not on the block, and if the particular executive believed the suggestion of acquisition or the proposal of merger was being made seriously, he should express the views of the directors that, in their business judgment, the interests of Field shareholders would be best served by the company remaining independent. Flom advised that directors and those who manage a company should always keep in mind that the timing of the sale of a business, if a sale is to take place, is very important; that if a company, through its management executives, saw and believed that its future was bright, or that the general economic conditions would be more propitious in the future, the directors had the right to decide when the business would be sold, as well as whether this should be done. He told the directors that just because someone approaches a company, no one in that company had any obligation to say automatically that the company was on the block. He further advised the directors that management should always endeavor to determine whether a person proposing an acquisition of the company, or a merger with it, had thought through the proposal being made; whether they were serious; and also whether they had considered the antitrust implications of an acquisition or merger. Flom was retained and, after December 1969, either he or a member of his firm attended each meeting of Field's board of directors.

Later, when his advice was sought by Field's executives concerning how they should deal with an inquiring potential acquirer, or one who was suggesting a merger, Flom, or one of his partners, repeated in general the advice he had given the directors when he was retained in 1969. On one occasion, he advised Field's chief executive officer that whenever a discussion was had with anyone seriously discussing acquisition of Field, potential merger, or the possibility of making a tender offer, at least two persons should attend such a meeting. Details of such transactions should be discussed informally and, preferably, an investment banker or financial officer should not be present. He advised that management personnel representing Field should always listen to what the visitor had to say. If a proposal was outlined, the executive was not to turn if down or argue about it, was never to say that it sounded good; but was simply to say that it was interesting. The executive was advised to say to the proposer that his proposal would be considered and that management would get back to him. Flom urged Field's chief executive officer that he should always find out who the visitor represented and whether he had authority to make a proposal. If he is speaking for someone else, the Field representative should learn all that he can, factual and financial, about the interested party. Field's representative should always inquire about the existence of antitrust issues and whether these had been considered. Flom admonished that anyone speaking for Field should remember at all times that his job was to do the best that could be done for the company's shareholders.

Flom's advice was accepted and followed. Every Field executive who had either a telephone conversation or meeting with any ***1177** inquirer concerning possible acquisition of or merger with Field, or a proposed tender offer or exchange offer, wrote a memorandum that became part of the business records of the company. Many of these memoranda are evidence in this joint trial, having been produced by defendants during pretrial discovery in these cases.

In the ten-year period between the time CHH first expressed an interest in Field and 1977, at least three other department store companies, in one way or another, did the same. For example, in 1970, Associated Dry Goods Company expressed a desire

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to merge with Field. This expression of interest, and the contacts of Field executives with representatives of Associated, were described in memoranda and made part of the company's files. At meetings of the board, the subject was discussed; and after considering the matter, the directors voted, reaffirming their earlier decision that Marshall Field should remain independent. At about the same time that the approach by Associated was considered, Field acquired Halle Brothers, a retailer with stores in Cleveland and other Ohio communities, and in Erie and West Erie, Pennsylvania. Associated had stores in the same cities.

In 1975, Federated Department Stores made acquisition overtures to Field. Again, all of the contacts with representatives of this potential acquirer were made the subject of memoranda that became part of the company's business records. The subject was submitted, with recommendations and views of management, to Field's board of directors. After consideration, the board concluded that remaining independent provided Field with a future that had greater possibilities than being acquired by another company. The board notified Federated that it did not wish to explore the matter further.

In August of the following year, Dayton-Hudson Corporation of Ohio inquired of Field's management about a possible acquisition of the company. Again, Field's executives met with spokesmen for Dayton-Hudson, recorded in memoranda what they said, and reported the inquiry to the board. The directors, after considering the contact, decided that it was in the best interest of the shareholders and the company that Field remain an independent department store. At the same time the Dayton contact was being considered, Field's management, executing policy decisions of the board, sought to show to the public that the company had the ability to grow. Accordingly, management personnel embarked on a program to acquire certain Liberty House Stores in Portland, Oregon and Tacoma, Washington, a market area where there was an overlap between Dayton-Hudson stores and those operated by Liberty House. When Dayton-Hudson later withdrew its acquisition overtures in May, 1977, Field's interest in the Liberty House stores subsided. Subsequently, all inquiries made of Field by companies wanting to acquire it or negotiate a merger were met by the directors with the same conclusion: it was best for the company that it remain independent. This conclusion was expressed so many times that at least two directors who are defendants in these cases recall it being stated as a policy. The occasions when the directors reflected this policy were all recorded either in memoranda which became part of the company's records, or in minutes of board meetings. Prior to December 14, 1977, however, no communication of the board to Field's shareholders, no press release, nor any report Field made to any state or federal regulatory agency contained any statement or description of this policy.

In 1977, the president and chief executive officer of Field was Joseph A. Burnham, an executive who nationally enjoyed a good reputation among leaders of the department store industry. The company's directors, however, thought that Field needed someone to "turn the company around"; they came to believe Burnham needed help at the highest level of management. Therefore, it was decided that Field should seek an experienced department store executive who could work with Burnham and be groomed to succeed to the office of president and chief executive of the company. After a search that took Field's executives ***1178** throughout the country, with Burnham principally responsible for the search, the man who was selected and offered the position was Angelo R. Arena who, at the time, was chairman of Nieman-Marcus, the $500 million a year division of Carter Hawley Hale based in Dallas, Texas. The agreement with Arena that he join Field later in 1977 was finalized in August of that year. It was expressly understood by Arena, Field's management, members of the board executive committee and Burnham in particular, that he was to join the company, work with Burnham and, if everything went well, in two or three years he was to succeed Burnham as president and chief executive officer of Field.

Having reached this understanding with Field's people, Arena then had a conversation in Los Angeles, California with Edward W. Carter and Philip M. Hawley who were, respectively, board chairman, president and chief executive officer of CHH. He told them that the opportunity he was being offered at Field was too attractive for him to refuse, and that even being chairman of an important CHH division did not have the career prospects equal to that being offered him by Field. Carter and Hawley told Arena that they did not believe Field was going to remain independent; that he, Arena, was chancing it in taking a job in the face of the possibility there will be a takeover of the company. Arena told his colleagues he had a conversation with Burnham in which he was assured that Field was

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going to remain an independent department store chain and, therefore, he thought that his decision to accept the position being offered him was one that he should make. Carter and Hawley agreed. Arena proceeded with plans to join Field late in 1977.

However, on October 10, 1977, while he was returning from a vacation, Burnham suffered a fatal heart attack. His death caused the executive committee of Field's board of directors to hold an emergency meeting on October 11, and the result was a recommendation that Arena be asked to come to Chicago immediately and replace Burnham as a Field director, its president and chief executive officer. A special meeting of the board was called for October 13. Edward McCormick Blair, a Field director, attended the executive committee meeting. However, sometime during the day, while Blair was occupied with the emergency caused by Burnham's death, Edward W. Carter called Blair's 93 year old father and, after expressing condolences concerning Burnham's unexpected passing, told the elder Blair that in his view a merger between Field and CHH was an ideal business arrangement. Carter knew enough about the relationship between Blair, the Field director, and his father to know that his mention of the advantages of a Field-CHH merger would be discussed by them; it was. In addition, during the evening of October 12, the younger Blair received a telephone call from Gaylord Freeman, a banker long connected with Field's largest shareholder, the First National Bank of Chicago, who said he was calling for his friend Ed Carter to urge that the subject of a Field-CHH merger be discussed at the next meeting of Field's directors.

The next day, at the special meeting of the directors, after Arena had been elected and appointed to Burnham's old job, George C. Rinder, Executive Vice President of the company, reported on the contacts by Carter. A summary of the board minutes shows the entry that "(p)resumably the inquiry was prompted by the untimely death of Mr. Burnham. The consensus of the Board was that the Company's future plans are such that the proposed business combination should not be considered because the best interests of the Company's stockholders would be served by this Company's continuing as an independent entity in view of the many opportunities to increase earnings and return to the stockholders (sic)." Arena arrived in Chicago on Monday, October 17, and took over as head of the company's management.

CHH's approaches to Field about a possible merger did not cease; in fact, they gathered momentum. On the day Arena began his duties as the company's chief executive officer, Philip Hawley called him ***1179** from Los Angeles and urged him to consider the advantages of a Field-CHH merger. Arena reminded Hawley that he was just beginning some rather arduous duties; that Field, like all similar companies, was approaching the most important part of the department store sales year, the Christmas season; and that he wanted to get to understand Marshall Field and its business, and become acquainted with the people with whom he was to work. He told Hawley of feeling uncomfortable bringing to the board of directors the question of selling the company when he had been employed to lead it toward achieving what the directors had in mind for the future.

On the next day, from Philadelphia, Carter called Blair and asked him to consider his "ten fundamental reasons" why he thought a Field-CHH merger made sense. Blair listened, made notes and thanked Carter for his expression of interest. He assured Carter that Field thought highly of CHH; and that if Field should consider a merger with any company, CHH would get the first chance. Carter in turn told Blair that in the event of a merger, Blair would be an important director on the new combined board. Hawley, in the meantime, called Arena and insisted on a meeting of Field's representatives with those of CHH to discuss a merger; and that the meeting take place before the end of the Christmas shopping season.

Arena was disturbed by this insistence on the part of Hawley. The subject of mergers, acquisitions, and takeovers of another company were not strange to him. He knew the economic and business consequences of a takeover for, after all, he had just left Carter Hawley Hale, a department store chain which had grown through the acquisition of other companies. He had, in his short time with the Field management, learned of Joseph H. Flom's retainer by the company, and he was familiar with the advice Flom had given management and the directors. Arena knew that Flom's advice to his clients when faced with the prospects of an unfriendly takeover was to raise questions concerning possible violations of the antitrust laws. Arena knew that once a board of directors, in good faith, considers any merger proposal, one of the questions to be addressed is whether such a business combination was legal. Therefore, on November 16, 1977 he asked

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Hammond Chaffetz of the Chicago law firm of Kirkland & Ellis to analyze the antitrust implications of a merger between Field and CHH.

Kirkland & Ellis had been Field's counsel for antitrust matters since 1971. Chaffetz immediately headed a team of Kirkland lawyers who studied the matter. On November 17 Arena reported to the board of directors the contacts from CHH about a merger and his inquiry about the antitrust questions to Kirkland & Ellis. He and Rinder were authorized to "sit down with (CHH) and visit with them on a friendly basis," but not to depart from the board's stated position on the matter. The meeting took place in Arena's Ritz Carlton Hotel suite in Chicago on November 18, and it was attended by Carter, Hawley, Arena and Rinder.

Carter and Hawley did most of the talking, with Carter saying at the outset that a merger of Field and CHH was an objective he had pursued for twenty years. He referred to his previous discussions with Field's three former chief executive officers. He pointed out the advantages of such a merger, especially its size, which he and Hawley expected to ultimately grow into a $10 billion a year business. He said that a combination of the two companies would be the best fit in American retailing, making it the most exciting business event in the history of American department stores. Hawley reviewed the comparative worth of CHH and Field. He emphasized the high quality of the department store name which Field represented, one that could be taken anywhere in the country with the possible exception of California, where expansion of Field was not feasible because of CHH's dominance through its four department store divisions. Reference was made to Field's vulnerability to a takeover by other companies, particularly foreign ones. Either Carter or Hawley mentioned the interest of Brenninkmeyer, a foreign ***1180** company they thought would make Field the object of a takeover. Carter said that this foreign company "might well offer $60.00 per share (to Field stockholders) at any time."

In response, Arena told Carter and Hawley that he understood there were some antitrust questions in any merger of the two companies. They answered by saying that they had been advised by their attorneys "that there is no antitrust deterrent." They agreed that there existed one overlap in the competitive area of the two companies, the Northbrook Court store of Nieman- Marcus; but that sale could be arranged for that business which at the time had annual sales exceeding $16 million. No mention was made by either Carter or Hawley of their Michigan Avenue site, or their plans to enter the Oakbrook Shopping Mall. The meeting ended with Arena expressing confidence in the future of Marshall Field, and saying that the question of unfriendly approaches by another company was something Field was living with. Arena emphasized that neither he nor the directors felt that the degree of urgency was as great as CHH was expressing. He concluded the meeting by stating that he and Rinder would report to the executive committee in about two weeks and that the board would meet on December 15, 1977, at which time the subject matter concerning CHH's approach about a merger would be discussed. Arena promised that he would keep them informed of the board's position regarding possible acquisition of Field by CHH. There was no commitment to meet again, or to contact CHH by any particular date.

The subject of the meeting, however, was not forgotten. On December 2, 1977, Chaffetz advised Arena and Rinder that in the opinion of Kirkland & Ellis lawyers, an acquisition of Field by CHH, or a merger of the two companies, would be illegal under the antitrust laws because of (a) the existing competition between Field's stores and the store operated in the Northbrook Court shopping enter by CHH's Nieman-Marcus division; (b) the potential competition between Field's stores and the stores on North Michigan Avenue and in Oakbrook which Nieman-Marcus was planning to open; and (c) the existing competition between Field's stores and the stores operated by CHH's Walden Books division. In forming this opinion, Kirkland lawyers relied on the 1976 CHH annual report issued in the spring of 1977, in which the company announced the intention to expand its Nieman-Marcus division and take advantage of the Chicago market. In this report, CHH recognized the splendid market for luxury fashion merchandise on North Michigan Avenue in Chicago, and emphasized its purchase of a large block of land on the avenue for further development. Prior to that report, CHH had in fact acquired property on Michigan Avenue, less than two blocks south of Field's Water Tower Place store, and announced the intention to build a Nieman-Marcus store almost adjacent to the Field location. The lawyers also considered Nieman-Marcus' interest in opening a store in the Oakbrook area, an interest that was publicly disclosed by CHH. In addition, the Kirkland lawyers took into account the fact that

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Field was the second largest book seller in the Chicago area, while CHH-owned Walden Books was a major factor in the Chicago book selling market. Up to the time that the lawyers formed the antitrust opinion which was conveyed by Chaffetz to Arena and Rinder, CHH had never formulated nor announced a plan for disposal of any of its Chicago stores which did business in competition with Field, a factor crucial to any reasonable antitrust analysis. Chaffetz's report, giving the opinion of Kirkland lawyers, was communicated to Field's directors. The matter remained in that posture until Saturday, December 10, 1977.

On that day, Philip Hawley called Arena and told him that unless Field directors agreed to begin merger negotiations by Monday, December 12, he would deliver and make public a letter proposing that the directors of the two companies enter into negotiations leading to a combination of Field and CHH. He told Arena what the letter would say. Generally, CHH would propose beginning negotiations with the ***1181** idea that for each share of Marshall Field common stock, CHH would exchange a number of its shares determined by dividing $36.00 by the average closing price of CHH common stock on the New York Stock Exchange during a period of thirty trading days immediately preceding the mailing of proxy statements relating to the transaction, with an election feature which would give Marshall Field shareholders the opportunity to receive up to 49% of the exchange in cash. Appropriate provisions were to be made for holders of Field's preferred stock and those persons who had the right to exercise stock options.

Arena construed what Hawley told him as the initiation of an unfriendly takeover of Field by CHH. Therefore, he immediately reached Joseph Flom in New York and arranged a meeting in the Skadden, Arps office on Sunday, December 11 with key Field directors and investment bankers present. The meeting was held and there was a general discussion about what to do the next day when the letter described to Arena by Hawley was delivered. Arena reported the opinion of Kirkland & Ellis lawyers concerning the legality, under the antitrust laws, of a Field-CHH merger. It was agreed that those directors who were absent were to be polled, by phone, for their authorization that a lawsuit be filed in this court asking for resolution of the antitrust issues which, in the opinion of Kirkland lawyers, were inherent in CHH's proposal for a merger. It was also agreed that the New York Stock Exchange would be informed of the development; and that an emergency meeting of the Field board of directors was to be called for Tuesday, December 13.

Events transpired as anticipated. On Monday, December 12, CHH's letter signed by Hawley was received. The letter, as it turned out, reviewed the advantages of the merger to be negotiated, referred to the gains Field shareholders would derive from the combination of the two companies, and ended with the statement that if Field should decline to meet for the proposed negotiation, CHH "will not be bound by these proposals in any offer or other action which we may elect to pursue in the future." Field directors were contacted by telephone, and all but one approved the filing of an antitrust lawsuit in this court by Kirkland & Ellis.

The special meeting of Field directors took place, as scheduled, on December 13 with all board members present. Also at the meeting were three lawyers from the Skadden, Arps firm: Flom, Aaron and Pelster; Chaffetz of Kirkland & Ellis; and representatives of Field's investment bankers: William Blair & Company and Smith Barney, Harris Upham & Company, Inc. The lawyers, particularly Chaffetz, gave the directors their opinion concerning the legality of the merger toward which the December 10 letter proposed negotiation, and the investment bankers evaluated the financial aspects of the merger. The CHH letter was reviewed, each director having received a copy by then. Arena, who presided, asked Chaffetz to give his views concerning antitrust implications of a Field-CHH merger. Then Flom and Chaffetz discussed the general legal status of the entire situation, as it then existed. Representatives of the investment bankers presented their report and discussed the financial aspects of the matter.

Questions were asked by board members. Management, represented by Arena and Rinder, made a report and projected the company's expected performance. Generally, the view was that future performance would be favorable. Many of the directors, as did the investment bankers, thought that a share of Marshall Field stock would bring more than $36.00 in a sale or merger of the company. After discussion and consideration, on motion duly made and seconded, the directors unanimously voted to reject the proposal contained in the December 10 letter from CHH because, in their judgment, any merger of Field with CHH would be "illegal,

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inadequate and not in the best interests of Marshall Field & Company, its stockholders and the communities which it serves." Then the board adopted two resolutions, one ratifying the filing of the antitrust suit and the other giving officers of ***1182** the company authority to take such action as they deemed necessary in connection with the CHH matter, including the filing of such reports and documents with the SEC and other governmental agencies as may be necessary.

Contemporaneous with their vote, the directors authorized issuance of a release to the press confirming receipt of the December 10 letter, referring to the filing of the antitrust suit alleging that acquisition of Field by CHH would constitute a violation of the federal antitrust laws, and disclosing the advice the directors had received from Kirkland & Ellis on the antitrust questions. Two days later, Arena wrote Hawley a letter telling him of the board's action on his December 10 merger negotiations proposal. On the same day, December 14, Field issued a press release in which Arena spoke for the company and described the board's position on the December 10 CHH letter. He said that Field's directors and management had faith in the momentum of the company, and that "it would be in the best interests of our stockholders, customers and employees for us to take advantage of this momentum and continue to implement our growth plans as an independent company."

The next day, Arena addressed a letter to all Field employees telling them that CHH was "seeking to take over Marshall Field & Company." He reviewed, in general terms, what had transpired, including "the aggressive and insensitive way (CHH has) pursued Marshall Field & Company." On December 20, he addressed a letter to Field stockholders in which he reviewed his observations of the company since assuming the responsibilities Burnham had discharged before his death. He spoke optimistically of the future, reviewed Field's immediate past performance, referred to the CHH proposal for negotiation, referred to the advice of antitrust counsel "that a CHH-Marshall Field & Company merger would clearly violate the United States antitrust laws," and concluded that "(y)our Board of Directors believes the maximum benefits for Marshall Field & Company and its stockholders, employees, customers and communities it serves will result from continuing to develop as an independent, publicly-owned Company."

CHH's response to the board's rejection of its proposal was a press release issued January 4, 1978 reporting reaffirmation of the desire of its directors to negotiate a merger with Field. Hawley was quoted as expressing the belief "that a negotiated merger of Carter Hawley Hale and Marshall Field is desirable for both parties and legally possible." Thereafter, no contact or communication was made by either company concerning the subject of a merger negotiation. The following day, however, Field issued a press release announcing that it had amended the complaint in its antitrust suit against CHH to add allegations of federal securities laws violations said to be connected with CHH's proposed acquisition of Field. Arena was quoted at the end of the release as saying that "our management is continuing the implementation of our long-standing programs to further build and develop the business of Marshall Field & Company. We are confident that all these programs are on course and are optimistic about our progress."

On January 19, 1978, Field directors had their regular meeting. On the agenda was a proposal that the company expand into Texas, and one that it acquire Liberty House Stores, three of which were located in Portland, Oregon, and two in Tacoma, Washington. Field had business operations in the Pacific Northwest through its Fredrick & Nelson division in Seattle, and its The Crescent subsidiary in Spokane. As to the southwest section of the country, Field executives and directors had considered acquisitions in that area. Investment analysts such as Stanley H. Iverson of Duff & Phelps, Inc., a knowledgeable investment advisor who had followed Field's business and market performance for years, had known of the company's general interest in expanding its Chicago division into the southwest area of the country, although no Field executive had ever particularly mentioned Houston, Texas.

***1183** The subject of expansion into other parts of the country, and the acquisition of other stores, had been dealt with by Field directors informally at first, and later through a development committee made up of lawyers, representatives of investment banking firms that advised the board, certain Field key executives, and some of the directors. When Flom was retained in 1969, one of the details of his legal advice to the directors and executives was to invest the company's accumulated reserves and adequately utilize its borrowing power in acquiring other stores. Flom advised that at all times such decisions had to

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be made consistent with sound business judgment, and in the best interest of the company and its shareholders. From his experience as a lawyer who had represented both acquirers and target companies, he told Field executives and directors that acquisitions were a lawful and legal way of coping with an unfriendly takeover. He was critical of the directors and the company's management in not fully exploiting Field's capacity to expand. It was Flom's view, one he expressed to Field's directors and executives when he gave them legal advice, that once, for sound business reasons, the decision was made to resist a takeover, a defensive acquisition was a legal and proper step for a target company to take, provided that the directors' decision to resist a takeover is reasonably related to the interests of the shareholders, the company, and the community it serves. At the December 11 meeting in his office, Flom reminded Field directors, in the presence of Arena, that he had urged them to make more acquisitions, but they had not followed his advice.

Flom was present on January 19 when the proposed expansion and acquisition were before the directors. Arena distributed a report that reviewed the Liberty House Stores, and the discussion that followed was premised on Field's purchase of their inventories, fixtures, and other assets. He told the board that the Tacoma market was clearly a place where the Fredrick & Nelson division should be operating, and Portland was a natural area for that division's operations. He recommended that officers of the company be authorized to enter into a letter of intent pertaining to acquisition of the five stores. The recommendation was approved by unanimous vote of the board and, accordingly, a formal resolution was adopted.

As to the expansion into Texas, Arena introduced the company's vice president for real estate who discussed management's investigation of four possible Texas locations. Specifically, he commented on The Galleria in Houston, Texas, and three others. After considering demographic details and other data, Arena asked that management be given authority to pursue The Galleria in Houston as a future location for a new Marshall Field store. This request was granted unanimously. On January 20, 1978, a letter of agreement for acquisition of the five Liberty House Stores was executed by the parties, and on that day Field announced the acquisition for the purpose of integrating these stores into its Seattle-based Fredrick & Nelson division. Then on February 2, 1978, a letter of agreement was executed for acquisition of a store location, and expansion of its Chicago division, in The Galleria shopping complex in Houston, Texas.

The day before the last letter was signed, Carter Hawley Hale, as required by law, filed documents with the Securities & Exchange Commission and announced its intention to make an exchange offer by which each Field shareholder who wanted to tender his shares would receive, for each share he owned, $42.00 in a combination of cash and CHH stock. The offer, however, could be accepted only after the Securities & Exchange Commission reviewed and declared the registration statement effective, and holders of a majority of outstanding CHH capital stock approved the offer at a shareholder's meeting to be held on an undetermined date in the future. Further, CHH's intention to make the offer was subject to the condition that if holders of 5% or more of its common stock dissented, they would be entitled to receive what their shares were worth on January 31, 1978, and at that time, CHH would have the option of withdrawing the offer.

***1184** Formal notice of this filing was served on Field directors, its president, law vice president and secretary. At a special meeting of the board on February 2nd, CHH's filing was discussed, its legal implications described to the directors by Aaron of the Skadden, Arps firm, and by Hammond Chaffetz of Kirkland & Ellis. In addition, Chaffetz brought the directors up to date on developments in the Field suit then pending in this court. Then, the directors took up a number of proposed acquisitions, including The Galleria in Houston, Texas. There was no mention of the adequacy or the inadequacy of the $42.00 per share price which CHH announced it intended to pay sometime in the future for each share of Field stock. After the board meeting, Field issued a press release in which Arena said that the company's "opposition to the takeover bid by Carter Hawley Hale is unchanged." The release concluded with the statement by Arena that "I assumed my position with Marshall Field & Company with the understanding that I would devote myself to making Marshall Field & Company a truly national retail business organization. We at Marshall Field & Company are determined not to be deterred from this course. Our recently announced agreement to acquire five Liberty House Stores in Tacoma, Washington and Portland, Oregon, was one step in our program."

No other communication occurred between the

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parties until February 22, 1978. Before that, on February 8, Arena announced, in a press release, that Field had concluded negotiations for a 200,000 square-feet, full line department store to be located in The Galleria complex, Houston, Texas. Then on February 22, CHH informed Field and the public that it was withdrawing its proposed exchange offer because "the expansion program announced by Marshall Field since February 1st has created sufficient doubt about Marshall Field's earning potential to make the offer no longer in the best interest of Carter Hawley Hale's shareholders." None of the events that conditioned CHH's intention to make the offer had occurred since February 1, 1978. It had not purchased any Field shares; no Marshall Field shareholder was ever solicited to sell any share owned; no publicity was engaged in either by CHH or by Field concerning solicitation of Marshall Field shares; and no opportunity was ever given to any Field shareholder to tender any share he owned in Marshall Field & Company.

II.

[1][2][3] These, then, being the facts most favorable to the plaintiff which in this court's judgment the jury can reasonably find from the evidence, defendants' motion for a directed verdict [FN11] presents a question of law: whether when all the evidence is considered, together with all reasonable inferences favorable to the plaintiffs, it totally fails to prove a necessary element of their case. Riggs v. Penn Central Railroad Company, 442 F.2d 105, 106 (7th Cir. 1971). It is recognized and the court bears this in mind, that since a directed verdict will deprive plaintiffs of a determination of the facts by the jury, a motion therefor should be sparingly granted. Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977); Clemons v. Mitsui O. S. K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979). Nevertheless, if the facts and inferences point so strongly and overwhelmingly in favor of defendants that the court is convinced reasonable men cannot arrive at a verdict contrary to one in their favor, granting of the motion is proper. Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969); see Neugebauer v. A. S. Abell Co., 474 F.Supp. 1053 (D.Md.1979). The rule is well established that when the evidence in a case is such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict to be reached, a district judge should determine the proceeding by directing the verdict, without submission to the jury; such direction will have the result of ***1185** saving the mischance of speculation over legally unfounded claims. See Brady v. Southern Ry. Co., 320 U.S. 476, 479-80, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943); 9 Wright & Miller, Federal Practice and Procedure s 2524 (1971). As the court of appeals for this circuit has held, a district judge should direct a verdict where the evidence, with all justifiably deducible inferences, will not support a verdict in favor of the party producing it. Hohmann v. Packard Instrument Company, Inc., 471 F.2d 815, 819 (7th Cir. 1973). Whether, in this case, a verdict should be directed is determined by the law that controls the controversy between the parties, law which this court would instruct the jury it must follow if asked to deliberate and reach a verdict.

FN11. The motion under Rule 41(b), Fed.R.Civ.P., will be treated by the court as a motion for directed verdict. Johnson v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 400 F.2d 968 (9th Cir. 1968).

III.

A. Plaintiffs' Section 10b and Rule 10b-5 Claims

The statute under which plaintiffs make these claims, Section 10b of the Securities & Exchange Act of 1934, 15 U.S.C. s 78j(b), provides that "(i)t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, adopted by the Securities and Exchange Commission and published in 17 C.F.R. s 240.10b-5 (1977), states that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in

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order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Based on this statute and rule, plaintiffs seek to recover as members of a class of "persons who held common stock of Marshall Field & Company at any time between December 12, 1977 and February 22, 1978." This class, prior to trial, was divided into four subclasses consisting of (1) persons who held Field's stock on or prior to December 12, 1977 and disposed of it after that date but prior to February 22, 1978; (2) persons who acquired Field's stock after December 12, 1977 and disposed of it prior to February 22, 1978; (3) persons who acquired Field's stock after December 12, 1977 and did not dispose of it prior to February 22, 1978; and (4) persons who held Field's stock on or prior to December 12, 1977 and did not dispose of it prior to February 22, 1978.

Plaintiffs contend, from the evidence heard, that between October 11, 1977 and February 28, 1978, when CHH withdrew its proposed exchange offer, defendants as directors of Marshall Field had a policy of keeping the company an independent business entity, a policy formulated years before; that this policy was not disclosed to Field shareholders who made investment decisions in purchasing or selling Marshall Field shares; that during the period in question, defendants made material misstatements in press releases and letters designed to influence investment decisions by the shareholders; that they omitted making material disclosures concerning the policy they were administering as Field directors; that on or about December 13, 1977, defendants arbitrarily rejected a proposal made by ***1186** Carter Hawley Hale for negotiation of a merger with Field; and that in doing these things, defendants engaged in manipulative, deceptive, and fraudulent conduct, knowingly recklessly, and with full knowledge of the consequences to the rights of the plaintiffs-shareholders affected. Plaintiffs insist that the evidence now in the record shows defendants made defensive acquisitions by which they succeeded in depriving Field stockholders of the opportunity to sell their shares at an advantageous price. These acts of the defendants, according to the plaintiffs, were committed, not in the interest of Field shareholders, but solely to perpetuate themselves in office as directors of the company.

[4][5][6] The evidence shows that all of the corporate decisions about which plaintiffs complain were made by defendants in their capacity as directors of Marshall Field. It is the law, which the jury would have to follow were it to deliberate to a verdict, that the general authority and power of defendants as Field directors during the period in question was to manage the corporate business and affairs for the stockholders, and their authority at all times was absolute, as long as they acted within the law. Questions of policy and internal management were, in the absence of nonfeasance, misfeasance or malfeasance, left wholly to their decision. 5 Fletcher, Cyclopedia of the Law of Private Corporations s 2100 (1976 rev. vol.); see Shlensky v. Wrigley, 95 Ill.App.2d 173, 237 N.E.2d 776 (1968). The laws of the State of Delaware governing the powers of corporate directors give defendants this authority. See Del.Code Tit. 8, s 141(a). Directors of a publicly owned corporation do not act outside of the law when they, in good faith, decide that it is in the best interest of the company and its shareholders that it remain an independent business entity. Lipton, Takeover Bids in the Target's Boardroom, 35 The Business Lawyer 101, 130 (1975). Having so determined, they can authorize management to oppose offers which, in their best judgment are detrimental to the company and its shareholders. Northwest Industries, Inc. v. B. F. Goodrich Company, 301 F.Supp. 706, 712 (N.D.Ill.1969). Certainly acquisitions, expansions, and the purchase of new stores are management decisions which, even though some shareholders may consider them breaches of fiduciary duty, are not grounds for liability under Section 10b or Rule 10b-5 unless there is deception, misrepresentation, or nondisclosure in violation of the statute and the rule. Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476, 97 S.Ct. 1292, 1302, 51 L.Ed.2d 480 (1977).

[7][8] These principles have to be considered together with another well settled rule. There can be no violation of Section 10b or Rule 10b-5 unless the evidence establishes that the person or persons charged with such violation committed three acts in connection with the transaction in question: (1) used the mail or other instrumentality of interstate commerce; (2) purchased or sold a security, or sought to affect the same; and (3) used a manipulative or deceptive device. See Olympic

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Capital Corporation v. Newman, 276 F.Supp. 646, 653 (C.D.Cal.1967); accord Cameron v. Outdoor Resorts of America, Inc., 608 F.2d 187 (5th Cir. 1979) and Securities & Exchange Commission v. Diversified Industries, 465 F.Supp. 104 (D.D.C.1979). The term "purchase or sale" as used in the section and rule is not limited to common law transactions. Spector v. L Q Motor Inns, Inc., 517 F.2d 278, 285 (5th Cir. 1975), cert. denied 423 U.S. 1055, 96 S.Ct. 786, 46 L.Ed.2d 644; see Annot. 4 A.L.R.Fed. 1048. Exchange of shares in connection with the merger or sale of corporate assets constitutes a purchase or sale within Section 10b and Rule 10b-5. Securities & Exchange Commission v. National Securities, 393 U.S. 453, 467, 89 S.Ct. 564, 572, 21 L.Ed.2d 668 (1969); Swanson v. American Consumer Industries, Inc., 415 F.2d 1326, 1330 (7th Cir. 1969).

[9] More importantly, in all such cases, the evidence must prove that the person or persons engaged in such sale or purchase, as defined, did so with intent to deceive, manipulate or defraud. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, 96 S.Ct. 1375, 1380, 47 L.Ed.2d 668 (1976). The expression ***1187** "any manipulative or deceptive device or contrivance," used in the statute and found in the rule, proscribes knowing or intentional misconduct. See Securities & Exchange Commission v. Texas Gulf Sulphur Co., 401 F.2d 833, 868 (2nd Cir. 1968) (Friendly, J., concurring), cert. denied 394 U.S. 976, 89 S.Ct. 1454, 22 L.Ed.2d 756 (1969); Loss, Summary Remarks, 30 Business Law 163, 165 (special issue 1975). This is conduct quite different from negligence. "Use of the word 'manipulative' is especially significant. It is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst v. Hochfelder, supra at 199, 96 S.Ct. at 1384; see Klamberg v. Roth, 473 F.Supp. 544, 549 n.8 (S.D.N.Y.1979); Annot. 3 A.L.R.Fed. 819.

[10] In this case, there is no evidence from which the jury could find that during the period relevant to this controversy any defendant engaged in the purchase or sale of any security, no matter how the term is defined. Additionally, while it is true that Marshall Field shares have always been sold on the open market, there is no evidence that in making their managerial decisions as to remaining independent, making acquisitions, and expanding the business of Marshall Field, defendants in any way acted with intent to deceive investors by controlling or artificially affecting the price of securities. Cf. Ernst & Ernst v. Hochfelder, supra 425 U.S. at 199, 96 S.Ct. at 1383.

The law and evidence, particularly the minutes of the meetings of Field's directors and the letters and press releases of defendants in response to merger proposals and the proposed exchange offer, simply do not support plaintiffs' allegations that the defendants violated Section 10b or Rule 10b-5 by intentionally and deceptively failing to disclose their policy of remaining independent so as to manipulate the price of the company's stock. Therefore, plaintiffs' evidence does not present a jury question on their claims under Section 10b or under Rule 10b-5. See Sanders v. John Nuveen & Co., Inc., 554 F.2d 790 (7th Cir. 1977).

B. Plaintiffs' Sections 14(d) and 14(e) Claims

[11] The provisions of law plaintiffs here invoke are two of the 1968 amendments to the Securities & Exchange Act of 1934, sometimes collectively referred to as the "Williams Act," and are found in 15 U.S.C. s 78n(d-f). Bath Industries, Inc. v. Blot, 427 F.2d 97 (7th Cir. 1970). Section 14(d) prohibits the making of a tender offer for any class of a registered stock if, after consummation, the offeror would own more than five percent of the class, unless a Schedule 13D form is first filed with the Securities & Exchange Commission. Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1205-1206 (2d Cir. 1978). Section 14(e), on which plaintiffs particularly rely in this case, provides that

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

The sole purpose of Congress in adopting these

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amendments "was the protection of investors who are confronted with a tender offer." Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 35, 97 S.Ct. 926, 946, 51 L.Ed.2d 124 (1977). The Williams Act amendments were intended "to insure that the public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate ***1188** information." Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58, 95 S.Ct. 2069, 2076, 45 L.Ed.2d 12 (1975). The critical phrase in Section 14(e) is "in connection with any tender offer." Lewis v. McGraw, (Current Binder) Fed.Sec.L.Rep. (CHH) P 97, 195 (S.D.N.Y.1979). Therefore, in order for Sections 14(d) and 14(e) to become operative, there must be an exchange or tender offer, or at least the announcement of one, because when "a public announcement of a proposed offer has been made, the very dangers that the Act was intended to guard against come into play, and the application of sections 14(d) and 14(e) is thus appropriate." Applied Digital Data Systems, Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145, 1155 (S.D.N.Y.1977); cf. Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207 (2d Cir. 1973). In view of plaintiffs' emphasis of this securities law concept, it is necessary that the term "tender offer" be defined.

[12] Neither the Williams Act nor the rules adopted by the Securities & Exchange Commission attempt to define these words. However, from judicial decisions and scholarly works, it can be seen that a tender or exchange offer may be any proposal, by an individual, group or corporation, made through public announcements or other means of communication, to purchase securities made in a manner "likely to pressure shareholders into making uninformed, ill- considered decisions to sell." Note, The Developing Meaning of "Tender Offer", 86 Harv.L.Rev. 1250, 1281 (1973) quoted in Kennecott Copper Corp. v. Curtiss-Wright Corporation, 449 F.Supp. 951, 961 (S.D.N.Y.1978), aff'd in part, rev'd in part, 584 F.2d 1195 (2d Cir. 1978); see E. Aranow, H. Einhorn & G. Berlstein, Developments in Tender Offers for Corporate Control, 1-34 (1977). The offer must be stated in terms which will induce the tender of shares by shareholders who wish to sell.

[13] The evidence at the close of plaintiffs' case shows that in the month of October 1977, Edward Carter and Philip Hawley of Carter Hawley Hale made approaches to Field about the possibility of a merger between the company and CHH. Under the laws of Delaware which govern the issue here, a merger proposal to Field had to be approved by defendants, as directors, before it could be presented to the shareholders. See Del. Corp. Law s 251. The courts of that state give directors of Delaware corporations the benefit of a presumption that their judgment in dealing with any plan of merger is made in good faith and attributable to a rational business purpose. E. g., Muschel v. Western Union Corporation, 310 A.2d 904, 909 (Del.Ch.1973). Acting on their authority, therefore, defendants asked Angelo Arena and George Rinder to meet with Carter and Hawley and discuss what they had in mind. A day or so before going to the meeting, Arena had talked with Field's antitrust counsel concerning possible antitrust violations in the merger Carter and Hawley were thinking about. It appears to be without question that had there been a merger of CHH and Field, it would have been the largest one in the history of department stores in this country. There were reasons to believe that antitrust issues existed. CHH was a Field competitor in the Chicago market; its announced plans were to expand that competition.

At the meeting, Arena brought up the possibility of antitrust violations; Carter and Hawley insisted there were none. When Arena said he understood the contrary, one or the other of the two men replied, giving the views of "their attorneys that there is no antitrust deterrent" to the merger they had in mind. They said that the one overlap, Nieman-Marcus' Northbrook Court store, could be sold because it was a highly successful operation. This disposition, they thought, would cure any antitrust problem. No mention was made of the Michigan Avenue site nor of CHH's announced plans to enter the Oakbrook shopping mall. The meeting ended on a friendly note with no understanding of further contacts.

Three days later, Rinder met with two Kirkland & Ellis lawyers, discussed with them the antitrust implications of a Field-CHH merger, and directed that they be ***1189** furnished information and data that had been requested. Then, on December 2, Hammond Chaffetz, who had headed the Kirkland & Ellis research into the antitrust questions, gave Arena the opinion of the lawyers. Chaffetz stated that after studying the market operations of the two companies, he and his colleagues had concluded that any merger of Field and CHH would violate the federal antitrust laws. It is reasonable to infer that the substance of Arena's conversation with Chaffetz was conveyed to defendants; and that from the origin of Carter's contact on October 11 to December 13,

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1977, the general subject of a merger of Field and CHH was studied and considered by defendants, the lawyers who advised them, Field executives, the company's investment bankers, and the accountants.

On December 10, 1977, Arena received a telephone call from Hawley. That day, as any juror would notice since jurors are good at noticing a mundane fact like this one, was a scant two weeks from Christmas. Field was in the midst of the most important shopping period of the business year, with Arena just becoming adjusted to his new position as its chief executive officer. Hawley told Arena that unless defendants authorized the immediate beginning of merger negotiation discussions with CHH, he would deliver and make public on December 12 a letter outlining a proposal he and Carter had in mind. Hawley knew the impact of this threat on Arena, on Field, its directors and management. He also knew that public announcement of merger possibilities would influence transactions of Marshall Field shares on the exchanges. Arena was also aware of these consequences. He proposed to Hawley that he appear and discuss the subject of his telephone call at a special meeting of Field directors the following week. Hawley declined, saying that a meeting with the directors was not what he had in mind: he wanted the beginning of merger negotiations. The telephone conversation ended with the understanding that the letter would be delivered Monday, December 12.

Arena reacted by calling Joseph H. Flom, the lawyer for corporate matters that Field's directors had retained in 1969. They agreed to meet at the Skadden, Arps law firm office the next day in New York City. The meeting was held, attended by representatives of Field's investment bankers and key directors. Flom reviewed the advice he had given Field through the years. Arena reported the opinion of Kirkland & Ellis lawyers that a Field-CHH merger would violate the federal antitrust laws. It was decided among those present that the stock exchanges would be informed of the impending letter from Hawley and that a suit would be filed by Field against CHH in this court on Monday, December 12. These things were done and, on December 13, Field's directors, each having received a copy of the letter Hawley had described to Arena, held a special meeting. Present were lawyers from Kirkland & Ellis and from Skadden, Arps. Representatives from two firms of investment bankers appeared and gave their views on the subject of the CHH letter. Management representatives expressed views concerning the future of Field, on the whole favorable. Hammond Chaffetz of Kirkland & Ellis discussed in detail the reasons for the opinion he and his colleagues had reached on the antitrust issues present in any proposal to merge Field with CHH.

At the conclusion of the meeting, the directors unanimously decided to reject the proposal contained in the December 10 letter because in their judgment it was "illegal, inadequate and not in the best interests of Marshall Field & Company, its shareholders and the communities which it serves." The next day Hawley was advised of the board's decision by letter and, at the same time, a press release was issued giving the reasons for the board's actions, referring to the law suit that had been filed on December 12, and quoting Arena as saying that the directors believed "it would be in the best interests of our stockholders, customers and employees for us to take advantage of (the momentum of the company's future) and continue to implement our growth plans as an independent company." Thereafter, ***1190** defendants authorized officers of the company to proceed with the Liberty House Stores acquisition and with negotiations for a department store location in The Galleria complex, Houston, Texas.

Plaintiffs argue that their evidence showing this course of conduct requires defendants to put on a defense because it has been proven, prima facie, that they made untrue statements of material facts, they omitted stating material facts and engaged in fraudulent, deceptive, or manipulative acts or practices when they rejected the proposal contained in CHH's letter of December 10. Plaintiffs say that they have shown that defendants filed documents with the Securities & Exchange Commission, issued press releases, and wrote letters to employees and shareholders all of which contained untrue statements or material omissions. Plaintiffs insist that, prima facie, they have proven defendants filed the antitrust suit and made acquisitions of other businesses after December 10, not in the interest of Marshall Field and its shareholders but, rather, in support of their undisclosed policy of keeping Field an independent business entity and perpetuating themselves in office as directors of the company. Plaintiffs contend their evidence shows defendants violated Sections 14(d), 14(e), and rules promulgated by the Securities & Exchange Commission; and thus, the motion for directed

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verdict should be denied.

[14] These contentions overlook the fact that sections 14(d) and 14(e) of the Williams Act apply only to conduct committed in connection either with a tender or an exchange offer, S-G Securities, Inc. v. Fugua Investment Co., 466 F.Supp. 1114 (D.Mass.1978); see Annot. 6 A.L.R.Fed. 906, or where there has been a public announcement of an intention to make one. Applied Digital Data Systems v. Milgo Electronic, 425 F.Supp. 1145 (S.D.N.Y.1977). The letter of December 10 was neither an exchange nor a tender offer, nor was it a public announcement concerning one. In fact, it was not even a merger proposal; it was only a request, shielded in a threat, that defendants and Field executives interrupt the company's business and engage in merger negotiations with CHH. [FN12] Therefore, there was no schedule or form which defendants had to first file with the Securities & Exchange Commission as required by Section 14(d); and clearly, their conduct with regard to CHH's proposal, was not "in connection with a tender offer" within the meaning of Section 14(e) of the Williams Act. This is also true of the proposed exchange offer CHH announced on February 1, 1978 when it made the Schedule 14D-1 filing with the Securities & Exchange Commission. The reasons, however, are different. A tender or exchange offer must be so expressed that "(t)he person making the offer obligates himself to purchase all or a specified portion of the tendered shares if certain specified conditions are met (by the shareholder)." H.R.Rep. No. 1711, 90th Congress 2d Sess., reprinted in (1968) U.S.Code Cong. & Admin.News, p. 2811; Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195, 1206 (2d Cir. 1978). It can be made by issuance of a public announcement stating that after appropriate steps have been taken to comply with federal securities laws, and after securing authorization of the offeror's stockholders, the tender or exchange offer will be made directly to the target shareholders. Applied Digital Data Systems v. Milgo Electronic, 425 F.Supp. 1145 (S.D.N.Y.1977). A person ***1191** is not obligated to purchase all or a specified portion of tendered shares if the offer is subject to a condition precedent, that is, "a fact or event which the parties intend must exist or take place before there is a right to performance." 5 Williston on Contracts 126, s 663 (3d ed.); Restatement of the Law, Contracts s 250; United States v. Schaeffer, 319 F.2d 907, 911 (9th Cir. 1963), cert. denied 376 U.S. 943, 84 S.Ct. 798, 11 L.Ed.2d 767 (1964).

FN12. The court will not extend this memorandum to discuss the response, under applicable laws, which defendants as Marshal Field directors were obliged to give the letter written by Philip M. Hawley for CHH. In this court's judgment, that letter, in the context of the circumstances under which it was written and received, was an imposition on Marshall Field, its directors, and executives. The law vested defendants with discretion to decide the answer they were to give it, and the action they should have taken concerning it. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 722 (Del.Supr.1971); Kaplan v. Goldsamt, 380 A.2d 556 (Del.Ch.1977) . There is nothing in the legislative history of the Williams Act to suggest that Congress intended those amendments to modify the traditional powers of American corporate directors. See Piper v. Chris- Craft Industries, Inc., 430 U.S. 1, 25-37, 97 S.Ct. 926, 941-947, 51 L.Ed.2d 124 (1977).

CHH's proposed offer was subject to more than approval by the Securities & Exchange Commission and by holders of a majority of the shares of CHH capital stock. It was also subject to the condition that if holders of 5% or more of CHH shares formally dissented to the making of the exchange offer, they would be entitled to receive what their shares were worth the day before CHH announced its proposal; and upon the happening of that event, CHH would have the option of either proceeding with or withdrawing the making of the proposed offer. From February 1, 1978 when the proposed offer was announced, until February 22 when it was withdrawn, however, CHH did not proceed before the Securities & Exchange Commission to obtain the required approval of its intended offer, it did not call a meeting of its shareholders, and it never ascertained what percent of its shareholders would dissent from the making of the exchange offer. In addition to these conditions which were not met, CHH hedged its proposed exchange offer with nine other conditions precedent, none involving the mere passage of time and only one subject to CHH's control. None of these conditions were met, either, but defendants did nothing to prevent their occurrence or to prevent CHH from effectuating their occurrence. It is clear, also, that at no time did CHH purchase any Field shares, nor did it in any way solicit or urge any Field shareholder to sell. Consequently, in this court's judgment, CHH's announcement of February 1 and the SEC filing it made were not and never became an exchange offer.

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[15] But even if a contrary conclusion were reached on this point, the evidence shows that during the period in question defendants never made any untrue statement of a material fact or omitted the stating of any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; nor did they engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender or exchange offer or request or invitation for tenders or exchanges, or any solicitation of security holders in opposition to such offer, request or invitation. Defendants' only response to CHH's announcement of February 1 was a press release the same day, in which no reference was made to the proposed offer. Arena, as president and chief executive officer of Marshall Field, again reiterated defendants' acceptance of legal advice which told them that any combination of the two companies would violate United States antitrust laws. He referred to the conditions imposed on the proposed exchange offer by CHH. The release concluded with references to the acquisitions Field was making, and was intending to make in the future, and his determination to pursue "making Marshall Field & Company a truly national retail business organization." Neither at the board meeting held that day, nor at any other time, did defendants express any view concerning the adequacy of the proposed exchange offer. They did not solicit shareholders to either accept or reject the offer. Under these circumstances, the evidence at the close of plaintiffs' case shows that they cannot prevail on the claims they made under sections 14(d) and 14(e) of the Williams Act. See Berman v. Gerber Products Co., 454 F.Supp. 1310 (W.D.Mich.1978); Altman v. Knight, 431 F.Supp. 309 (S.D.N.Y.1977) .

C. Plaintiffs' State Law Claims

Based on the same occurrences and same events on which they sue under Section 10b, Rule 10(b)-5, and sections 14(d) and 14(e) of the Williams Act, plaintiffs claim, and insist their evidence shows, that defendants, as ***1192** directors, breached their fiduciary duties owed to plaintiffs as shareholders of Marshall Field by maintaining a policy of keeping Field independent, making acquisitions to thwart takeovers they feared would deprive them of their directorships, making misleading statements which included omitting important disclosures, and filing the antitrust suit against CHH. Plaintiffs contend they have proven that defendants rejected CHH's approach concerning a merger, not in the best interests of Field shareholders, but only to preserve their positions as directors of the company. They insist that the hasty and ill-considered decision of defendants deprived them of the opportunity to sell their shares at a premium, first at the suggested figure of $36.00, then at the $42.00 price announced by CHH in its proposed exchange offer.

[16] These claims are based on fiduciary principles discussed by the courts of Delaware in Brophy v. Cities Service Co., 31 Del.Ch. 241, 70 A.2d 5 (1949) and Singer v. Magnavox Co., 380 A.2d 969 (Del.Supr.1977). Since Field is a Delaware corporation, this court must apply the law of that state in determining whether defendants as directors of a corporation have breached any fiduciary duty they owed to the plaintiffs. Davidge v. White, 377 F.Supp. 1084, 1088 (S.D.N.Y.1974); see Scott v. Multi-Amp Corporation, 386 F.Supp. 44 (D.N.J.1974). After reviewing the evidence and the law this court has concluded, as a matter of law, that at the close of their case in chief, plaintiffs have not produced evidence which would prove essential elements of the claims they have made under the federal securities statutes and rules. Despite this conclusion, but without deciding whether the federal claims were not insubstantial, the court is of the view that it should exercise its discretion, retain pendent jurisdiction, and determine whether, as to their state law claims, plaintiffs have made a prima facie case. Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 129 (7th Cir. 1972); cf. Rousseff v. Dean Witter & Co., 453 F.Supp. 774 (N.D.Ind.1978); see Forest Laboratories, Inc. v. Pillsbury Company, 452 F.2d 621 (7th Cir. 1971); United States ex rel. Crow Creek Sioux Tribe v. Tri-County Bank of Chamberlain, South Dakota, 415 F.Supp. 858 (D.S.D.1976).

[17] The chancellors of the state of Delaware have said that "(t)here is no rule better settled in the law of corporations than that directors in their conduct of the corporation stand in the situation of fiduciaries." Bodell v. General Gas and Electric Corporation, 15 Del.Ch. 119, 132 A. 442, 446 (1926) aff'd 15 Del.Ch. 420, 140 A. 264 (1927); see Guth v. Loft, Inc., 23 Del.Ch. 255, 5 A.2d 503, 510 (1939). As fiduciaries, directors owe to the corporation and its shareholders the duties of honesty, loyalty, good faith, diligence and fairness; they must act for the benefit of the corporation and its shareholders, and never use their fiduciary positions to further their personal interests. Singer v. Magnavox Co., 380

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A.2d 969 (Del.1977). It follows, as a corollary, that corporate directors who negligently waste the assets of the company in buying stock of another corporation, and thus interfere with the rights of shareholders, commit breaches of their fiduciary duties. Penn Mart Realty Company v. Becker, 298 A.2d 349 (Del.Ch.1972); cf. Michelson v. Duncan, 407 A.2d 211 (Del.Supr.1979).

In a background memorandum filed to aid the court in understanding their underlying litigation theory in eight of the nine consolidated cases, plaintiffs argue that as to the question of liability of entrenched management that resists takeover attempts solely to perpetuate itself in office, the leading case is Condec Corporation v. Lunkenheimer Company, 43 Del.Ch. 353, 230 A.2d 769, 775-776 (1967). After a descriptive statement of what they understood was involved, plaintiffs conclude that "(a)lmost identical (with Condec) are the facts in the instant case."

In their memorandum objecting to defendants' motion for directed verdict, they again cite Condec Corporation v. Lunkenheimer Company and say it holds that "(w)here directors have taken actions otherwise lawful but for an improper motive, ***1193** such as resisting the acquisition of their corporation out of a desire to perpetuate the present directors' control, Delaware law holds that the directors have breached their fiduciary duty and are outside the protection of the business judgment rule." In view of this reliance on Condec v. Lunkenheimer, this court will examine that decision in order to determine whether, as plaintiffs contend, it controls the issues at bar.

Condec was a case in which a Delaware court of chancery heard a motion to restrain the use of 75,000 authorized but unissued shares of a target corporation in a way which would have prevented the plaintiff, a tender- offeror, from exercising its rights as a minority shareholder of the target company. Lunkenheimer Company directors, for reasons they could not justify at the hearing for preliminary relief, had rejected Condec's approach toward a merger; but, not to be undone, Condec, through two tender offers, succeeded in obtaining tenders for 191,017 shares of Lunkenheimer stock, a total of 414,000 then being outstanding. It became clear to Lunkenheimer that Condec was going to acquire enough shares to control the company. To prevent this, but without any benefit to the company and its shareholders, Lunkenheimer entered into an agreement with a subsidiary of a company that had evinced an interest in acquiring all of Lunkenheimer's assets, an interest Lunkenheimer approved, whereby it issued to the subsidiary 75,000 shares. The terms of the agreement were such that no money was paid; the sole purpose of the issuance was to thwart Condec's efforts to complete its tender offer and control the company. Without hearing more, the chancellor ruled that a final order would be entered cancelling the 75,000 shares of Lunkenheimer stock.

[18][19] Condec Corporation v. Lunkenheimer is the law of Delaware; see Young v. Valhi, Inc., 382 A.2d 1372, 1379 (Del.Ch.1978); it is cited by Delaware chancellors for the propositions that "shares may not be issued solely to preserve or to gain corporate control" and "corporate action, though technically correct and in compliance with Delaware Corporation Law, may not be undertaken for an inequitable purpose." Lynch v. Vickers Energy Corporation, 351 A.2d 570, 575 (Del.Ch.1976), rev'd on other grounds, 383 A.2d 278 (Del.Supr.1977). In Delaware, a majority of shareholders of a corporation owes a fiduciary duty to the minority. Roland International Corporation v. Najjar, 407 A.2d 1032 (Del.Supr.1979). Obviously, it is inequitable, and hence a breach of fiduciary duties, for a corporation acting at the instigation of a majority of its shareholders to issue stock, without consideration, solely to prevent a minority shareholder from completing a tender offer that is proceeding in accordance with law. Clearly, Condec is distinguishable as to parties, facts, issues, and relief sought. Nothing of the kind that happened in that case is shown in the evidence which plaintiffs have produced in this one.

[20] What plaintiffs have shown is that in each instance when a contact or approach was made to Field concerning an acquisition of it by another company, or a possible merger, the proposition was considered by defendants on its merits. Each contact or approach was made a part of the company's records by signed or initialed memoranda, with defendants' actions recorded in board minutes containing appropriate resolutions. Defendants reached their decision as to each approach or contact only after consulting with management, lawyers, accountants, and investment bankers. For reasons that were applicable to each occasion, defendants decided that the suggested acquisition or proposed merger was not in the best interest of Marshall Field, its shareholders, and communities served by the company. These were decisions made in the

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exercise of business judgment.

The same process, the evidence shows, occurred in connection with the approach made by Carter and Hawley in October 1977. The important difference was the timing of it, and the insensitivity represented by the fact that representatives of CHH appeared to be taking advantage of the ***1194** death of an important Field executive, and trying to exploit defendants' employment of Arena, who had just left CHH. There were valid reasons to believe that any merger of Field with CHH would violate the antitrust laws, and the subject, over a period of more than a month, was studied and discussed by Field executives with qualified lawyers. It is true that neither defendants nor the lawyers they consulted communicated with the law firm Carter and Hawley had mentioned; but this was a matter of judgment. Defendants did not breach any fiduciary duty they owed plaintiffs when they acted on the CHH approach.

It is worth remembering that according to plaintiffs' evidence, defendants had never told anyone they were interested in a merger with CHH, or that Field was for sale. Corporations in the kind of business as important as that in which Marshall Field was engaged plan to exist as on-going commercial or merchandising entities. Plaintiffs appear to believe that large companies like Field are developed for takeovers; and that seeing to shareholder opportunities for sale of their shares at a premium is the most important duty of directors who manage publicly owned corporations. Plaintiffs are mistaken; for if they were not, public equity ownership in corporations would be a form of entreprenuerial hazard that few corporations could survive.

As to the acquisitions which defendants authorized Field management to make, Halle's, The Liberty House Stores, and The Galleria in Houston, Texas, each was consummated after defendants considered business projections by management received the advice of lawyers and experts, and consulted with accountants and investment bankers. Despite a great deal of straining with financial data, reports and statistics, plaintiffs have not produced evidence which could prove that any of these acquisitions were unsound business ventures.

The lawsuit Field filed against CHH was authorized by defendants only after they had considered the advice of competent legal counsel who, according to evidence shown to the jury, had reasonable grounds for the litigation that was contemplated. Directors of corporations are entitled to rely in good faith on the advice of experts, including that of legal counsel. Spirt v. Bechtel, 232 F.2d 241, 247 (2d Cir. 1956); Voege v. Magnavox Co., 439 F.Supp. 935, 942 (D.Del.1977). The suit was proper; defendants had in good faith and in the exercise of business judgment decided that CHH's proposal toward a merger was illegal, inadequate, and not in the best interests of Marshall Field, its shareholders, and the communities it serves.

[21][22] Directors of corporations discharge their fiduciary duties when in good faith they exercise business judgment in making decisions regarding the corporation. Warshaw v. Calhoun, 221 A.2d 487 (Del.Supr.1966); Gimbel v. Signal Companies, Inc., 316 A.2d 599, 609 (Del.Ch.1974) aff'd 316 A.2d 619 (Del.Supr.1974); see S. Kaplan, Fiduciary Responsibility in the Management of the Corporation, 31 Business Law 883 (1976). When they act in good faith, they enjoy a presumption of sound business judgment, reposed in them as directors, which courts will not disturb if any rational business purpose can be attributed to their decisions. Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del.Ch.1977). In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exercise of business judgment by corporate directors. Sinclair Oil Corporation v. Levien, 280 A.2d 717, 722 (Del.Supr.1971); Warshaw v. Calhoun, 221 A.2d 487 (Del.Supr.1966). There is no evidence in this record on which the jury could find that at any time any defendant in this case committed fraud, was guilty of bad faith, grossly overreached, or abused his discretion in dealing with any property or right of any plaintiff, or a member of the class or subclasses.

[23] Corporate directors have the duty to oppose a takeover offer which they have determined would be detrimental to the interests of the corporation and its shareholders. Treadway Companies v. Care Corporation, ***1195** (Current Binder) Fed.Sec.L.Rep. (CHH) P 97,188 (S.D.N.Y.1979). Having so decided in good faith, with rational business purposes attributable to their decision, defendants had not only the right "but the duty to resist by all lawful means persons whose attempt to win control of the corporation, if successful, would harm the corporate enterprise." Heit v. Baird, 567 F.2d 1157, 1161 (1st Cir. 1977); Northwest Industries, Inc. v. B. F. Goodrich Co., 301 F.Supp. 706, 712 (N.D.Ill.1969); Cheff v. Mathes, 41

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Del.Ch. 494, 199 A.2d 548 (Del.Supr.1964).

IV.

For these reasons, as they have been stated by the court in the subdivisions of this memorandum, each discussing the law applicable to plaintiffs' claims under sections 10b, 14(d), 14(e) of the Securities and Exchange Act of 1934, Rule 10(b)-5 adopted by the Securities and Exchange Commission, and common law claims of alleged breaches of fiduciary duties by defendants, the court concludes that plaintiffs' evidence, considered together with all reasonable inferences favorable to them, totally fails to prove necessary elements of their claims. The facts established by the proof, and the inferences reasonably drawn therefrom, point so strongly and overwhelmingly in favor of defendants that the court is convinced the jury in this case, as reasonable men and women, would not arrive at a verdict contrary to one in defendants' favor.

Therefore, defendants' motion for directed verdict should be granted, without submission of this case to the jury, because this ruling will have the result of saving the mischance of speculation over plaintiffs' legally unfounded claims. Accordingly, the motion for directed verdict is granted and since an order granting a motion for directed verdict is effected without any assent of the jury, it will be discharged; and judgment will be entered on the directed verdict. The clerk will be instructed to enter a judgment in each of these consolidated cases against the plaintiffs and in favor of each defendant, with costs as provided by law.

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Supreme Court of Delaware.

PARAMOUNT COMMUNICATIONS INC., Viacom Inc., Martin S. Davis, Grace J. Fippinger, Irving R. Fischer, Benjamin L. Hooks, Franz J. Lutolf, James A. Pattison, Irwin Schloss, Samuel J. Silberman, Lawrence M. Small, and George Weissman, Defendants Below, Appellants,
v.
QVC NETWORK INC., Plaintiff Below, Appellee.
In re PARAMOUNT COMMUNICATIONS INC. SHAREHOLDERS' LITIGATION.

Submitted: Dec. 9, 1993.
Decided by Order: Dec. 9, 1993.
Opinion: Feb. 4, 1994.

Following corporation's announcement of merger, competing tender offeror brought suit for injunctive relief. The Court of Chancery, --- A.2d ----, granted preliminary injunction. The Supreme Court, Veasey, C.J., held that: (1) sale of control implicated enhanced judicial scrutiny, and (2) directors violated their fiduciary duties.

Affirmed and remanded.

West Headnotes

[1] Appeal and Error ⇐1024.2
30k1024.2

Supreme Court's standard and scope of review as to facts on appeal from preliminary injunction entered by Court of Chancery is whether, after independently reviewing entire record, Supreme Court can conclude that findings of Court of Chancery are sufficiently supported by the record and are product of orderly and logical deductive process.

[2] Corporations ⇐310(1)
101k310(1)

Directors' conduct is subject to enhanced scrutiny in situations involving approval of transaction resulting in sale of control, and adoption of defensive measures in response to threat to corporate control.

[3] Corporations ⇐310(1)
101k310(1)

Enhanced judicial scrutiny was mandated in sale or change of control transaction, by threatened diminution of current shareholders' voting power, fact that control premium was being sold, and traditional concern of courts for actions which impair or impede shareholder voting rights.

[4] Corporations ⇐310(1)
101k310(1)

Key features of enhanced judicial scrutiny applied to sale or change of control transaction are: judicial determination regarding adequacy of decision-making process employed by directors, including information on which directors based their decision; and judicial examination of reasonableness of directors' action in light of circumstances then existing.

[5] Corporations ⇐320(11)
101k320(11)

In sale or change of control situation, directors have burden of proving that they were adequately informed and acted reasonably.

[6] Corporations ⇐310(1)
101k310(1)

In cases where traditional business judgment rule is applicable and board of directors acted with due care, in good faith and in honest belief that they were acting in best interests of shareholder, court gives great deference to substance of directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if latter's decision can be attributed to any rational business purpose.

[7] Corporations ⇐310(1)
101k310(1)

In applying enhanced scrutiny to sale or change of control transaction, courts will not substitute its business judgment for that of directors, but will determine if directors' decision was, on balance, within range of reasonableness.

[8] Corporations ⇐310(1)
101k310(1)

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In sale or change of control transaction, enhanced judicial scrutiny is applied, and directors are obligated to seek best value reasonably available for stockholders, regardless of whether there is to be breakup of the corporation.

[9] Corporations ⚿310(1)
101k310(1)

When corporation undertakes transaction which will cause change in corporate control or breakup of corporate entity, directors' obligation is to seek best value reasonably available to stockholders.

[10] Corporations ⚿310(2)
101k310(2)

Having decided to sell control of corporation and faced with two tender offers, directors had obligation: to be diligent and vigilant in critically examining proposed transaction and competing offers; to act in good faith; to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide best value reasonably available to stockholders; and to negotiate actively and in good faith with both prospective purchasers to that end.

[11] Corporations ⚿310(1)
101k310(1)

Enhanced judicial scrutiny of directors' action was implicated by defensive provisions of merger agreement, coupled with sale of control and subsequent disparate treatment of competing bidders.

[12] Corporations ⚿310(1)
101k310(1)

Having entered merger agreement with one corporation, directors violated their fiduciary duties by failing to modify improper defensive provisions of agreement or improve economic terms of agreement when faced with competing higher offer.

[13] Corporations ⚿582
101k582

Provision of merger agreement, whereby board of selling corporation agreed that it would not solicit, encourage, discuss, negotiate or endorse any competing transaction unless certain conditions were met, was unenforceable, to extent provision was inconsistent with directors' fiduciary duties.

[14] Corporations ⚿310(1)
101k310(1)

To extent that contract, or provision thereof, purports to require board to act or not act in such a fashion as to limit exercise of fiduciary duties, it is invalid and unenforceable.

[15] Corporations ⚿582
101k582

Defensive provision of merger agreement, which granted buyer an option to purchase percentage of seller's outstanding common stock at a fixed price if seller terminated agreement because of competing transaction, if seller's stockholders did not approve merger or if seller's board recommended competing transaction, and which permitted buyer to pay for shares with senior subordinated note of questionable marketability and allowed buyer to elect to require seller to pay seller in cash a sum equal to difference between purchase price and market price of seller's stock, was invalid, insofar as provisions were inconsistent with directors' fiduciary duties.

[16] Attorney and Client ⚿10
45k10

Although there is no clear mechanism for Supreme Court to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts, consideration will be given to whether it is appropriate and fair to take into account attorney's behavior in event application is made by him in the future to appear pro hac vice in any proceeding in the state. Rules of Prof.Conduct, Rule 3.5(c), Del.C.Ann.

[17] Attorney and Client ⚿10
45k10

Out-of-state attorney must be admitted pro hac vice before participating in deposition in proceeding pending in state courts.

***35** Upon appeal from the Court of Chancery. AFFIRMED.

Charles F. Richards, Jr., Thomas A. Beck and Anne C. Foster of Richards, Layton & Finger, Wilmington, Barry R. Ostrager (argued), Michael J. Chepiga, Robert F. Cusumano, Mary Kay Vyskocil

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and Peter C. Thomas of Simpson Thacher & Bartlett, New York City, for appellants Paramount Communications Inc. and the individual defendants.

A. Gilchrist Sparks, III and William M. Lafferty of Morris, Nichols, Arsht & Tunnell, Wilmington, Stuart J. Baskin (argued), Jeremymymy ***36** G. Epstein, Alan S. Goudiss and Seth J. Lapidow of Shearman & Sterling, New York City, for appellant Viacom Inc.

Bruce M. Stargatt, David C. McBride, Josy W. Ingersoll, William D. Johnston, Bruce L. Silverstein and James P. Hughes, Jr. of Young, Conaway, Stargatt & Taylor, Wilmington, Herbert M. Wachtell (argued), Michael W. Schwartz, Theodore N. Mirvis, Paul K. Rowe and George T. Conway, III of Wachtell, Lipton, Rosen & Katz, New York City, for appellee QVC Network Inc.

Irving Morris, Karen L. Morris and Abraham Rappaport of Morris & Morris, Pamela S. Tikellis, Carolyn D. Mack and Cynthia A. Calder of Chimicles, Burt & Jacobsen, Joseph A. Rosenthal and Norman M. Monhait of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Daniel W. Krasner and Jeffrey G. Smith of Wolf, Haldenstein, Adler, Freeman & Herz, Arthur N. Abbey (argued), and Mark C. Gardy of Abbey & Ellis, New York City, for the shareholder appellees.

Before VEASEY, C.J., MOORE and HOLLAND, JJ.

VEASEY, Chief Justice.

In this appeal we review an order of the Court of Chancery dated November 24, 1993 (the "November 24 Order"), preliminarily enjoining certain defensive measures designed to facilitate a so-called strategic alliance between Viacom Inc. ("Viacom") and Paramount Communications Inc. ("Paramount") approved by the board of directors of Paramount (the "Paramount Board" or the "Paramount directors") and to thwart an unsolicited, more valuable, tender offer by QVC Network Inc. ("QVC"). In affirming, we hold that the sale of control in this case, which is at the heart of the proposed strategic alliance, implicates enhanced judicial scrutiny of the conduct of the Paramount Board under *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del.Supr., 506 A.2d 173 (1986). We further hold that the conduct of the Paramount Board was not reasonable as to process or result.

QVC and certain stockholders of Paramount commenced separate actions (later consolidated) in the Court of Chancery seeking preliminary and permanent injunctive relief against Paramount, certain members of the Paramount Board, and Viacom. This action arises out of a proposed acquisition of Paramount by Viacom through a tender offer followed by a second-step merger (the "Paramount- Viacom transaction"), and a competing unsolicited tender offer by QVC. The Court of Chancery granted a preliminary injunction. *QVC Network, Inc. v. Paramount Communications Inc.*, Del.Ch., 635 A.2d 1245, Jacobs, V.C. (1993), (the "Court of Chancery Opinion"). We affirmed by order dated December 9, 1993. *Paramount Communications Inc. v. QVC Network Inc.*, Del.Supr., Nos. 427 and 428, 1993, 637 A.2d 828, Veasey, C.J. (Dec. 9, 1993) (the "December 9 Order"). [FN1]

> FN1. We accepted this expedited interlocutory appeal on November 29, 1993. After briefing and oral argument in this Court held on December 9, 1993, we issued our December 9 Order affirming the November 24 Order of the Court of Chancery. In our December 9 Order, we stated, "It is not feasible, because of the exigencies of time, for this Court to complete an opinion setting forth more comprehensively the rationale of the Court's decision. Unless otherwise ordered by the Court, such an opinion will follow in due course." December 9 Order at 3. This is the opinion referred to therein.

The Court of Chancery found that the Paramount directors violated their fiduciary duties by favoring the Paramount-Viacom transaction over the more valuable unsolicited offer of QVC. The Court of Chancery preliminarily enjoined Paramount and the individual defendants (the "Paramount defendants") from amending or modifying Paramount's stockholder rights agreement (the "Rights Agreement"), including the redemption of the Rights, or taking other action to facilitate the consummation of the pending tender offer by Viacom or any proposed second-step merger, including the Merger Agreement between Paramount and Viacom dated September 12, 1993 (the "Original Merger Agreement"), as amended on October 24, 1993 (the "Amended Merger Agreement"). Viacom and the Paramount defendants were enjoined from taking any action ***37** to exercise

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any provision of the Stock Option Agreement between Paramount and Viacom dated September 12, 1993 (the "Stock Option Agreement"), as amended on October 24, 1993. The Court of Chancery did not grant preliminary injunctive relief as to the termination fee provided for the benefit of Viacom in Section 8.05 of the Original Merger Agreement and the Amended Merger Agreement (the "Termination Fee").

Under the circumstances of this case, the pending sale of control implicated in the Paramount-Viacom transaction required the Paramount Board to act on an informed basis to secure the best value reasonably available to the stockholders. Since we agree with the Court of Chancery that the Paramount directors violated their fiduciary duties, we have AFFIRMED the entry of the order of the Vice Chancellor granting the preliminary injunction and have REMANDED these proceedings to the Court of Chancery for proceedings consistent herewith.

We also have attached an Addendum to this opinion addressing serious deposition misconduct by counsel who appeared on behalf of a Paramount director at the time that director's deposition was taken by a lawyer representing QVC. [FN2]

FN2. It is important to put the Addendum in perspective. This Court notes and has noted its appreciation of the outstanding judicial workmanship of the Vice Chancellor and the professionalism of counsel in this matter in handling this expedited litigation with the expertise and skill which characterize Delaware proceedings of this nature. The misconduct noted in the Addendum is an aberration which is not to be tolerated in any Delaware proceeding.

I. FACTS

[1] The Court of Chancery Opinion contains a detailed recitation of its factual findings in this matter. Court of Chancery Opinion, 635 A.2d 1245, 1246-1259. Only a brief summary of the facts is necessary for purposes of this opinion. The following summary is drawn from the findings of fact set forth in the Court of Chancery Opinion and our independent review of the record. [FN3]

FN3. This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process. *Ivanhoe Partners v. Newmont Mining Corp.*, Del.Supr., 535 A.2d 1334, 1342-41 (1987).

Paramount is a Delaware corporation with its principal offices in New York City. Approximately 118 million shares of Paramount's common stock are outstanding and traded on the New York Stock Exchange. The majority of Paramount's stock is publicly held by numerous unaffiliated investors. Paramount owns and operates a diverse group of entertainment businesses, including motion picture and television studios, book publishers, professional sports teams, and amusement parks.

There are 15 persons serving on the Paramount Board. Four directors are officer-employees of Paramount: Martin S. Davis ("Davis"), Paramount's Chairman and Chief Executive Officer since 1983; Donald Oresman ("Oresman"), Executive Vice-President, Chief Administrative Officer, and General Counsel; Stanley R. Jaffe, President and Chief Operating Officer; and Ronald L. Nelson, Executive Vice President and Chief Financial Officer. Paramount's 11 outside directors are distinguished and experienced business persons who are present or former senior executives of public corporations or financial institutions. [FN4]

FN4. Grace J. Fippinger, a former Vice President, Secretary and Treasurer of NYNEX Corporation, and director of Pfizer, Inc., Connecticut Mutual Life Insurance Company, and The Bear Stearns Companies, Inc.

Irving R. Fischer, Chairman and Chief Executive Officer of HRH Construction Corporation, Vice Chairman of the New York City Chapter of the National Multiple Sclerosis Society, a member of the New York City Holocaust Memorial Commission, and an Adjunct Professor of Urban Planning at Columbia University

Benjamin L. Hooks, Senior Vice President of the Chapman Company and director of Maxima Corporation

J. Hugh Liedtke, Chairman of Pennzoil Company

Franz J. Lutolf, former General Manager and a member of the Executive Board of Swiss Bank Corporation, and director of Grapha Holding AG, Hergiswil (Switzerland), Banco Santander (Suisse) S.A., Geneva, Diawa Securities Bank (Switzerland), Zurich, Cheak Coast Helarb European Acquisitions S.A., Luxembourg Internationale Nederlanden Bank (Switzerland), Zurich James A. Pattison, Chairman and Chief Executive Officer of the Jim Pattison Group, and

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director of the Toronto-Dominion Bank, Canadian Pacific Ltd., and Toyota's Canadian subsidiary

Lester Pollack, General Partner of Lazard Freres & Co., Chief Executive Officer of Center Partners, and Senior Managing Director of Corporate Partners, investment affiliates of Lazard Freres, director of Loews Corp., CNA Financial Corp., Sunamerica Corp., Kaufman & Broad Home Corp., Parlex Corp., Transco Energy Company, Polaroid Corp., Continental Cablevision, Inc., and Tidewater Inc., and Trustee of New York University

Irwin Schloss, Senior Advisor, Marcus Schloss & Company, Inc.

Samuel J. Silberman, Retired Chairman of Consolidated Cigar Corporation

Lawrence M. Small, President and Chief Operating Officer of the Federal National Mortgage Association, director of Fannie Mae and the Chubb Corporation, and trustee of Morehouse College and New York University Medical Center

George Weissman, retired Chairman and Consultant of Philip Morris Companies, Inc., director of Avnet, Incorporated, and Chairman of Lincoln Center for the Performing Arts, Inc.

***38** Viacom is a Delaware corporation with its headquarters in Massachusetts. Viacom is controlled by Sumner M. Redstone ("Redstone"), its Chairman and Chief Executive Officer, who owns indirectly approximately 85.2 percent of Viacom's voting Class A stock and approximately 69.2 percent of Viacom's nonvoting Class B stock through National Amusements, Inc. ("NAI"), an entity 91.7 percent owned by Redstone. Viacom has a wide range of entertainment operations, including a number of well-known cable television channels such as MTV, Nickelodeon, Showtime, and The Movie Channel. Viacom's equity co-investors in the Paramount-Viacom transaction include NYNEX Corporation and Blockbuster Entertainment Corporation.

QVC is a Delaware corporation with its headquarters in West Chester, Pennsylvania. QVC has several large stockholders, including Liberty Media Corporation, Comcast Corporation, Advance Publications, Inc., and Cox Enterprises Inc. Barry Diller ("Diller"), the Chairman and Chief Executive Officer of QVC, is also a substantial stockholder. QVC sells a variety of merchandise through a televised shopping channel. QVC has several equity co- investors in its proposed combination with Paramount including BellSouth Corporation and Comcast Corporation.

Beginning in the late 1980s, Paramount investigated the possibility of acquiring or merging with other companies in the entertainment, media, or communications industry. Paramount considered such transactions to be desirable, and perhaps necessary, in order to keep pace with competitors in the rapidly evolving field of entertainment and communications. Consistent with its goal of strategic expansion, Paramount made a tender offer for Time Inc. in 1989, but was ultimately unsuccessful. *See Paramount Communications, Inc. v. Time Inc.*, Del.Supr., 571 A.2d 1140 (1990) ("*Time-Warner* ").

Although Paramount had considered a possible combination of Paramount and Viacom as early as 1990, recent efforts to explore such a transaction began at a dinner meeting between Redstone and Davis on April 20, 1993. Robert Greenhill ("Greenhill"), Chairman of Smith Barney Shearson Inc. ("Smith Barney"), attended and helped facilitate this meeting. After several more meetings between Redstone and Davis, serious negotiations began taking place in early July.

It was tentatively agreed that Davis would be the chief executive officer and Redstone would be the controlling stockholder of the combined company, but the parties could not reach agreement on the merger price and the terms of a stock option to be granted to Viacom. With respect to price, Viacom offered a package of cash and stock (primarily Viacom Class B nonvoting stock) with a market value of approximately $61 per share, but Paramount wanted at least $70 per share.

Shortly after negotiations broke down in July 1993, two notable events occurred. First, Davis apparently learned of QVC's potential interest in Paramount, and told Diller over lunch on July 21, 1993, that Paramount was not for sale. Second, the market value of Viacom's Class B nonvoting stock increased from $46.875 on July 6 to $57.25 on August 20. QVC claims (and Viacom disputes) that this price increase was caused by open market purchases of such stock by Redstone or entities controlled by him.

***39** On August 20, 1993, discussions between Paramount and Viacom resumed when Greenhill arranged another meeting between Davis and Redstone. After a short hiatus, the parties negotiated in earnest in early September, and

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performed due diligence with the assistance of their financial advisors, Lazard Freres & Co. ("Lazard") for Paramount and Smith Barney for Viacom. On September 9, 1993, the Paramount Board was informed about the status of the negotiations and was provided information by Lazard, including an analysis of the proposed transaction.

On September 12, 1993, the Paramount Board met again and unanimously approved the Original Merger Agreement whereby Paramount would merge with and into Viacom. The terms of the merger provided that each share of Paramount common stock would be converted into 0.10 shares of Viacom Class A voting stock, 0.90 shares of Viacom Class B nonvoting stock, and $9.10 in cash. In addition, the Paramount Board agreed to amend its "poison pill" Rights Agreement to exempt the proposed merger with Viacom. The Original Merger Agreement also contained several provisions designed to make it more difficult for a potential competing bid to succeed. We focus, as did the Court of Chancery, on three of these defensive provisions: a "no-shop" provision (the "No-Shop Provision"), the Termination Fee, and the Stock Option Agreement.

First, under the No-Shop Provision, the Paramount Board agreed that Paramount would not solicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party "makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing"; and (b) the Paramount Board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties.

Second, under the Termination Fee provision, Viacom would receive a $100 million termination fee if: (a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction.

The third and most significant deterrent device was the Stock Option Agreement, which granted to Viacom an option to purchase approximately 19.9 percent (23,699,000 shares) of Paramount's outstanding common stock at $69.14 per share if any of the triggering events for the Termination Fee occurred. In addition to the customary terms that are normally associated with a stock option, the Stock Option Agreement contained two provisions that were both unusual and highly beneficial to Viacom: (a) Viacom was permitted to pay for the shares with a senior subordinated note of questionable marketability instead of cash, thereby avoiding the need to raise the $1.6 billion purchase price (the "Note Feature"); and (b) Viacom could elect to require Paramount to pay Viacom in cash a sum equal to the difference between the purchase price and the market price of Paramount's stock (the "Put Feature"). Because the Stock Option Agreement was not "capped" to limit its maximum dollar value, it had the potential to reach (and in this case did reach) unreasonable levels.

After the execution of the Original Merger Agreement and the Stock Option Agreement on September 12, 1993, Paramount and Viacom announced their proposed merger. In a number of public statements, the parties indicated that the pending transaction was a virtual certainty. Redstone described it as a "marriage" that would "never be torn asunder" and stated that only a "nuclear attack" could break the deal. Redstone also called Diller and John Malone of Tele-Communications Inc., a major stockholder of QVC, to dissuade them from making a competing bid.

Despite these attempts to discourage a competing bid, Diller sent a letter to Davis on September 20, 1993, proposing a merger in which QVC would acquire Paramount for approximately $80 per share, consisting of 0.893 shares of QVC common stock and $30 in cash. QVC also expressed its eagerness to meet with Paramount to negotiate the details of a transaction. When the Paramount Board met on September 27, it was advised by Davis that the Original Merger ***40** · Agreement prohibited Paramount from having discussions with QVC (or anyone else) unless certain conditions were satisfied. In particular, QVC had to supply evidence that its proposal was not subject to financing contingencies. The Paramount Board was also provided information from Lazard describing QVC and its proposal.

On October 5, 1993, QVC provided Paramount with evidence of QVC's financing. The Paramount Board then held another meeting on October 11, and decided to authorize management to meet with QVC. Davis also informed the Paramount Board that Booz-Allen & Hamilton ("Booz-Allen"), a management consulting firm, had been retained to assess, *inter alia,* the incremental earnings potential from a Paramount-Viacom merger and a Paramount-QVC

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merger. Discussions proceeded slowly, however, due to a delay in Paramount signing a confidentiality agreement. In response to Paramount's request for information, QVC provided two binders of documents to Paramount on October 20.

On October 21, 1993, QVC filed this action and publicly announced an $80 cash tender offer for 51 percent of Paramount's outstanding shares (the "QVC tender offer"). Each remaining share of Paramount common stock would be converted into 1.42857 shares of QVC common stock in a second-step merger. The tender offer was conditioned on, among other things, the invalidation of the Stock Option Agreement, which was worth over $200 million by that point. [FN5] QVC contends that it had to commence a tender offer because of the slow pace of the merger discussions and the need to begin seeking clearance under federal antitrust laws.

> FN5. By November 15, 1993, the value of the Stock Option Agreement had increased to nearly $500 million based on the $90 QVC bid. *See* Court of Chancery Opinion, 635 A.2d 1245, 1271.

Confronted by QVC's hostile bid, which on its face offered over $10 per share more than the consideration provided by the Original Merger Agreement, Viacom realized that it would need to raise its bid in order to remain competitive. Within hours after QVC's tender offer was announced, Viacom entered into discussions with Paramount concerning a revised transaction. These discussions led to serious negotiations concerning a comprehensive amendment to the original Paramount-Viacom transaction. In effect, the opportunity for a "new deal" with Viacom was at hand for the Paramount Board. With the QVC hostile bid offering greater value to the Paramount stockholders, the Paramount Board had considerable leverage with Viacom.

At a special meeting on October 24, 1993, the Paramount Board approved the Amended Merger Agreement and an amendment to the Stock Option Agreement. The Amended Merger Agreement was, however, essentially the same as the Original Merger Agreement, except that it included a few new provisions. One provision related to an $80 per share cash tender offer by Viacom for 51 percent of Paramount's stock, and another changed the merger consideration so that each share of Paramount would be converted into 0.20408 shares of Viacom Class A voting stock, 1.08317 shares of Viacom Class B nonvoting stock, and 0.20408 shares of a new series of Viacom convertible preferred stock. The Amended Merger Agreement also added a provision giving Paramount the right not to amend its Rights Agreement to exempt Viacom if the Paramount Board determined that such an amendment would be inconsistent with its fiduciary duties because another offer constituted a "better alternative." [FN6] Finally, the Paramount Board was given the power to terminate the Amended Merger Agreement if it withdrew its recommendation of the Viacom transaction or recommended a competing transaction.

> FN6. Under the Amended Merger Agreement and the Paramount Board's resolutions approving it, no further action of the Paramount Board would be required in order for Paramount's Rights Agreement to be amended. As a result, the proper officers of the company were authorized to implement the amendment unless they were instructed otherwise by the Paramount Board.

Although the Amended Merger Agreement offered more consideration to the Paramount stockholders and somewhat more flexibility to the Paramount Board than did the Original Merger Agreement, the defensive measures designed to make a competing bid more difficult were not removed or modified. ***41** In particular, there is no evidence in the record that Paramount sought to use its newly-acquired leverage to eliminate or modify the No-Shop Provision, the Termination Fee, or the Stock Option Agreement when the subject of amending the Original Merger Agreement was on the table.

Viacom's tender offer commenced on October 25, 1993, and QVC's tender offer was formally launched on October 27, 1993. Diller sent a letter to the Paramount Board on October 28 requesting an opportunity to negotiate with Paramount, and Oresman responded the following day by agreeing to meet. The meeting, held on November 1, was not very fruitful, however, after QVC's proposed guidelines for a "fair bidding process" were rejected by Paramount on the ground that "auction procedures" were inappropriate and contrary to Paramount's contractual obligations to Viacom.

On November 6, 1993, Viacom unilaterally raised its tender offer price to $85 per share in cash and offered a comparable increase in the value of the securities being proposed in the second-step merger.

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At a telephonic meeting held later that day, the Paramount Board agreed to recommend Viacom's higher bid to Paramount's stockholders.

QVC responded to Viacom's higher bid on November 12 by increasing its tender offer to $90 per share and by increasing the securities for its second-step merger by a similar amount. In response to QVC's latest offer, the Paramount Board scheduled a meeting for November 15, 1993. Prior to the meeting, Oresman sent the members of the Paramount Board a document summarizing the "conditions and uncertainties" of QVC's offer. One director testified that this document gave him a very negative impression of the QVC bid.

At its meeting on November 15, 1993, the Paramount Board determined that the new QVC offer was not in the best interests of the stockholders. The purported basis for this conclusion was that QVC's bid was excessively conditional. The Paramount Board did not communicate with QVC regarding the status of the conditions because it believed that the No-Shop Provision prevented such communication in the absence of firm financing. Several Paramount directors also testified that they believed the Viacom transaction would be more advantageous to Paramount's future business prospects than a QVC transaction. [FN7] Although a number of materials were distributed to the Paramount Board describing the Viacom and QVC transactions, the only quantitative analysis of the consideration to be received by the stockholders under each proposal was based on then-current market prices of the securities involved, not on the anticipated value of such securities at the time when the stockholders would receive them. [FN8]

FN7. This belief may have been based on a report prepared by Booz- Allen and distributed to the Paramount Board at its October 24 meeting. The report, which relied on public information regarding QVC, concluded that the synergies of a Paramount-Viacom merger were significantly superior to those of a Paramount-QVC merger. QVC has labelled the Booz-Allen report as a "joke."

FN8. The market prices of Viacom's and QVC's stock were poor measures of their actual values because such prices constantly fluctuated depending upon which company was perceived to be the more likely to acquire Paramount.

The preliminary injunction hearing in this case took place on November 16, 1993. On November 19, Diller wrote to the Paramount Board to inform it that QVC had obtained financing commitments for its tender offer and that there was no antitrust obstacle to the offer. On November 24, 1993, the Court of Chancery issued its decision granting a preliminary injunction in favor of QVC and the plaintiff stockholders. This appeal followed.

II. APPLICABLE PRINCIPLES OF ESTABLISHED DELAWARE LAW

The General Corporation Law of the State of Delaware (the "General Corporation Law") and the decisions of this Court have repeatedly recognized the fundamental principle that the management of the business and affairs of a Delaware corporation is entrusted to its directors, who are the duly elected and authorized representatives of the ***42** stockholders. 8 *Del.C.* § 141(a); *Aronson v. Lewis,* Del.Supr., 473 A.2d 805, 811-12 (1984); *Pogostin v. Rice,* Del.Supr., 480 A.2d 619, 624 (1984). Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decisions of the directors. The business judgment rule embodies the deference to which such decisions are entitled. *Aronson,* 473 A.2d at 812.

[2] Nevertheless, there are rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors. In these situations, a court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable. [FN9] The decisions of this Court have clearly established the circumstances where such enhanced scrutiny will be applied. *E.g., Unocal,* 493 A.2d 946; *Moran v. Household Int'l, Inc.,* Del.Supr., 500 A.2d 1346 (1985); *Revlon,* 506 A.2d 173; *Mills Acquisition Co. v. Macmillan, Inc.,* Del.Supr., 559 A.2d 1261 (1989); *Gilbert v. El Paso Co.,* Del.Supr., 575 A.2d 1131 (1990). The case at bar implicates two such circumstances: (1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control.

FN9. Where actual self-interest is present and affects a majority of the directors approving a transaction, a court will apply even more exacting scrutiny to determine whether the transaction is entirely fair to the stockholders. *E.g.,*

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Weinberger v. UOP, Inc., Del.Supr., 457 A.2d 701, 710-11 (1983); *Nixon v. Blackwell*, Del.Supr., 626 A.2d 1366, 1376 (1993).

A. The Significance of a Sale or Change [FN10] of Control

FN10. For purposes of our December 9 Order and this Opinion, we have used the terms "sale of control" and "change of control" interchangeably without intending any doctrinal distinction.

When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders. Under the statutory framework of the General Corporation Law, many of the most fundamental corporate changes can be implemented only if they are approved by a majority vote of the stockholders. Such actions include elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. 8 *Del.C.* §§ 211, 242, 251-258, 263, 271, 275. Because of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights. [FN11]

FN11. *See Schnell v. Chris-Craft Indus., Inc.*, Del.Supr., 285 A.2d 437, 439 (1971) (holding that actions taken by management to manipulate corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management" were "contrary to established principles of corporate democracy" and therefore invalid); *Giuricich v. Emtrol Corp.*, Del.Supr., 449 A.2d 232, 239 (1982) (holding that "careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been effectively frustrated"); *Centaur Partners, IV v. Nat'l Intergroup*, Del.Supr., 582 A.2d 923 (1990) (holding that supermajority voting provisions must be clear and unambiguous because they have the effect of disenfranchising the majority); *Stroud v. Grace*, Del.Supr., 606 A.2d 75, 84 (1992) (directors' duty of disclosure is premised on the importance of stockholders being fully informed when voting on a specific matter); *Blasius Indus., Inc. v. Atlas Corp.*, Del.Ch., 564 A.2d 651, 659 n. 2 (1988) ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.").

In the absence of devices protecting the minority stockholders, [FN12] stockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger. *Weinberger*, ***43** 457 A.2d at 703. Absent effective protective provisions, minority stockholders must rely for protection solely on the fiduciary duties owed to them by the directors and the majority stockholder, since the minority stockholders have lost the power to influence corporate direction through the ballot. The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.

FN12. Examples of such protective provisions are supermajority voting provisions, majority of the minority requirements, etc. Although we express no opinion on what effect the inclusion of any such stockholder protective devices would have had in this case, we note that this Court has upheld, under different circumstances, the reasonableness of a standstill agreement which limited a 49.9 percent stockholder to 40 percent board representation. *Ivanhoe*, 535 A.2d at 1343.

In the case before us, the public stockholders (in the aggregate) currently own a majority of Paramount's voting stock. Control of the corporation is not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders. In the event the Paramount-Viacom transaction is consummated, the public stockholders will receive cash and a minority equity voting position in the surviving corporation. Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests. Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the

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proposed sale of control would provide the new controlling stockholder with the power to alter that vision.

Because of the intended sale of control, the Paramount-Viacom transaction has economic consequences of considerable significance to the Paramount stockholders. Once control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom-Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available.

B. The Obligations of Directors in a Sale or Change of Control Transaction

The consequences of a sale of control impose special obligations on the directors of a corporation. [FN13] In particular, they have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders. The courts will apply enhanced scrutiny to ensure that the directors have acted reasonably. The obligations of the directors and the enhanced scrutiny of the courts are well-established by the decisions of this Court. The directors' fiduciary duties in a sale of control context are those which generally attach. In short, "the directors must act in accordance with their fundamental duties of care and loyalty." *Barkan v. Amsted Indus., Inc.,* Del.Supr., 567 A.2d 1279, 1286 (1989). As we held in *Macmillan:*

> FN13. We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent. For example, where a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer. *See Pogostin,* 480 A.2d at 627; *Time-Warner,* 571 A.2d at 1152; *Bershad v. Curtiss-Wright Corp.,* Del.Supr., 535 A.2d 840, 845 (1987); *Macmillan,* 559 A.2d at 1285 n. 35. The decision of a board to resist such an acquisition, like all decisions of a properly- functioning board, must be informed, *Unocal,* 493 A.2d at 954-55, and the circumstances of each particular case will determine the steps that a board must take to inform itself, and what other action, if any, is required as a matter of fiduciary duty.

> It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders. This unremitting obligation extends equally to board conduct in a sale of corporate control.
> ***44** 559 A.2d at 1280 (emphasis supplied) (citations omitted).

In the sale of control context, the directors must focus on one primary objective--to secure the transaction offering the best value reasonably available for the stockholders--and they must exercise their fiduciary duties to further that end. The decisions of this Court have consistently emphasized this goal. *Revlon,* 506 A.2d at 182 ("The duty of the board ... [is] the maximization of the company's value at a sale for the stockholders' benefit."); *Macmillan,* 559 A.2d at 1288 ("[I]n a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."); *Barkan,* 567 A.2d at 1286 ("[T]he board must act in a neutral manner to encourage the highest possible price for shareholders."). *See also Wilmington Trust Co. v. Coulter,* Del.Supr., 200 A.2d 441, 448 (1964) (in the context of the duty of a trustee, "[w]hen all is equal ... it is plain that the Trustee is bound to obtain the best price obtainable").

In pursuing this objective, the directors must be especially diligent. *See Citron v. Fairchild Camera and Instrument Corp.,* Del.Supr., 569 A.2d 53, 66 (1989) (discussing "a board's active and direct role in the sale process"). In particular, this Court has stressed the importance of the board being adequately informed in negotiating a sale of control: "The need for adequate information is central to the enlightened evaluation of a transaction that a board must make." *Barkan,* 567 A.2d at 1287. This requirement is consistent with the general principle that "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them." *Aronson,* 473 A.2d at 812. *See also Cede & Co. v. Technicolor, Inc.,* Del.Supr., 634 A.2d 345, 367 (1993); *Smith v. Van Gorkom,* Del.Supr., 488 A.2d

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858, 872 (1985). Moreover, the role of outside, independent directors becomes particularly important because of the magnitude of a sale of control transaction and the possibility, in certain cases, that management may not necessarily be impartial. *See Macmillan,* 559 A.2d at 1285 (requiring "the intense scrutiny and participation of the independent directors").

Barkan teaches some of the methods by which a board can fulfill its obligation to seek the best value reasonably available to the stockholders. 567 A.2d at 1286-87. These methods are designed to determine the existence and viability of possible alternatives. They include conducting an auction, canvassing the market, etc. Delaware law recognizes that there is "no single blueprint" that directors must follow. *Id.* at 1286-87; *Citron* 569 A.2d at 68; *Macmillan,* 559 A.2d at 1287.

In determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance. *See Macmillan,* 559 A.2d at 1282 n. 29. Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives. [FN14] In addition, the board may assess a variety of practical considerations relating to each alternative, including:

> FN14. When assessing the value of non-cash consideration, a board should focus on its value as of the date it will be received by the stockholders. Normally, such value will be determined with the assistance of experts using generally accepted methods of valuation. *See In re RJR Nabisco, Inc. Shareholders Litig.,* Del.Ch., C.A. No. 10389, 1989 WL 7036, Allen, C. (Jan. 31, 1989), reprinted at 14 Del.J.Corp.L. 1132, 1161.

> [an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; ... the risk of non-consum[m]ation; ... the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.

Macmillan, 559 A.2d at 1282 n. 29. These considerations are important because the selection of one alternative may permanently foreclose other opportunities. While the assessment of these factors may be complex, ***45** the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders.

C. Enhanced Judicial Scrutiny of a Sale or Change of Control Transaction

[3] Board action in the circumstances presented here is subject to enhanced scrutiny. Such scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights (see *supra* note 11). In *Macmillan,* this Court held:

> When *Revlon* duties devolve upon directors, this Court will continue to exact an enhanced judicial scrutiny at the threshold, as in *Unocal,* before the normal presumptions of the business judgment rule will apply. [FN15]

> FN15. Because the Paramount Board acted unreasonably as to process and result in this sale of control situation, the business judgment rule did not become operative.

559 A.2d at 1288. The *Macmillan* decision articulates a specific two- part test for analyzing board action where competing bidders are not treated equally: [FN16]

> FN16. Before this test is invoked, "the plaintiff must show, and the trial court must find, that the directors of the target company treated one or more of the respective bidders on unequal terms." *Macmillan,* 559 A.2d at 1288.

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.

Id. See also Roberts v. General Instrument Corp.,

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Del.Ch., C.A. No. 11639, 1990 WL 118356, Allen, C. (Aug. 13, 1990), reprinted at 16 Del.J.Corp.L. 1540, 1554 ("This enhanced test requires a judicial judgment of reasonableness in the circumstances.").

[4][5] The key features of an enhanced scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

[6][7] Although an enhanced scrutiny test involves a review of the reasonableness of the substantive merits of a board's actions, [FN17] a court should not ignore the complexity of the directors' task in a sale of control. There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness. ***46** *See Unocal,* 493 A.2d at 955-56; *Macmillan,* 559 A.2d at 1288; *Nixon,* 626 A.2d at 1378.

> FN17. It is to be remembered that, in cases where the traditional business judgment rule is applicable and the board acted with due care, in good faith, and in the honest belief that they are acting in the best interests of the stockholders (which is not this case), the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and "will not substitute our views for those of the board if the latter's decision can be 'attributed to any rational business purpose.' " *Unocal,* 493 A.2d at 949 (*quoting Sinclair Oil Corp. v. Levien,* Del.Supr., 280 A.2d 717, 720 (1971)). *See Aronson,* 473 A.2d at 812.

D. *Revlon* and *Time-Warner* Distinguished

The Paramount defendants and Viacom assert that the fiduciary obligations and the enhanced judicial scrutiny discussed above are not implicated in this case in the absence of a "break-up" of the corporation, and that the order granting the preliminary injunction should be reversed. This argument is based on their erroneous interpretation of our decisions in *Revlon* and *Time- Warner.*

In *Revlon,* we reviewed the actions of the board of directors of Revlon, Inc. ("Revlon"), which had rebuffed the overtures of Pantry Pride, Inc. and had instead entered into an agreement with Forstmann Little & Co. ("Forstmann") providing for the acquisition of 100 percent of Revlon's outstanding stock by Forstmann and the subsequent break-up of Revlon. Based on the facts and circumstances present in *Revlon,* we held that "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." 506 A.2d at 182. We further held that "when a board ends an intense bidding contest on an insubstantial basis, ... [that] action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct." *Id.* at 184.

It is true that one of the circumstances bearing on these holdings was the fact that "the break-up of the company ... had become a reality which even the directors embraced." *Id.* at 182. It does not follow, however, that a "break-up" must be present and "inevitable" before directors are subject to enhanced judicial scrutiny and are required to pursue a transaction that is calculated to produce the best value reasonably available to the stockholders. In fact, we stated in *Revlon* that "when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions." *Id.* at 184 (emphasis added). *Revlon* thus does not hold that an inevitable dissolution or "break-up" is necessary.

[8] The decisions of this Court following *Revlon* reinforced the applicability of enhanced scrutiny and the directors' obligation to seek the best value reasonably available for the stockholders where there is a pending sale of control, regardless of whether or not there is to be a break-up of the corporation. In *Macmillan,* this Court held:

We stated in *Revlon,* and again here, that in a sale of corporate control the responsibility of the

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directors is to get the highest value reasonably attainable for the shareholders.

559 A.2d at 1288 (emphasis added). In *Barkan,* we observed further:

We believe that the general principles announced in *Revlon,* in *Unocal Corp. v. Mesa Petroleum Co.,* Del.Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.,* Del.Supr., 500 A.2d 1346 (1985) govern this case and every case in which a fundamental change of corporate control occurs or is contemplated.

567 A.2d at 1286 (emphasis added).

Although *Macmillan* and *Barkan* are clear in holding that a change of control imposes on directors the obligation to obtain the best value reasonably available to the stockholders, the Paramount defendants have interpreted our decision in *Time-Warner* as requiring a corporate break-up in order for that obligation to apply. The facts in *Time-Warner,* however, were quite different from the facts of this case, and refute Paramount's position here. In *Time-Warner,* the Chancellor held that there was no change of control in the original stock-for-stock merger between Time and Warner because Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger:

If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as ***47** here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger. This in my judgment was the situation with respect to the original merger agreement. When the specifics of that situation are reviewed, it is seen that, aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of [Nicholas J. Nicholas, Jr., president of Time], neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market.

The existence of a control block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of "minority" stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders. But here, effectuation of the merger would not have subjected Time shareholders to the risks and consequences of holders of minority shares. This is a reflection of the fact that no control passed to anyone in the transaction contemplated. The shareholders of Time would have "suffered" dilution, of course, but they would suffer the same type of dilution upon the public distribution of new stock.

Paramount Communications Inc. v. Time Inc., Del.Ch., No. 10866, 1989 WL 79880, Allen, C. (July 17, 1989), reprinted at 15 Del.J.Corp.L. 700, 739 (emphasis added). Moreover, the transaction actually consummated in *Time-Warner* was not a merger, as originally planned, but a sale of Warner's stock to Time.

In our affirmance of the Court of Chancery's well-reasoned decision, this Court held that "The Chancellor's findings of fact are supported by the record and his conclusion is correct as a matter of law." 571 A.2d at 1150 (emphasis added). Nevertheless, the Paramount defendants here have argued that a break-up is a requirement and have focused on the following language in our *Time-Warner* decision:

However, we premise our rejection of plaintiffs' *Revlon* claim on different grounds, namely, the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or break-up of the corporate entity inevitable, as was the case in *Revlon.*

Under Delaware law there are, generally speaking and without excluding other possibilities, two circumstances which may implicate *Revlon* duties. The first, and clearer one, is when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long- term strategy and seeks an alternative transaction involving the breakup of the company.

Id. at 1150 (emphasis added) (citation and footnote omitted).

The Paramount defendants have misread the holding of *Time-Warner.* Contrary to their argument, our decision in *Time-Warner* expressly states that the two general scenarios discussed in the above-quoted paragraph are not the only instances where "*Revlon* duties" may be implicated. The Paramount

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defendants' argument totally ignores the phrase "without excluding other possibilities." Moreover, the instant case is clearly within the first general scenario set forth in *Time-Warner*. The Paramount Board, albeit unintentionally, had "initiate[d] an active bidding process seeking to sell itself" by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquiror (QVC) was equally interested in being a bidder.

The Paramount defendants' position that both a change of control and a break- up are required must be rejected. Such a holding would unduly restrict the application of *Revlon,* is inconsistent with this Court's decisions in *Barkan* and *Macmillan,* and has no basis in policy. There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental ***48** (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of each of these events that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.

[9] Accordingly, when a corporation undertakes a transaction which will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders. This obligation arises because the effect of the Viacom-Paramount transaction, if consummated, is to shift control of Paramount from the public stockholders to a controlling stockholder, Viacom. Neither *Time-Warner* nor any other decision of this Court holds that a "break-up" of the company is essential to give rise to this obligation where there is a sale of control.

III. BREACH OF FIDUCIARY DUTIES BY PARAMOUNT BOARD

We now turn to duties of the Paramount Board under the facts of this case and our conclusions as to the breaches of those duties which warrant injunctive relief.

A. The Specific Obligations of the Paramount Board

[10] Under the facts of this case, the Paramount directors had the obligation: (a) to be diligent and vigilant in examining critically the Paramount-Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end.

Having decided to sell control of the corporation, the Paramount directors were required to evaluate critically whether or not all material aspects of the Paramount-Viacom transaction (separately and in the aggregate) were reasonable and in the best interests of the Paramount stockholders in light of current circumstances, including: the change of control premium, the Stock Option Agreement, the Termination Fee, the coercive nature of both the Viacom and QVC tender offers, [FN18] the No-Shop Provision, and the proposed disparate use of the Rights Agreement as to the Viacom and QVC tender offers, respectively.

FN18. Both the Viacom and the QVC tender offers were for 51 percent cash and a "back-end" of various securities, the value of each of which depended on the fluctuating value of Viacom and QVC stock at any given time. Thus, both tender offers were two-tiered, front-end loaded, and coercive. Such coercive offers are inherently problematic and should be expected to receive particularly careful analysis by a target board. *See Unocal,* 493 A.2d at 956.

These obligations necessarily implicated various issues, including the questions of whether or not those provisions and other aspects of the Paramount-Viacom transaction (separately and in the aggregate): (a) adversely affected the value provided to the Paramount stockholders; (b) inhibited or encouraged alternative bids; (c) were enforceable contractual obligations in light of the directors' fiduciary duties; and (d) in the end would advance or retard the Paramount directors' obligation to secure for the Paramount stockholders the best value reasonably available under the circumstances.

The Paramount defendants contend that they were precluded by certain contractual provisions, including the No-Shop Provision, from negotiating with QVC or seeking alternatives. Such provisions, whether or not they are presumptively valid in the

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abstract, may not validly define or limit the directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties under Delaware law. To the extent such provisions are inconsistent with those duties, they are invalid and unenforceable. *See Revlon,* 506 A.2d at 184-85.

Since the Paramount directors had already decided to sell control, they had an obligation ***49** to continue their search for the best value reasonably available to the stockholders. This continuing obligation included the responsibility, at the October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount-Viacom transaction to determine if: (a) the QVC tender offer was, or would continue to be, conditional; (b) the QVC tender offer could be improved; (c) the Viacom tender offer or other aspects of the Paramount-Viacom transaction could be improved; (d) each of the respective offers would be reasonably likely to come to closure, and under what circumstances; (e) other material information was reasonably available for consideration by the Paramount directors; (f) there were viable and realistic alternative courses of action; and (g) the timing constraints could be managed so the directors could consider these matters carefully and deliberately.

B. The Breaches of Fiduciary Duty by the Paramount Board

[11][12] The Paramount directors made the decision on September 12, 1993, that, in their judgment, a strategic merger with Viacom on the economic terms of the Original Merger Agreement was in the best interests of Paramount and its stockholders. Those terms provided a modest change of control premium to the stockholders. The directors also decided at that time that it was appropriate to agree to certain defensive measures (the Stock Option Agreement, the Termination Fee, and the No-Shop Provision) insisted upon by Viacom as part of that economic transaction. Those defensive measures, coupled with the sale of control and subsequent disparate treatment of competing bidders, implicated the judicial scrutiny of *Unocal, Revlon, Macmillan,* and their progeny. We conclude that the Paramount directors' process was not reasonable, and the result achieved for the stockholders was not reasonable under the circumstances.

When entering into the Original Merger Agreement, and thereafter, the Paramount Board clearly gave insufficient attention to the potential consequences of the defensive measures demanded by Viacom. The Stock Option Agreement had a number of unusual and potentially "draconian" [FN19] provisions, including the Note Feature and the Put Feature. Furthermore, the Termination Fee, whether or not unreasonable by itself, clearly made Paramount less attractive to other bidders, when coupled with the Stock Option Agreement. Finally, the No-Shop Provision inhibited the Paramount Board's ability to negotiate with other potential bidders, particularly QVC which had already expressed an interest in Paramount. [FN20]

FN19. The Vice Chancellor so characterized the Stock Option Agreement. Court of Chancery Opinion, 635 A.2d 1245, 1272. We express no opinion whether a stock option agreement of essentially this magnitude, but with a reasonable "cap" and without the Note and Put Features, would be valid or invalid under other circumstances. *See Hecco Ventures v. Sea- Land Corp.,* Del.Ch., C.A. No. 8486, 1986 WL 5840, Jacobs, V.C. (May 19, 1986) (21.7 percent stock option); *In re Vitalink Communications Corp. Shareholders Litig.,* Del.Ch., C.A. No. 12085, Chandler, V.C. (May 16, 1990) (19.9 percent stock option).

FN20. We express no opinion whether certain aspects of the No-Shop Provision here could be valid in another context. Whether or not it could validly have operated here at an early stage solely to prevent Paramount from actively "shopping" the company, it could not prevent the Paramount directors from carrying out their fiduciary duties in considering unsolicited bids or in negotiating for the best value reasonably available to the stockholders. *Macmillan,* 559 A.2d at 1287. As we said in *Barkan:* "Where a board has no reasonable basis upon which to judge the adequacy of a contemplated transaction, a no-shop restriction gives rise to the inference that the board seeks to forestall competing bids." 567 A.2d at 1288. *See also Revlon,* 506 A.2d at 184 (holding that "[t]he no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder").

Throughout the applicable time period, and especially from the first QVC merger proposal on September 20 through the Paramount Board meeting on November 15, QVC's interest in Paramount

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provided the opportunity for the Paramount Board to seek significantly higher value for the Paramount stockholders than that being offered by Viacom. QVC persistently demonstrated its intention to meet and exceed the Viacom offers, and ***50** frequently expressed its willingness to negotiate possible further increases.

The Paramount directors had the opportunity in the October 23-24 time frame, when the Original Merger Agreement was renegotiated, to take appropriate action to modify the improper defensive measures as well as to improve the economic terms of the Paramount-Viacom transaction. Under the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No-Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders. Nevertheless, the Paramount Board made no effort to eliminate or modify these counterproductive devices, and instead continued to cling to its vision of a strategic alliance with Viacom. Moreover, based on advice from the Paramount management, the Paramount directors considered the QVC offer to be "conditional" and asserted that they were precluded by the No- Shop Provision from seeking more information from, or negotiating with, QVC.

By November 12, 1993, the value of the revised QVC offer on its face exceeded that of the Viacom offer by over $1 billion at then current values. This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way. Moreover, their uninformed process had deprived their strategic vision of much of its credibility. *See Van Gorkom,* 488 A.2d at 872; *Cede v. Technicolor,* 634 A.2d at 367; *Hanson Trust PLC v. ML SCM Acquisition Inc.,* 2d Cir., 781 F.2d 264, 274 (1986).

When the Paramount directors met on November 15 to consider QVC's increased tender offer, they remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves. Yet, it was not "too late" to reconsider negotiating with QVC. The circumstances existing on November 15 made it clear that the defensive measures, taken as a whole, were problematic: (a) the No-Shop Provision could not define or limit their fiduciary duties; (b) the Stock Option Agreement had become "draconian"; and (c) the Termination Fee, in context with all the circumstances, was similarly deterring the realization of possibly higher bids. Nevertheless, the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was "illusory." This final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was thereby squandered. [FN21]

FN21. The Paramount defendants argue that the Court of Chancery erred by assuming that the Rights Agreement was "pulled" at the November 15 meeting of the Paramount Board. The problem with this argument is that, under the Amended Merger Agreement and the resolutions of the Paramount Board related thereto, Viacom would be exempted from the Rights Agreement in the absence of further action of the Paramount Board and no further meeting had been scheduled or even contemplated prior to the closing of the Viacom tender offer. This failure to schedule and hold a meeting shortly before the closing date in order to make a final decision, based on all of the information and circumstances then existing, whether to exempt Viacom from the Rights Agreement was inconsistent with the Paramount Board's responsibilities and does not provide a basis to challenge the Court of Chancery's decision.

IV. VIACOM'S CLAIM OF VESTED CONTRACT RIGHTS

Viacom argues that it had certain "vested" contract rights with respect to the No-Shop Provision and the Stock Option Agreement. [FN22] In effect, Viacom's argument is that the Paramount directors could enter into an agreement in violation of their fiduciary duties and then render Paramount, and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties. Viacom's protestations about vested rights are without merit. This Court has found that those defensive measures were improperly designed to deter potential bidders, and that ***51** such measures do not meet the reasonableness test to which they must be subjected. They are consequently invalid and unenforceable under the facts of this case.

FN22. Presumably this argument would have included the Termination Fee had the Vice Chancellor invalidated that provision or if appellees had cross-appealed from the Vice

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Chancellor's refusal to invalidate that provision.

[13][14] The No-Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable. *Cf. Wilmington Trust v. Coulter,* 200 A.2d at 452-54. Despite the arguments of Paramount and Viacom to the contrary, the Paramount directors could not contract away their fiduciary obligations. Since the No- Shop Provision was invalid, Viacom never had any vested contract rights in the provision.

[15] As discussed previously, the Stock Option Agreement contained several "draconian" aspects, including the Note Feature and the Put Feature. While we have held that lock-up options are not *per se* illegal, *see Revlon,* 506 A.2d at 183, no options with similar features have ever been upheld by this Court. Under the circumstances of this case, the Stock Option Agreement clearly is invalid. Accordingly, Viacom never had any vested contract rights in that Agreement.

Viacom, a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features of the Stock Option Agreement. It cannot be now heard to argue that it obtained vested contract rights by negotiating and obtaining contractual provisions from a board acting in violation of its fiduciary duties. As the Nebraska Supreme Court said in rejecting a similar argument in *ConAgra, Inc. v. Cargill, Inc.,* 222 Neb. 136, 382 N.W.2d 576, 587-88 (1986), "To so hold, it would seem, would be to get the shareholders coming and going." Likewise, we reject Viacom's arguments and hold that its fate must rise or fall, and in this instance fall, with the determination that the actions of the Paramount Board were invalid.

V. CONCLUSION

The realization of the best value reasonably available to the stockholders became the Paramount directors' primary obligation under these facts in light of the change of control. That obligation was not satisfied, and the Paramount Board's process was deficient. The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process to the point where the arsenal of defensive measures established at the outset was perpetuated (not modified or eliminated) when the situation was dramatically altered. QVC's unsolicited bid presented the opportunity for significantly greater value for the stockholders and enhanced negotiating leverage for the directors. Rather than seizing those opportunities, the Paramount directors chose to wall themselves off from material information which was reasonably available and to hide behind the defensive measures as a rationalization for refusing to negotiate with QVC or seeking other alternatives. Their view of the strategic alliance likewise became an empty rationalization as the opportunities for higher value for the stockholders continued to develop.

It is the nature of the judicial process that we decide only the case before us--a case which, on its facts, is clearly controlled by established Delaware law. Here, the proposed change of control and the implications thereof were crystal clear. In other cases they may be less clear. The holding of this case on its facts, coupled with the holdings of the principal cases discussed herein where the issue of sale of control is implicated, should provide a workable precedent against which to measure future cases.

For the reasons set forth herein, the November 24, 1993, Order of the Court of Chancery has been AFFIRMED, and this matter has been REMANDED for proceedings consistent herewith, as set forth in the December 9, 1993, Order of this Court.

ADDENDUM

The record in this case is extensive. The appendix filed in this Court comprises 15 volumes, totalling some 7251 pages. It includes***52** substantial deposition testimony which forms part of the factual record before the Court of Chancery and before this Court. The members of this Court have read and considered the appendix, including the deposition testimony, in reaching its decision, preparing the Order of December 9, 1993, and this opinion. Likewise, the Vice Chancellor's opinion revealed that he was thoroughly familiar with the entire record, including the deposition testimony. As noted, *supra* p. 37 note 2, the Court has commended the parties for their professionalism in conducting expedited discovery, assembling and organizing the record, and preparing and presenting very helpful briefs, a joint appendix, and oral argument.

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The Court is constrained, however, to add this Addendum. Although this Addendum has no bearing on the outcome of the case, it relates to a serious issue of professionalism involving deposition practice in proceedings in Delaware trial courts. [FN23]

FN23. We raise this matter *sua sponte* as part of our exclusive supervisory responsibility to regulate and enforce appropriate conduct of lawyers appearing in Delaware proceedings. *See In re Infotechnology, Inc. Shareholder Litig.*, Del.Supr., 582 A.2d 215 (1990); *In re Nenno,* Del.Supr., 472 A.2d 815, 819 (1983); *In re Green,* Del.Supr., 464 A.2d 881, 885 (1983); *Delaware Optometric Corp. v. Sherwood,* 36 Del.Ch. 223, 128 A.2d 812 (1957); *Darling Apartment Co. v. Springer,* 25 Del.Ch. 420, 22 A.2d 397 (1941). Normally our supervision relates to the conduct of members of the Delaware Bar and those admitted *pro hac vice.* Our responsibility for supervision is not confined to lawyers who are members of the Delaware Bar and those admitted *pro hac vice,* however. *See In re Metviner,* Del.Supr., Misc. No. 256, 1989 WL 226135, Christie, C.J. (July 7, 1989 and Aug. 22, 1989) (ORDERS). Our concern, and our duty to insist on appropriate conduct in any Delaware proceeding, including out-of-state depositions taken in Delaware litigation, extends to all lawyers, litigants, witnesses, and others.

[16] The issue of discovery abuse, including lack of civility and professional misconduct during depositions, is a matter of considerable concern to Delaware courts and courts around the nation. [FN24] One particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future--a lesson of conduct not to be tolerated or repeated.

FN24. Justice Sandra Day O'Connor recently highlighted the national concern about the deterioration in civility in a speech delivered on December 14, 1993, to an American Bar Association group on "Civil Justice Improvements."

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
> ....
> ... In my view, incivility disserves the client because it wastes time and energy--time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.

The Honorable Sandra Day O'Connor, "Civil Justice System Improvements," ABA at 5 (Dec. 14, 1993) (footnotes omitted).

On November 10, 1993, an expedited deposition of Paramount, through one of its directors, J. Hugh Liedtke, [FN25] was taken in the state of Texas. The deposition was taken by Delaware counsel for QVC. Mr. Liedtke was individually represented at this deposition by Joseph D. Jamail, Esquire, of the Texas Bar. Peter C. Thomas, Esquire, of the New York Bar appeared and defended on behalf of the Paramount defendants. It does not appear that any member of the Delaware bar was present at the deposition representing any of the defendants or the stockholder plaintiffs.

FN25. The docket entries in the Court of Chancery show a November 2, 1993, "Notice of Deposition of Paramount Board" (Dkt 65). Presumably, this included Mr. Liedtke, a director of Paramount. Under Ch. Ct. R. 32(a)(2), a deposition is admissible against a party if the deposition is of an officer, director, or managing agent. From the docket entries, it appears that depositions of third party witnesses (persons who were not directors or officers) were taken pursuant to the issuance of commissions.

Mr. Jamail did not otherwise appear in this Delaware proceeding representing any party, and he was not admitted *pro hac vice*. [FN26] ***53** Under the rules of the Court of Chancery and this Court, [FN27] lawyers who are admitted *pro hac vice* to represent a party in Delaware proceedings are subject to Delaware Disciplinary Rules, [FN28] and are required to review the Delaware State Bar Association Statement of Principles of Lawyer Conduct (the "Statement of Principles"). [FN29] During the Liedtke deposition, Mr. Jamail abused the privilege of representing a witness in a Delaware proceeding, in that he: (a) improperly directed the witness not to answer certain questions; (b) was extraordinarily rude, uncivil, and vulgar; and (c) obstructed the ability of the questioner to elicit testimony to assist the Court in this matter.

FN26. It does not appear from the docket entries

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that Mr. Thomas was admitted *pro hac vice* in the Court of Chancery. In fact, no member of his firm appears from the docket entries to have been so admitted until Barry R. Ostrager, Esquire, who presented the oral argument on behalf of the Paramount defendants, was admitted on the day of the argument before the Vice Chancellor, November 16, 1993.

FN27. Ch.Ct.R. 170; Supr.Ct.R. 71. There was no Delaware lawyer and no lawyer admitted *pro hac vice* present at the deposition representing any party, except that Mr. Johnston, a Delaware lawyer, took the deposition on behalf of QVC. The Court is aware that the general practice has not been to view as a requirement that a Delaware lawyer or a lawyer already admitted *pro hac vice* must be present at all depositions. Although it is not as explicit as perhaps it should be, we believe that Ch.Ct.R. 170(d), fairly read, requires such presence:

(d) Delaware counsel for any party shall appear in the action in which the motion for admission pro hac vice is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the Court, Clerk of the Court, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.

See also Hoechst Celanese Corp. v. National Union Fire Ins. Co., Del.Super., 623 A.2d 1099, 1114 (1991). (Super.Ct.Civ.R. 90.1, which corresponds to Ch.Ct.R. 170, "merely excuses attendance of local counsel at depositions, but does not excuse non-Delaware counsel from compliance with the *pro hac vice* requirement.... A deposition conducted pursuant to Court rules is a proceeding."). We believe that these shortcomings in the enforcement of proper lawyer conduct can and should be remedied consistent with the nature of expedited proceedings.

FN28. It appears that at least Rule 3.5(c) of the Delaware Lawyer's Rules of Professional Conduct is implicated here. It provides: "A lawyer shall not ... (c) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct which is degrading to a tribunal."

FN29. The following are a few pertinent excerpts from the Statement of Principles:

The Delaware State Bar Association, for the Guidance of Delaware lawyers, and those lawyers from other jurisdictions who may be associated with them, adopted the following Statement of Principles of Lawyer Conduct on [November 15, 1991].... The purpose of adopting these Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation.... A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession.... [A] lawyer ... should treat all persons, including adverse lawyers and parties, fairly and equitably.... Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice.... Respect for the court requires ... emotional self-control; [and] the absence of scorn and superiority in words of demeanor.... A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial. No pre-trial procedure should be used to harass an opponent or delay a case.... Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.... Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such investigation as is required to form an informed conviction that the lawyer to be admitted is ethical and competent, and should furnish the candidate for admission with a copy of this Statement.

(Emphasis supplied.)

To illustrate, a few excerpts from the latter stages of the Liedtke deposition follow:

A. [Mr. Liedtke] I vaguely recall [Mr. Oresman's letter].... I think I did read it, probably.

....

Q. (By Mr. Johnston [Delaware counsel for QVC]) Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?

MR. JAMAIL: Don't answer that.

How would he know what was going on in Mr. Oresman's mind?

Don't answer it.

Go on to your next question.

MR. JOHNSTON: No, Joe--

MR. JAMAIL: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.

***54** MR. JOHNSTON: No. Joe, Joe--

MR. JAMAIL: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.

MR. JOHNSTON: Let's just take it easy.

MR. JAMAIL: No, we're not going to take it easy. Get done with this.

MR. JOHNSTON: We will go on to the next

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question.
MR. JAMAIL: Do it now.
MR. JOHNSTON: We will go on to the next question. We're not trying to excite anyone.
MR. JAMAIL: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.
MR. JOHNSTON: I'm not trying to socialize. We'll go on to another question. We're continuing the deposition.
MR. JAMAIL: Well, go on and shut up.
MR. JOHNSTON: Are you finished?
MR. JAMAIL: Yeah, you--
MR. JOHNSTON: Are you finished?
MR. JAMAIL: I may be and you may be. Now, you want to sit here and talk to me, fine. This deposition is going to be over with. You don't know what you're doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you're doing.
Now, I've tolerated you for three hours. If you've got another question, get on with it. This is going to stop one hour from now, period. Go.
MR. JOHNSTON: Are you finished?
MR. THOMAS: Come on, Mr. Johnston, move it.
MR. JOHNSTON: I don't need this kind of abuse.,
MR. THOMAS: Then just ask the next question.
Q. (By Mr. Johnston) All right. . To try to move forward, Mr. Liedtke, ... I'll show you what's been marked as Liedtke 14 and it is a covering letter dated October 29 from Steven Cohen of Wachtell, Lipton, Rosen & Katz including QVC's Amendment Number 1 to its Schedule 14D-1, and my question--
A. No.
Q. --to you, sir, is whether you've seen that?
A. No. Look, I don't know what your intent in asking all these questions is, but, my God, I am not going to play boy lawyer.
Q. Mr. Liedtke--
A. Okay. Go ahead and ask your question.
Q. --I'm trying to move forward in this deposition that we are entitled to take. I'm trying to streamline it.
MR. JAMAIL: Come on with your next question. Don't even talk with this witness.
MR. JOHNSTON: I'm trying to move forward with it.
MR. JAMAIL: You understand me? Don't talk to this witness except by question. Did you hear me?
MR. JOHNSTON: I heard you fine.
MR. JAMAIL: You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions. Let's go with it.
(JA 6002-06). [FN30]

FN30. Joint Appendix of the parties on appeal.

Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by Mr. Jamail on the record of the Liedtke deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature. It happens that in this case there was no application to the Court, and the parties and the witness do not ***55** appear to have been prejudiced by this misconduct. [FN31]

FN31. We recognize the practicalities of litigation practice in our trial courts, particularly in expedited proceedings such as this preliminary injunction motion, where simultaneous depositions are often taken in far-flung locations, and counsel have only a few hours to question each witness. Understandably, counsel may be reluctant to take the time to stop a deposition and call the trial judge for relief. Trial courts are extremely busy and overburdened. Avoidance of this kind of misconduct is essential. If such misconduct should occur, the aggrieved party should recess the deposition and engage in a dialogue with the offending lawyer to obviate the need to call the trial judge. If all else fails and it is necessary to call the trial judge, sanctions may be appropriate against the offending lawyer or party, or against the complaining lawyer or party if the request for court relief is unjustified. *See* Ch.Ct.R. 37. It should also be noted that discovery abuse sometimes is the fault of the questioner, not the lawyer defending the deposition. These admonitions should be read as applying to both sides.

Nevertheless, the Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed by Mr. Jamail on this record, that lawyer would have been subject to censure or more serious sanctions. [FN32] While the specter of disciplinary proceedings should not be used by the

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parties as a litigation tactic, [FN33] conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief under the trial court's rules, including Ch. Ct. R. 37. Under some circumstances, the use of the trial court's inherent summary contempt powers may be appropriate. *See In re Butler,* Del.Supr., 609 A.2d 1080, 1082 (1992).

FN32. *See In re Ramunno,* Del.Supr., 625 A.2d 248, 250 (1993) (Delaware lawyer held to have violated Rule 3.5 of the Rules of Professional Conduct, and therefore subject to public reprimand and warning for use of profanity similar to that involved here and "insulting conduct toward opposing counsel [found] ... unacceptable by any standard").

FN33. *See Infotechnology,* 582 A.2d at 220 ("In Delaware there is the fundamental constitutional principle that [the Supreme] Court, alone, has the sole and exclusive responsibility over all matters affecting governance of the Bar.... The Rules are to be enforced by a disciplinary agency, and are not to be subverted as procedural weapons.").

Although busy and overburdened, Delaware trial courts are "but a phone call away" and would be responsive to the plight of a party and its counsel bearing the brunt of such misconduct. [FN34] It is not appropriate for this Court to prescribe in the abstract any particular remedy or to provide an exclusive list of remedies under such circumstances. We assume that the trial courts of this State would consider protective orders and the sanctions permitted by the discovery rules. Sanctions could include exclusion of obstreperous counsel from attending the deposition (whether or not he or she has been admitted *pro hac vice*), ordering the deposition recessed and reconvened promptly in Delaware, or the appointment of a master to preside at the deposition. Costs and counsel fees should follow.

FN34. *See Hall v. Clifton Precision,* E.D.Pa., 150 F.R.D. 525 (1993) (ruling on "coaching," conferences between deposed witnesses and their lawyers, and obstructive tactics):

> Depositions are the factual battleground where the vast majority of litigation actually takes place.... Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away.
>
> 150 F.R.D. at 531.

[17] As noted, this was a deposition of Paramount through one of its directors. Mr. Liedtke was a Paramount witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been represented at the deposition by a Delaware lawyer or a lawyer admitted *pro hac vice*. A Delaware lawyer who moves the admission *pro hac vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except depositions when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing ***56** *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer. [FN35] Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a deposition, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding.

FN35. *See, e.g.,* Ch.Ct.R. 170(b), (d), and (h).

Counsel attending the Liedtke deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of that proceeding. The record of the deposition as a whole (JA 5916-6054) demonstrates that, not only Mr. Jamail, but also Mr. Thomas (representing the Paramount defendants), continually interrupted the questioning, engaged in colloquies and objections which sometimes suggested answers to questions, [FN36] and constantly pressed the questioner for time throughout the deposition. [FN37] As to Mr. Jamail's tactics quoted above, Mr. Thomas passively let matters proceed as they did, and at times even added his own voice to support the behavior of Mr. Jamail. A Delaware lawyer or a lawyer admitted *pro hac vice* would have been expected to put an end to the misconduct in the Liedtke deposition.

FN36. Rule 30(d)(1) of the revised Federal Rules of Civil Procedure, which became effective on

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December 1, 1993, requires objections during depositions to be "stated concisely and in a non-argumentative and non- suggestive manner." *See Hall,* 150 F.R.D. at 530. *See also Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, D.Del., C.A. No. 79- 182, Steel, J. (Dec. 12, 1980); *Cascella v. GDV, Inc.*, Del.Ch., C.A. No. 5899, 1981 WL 15129, Brown, V.C. (Jan. 15, 1981); *In re Asbestos Litig.*, Del.Super., 492 A.2d 256 (1985); *Deutschman v. Beneficial Corp.*, D.Del., C.A. No. 86-595 MMS, Schwartz, J. (Feb. 20, 1990). The Delaware trial courts and this Court are evaluating the desirability of adopting certain of the new Federal Rules, or modifications thereof, and other possible rule changes.

FN37. While we do not necessarily endorse everything set forth in the *Hall* case, we share Judge Gawthrop's view not only of the impropriety of coaching witnesses on and off the record of the deposition (*see supra* note 34), but also the impropriety of objections and colloquy which "tend to disrupt the question-and-answer rhythm of a deposition and obstruct the witness's testimony." *See* 150 F.R.D. at 530. To be sure, there are also occasions when the questioner is abusive or otherwise acts improperly and should be sanctioned. *See supra* note 31. Although the questioning in the Liedtke deposition could have proceeded more crisply, this was not a case where it was the questioner who abused the process.

This kind of misconduct is not to be tolerated in any Delaware court proceeding, including depositions taken in other states in which witnesses appear represented by their own counsel other than counsel for a party in the proceeding. Yet, there is no clear mechanism for this Court to deal with this matter in terms of sanctions or disciplinary remedies at this time in the context of this case. Nevertheless, consideration will be given to the following issues for the future: (a) whether or not it is appropriate and fair to take into account the behavior of Mr. Jamail in this case in the event application is made by him in the future to appear *pro hac vice* in any Delaware proceeding; [FN38] and (b) what rules or standards should be adopted to deal effectively with misconduct by out-of-state lawyers in depositions in proceedings pending in Delaware courts.

FN38. The Court does not condone the conduct of Mr. Thomas in this deposition. Although the Court does not view his conduct with the gravity and revulsion with which it views Mr. Jamail's conduct, in the future the Court expects that counsel in Mr. Thomas's position will have been admitted *pro hac vice* before participating in a deposition. As an officer of the Delaware Court, counsel admitted *pro hac vice* are now clearly on notice that they are expected to put an end to conduct such as that perpetrated by Mr. Jamail on this record.

As to (a), this Court will welcome a voluntary appearance by Mr. Jamail if a request is received from him by the Clerk of this Court within thirty days of the date of this Opinion and Addendum. The purpose of such voluntary appearance will be to explain the questioned conduct and to show cause why such conduct should not be considered as a bar to any future appearance by Mr. Jamail in a Delaware proceeding. As to (b), this Court and the trial courts of this State will undertake to strengthen the existing mechanisms for dealing with the type of misconduct referred ***57** to in this Addendum and the practices relating to admissions *pro hac vice*.

END OF DOCUMENT

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United States Court of Appeals,
Seventh Circuit.

John PATTERSON et al., Plaintiffs-Appellees,
v.
Roy STOVALL et al., Defendants-Appellees,
William P. Corkill et al., Objectors-Appellants.

No. 75--1349.

Argued Oct. 29, 1975.
Decided Jan. 8, 1976.
Rehearing Denied Jan. 26, 1976.

Suit was brought on behalf of depositors to recover sums invested by defendants in cash commodities for deferred deliveries. The United States District Court for the Northern District of Illinois, Eastern Division, Thomas R. McMillen, J., approved settlement and certain depositors objected and appealed. The Court of Appeals, Bauer, Circuit Judge, held that approval of settlement which would return 80 to 90% of original investment or allow option to pursue 100% recovery and which was not in conflict with power to order further restitution in connection with criminal proceedings pending against individual defendant out of $1,000,000 fund that would, after payment of certain claims, eventually be returned to defendants, was not abuse of discretion.

Affirmed.

West Headnotes

[1] Federal Courts ⚿544
170Bk544
(Formerly 106k405(13))

Certain depositors, who represented approximately one-fifth of 1% both in number and in amounts of all claims against defendants for sums invested in cash commodities for deferred deliveries, had standing to appeal from certification of class and approval of settlement between depositors and defendants.

[2] Federal Courts ⚿818
170Bk818
(Formerly 106k406.5(14))

Appellate court will only intervene and upset settlement on clear showing that trial court committed abuse of discretion.

[3] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1699)

[3] Federal Courts ⚿346
170Bk346
(Formerly 106k328.4(3))

In connection with suits brought by depositors to recover sums invested by defendants in cash commodities for deferred deliveries, jurisdiction giving district court authority to approve class action settlement was available under, inter alia, theory that settlement could have been approved as condition of probation of individual defendant, or on theory of diversity in that at least some of depositors could have individually satisfied $10,000 limitation.

[4] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1699)

Where objectors to class action settlement of claims for sums invested in cash commodities for deferred deliveries were allowed 18 months to pursue whatever discovery or investigations they desired, and refusal to order individual defendant to answer questions concerning his potential liability was not abuse of discretion in that settlement negotiations had neared fruition with vast majority of class members and such defendant may have had privilege under Fifth Amendment not to answer questions, trial court did not abuse its discretion in approving settlement without further discovery. U.S.C.A.Const. Amend. 5; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

[5] Compromise and Settlement ⚿69
89k69
(Formerly 170Ak1699)

Where trial court in determining whether certification of class and proposed settlement were appropriate in suit brought to recover sums invested in cash commodities for deferred deliveries had ample opportunity to gain familiarity with subtleties of proposed settlement, court had access to numerous documents, exhibits, computer printout of depositors and amounts invested as well as transcript of proceedings in criminal case against individual

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defendant and summary of government's evidence, failure of trial court to hold evidentiary hearing before approving settlement did not constitute abuse of discretion.

[6] Federal Courts ⚿763.1
170Bk763.1
(Formerly 170Bk763, 106k406.1(11))

In reviewing proposed settlement court should consider judgment of counsel and presence of good faith bargaining.

[7] Compromise and Settlement ⚿15(2)
89k15(2)

Trial judge should not attempt to decide merits of controversy where parties have reached settlement since any virtue which may reside in compromise is based upon doing away with effect of such a decision.

[8] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1699)

Approval of class action settlement which would return 80 to 90% of original investment by depositors in cash commodities for deferred deliveries or allow option to pursue 100% recovery and which was not in conflict with power to order further restitution in criminal proceedings against individual defendant out of $1,000,000 fund that, after satisfying certain claims, would eventually be returned to defendants was not abuse of discretion.

[9] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1699)

Even assuming that defendants would come out of settlement with depositors concerning sums invested in cash commodities for deferred deliveries with money remaining in $1,000,000 fund that, after payment of certain claims, was to be returned to the defendants, that fact alone would not make settlement unreasonable.

[10] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1699)

Trial court did not err in relying on accounting of defendants' assets in approving settlement in suit brought on behalf of depositors to recover sums invested in cash commodities for deferred deliveries where accuracy of reports, although initially questionable, was borne out during disbursement of settlement funds.

***109** James P. Chapman, Edward T. Joyce, Chicago, Ill., for appellants.

James A. Brandvik, Daniel F. Hopp, Herbert I. Rothbart, Jeffrey Schulman, Edward A. Berman, Philip S. Wolin, Arthur M. Mintz, Michael A. Zelmar, Craig E. Anderson, Bernard Kleinman, Robert E. Cronin, Lowell H. Jacobson, Chicago, Ill., for appellees.

Before HASTINGS, Senior Circuit Judge, and SPRECHER and BAUER, Circuit Judges.

BAUER, Circuit Judge.

This appeal is brought by certain named individuals on behalf of themselves and other individuals similarly situated raising objections to a class action settlement. The sole question on appeal is whether the trial judge abused his discretion in approving the settlement. We affirm the trial court's approval of the settlement.

[1] Appellants-objectors[FN1] are members of a class of plaintiffs who over a two-year period deposited money ultimately totalling approximately $9,700,000 with Rawlin L. Stovall and his company, American Cash Commodities of Missouri, Inc., both defendants herein, for investment by them in cash commodities for deferred delivery. In September, 1973, immediately prior to the defendants' indictment on charges arising out of their misuse of these funds, numerous ***110** suits were filed seeking class status, an accounting of the depositors' funds, and a recession of all contracts between the depositors and the defendants.

FN1. William P. Corkill, John Corkill, Joane Duda, James Fry, Diane Jezierski and Robert Ryan are the six appellant-objectors who equal in number .0018 percent (6 of 3,183 $ 18), or approximately 1/5 of 1 percent of all depositors, having claims totalling $19,925.00 or .0022 percent of all claims. In fact, they represent approximately 1/5 of 1 percent in number and in amounts of all claims. Although in terms of the class and settlement their number and size might be considered miniscule, the serious issues raised before this Court are not reduced in their magnitude. Initially appellees maintained that the

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objectors had no standing to bring this appeal. In light of the total factual picture, however, there is no doubt that the objectors have standing to appeal. The fact that they accepted certain funds in settlement did not constitute a waiver since that action was taken primarily to help the plaintiff-appellees secure a disbursement from the bank.

Shortly after the criminal indictments were returned against both defendants, plaintiffs requested the court to enjoin the transfer of $6,500,000 on deposit in the defendants' bank accounts. Although no injunction order was entered the money remained on deposit at the Continental Bank. On February 6, 1974, a proposed settlement was presented to the trial court and counsel for both sides requested leave to present the settlement to the class members.

Appellants, through independent counsel, filed numerous objections both to the substance of the settlement and to the procedures followed in preparing the settlement proposal for submission to the court. With one exception, appellants' objections and suggestions were overruled; the class was certified, the proposed settlement was approved for submission to the class, and notice of the class certification and the proposed settlement was sent to the class. Appellants filed objections to the form of the notice and again asserted their objections to the proposed settlement itself. On February 20, 1975, the trial court overruled all objections, approved the settlement, and authorized a distribution of part of the sequestered funds to the class.[FN2]

FN2. The settlement agreement provided as follows:

'The defendants Stovall, American and Hackbarth, have submitted a Settlement Agreement for approval to the Court. The Agreement provides, in substance, that $6,500,000 (now approximately $6,800,000) (Fund 'A') will be set aside and deposited in interest bearing accounts for eventual distribution to those class members on a pro rata basis who establish their claims and to counsel for plaintiffs for their fees and expenses, as determined by the Court, in full and final settlement of all claims against Stovall, American and Hackbarth, which are alleged in the Complaints or could have been alleged by reason of or in connection with any matter or fact set forth or referred to in any of the Complaints.

'Settlement Fund A' shakll consist of all the aforesaid funds and all interest accruing thereon, less $1,000,000 allocated to 'Settlement Fund B'. Upon its establishment by court order, 'Settlement Fund A' shall be available to all plaintiff-depositors who shall participate in this settlement by filing acceptable claims for refund (which shall be limited to the amount of monies deposited, exclusive of interest, profits and other increments) with the Court, and for claimants who do not file, but may be equally entitled to a refund; 'Settlement Fund A' shall be used for the pro rata distribution of all such claims, subject only to actual costs of administrating said funds which are necessarily incurred by consolidated class counsel, costs in mailing distribution after notice, and reasonable costs and attorneys' fees to consolidated class counsel.

The approximate sum of $1,000.000 (Fund 'B') will be set aside in interest bearing accounts and subject to claims of any creditors who are not depositors, the claims of depositors who choose to litigate their claims, claims of the Internal Revenue Service, and of any creditors who are not depositors, defendants' attorneys' fees and costs of any fines imposed against defendants in the criminal proceedings before Judge Abraham L. Marovitz. In the event any funds remain in Fund 'B' after payment of all claims herein described the balance shall be turned over to American.'

It appears that the major stimulus for the defendants' civil settlement of the actions against Stovall was the government's agreement to accept a plea of nolo contendere to all counts in the indictment, except for one perjury count, to which Stovall pled guilty. Judge Marovitz received the pleas and sentenced Stovall to two concurrent five year sentences, which were immediately suspended in favor of probation under 18 U.S.C. s 3651. Judge Marovitz was fully informed of the terms of the civil settlements. On February 28, 1974, at the time of defendant's sentencing, the judge announced that the disposition of the defendants, admittedly quite lenient under all the facts and circumstances, was based in part on his intention of ordering further restitution out of settlement monies in fund 'B' (discussed infra pp. 114--115) pursuant to the court's power under the restitution statutes. ***111** This point was again restated by the court on September 20, 1974. Nevertheless, the language of the settlement agreement reached by the parties states that any money remaining in fund 'B' will be turned over to Stovall's company. Depositors who were reimbursed out of fund 'A' are barred from claiming or receiving further amounts from fund 'B'. Thus Judge Marovitz' intention to order further restitution appears to conflict with the language of the settlement agreement.

We believe that this apparent conflict must be

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interpreted in favor of the depositors. Since Judge Marovitz' handling of the criminal proceedings greatly influenced the settlement of the civil cases we do not believe that the wording of the agreement should be read to usurp his power to order restitution [FN3]--an action which he clearly indicated he would take on two separate occasions. If in the future, he should decide that as a condition of probation defendants must make restitution by paying out of money left over in fund 'B' in the criminal case such an order would not violate the settlement agreement reached in the civil suit. Thus the most compelling argument of objectors that Stovall still remains a millionaire, despite his nefarious activities in defrauding depositors, his criminal conviction, and the multiple lawsuits filed against him, is not really valid since Judge Marovitz still retains the power to order restitution to depositors from any funds remaining with Stovall or his company in fund 'B'.

> FN3. Under 18 U.S.C. s 3651 the sentencing judge clearly has the power to make restitution a condition of probation. Section 3651 states, inter alia:
> '(W)hile on probation and among the conditions thereof, the defendant may be required to pay a fine in one or several sums; and may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; . . .'

As the Court of Appeals we have no power to rewrite a settlement agreement reached by the parties. However, we do have the authority to approve or disapprove a class action settlement after considering any objections raised. Our approval in this case is based upon our interpretation of the agreement entered into after the parties were made aware of Judge Marovitz' intentions. [FN4]

> FN4. The transcript of proceedings on February 28, 1974 before Judge Marovitz indicates that attorneys involved in the civil suit were present for the defendants' sentencing and that the following colloquy took place:
> 'By Mr. Montana (prosecutor): 'Through various discussions with our office, it is my understanding that our office has agreed that in the unique situation of this case, because of the availability of the money, that we would not oppose and in fact would suggest to the Court that probation be imposed under the strictest condition and that is that this Court maintain power and jurisdiction over those settlement funds; that as complete restitution as possible be made to the victims for the monies that Mr. Stovall fraudulently took from them; that the Court is sure that the defendant does not profit substantially from his fraud . . . (Tr. 4).
> By Mr. Branvik (attorney for defendant):
> Your Honor, I have explained to Mr. Stovall, following our discussions that this Court will maintain jurisdiction to review the terms of the settlement and also particularly the contents of Fund B under the settlement at the end of the civil litigation and that this Court will determine, will have the power to determine at such time, whether a fine or other conditions should be imposed with respect to that Fund B settlement as to Mr. Stovall and he understands it, your Honor.
> The Court: Does he consent to it?
> Branvik: Yes, your Honor.
> The Court: Is that correct, Mr. Stovall?
> The Defendants: Yes, sir, it is (Tr. 6). By the Court:
> Well, this Court will impose a sentence on each count of five years and suspend the sentence, and also by agreement of the defendant in his own proper person and through his counsel suspend the imposition of a fine on each of these counts until September 20th or any other earlier or later date within the period of the probation depending upon the determination of the civil case which will establish the amount of money left in the B fund.
> It is the Court's intention then to order restitution and impose such fines as the Court deems just under the circumstances.'

***112** [2] Our approval is also based upon the principle that an appellate court will only intervene and upset a settlement upon a clear showing that the trial court committed an abuse of its discretion. State of West Virginia v. Chas. Pfizer & Company, 440 F.2d 1079, 1085 (2d Cir. 1971); Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972); United Founders Life Insurance v. Consumers Nat'l. Life Insurance, 447 F.2d 647, 655 (7th Cir. 1971). Courts of review generally will consider the facts of a settlement in a light favorable to promoting settlements. As the Court of Appeals for the Fifth Circuit stated in Florida Trailer and Equipment Co. v. Deal, 284 F.2d 567 (1960):

> 'Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and

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expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and (thus) no basis for a compromise.'

In light of this standard we shall review each of the major objections to the settlement raised by this appeal.

[3] Appellant-objectors submit that the proponents of the settlement agreement did not create a sufficient factual record to permit the trial court to make a proper determination that the agreement was fair, reasonable and adequate. Specifically they argue that they were denied sufficient discovery before the settlement which would have enabled them to evaluate Stovall's claims for commissions, the potential costs of a trial, and the probability of multiple appeals. In addition they question the defendants withdrawing their motion to dismiss for want of jurisdiction. Since the question of jurisdiction can never be waived by the parties we have reviewed the record sua sponte on this issue and believe that one or more alternate grounds for federal jurisdiction does exist.[FN5]

FN5. On appeal none of the parties have argued that this Court does not now have jurisdiction. However the question was seriously raised in the trial court before defendants withdrew their motion to dismiss. Despite that withdrawal the District Court would have no authority to approve the settlement had it lacked jurisdiction. However we believe jurisdiction was available on a number of different theories. First, Judge Marovitz clearly had jurisdiction of the criminal suit and he conditioned his sentence in that case on the return of the depositors funds. Thus even if the civil suits were without jurisdiction he could approve the settlement as a condition of probation. Second, although class members cannot aggregate their claims in a diversity case, Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969); Zahn v. International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), at least some of the claimants could have individually satisfied the $10,000 limitation. Third, jurisdiction might exist under either the Commodity Exchange Act ss 4 and 6(b) or the Securities Exchange Act. Fourth, even if the case was dismissed on jurisdictional grounds the bank could clearly re-file the same case with the same parties under the statutory interpleader section, 28 U.S.C. s 1335, which requires only minimal jurisdiction of claimants. See State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530--1, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967); Haynes v. Felder, 239 F.2d 868 (5th Cir. 1957). Cf. State of West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710 (S.D.N.Y.1970), aff'd 440 F.2d 1079 (2d Cir. 1971).

[4] Obviously an evidentiary hearing is not required before the settlement of every case. Under Rule 23 the trial court must be more vigilant over class settlements because of the rights of the ***113** absent class members and because sometimes counsel may appear to be too eager to settle in order to guarantee themselves a fee for their professional services. However a review of the settlement agreement here indicates that its genesis was on January 14, 1974 when Stovall's counsel were engaged in plea bargaining with the government. The class determination was not made until July 12, 1974, and all the parties were given until October 3, 1974, to determine whether the agreement was to be approved or to present their objections. At the October 3rd hearing appellant-objectors requested additional discovery and the court granted additional time to pursue discovery. They were allowed to depose Stovall, Hackbarth, the accountant, and any bank or financial institution they chose. [FN6] Unfortunately, this additional discovery did not produce any new information that would materially effect the settlement. Subsequently the court received various reports from the objectors and other parties in the action and entered an order on February 20, 1975 giving final approval to the settlement. There is no evidence of the trial court abusing its discretion. The court was most patient in allowing the appellant-objectors to pursue whatever discovery or investigations they desired over a period of eighteen months. Thus, objector-appellants misplace reliance on Cohen v. Young, 127 F.2d 721 (6th Cir. 1942) where the court summarily dismissed the objectors' petition to intervene and denied them the right to produce evidence.

FN6. Appellant-objectors claim that their discovery was limited in that they were not allowed to question the defendant about his potential liability. They requested the court to direct Stovall to answer the questions. The court

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> refused to order the defendant to answer. We believe it was within the ambit of the trial court's discretion to refuse to order the answers. Since settlement negotiations had neared fruition with the vast majority of class members the court may have decided that the only inquiry that was proper dealt with the extent of Stovall's assets. In addition, Stovall may have had a privilege under the Fifth Amendment not to answer the questions. Normally, however, we would consider it an abuse of the court's discretion not to order a defendant to answer questions concerning his acts and possible liability in a civil case.

The objectors' main argument is similar to that pursued by Greenspun v. Bogan, 492 F.2d 375 (1st Cir. 1974), where the trial court had approved a derivative action settlement. Certain parties appealed claiming that the District Court abused its discretion because it failed to conduct an independent evaluation of the settlement and because it received more supporting data after giving its tentative approval. In considering this issue, the Court stated at p. 378 of the opinion:

> 'Appellants contend that the district court could not have exercised independent judgment because it lacked sufficient evidence to show the fairness of the proposed settlement. They point to the fact that the court had access to only two depositions concerning the proposed fee schedules, both of which were conducted after the March 19th announcement that an agreement had been reached 'in principle' between the parties of the derivative action. Moreover, two volumes of exhibits and documents were given to the court on the eve before it approved the settlement, giving rise to the speculation that the court did not have a full opportunity to review their contents. And appellants point, most particularly, to the fact that the court did not have any documents in its possession which could show that the proposed fee schedule was comparable to the fee schedules of other similar real estate investment trusts and their advisors.
>
> While the district court's evaluation of the proposed settlement may not have been as comprehensive or intensive as it could have been, appellants have failed to show that the district court clearly abused its discretion in approving the settlement because it lacked sufficient evidence upon which an independent appraisal (could) be based' (492 F.2d at 378).

***114** [5] In the instant case the trial court had sufficient facts before it to make an informed judgment. Perhaps holding an evidentiary hearing may be the better practice; the failure to do so however does not constitute a per se abuse of discretion. The court had ample opportunity to gain familiarity with the subtleties of the proposed settlement. Memoranda in support of the settlement as well as objections were presented to the court. Further, the court had access to numerous documents, exhibits, a computer print-out of depositors and amounts invested, a transcript of the proceedings in the criminal case, a summary of the government's evidence, and, the benefit of dozens of appearances by counsel for the plaintiffs and defendants.

[6] In reviewing a proposed settlement the court should consider the judgment of counsel and the presence of good faith bargaining. Newman v. Stein, supra p. 111. Courts usually refuse to substitute their business judgment for that of counsel, absent fraud or overreaching. As stated in Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151 at 159 (S.D.N.Y. 1971).

> 'The Court will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.' Glicken v. Bradford, 35 F.R.D. 144, 151 (S.D.N.Y. 1964) . . .'

[7] The trial judge should not attempt to decide the merits of the controversy where the parties have reached a settlement. Any virtue which may reside in a compromise is based upon doing away with the effect of such a decision. Woods & Selick, Inc. v. Todd, 282 U.S. 881, 51 S.Ct. 85, 75 L.Ed. 777 (1930); Schleiff v. Chesapeake & Ohio Ry. Co., 43 F.R.D. 175, 178--179 (S.D.N.Y.1967); City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974); 'Factors Considered in Determining the Fairness of a Settlement,' 68 N.U.L.Rev., p. 1145. As Judge Wyatt stated in Schleiff, supra:

> 'In determining whether to approve the compromise or not, the Court does not try out the disputed issues. The compromise was agreed to for the purpose of avoiding just that' (43 F.R.D. at 178).

[8] Appellant-objectors are asking this Court to upset a settlement which returns 80 to 90% of the original investment of the class members plus allows plaintiffs an option to pursue a 100% recovery. This settlement compared to much of the litigation in the federal courts is imminent fair and reasonable.

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The creation of funds 'A' and 'B' is the result of negotiations between plaintiffs and defendants. It is a division of Stovall's assets accumulated from the scheme and acquired during the period described in the complaint. The trial court did not create the divided funds. The parties chose it as a method to provide defendants an incentive to settle.

Fund 'A' consisted of approximately 6.8 million dollars set aside and deposited in interest bearing accounts for pro rata distribution to class members who agreed to the settlement. The majority of the money in fund 'A' has already been paid out to depositors.

Fund 'B' consists of one million dollars set aside to provide for those depositors who opt out of the settlement agreement of fund 'A', claims by the Internal Revenue Service for taxes, claims by any creditors who are not depositors, and, any costs, fines or restitution payments resulting from the criminal proceedings before Judge Marovitz. Claims on fund 'B' by depositors amount to approximately $48,000. The Internal Revenue Service has subpoenaed the records of defendants but no claims have been made at this time. Judge Marovitz has not yet ordered any restitution of monies from this fund as a condition of probation because not all of the money in fund 'A' has been distributed nor have any of the other potential claims on fund 'B' been made.

Appellant-objectors submit that the trial court had no basis for establishing ***115** the fund 'B'; that the claims of the Internal Revenue Service cannot possibly amount to one million dollars, consequently Stovall and his company, American, stand to profit handsomely from the settlement. As we stated previously, Judge Marovitz still has the power to order restitution from fund 'B'. As to the potentially large claims of the Internal Revenue Service we issue no opinion at this time. Nevertheless it is difficult to believe that Stovall stands to make a profit because of wrongdoing.

[9] Assuming arguendo that the defendants were to come out of the settlement with money remaining in fund 'B' (a decision that largely rests within Judge Marovitz' discretion), that fact alone would not make the settlement unreasonable. A settlement by its very nature is an agreement where both sides gain as well as lose something. It is clear that by settling Stovall was able to maintain his freedom. But he also gave up a potentially large claim for 'handling fees', he gave up his seat on the Chicago Board of Trade, as well as his constitutional right to a jury trial and the raising of any legitimate defenses. In addition he has to serve a period of five years of probation during which he will not be allowed to trade on behalf of anyone other than himself.

[10] Finally appellant-objectors contend that the court improperly relied upon the J. K. Lasser Company reports which gave an accounting of the Stovall assets. They submit the reports are without integrity because their author, Mr. Adelman, did not express an opinion, as is the usual practice by accountants; and, the fact that the reports did not constitute a full and complete audit of accounts, liabilities, and assets. Appellant-objectors advised the trial court of numerous deficiencies in the report and requested the appointment of an independent expert to evaluate the defendants' financial status. That request was denied after both plaintiffs and defendants attempted to explain the discrepancies in the Lasser Co. reports.

In response to this argument appellees now point out that the accuracy of the reports has been verified by the settlement itself. As of June 24, 1975, a total of 3143 claims were either filed, approved, or paid. This was out of an original 3369 depositors. Subsequent verification showed that many persons had three or four accounts and that the true number of located individual depositors came to 3143. These class members have all verified that their accounts were correctly reflected in the defendants' records which were the materials upon which the Lasser reports were based.

Moreover, the total claims amount to $8,755,546 as of this date, with only a few claimants to be located. This figure is very close to the estimated deposit figure of $8,900,000 used in the settlement and the J. K. Lasser Co. computation. $6,063,274.50 has been paid to class members whose names and addresses and amount of deposits were taken from the Hackbarth computer print- out and the J. K. Lasser reports. Even though the Lasser reports initially may have been questionable, their accuracy has been borne out of the disbursement of the settlement funds. No error was committed in relying on the reports in approving the settlement.

Accordingly, the judgment of the trial court is affirmed.

Affirmed.

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Court of Chancery of Delaware, New Castle County.

PENN MART REALTY COMPANY, a corporation of the Commonwealth of Pennsylvania, Plaintiff,
v.
Isadore A. BECKER et al., Defendants.

Nov. 29, 1972.

Derivative action against, inter alia, buyer corporations which had purchased stock from plaintiff's corporation. Buyer corporations moved to dismiss. The Court of Chancery, Short, Vice Chancellor, held that shareholder's complaint alleging that directors of shareholder's corporation had been negligent and had wasted corporate assets in selling third corporation's stock to buyer corporations while knowing that they intended to purchase stock in same corporation at higher price and that buyer corporations knew that they were dealing with fiduciaries, knew true worth of assets, and aided directors in breach of duty, stated a cause of action.

Motion denied.

West Headnotes

[1] Equity ⚿363
150k363

On motion to dismiss, all inferences must be construed in favor of plaintiff and complaint may not be dismissed unless it appears to reasonable certainty that plaintiff would not be entitled to relief under any state of facts which could be proved in support of claim. Court of Chancery Rules, rule 12(b)(6), Del.C.Ann.

[2] Corporations ⚿307
101k307

Directors of corporation stand in fiduciary relation to shareholders.

[3] Corporations ⚿210
101k210

One who knowingly joins with any fiduciary, including corporate official, in breach of his obligation is liable to beneficiaries of trust relation.

[4] Corporations ⚿310(2)
101k310(2)

[4] Corporations ⚿312(1)
101k312(1)

Fraud and self-dealing are not the only ways in which corporate directors may breach their fiduciary duty; they may also breach it by being grossly negligent or by wasting corporate assets.

[5] Corporations ⚿310(1)
101k310(1)

[5] Evidence ⚿60
157k60

Directors are accorded presumption of having acted in good faith and in interests of stockholders and may also avail themselves of benefit of business judgment rule.

[6] Corporations ⚿310(1)
101k310(1)

[6] Corporations ⚿312(5)
101k312(5)

[6] Evidence ⚿85.1
157k85.1
(Formerly 157k85)

Presumption of directors' good faith and business judgment rule, and fact that directors sold assets at market price, did not establish as matter of law that there was no breach of directors' duty.

[7] Corporations ⚿211(6)
101k211(6)

Shareholder's complaint against buyer corporations and others, alleging that directors of shareholder's corporation had been negligent and had wasted corporate assets in selling third corporation's stock to buyer corporations while knowing that they intended to purchase stock in same corporation at higher price and that buyer corporations knew that they were dealing with fiduciaries, knew true worth of assets, and aided directors in breach of duty, stated a cause of action. Court of Chancery Rules, rule 12(b)(6), Del.C.Ann.

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[8] Judgment ⚿829(3)
228k829(3)

Federal court judgment dismissing securities fraud action under Securities Act and rule and pendent common-law claim concluded plaintiff as to any allegations of fraud, the standard of fraud under statute and rule being more lenient than that required to establish common-law fraud, but, since federal court had no jurisdiction over common-law claim after determination that plaintiff had failed to state federal claim, plaintiff was not concluded on any common-law theory except fraud and could allege gross negligence and waste by directors. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

***350** Irving Morris, and Joseph A. Rosenthal, of Cohen, Morris & Rosenthal, Wilmington, for plaintiff.

Hugh Corroon, and E. D. Griffenberg, Jr., of Potter Anderson & Corroon, Wilmington, for defendants Investors Diversified Services, Inc., and Investors Variable Payment Fund, Inc.; Donovan, Leisure, Newton & Irvine, and Davis, Polk & Wardwell, New York City, of counsel.

Howard M. Handelman, of Bayard, Brill & Handelman, Wilmington, for defendant Glen Alden Corp.

SHORT, Vice Chancellor:

This is a derivative suit brought on behalf of Glen Alden Corporation (Glen Alden), a Delaware corporation, by one of its stockholders, Penn Mart Realty Co. (Penn Mart). The individual defendants are the board of directors of Glen Alden. The corporate defendants are Investors Diversified Services, Inc. (IDS), a Minnesota corporation; Investors Variable Payment Fund, Inc. (Investors), a Nevada corporation; and Carter, Berlind & Weill, Inc. (Carter), a Delaware corporation. IDS is a securities broker-dealer and principal underwriter and investment manager of Investors, an open-end diversified investment company. Carter is a securities broker-dealer.

Penn Mart seeks to recover for Glen Alden damages which it says the latter suffered because of the individual defendants' gross negligence and waste of corporate assets. It charges the corporate defendants with knowingly assisting in the directors' alleged breaches of their fiduciary duty.

IDS and Investors have moved to dismiss the complaint as to them on the alternative theories that it either fails to state a claim upon which relief can be granted, or that the matter has been concluded between them and plaintiff by the decision of the Federal District Court for the Southern District of New York in Penn Mart Realty Company v. Becker, 300 F.Supp. 731 (S.D.N.Y.1969). This is the decision on that motion.

The controversy centers about the following series of events. Between February 1, 1968 and February 23, 1968 Glen Alden acquired, through Carter as broker, 92,700 shares of common stock of Schenley Industries, Inc., in open market transactions on the New York Stock Exchange. On February 8, 1968 a meeting, arranged by Carter, was held between Glen Alden and representatives of IDS and Carter. Penn Mart says that at this meeting and thereafter Glen Alden disclosed to IDS and Carter inside information concerning its affairs, its subsidiaries and other companies in which it has an interest.

On March 14, 1968, Glen Alden sold to Investors the block of 92,700 shares of Schenley common stock which it had acquired during the previous month. The sale was made through Carter as broker in a New York Stock Exchange transaction at a market price of $63 per share.

On March 20, 1968, Glen Alden bought from Lewis S. Rosenstiel 945, 126 shares of Schenley common stock at a price of $80 ***351** per share (an aggregate purchase price of $75,610,080). On the following day Glen Alden announced its plans to make a tender offer to purchase all of the outstanding shares of Schenley common stock, at a price substantially equivalent to or in excess of $80 per share, payable partly in cash and partly in Glen Alden debentures.

Penn Mart claims that at the time of the February 8 meeting, Glen Alden knew of its plan to acquire the Rosenstiel shares and to make the tender offer, and that those plans were disclosed to IDS. Plaintiff says that Glen Alden's directors were grossly negligent and breached their fiduciary duties when, knowing that they would soon be purchasing the Rosenstiel shares at a price of $80 per share and would be offering to purchase all outstanding Schenley common at that same price, they made the March 14 sale to Investors at the considerably lower price of $63 per share, a difference of $17 per share or approximately $1,700,000 in the aggregate.

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[1] I consider first the defendants' motion under Chancery Rule 12(b)(6), del.C.Ann., to dismiss the complaint for failure to state a claim. In considering such a motion, all inferences must be construed in favor of the plaintiff, and the complaint may not be dismissed unless it appears to a reasonable certainty that plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. Jefferson Chemical Company v. Mobay Chemical Company Del.Ch., 253 A.2d 512 (1969). It is against this standard that the theory of plaintiff's case against defendants must be tested.

[2][3] Penn Mart argues that the Glen Alden directors were grossly negligent, wasted corporate assets, and therefore breached their fiduciary duty, by selling a corporate asset (the stock) to Investors at a price greatly less than what they knew, and had in fact determined, to be its true worth. Both Investors and IDS knew, says Penn Mart, that they were dealing with fiduciaries, knew the true worth of the asset through their inside information, and nevertheless aided the directors in the breach of their duties. Thus, asserts Penn Mart, IDS and Investors are liable to the beneficiary of the fiduciary relationship, the corporation. The legal theory is sound. The directors of a corporation stand in a fiduciary relationship to the corporation's shareholders. Cahall v. Lofland, 12 Del.Ch. 299, 114 A. 224 (1921). And one who knowingly joins with any fiduciary, including corporate officials, in a breach of his obligation is liable to the beneficiaries of the trust relationship. Bogart, Trust and Trustees, s 901. Whatley v. Wood,157 Colo. 552, 404 P.2d 537 (1965); Adams v. Smith, 275 Ala. 142, 153 So.2d 221 (1963); Cachules v. 116 E. 57th Street, Inc., 125 N.Y.S.2d 97 (Sup.1953). Cf. Baker v. Baker, 122 Misc. 757, 204 N.Y.S. 11 (1924), aff'd 212 App.Div. 850, 207 N.Y.S. 809 (Mem.).

In order to make out its case, Penn Mart must allege (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) knowing participation in that breach by the defendants. Bogart, Supra s 901.

Defendants claim that the plaintiff must allege either that 'the IDS--Glen Alden negotiations were not conducted at arms length (or) that IDS exerted an influence over the directors sufficient to infect their action with vitiating conflict of interest.' They argue that because Penn Mart has made no such allegations of fraud or selfdealing (or is barred from making them under the doctrines of res judicata or collateral estoppel), it has failed to state a good cause of action.

[4] That argument cannot prevail. Fraud and self-dealing are not the only ways in which corporate directors may breach their fiduciary duty; they may also breach that duty by being grossly negligent or by wasting corporate assets. Fletcher, Cyclopedia Corporations s 1011. See Adams v. Smith, Supra, and Cachules v. 116 ***352** E. 57th Street, Inc., Supra. This is what Penn Mart has alleged, and the necessary elements are therefore made out.

[5][6] It is true that the directors are accorded a presumption of having acted in good faith and in the interests of the stockholders, and may also avail themselves of the benefit of the business judgment rule. But the ultimate effect of those doctrines upon the directors' liability is not, as defendants concede in their briefs, the matter here to be decided. I cannot say that those doctrines and the fact that the sale to Investors was made at market price establish as a matter of law that there was no breach of the directors' duty, and the question is not otherwise ripe for decision.

I am not persuaded by defendants' argument that an ultimate decision of liability as to them in this case would cause an intolerable conflict between their fiduciary duty to their own shareholders (in obtaining the best price for stock purchased) and their duty to refrain from participating in another's breach of fiduciary duty. For purposes of this motion, plaintiff's allegations must be taken as true, and the circumstances they portray show no such fiduciary conflict.

[7] I am therefore not satisfied that plaintiff would not under any state of facts provable in support of its claim be entitled of relief. Therefore, the motion to dismiss under Rule 12(b)(6) must be denied.

I now consider defendants' argument that plaintiff is barred from asserting this claim by the doctrines of res judicata and collateral estoppel as a result of the district court's opinion in Penn Mart Realty Company v. Becker, Supra. In that case, plaintiff advanced two claims. The first was a federal cause of action brought under s 10(b) of the Securities Act of 1934. 15 U.S.C. s 78j(b), and Rule 10b--5, 17 C.F.R. 240 10--5. The second was a common law claim, joined with the federal claim under the doctrine of pendent jurisdiction.

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The district court dismissed that complaint, holding that plaintiff had failed to make out a federal cause of action under Rule 10b--5. Because the standard of fraud under Rule 10b--5 is more lenient than that required to establish common law fraud, it follows that the parties are certainly concluded as to any allegations of fraud. See II Loss, Securities Regulation 1019.

[8] When the district court found that plaintiff had failed to state a cause of action under Rule 10b--5 (the federal claim), it followed that it had no jurisdiction over the common law claim. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Plaintiff therefore could not have been concluded as to any theory at common law, except as to any based upon fraud.

The result is that plaintiff is indeed barred from any assertions of fraud as to these defendants but is free to advance other theories of liability in this court. This it has done, its theory being based upon gross negligence and waste.

Defendants' motion to dismiss is therefore denied.

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United States Court of Appeals,
Second Circuit.

J. Ralph SAYLOR, Plaintiff-Appellant,
v.
Thayer LINDSLEY et al., Defendants-Appellees,
and Roseanne Horn, Michael J.
McLaughlin, Objectors-Appellants, and Abraham I.
Markowitz, Appellee.

Nos. 474, 475, Dockets 71-1332, 71-1380.

Argued Jan. 27, 1972.
Decided March 7, 1972.

Stockholder's derivative action for violations of federal securities laws and for recovery under state law. The United States District Court for the Southern District of New York entered summary judgment for defendants, 274 F.Supp. 253. The Court of Appeals reversed and remanded, 391 F.2d 965. On remand, the District Court dismissed pendent state claims, 302 F.Supp. 1174, unless complaint was amended in certain material respects. Thereafter, the District Court, Sylvester J. Ryan, J., entered order approving settlement over objection of plaintiff and other stockholders, and they appealed. The Court of Appeals, Friendly, Chief Judge, held that settlement should not have been approved over opposition of plaintiff when there was doubt whether there had been truly adversary discovery prior to stipulation of settlement and plaintiff was afforded no opportunity for any thereafter.

Reversed and remanded.

West Headnotes

[1] Compromise and Settlement ⚿63
89k63
(Formerly 170Ak1699)

Settlement of stockholder's derivative action for violations of federal securities laws should not have been approved over opposition of plaintiff when there was doubt whether there had been truly adversary discovery prior to stipulation of settlement and plaintiff was afforded no opportunity for any thereafter. Investment Advisors Act of 1940, § 17(a), 15 U.S.C.A. § 80a- 17(a).

[2] Compromise and Settlement ⚿4.5
89k4.5
(Formerly 170Ak1696)

Assent of plaintiff who brought stockholder's derivative action is not essential to settlement.

[3] Attorney and Client ⚿106
45k106
(Formerly 45k32)

Attorney is bound to keep client fully informed of settlement negotiations, to advise client before signing a stipulation of settlement on his behalf, and, if client has objected, to inform court of this when presenting settlement so that it may devise procedures whereby plaintiff with new attorney may himself conduct further inquiry if so advised.

[4] Compromise and Settlement ⚿63
89k63
(Formerly 170Ak1699)

Court need not necessarily reject settlement in stockholder's derivative action opposed by plaintiff but represented by attorney to be in best interest of all stockholders, but should exercise particular care to see that non- assenting plaintiff has had full opportunity to develop basis for his objection.

[5] Compromise and Settlement ⚿63
89k63
(Formerly 170Ak1699)

In passing on settlement of stockholder's derivative suit, judge must have apprised himself of all facts necessary for intelligent and objective opinion of probabilities of ultimate success should claim be litigated.

***897** Lillian Eichman, New York City, for appellant Saylor.

Avrom S. Fischer, Brooklyn, N. Y., for appellant Horn.

Reeves & O'Brien, New York City, for appellant McLaughlin.

Herbert Jacobi, New York City (Wickes, Riddell, Bloomer, Jacobi & McGuire, New York City, of counsel), for appellees Lindsley, Stott, Zeckhausen, Northfield Mines, Inc. and Mines Inc.

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Abraham I. Markowitz, pro se.

Before FRIENDLY, Chief Judge, and ANDERSON and MANSFIELD, Circuit Judges.

FRIENDLY, Chief Judge:

This appeal raises questions about the settlement of a stockholder's derivative action over the objection of the plaintiff. While we decline to lay down a rule that this may never be done, we hold that the procedures here followed did not adequately protect the right of plaintiff, and of other objecting stockholders, to develop a record which might show that the settlement was improvident.

The transaction here at issue, the twostep sale to Mines Incorporated, in 1951 and 1953, by the Tonopah Mining Company of Nevada (Tonopah) of the stock of Tonopah Nicaragua Company (Tonopah Nicaragua), owner of the Rosita copper mine, is no stranger to the courts of this circuit. The history of an earlier action attacking the sale, Hawkins v. Lindsley, brought in 1957, in the District Court for the Southern District of New York, is recounted in Judge Swan's opinion for this court, 327 F.2d 356 (2 Cir. 1964). It suffices here to say that a second amended complaint in that action charged that the sale violated both state law of fiduciary obligations and the Investment Company Act of 1940; that in September, 1958, Judge Noonan dismissed the claim under the Investment Company Act and required the furnishing of $50,000 of security pursuant to § 61-b of the New York General Corporation Law (McKinney's Consol.Laws, c. 23 Supp. 1971-72); and that when plaintiff failed to post security, Judge Ryan, on July 27, 1961, ordered dismissal with prejudice. Plaintiff failed to take a timely appeal, and other efforts to vacate Judge Ryan's order of dismissal were rejected in the opinion cited.

In February, 1965, plaintiff Saylor began this action, also in the District Court for the Southern District of New York. Federal jurisdiction was based on violations of the federal securities laws, and state claims were alleged merely as pendent. Defendants responded by way of a motion for summary judgment on the basis that this new action was barred by *res judicata* and by the applicable statute of limitations. Judge Cooper granted the motion and dismissed the complaint on the ground of *res judicata;* in addition, while not purporting to decide the defense of limitations, he suggested that this presented a question which, if plaintiff appropriately amended his complaint, would create a triable issue of fact, 274 F.Supp. 253 (S.D.N.Y.1967). We reversed on the ground that the dismissal of the *Hawkins* action for failure to post security was not "on the merits" for purposes of *res judicata;* we indicated agreement with Judge Cooper's statement as to the defense of limitations and remanded for further proceedings with respect to that issue. 391 F.2d 965 (2 Cir. 1968). [FN1] In an opinion on remand, Judge ***898** Cooper determined that with respect to the federal claims there were, indeed factual questions whether the applicable statute of limitations had run, and therefore denied summary judgment on that ground; however, with regard to the pendent state claims, he granted summary judgment on the basis of the running of the applicable limitations period unless within thirty days of the court's order plaintiff amended his complaint in certain material respects, 302 F.Supp. 1174 (S.D.N.Y.1969). [FN2] The defendants filed their answer on January 9, 1970, denying most of the allegations in the complaint and setting up a number of affirmative defenses.

FN1. The opinion does not discuss in terms the effect of Judge Noonan's dismissal of the claim under the Investment Company Act in *Hawkins* in 1958. Apparently the court proceeded on the ground that there could have been no true "dismissal" of what was merely an alternative theory of recovery for the same operative facts, see 391 F.2d at 969, n. 6, and that the only final judgment in the *Hawkins* case was that entered by Judge Ryan in 1961 for failure to post security. Judge Noonan's order was not appealable, see 327 F.2d at 358 n. 2, and for that reason also would not have *res judicata* effect. Cf. ALI, Restatement of Judgments § 69 (1942).

FN2. The record contains no indication of any amendment to the complaint being filed within the time stipulated or at any time thereafter.

[1] On September 24, 1970, Mr. Markowitz, "attorney for plaintiff," entered into a stipulation of settlement with the attorneys for the various individual and corporate defendants and the attorneys for Tonopah, which had previously been dissolved. This provided for the payment to Wilmington Trust Company, which a Delaware court had appointed to receive and distribute any assets of Tonopah that could not be distributed in liquidation before March 31, 1965, of $250,000 less the costs of notice of the settlement hearing and the fees and disbursements of plaintiff's counsel. Although there is a dispute when

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agreement on the settlement was actually reached, it is not asserted that plaintiff Saylor at any time authorized it or that Markowitz or anyone else advised him of its terms until November 4, 1970.

On that date Judge Ryan had signed an order setting a hearing on the settlement for December 1, 1970. The notice approved for transmission to stockholders contained no intelligible reference to the most important allegation of the complaint, namely, that defendants had intended the sales to Mines Incorporated to constitute only a step in an ultimate transfer to defendant La Luz Mines, Limited. [FN3] The notice informed stockholders that transcripts of depositions could be read at the office of the clerk of the district court, and that exhibits could be inspected at the offices of the attorneys. The notice indicated that Mr. Markowitz would apply for an allowance of $83,000 and expenses of $1,313.73. After deduction of these sums, which were subsequently allowed, distribution to Tonopah stockholders would be something less than $166,000, or about 19 cents a share, as against the many millions of dollars in damages alleged to have been suffered. Of this amount, over $109,000 would be paid to the unserved defendant, Falconbridge Nickel Mines, Limited, which held some 74% of Tonopah's shares at the time of the latter's dissolution; the balance, some $57,000, would go to the independent stockholders.

> FN3. We intend no criticism of the district judge on this score; the form of the notice was prepared by counsel.

At the hearing on December 1, 1970, Mr. Markowitz announced that he appeared "on behalf of the plaintiff." This elicited a response by Lillian Eichman, who had been of counsel in the *Hawkins* action, that she appeared on behalf of Mr. Saylor in opposition to the settlement. Avrom S. Fischer announced he represented another opposing stockholder, Roseanne Horn, and was of counsel to Mrs. Eichman. Gerard J. O'Brien appeared on behalf of another objecting stockholder, Michael J. McLaughlin. McLaughlin, Saylor, and Fischer, on Miss Horn's behalf, filed affidavits in opposition. Mr. Markowitz made an extended statement in support of the settlement, ***899** which was seconded by Mr. Jacobi, counsel for the defendants, and Mr. Singer, counsel for Tonopah, who reported approval of the settlement by Wilmington Trust Company. After briefly hearing Mr. Fischer and Mr. O'Brien, the judge gave them two weeks in which to submit further papers. McLaughlin and Fischer filed extensive affidavits; Markowitz submitted a reply affidavit. On January 14, 1971, the court issued an opinion approving the settlement, [1970-71 Transfer Binder] CCH Fed.Sec.L.Rep. ¶92,222, at 90,410 (S.D.N.Y.1971); this was followed by the order here under appeal.

As earlier stated, there is a dispute about the time when the settlement was actually reached. McLaughlin's second affidavit stated that Markowitz informed him on June 4, 1969, of a meeting to be held the next day to discuss settlement; that "on Aug. 20, 1969, [Markowitz] informed me of the present offer, which I refused. Mr. Saylor soon thereafter advised me that he had similarly told Mr. Markowitz that he does not agree to any settlement, such as the present proposal." Fischer's second affidavit pointed to a letter to Miss Horn, dated October 29, 1969, from a member of the firm representing defendants, which states in part:

> Without going into details as to all the procedural matters that have taken place in the meantime, I can tell you that we have been in active negotiations with counsel for the plaintiff and today agreed on a settlement of the case. It will be necessary to have examinations of several people because the entire settlement will be subject to approval of the court and the court will have to be convinced that it is in the best interest of the stockholders.

Fischer also relied on the nature of the three depositions taken by Markowitz and filed with the District Court, which, we must say, impress us as designed to justify a settlement rather than as an aggressive effort to ferret out facts helpful to prosecution of the suit, as evidence that a settlement had been agreed upon by the time they were taken. In contrast, Markowitz asserted in his reply affidavit that on August 20, 1969, he did not inform McLaughlin of defendants' offer but essentially of the prospects of negotiations; that on September 27, 1969, he called Saylor to advise him of the negotiations and the weakness of plaintiff's case; that he and counsel for Lindsley did believe on October 28, 1969, they had agreed on a settlement, but this subsequently fell through because there was in fact no agreement on the extent to which Falconbridge as a stockholder of Tonopah should share in the proceeds; that subsequent negotiations foundered; and that on January 15, 1970, he sent McLaughlin a letter which he claims informed McLaughlin that settlement negotiations were halted. [FN4] We find

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it unnecessary to resolve this dispute or to direct the district court to do so, for even on the basis of Markowitz' version of the relevant events we cannot conclude that enough was done here to protect the rights of the stockholder plaintiff.

> FN4. The pertinent part of the letter read:
> I have concluded all discussions of settlement and am proceeding with pre- trial proceedings. In that connection, the defendants are supplying me with documents that I have requested and depositions of defendants and others are being scheduled.
> Everything turns on the meaning of "concluded." Plaintiff says it means "finished." Markowitz, relying on the reference to "pre-trial proceedings", contends it means "broken off". Plaintiff counters that the October 29 letter of defendants' counsel quoted in the text contemplated the taking of depositions prior to a hearing on a settlement.

[2][3] We are willing to go along with appellees and hold, despite the seeming incongruity, that the assent of the plaintiff (or plaintiffs) who brought a derivative stockholder's action is not essential to a settlement; [FN5] a contrary view ***900** would put too much power in a wishful thinker or a spite monger to thwart a result that is in the best interests of the corporation and its stockholders. On the other hand, despite the fact that the usual plaintiff in a derivative stockholder's action does not give his attorney the help normally furnished by a client, we are not willing to go to the other extreme and accept the view that the attorney for the plaintiff is the *dominus litis* and the plaintiff only a key to the courthouse door dispensable once entry has been effected. The attorney remains bound to keep his client fully informed of settlement negotiations, to advise the client before signing a stipulation of settlement on his behalf, and, if the client has objected, to inform the court of this when presenting the settlement, so that it may devise procedures whereby the plaintiff, with a new attorney, may himself conduct further inquiry if so advised. [FN6] We find the record before us inadequate to sustain the conclusion that this obligation was met here-whatever the timing of the initial agreement in principle on the settlement. As has been said in an article much relied upon by appellee Markowitz, "As a practical matter, derivative settlements concluded over the head of the complaining stockholders are extremely rare and should be so." Haudek, The Settlement and Dismissal of Stockholders' Actions-Part II: The Settlement, 23 Sw.L.J. 765, 771 (1969).

> FN5. See 3B Moore, Federal Practice ¶ 23.1.24 [2], at 23.1-407 (1969); 2 Barron & Holtzoff, Federal Practice and Procedure § 570, at 335. (Wright ed. 1961). Denicke v. Anglo California Nat'l Bank, 141 F.2d 285 (9 Cir.), cert. denied, 323 U.S. 739, 65 S.Ct. 44, 89 L.Ed. 592 (1944), the case usually cited for this proposition, supports it only to a limited extent. There the corporation, the real party in interest, had come under new management, which made a settlement with the defendants and secured court approval of it over the objection of the stockholder plaintiff. Settlement of a derivative action by the real party in interest over the plaintiff's objection is quite different from settlement by the plaintiff's own attorney over the plaintiff's objection. Moreover, it appears that in *Denicke* the corporation attempted to keep the stockholder plaintiff informed of the settlement negotiations. 141 F.2d at 286. Although in this case the Wilmington Trust Company could arguably be cast in the role of the settling real party in interest, we are not inclined to do that here since the statements made at the hearing and the affidavit submitted by its attorney in support of the settlement do not convey the impression that it either actively participated in the negotiations or reviewed the settlement in depth.

> FN6. In this connection we find it rather significant that although the stipulation of settlement was signed on September 24, 1970, Mr. Markowitz did not formally advise his client of the settlement until November 4, after Judge Ryan had signed the order directing a hearing and approving the form of notice. It was thus largely his own fault that, as claimed in his affidavit of December 17, 1970, "[he] had no knowledge of Mr. Saylor's objection to the settlement until the Hearing before the Court." What is more important, prompt advice of the signature of the stipulation to Mr. Saylor would have allowed the latter to communicate his opposition to Mr. Markowitz and the Court before the notice of the hearing was approved; if he had done so, the notice should have stated this and a greater amount of opposition might have developed.

[4] There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which, as has been noted, may cause special divergence of interest in cases where extremely large amounts are at stake, see Haudek, *supra,* 23 Sw.L.J. at 768 & n. 166, there is a difference in every case. The plaintiff's

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financial interest is in his share of the total recovery less what may be awarded to counsel, *simpliciter;* counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a much larger recovery obtained only after extensive discovery, a long trial and an appeal. The risks in proceeding to trial vary even more essentially. For the plaintiff, a defendant's judgment may mean simply the defeat of an expectation, often of relatively small ***901** amount; for his lawyer it can mean the loss of years of costly effort by himself and his staff. In this respect a derivative action is in a quite different posture from a personal injury action conducted on a contingent basis. We say this not in criticism but in simple recognition of the facts of class action life. While recognition of this conflict of interest should not mandate rejection of a settlement opposed by the plaintiff but represented by the attorney to be in the best interest of all stockholders, it does require the court to exercise particular care to see to it that the non-assenting plaintiff has had a full opportunity to develop the basis for his objection.

In many suits which have been prepared almost to the point of trial, the pretrial discovery, conducted when the objective of plaintiff's attorney was still to develop the strongest possible basis for a recovery, may be entirely adequate to that end. But that is not the case here. Two of the defendants, La Luz and Falconbridge, [FN7] had not even been served. The only depositions taken were those of defendants Zeckhausen and McWilliams and of H. S. McGowan, president of La Luz. Naturally these gentlemen were not disposed to assist plaintiff in sustaining his theories of recovery; helpful testimony from them could be obtained only by confronting them with documents they would find difficult to explain. Yet there had been little discovery of documentary evidence save of such generally selfserving instruments as minutes and annual reports, although even these proved valuable to plaintiff as we shall see; there had been no attempt to find the kind of inculpatory correspondence that so often reposes in corporate files even for the long time here involved, and refutes, or at least casts doubt upon, exculpatory testimony by the defendants of the sort here given. [FN8]

FN7. Ventures, Limited, which is nominally a defendant, also was not served. However, it was merged into defendant Falconbridge in 1962, before this action was instituted.

FN8. The annals of antitrust litigation and, indeed, of stockholder's derivative actions include many such instances, including the "destroy all copies" sort.

Despite all this, we ought not to take up the time of the district court and the parties with a remand if, on the basis of undisputed facts, a substantial recovery here was hopeless or nearly so. We do not think, however, this can fairly be said on the record before us. We shall limit our discussion to what we consider plaintiff's most promising theory-that the defendants, or at least some of them, in obtaining the SEC exemptions from § 17(a) of the Investment Company Act of 1940 which were required for the sale of the stock of Tonopah Nicaragua to Mines Incorporated, had concealed that the true beneficiary of the transfers was always intended to be La Luz, [FN9] which was in a peculiarly advantageous position to develop the mine economically, and thus the consideration was unfairly low.

FN9. La Luz, like Mines Incorporated, was an "affiliated person" of Tonopah within § 2(a) (3) of the Investment Company Act, see *infra.*

In order to understand the problem, some knowledge of the intricate intercorporate relations is needed. Plaintiff's complaint alleges the following facts in this respect: In 1950 Ventures, Limited, owned 13.48% of the voting stock of Tonopah, a registered investment company; by 1953 the proportion had increased to 26.25%, presumptively control under § 2(a) (9) of the 1940 Act. Defendant Lindsley, individually and through defendant Northfield Mines, Inc., owned more than 34% of the voting stock of Ventures. That company owned in excess of 54% of the voting stock of Frobisher Ltd., of which Mines Incorporated was a wholly owned subsidiary. Also Ventures owned more than 69% of the voting stock of La Luz, which owned and operated a gold and silver mine in Nicaragua only thirty miles away from Tonopah Nicaragua's Rosita copper mine and had developed a hydro-electric power plant at a site which was apparently the ***902** only feasible one in the area and was even closer to the Rosita mine than to its own.

In November, 1950, Tonopah applied, pursuant to § 17(b) of the 1940 Act, for an exemption permitting the sale of 60% of the stock of Tonopah Nicaragua to Mines for $210,000. This was necessary because

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Ventures' ownership, then 13.48%, of the voting stock of Tonopah and of some 54% of the voting stock of Frobisher made Tonopah and Mines affiliated persons within § 2(a) (3). The application recited unsuccessful efforts in 1948-49 to sell the Rosita mine at a net price of $297,000, and a similarly unsuccessful effort early in 1950 to sell it for $275,000. There appears never to have been doubt that the Rosita mine possessed very substantial copper reserves; the problem was the cost of mining and refining, due to the mine's remote jungle location and the complex nature of the Rosita copper ore. The application was twice amended, apparently on the insistence of the SEC, to incorporate further detail, including a report by an engineering firm, Singmaster & Breyer, bringing up to date a 1943 report by A. Wheeler, which showed that the cost of producing a pound of refined copper by a process involving the use of a flotation concentrator, a reverberatory furnace, and converters would be 31.6 cents as against a domestic copper price, as of February 21, 1951, of 24.5 cents, and would require investment of $12,000,000, several times Tonopah's total resources. On April 16, 1951, the SEC granted the exemption.

In January, 1953, Tonopah filed an application with the SEC for a § 17(b) exemption for the sale of the remaining 40% of the stock of Tonopah Nicaragua to Mines for $65,000 plus 10,000 shares of common stock of Falconbridge Nickel Mines Limited having a market value of some $200,000, more or less, in Canadian funds. Defendant Lindsley was president of Falconbridge, and Ventures owned 61.1% of its stock. Just how Mines came into ownership of the 10,000 shares was not explained. This application, too, was twice amended. One amendment included a new report from Singmaster & Breyer showing that "the most feasible process," still the flotation concentrator, reverberatory furnace and converters recommended by Wheeler a decade before, would now require a capital investment in excess of $13,500,000 and would result in a cost per pound well above current copper prices. The SEC granted the exemption in November, 1953.

All of the Tonopah Nicaragua stock was transferred from Mines to its parent, Frobisher, on February 11, 1954. Frobisher then entered into agreement, dated September 21, 1954, to sell the Tonopah Nicaragua stock-and thus the Rosita mine-to La Luz for $515,907.65. Evidently an agreement in principle had been made much earlier, since the minutes of a La Luz shareholders' meeting on May 26, 1954, recited that half the price had already been paid. The mine was conveyed in January, 1955. The refining method evaluated by Wheeler and by Singmaster and Breyer being economically impracticable, La Luz apparently devoted considerable effort to the development of an electrolytic refining process for the Rosita ore. That process, however, was also eventually rejected because of excessive capital requirements and too narrow a profit margin. Ultimately, it was decided not to smelt and refine the ore at the mine site, but rather to use a leach precipitation flotation process to produce a copper concentrate which was then shipped overseas for smelting and refining. The operating cost of producing a pound of refined copper by this process was estimated to be 22 cents by H. S. McGowan in 1957, and the capital cost to La Luz was in fact only some $7,500,000. Acquisition of the mine was hugely profitable to La Luz; objector McLaughlin asserts that La Luz realized net operating profits from it of $38,660,000 between 1959 and 1969.

Although the 1950-51 exemption application to the SEC contained no reference to La Luz, that company's report to stockholders for the fiscal year ended September 30, 1951, issued on March 12, 1952, stated, in explanation of a small balance sheet item entitled "Rosita property ***903** . . . $26,763.62," that this "represents expenditures made by La Luz investigating a high-grade copper property within thirty miles of your gold mine in Nicaragua. Your Board considers this property as having great promise and has joined with Mines Inc. and Northfield to purchase a 60% interest in the Tonopah Nicaragua company, who are the owners." The second application, of January, 1953, made no reference to any such joinder by La Luz in the ownership of Tonopa Nicaragua, although the first amendment, dated July 7, 1953, said that if the sale were effected and the Rosita property profitably operated, "Tonopah would share in the profits as it is presently contemplated that a Management Contract would be made with La Luz Mines Ltd.," in which Tonopah had an 8% stock interest, "for the operation of the Rosita property." La Luz' annual report for the year ended September 30, 1954, told of the contract for the acquisition of the Rosita mine mentioned above and added:

> We consider the possibility of a successful operation on the Rosita property as very encouraging. Calculations based on ore now blocked out indicate 3,582,000 tons of ore averaging 2.91% copper and .027 ozs. of gold per ton. At an estimated price of 30 cents per pound

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the gross value of copper content (208 million pounds) works out at over $62,000,000.
Research work, carried on for several years, indicates that electrolytic cathode copper can be produced at a cost not exceeding 15 cents per pound at the plant. This cathode copper is readily marketable at a trifle less than the wire bar price-a considerable amount of the gold will be recovered as a by- product.
Electric power is an important factor in the proposed process and the possibilities of expanding the La Luz hydroelectric system to produce the additional power for Rosita is being investigated. Results obtained so far indicate that the power plant expansion is feasible and at not too great a cost.

None of this history explicitly refutes defendants' claim that, at the time the SEC granted the first exemption application in April, 1951, there was no thought that La Luz, also an "affiliated person" of Tonopah within § 2(a) (3), would become the owner of the Rosita mine, although La Luz' statement of joint ownership in its 1951 annual report at least creates some basis for scepticism. In any event, some explanation would surely seem required why no mention was made of La Luz in the application of January, 1953, and why it was characterized merely as a prospective *operator* in the amendment of July 7, 1953. What puts a somewhat sinister color on what may have been merely an innocent mistake, if even that, is the possibility that La Luz ownership of a nearby hydroelectric power plant may have invalidated the calculations submitted to convince the SEC that the Rosita mine could not be profitably operated at that time, and that some of the directors of Tonopah or other persons having responsibility for the applications knew not only this but also the actual extent of development of an economically feasible refining process for the Rosita ore. [FN10] If either of these should be true, the fact that Lindsley and Northfield had only a slightly larger proportional interest in La Luz than in Frobisher would be no answer; the SEC, in all likelihood, would have insisted on a considerably higher price as a condition to permitting the sale. If in its applications Tonopah made "any untrue statement of a material fact" or omitted "to state therein any fact necessary in order to prevent the ***904** statements made therein, in the light of the circumstances under which they were made, from being materially misleading," this would be "unlawful" under § 34(b) of the Investment Company Act and would provide a basis for imposing civil liability on those who were responsible for the statements or omissions or who profited therefrom with knowledge of the falsity. See Brown v. Bullock, 194 F.Supp. 207, 231 (S.D.N.Y.), aff'd, 294 F.2d 415 (2 Cir. 1961) (*en banc*); J. I. Case Co. v. Borak, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).

> FN10. By letter dated October 8, 1953, L. H. Bregy on behalf of Mines Incorporated informed the SEC that the company was working to find a "better and more economical method of treatment" for the Rosita ore. It can hardly be said, however, that he was encouraging about the prospects of success; without providing any details of the process under development, he said, "It can be definitely stated that a commercial process has not been developed at the present time, and that it will take a minimum of two or three years to do so, if it can be done at all."

We do not mean any of this to be taken either as indicating that plaintiff in fact has a winning case on the theory here discussed or that others of his theories may not have promise, at least as against some of the defendants. We have felt compelled to go this far into the merits only to show that the settlement should not have been approved over his opposition when there is such doubt whether there had been truly adversary discovery prior to the stipulation of settlement and he was afforded no opportunity for any thereafter.

[5] We recognize that since "[t]he very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation", the court must not turn the settlement hearing "into a trial or a rehearsal of the trial"; and that the court "is concerned with the likelihood of success or failure and ought, therefore, to avoid any actual determination of the merits." See Haudek, *supra,* 23 Sw.L.J. at 795 (footnotes omitted). Still, in passing on the settlement of a derivative suit, as on a compromise in a proceeding under Ch. X of the Bankruptcy Act, the judge must have "apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-425, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). We cannot say that, particularly in light of the reasoned objections of the plaintiff, as well as of other stockholders, the court did that here. No one

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would think of applying to the presentation of plaintiff's former attorney at the hearing in this case the characterization of "thoroughness, thoughtfulness and disinterested judgment," which Judge Wyzanski used in approving the settlement in Cherner v. Transitron Electronic Corp., 221 F.Supp. 48, 51 (D.Mass.1963). [FN11] The plaintiff, through his new counsel, and the other objectors should be allowed to delve somewhat more deeply into the merits of this action; whether this should be done by further discovery, or by taking evidence in open court, or by both, is for the district court to determine in the exercise of sound discretion. While a remand may well result in renewed approval of the settlement, [***905** FN12] this should come only after thorough consideration of what the parties will present although "less than a trial." See Isaacs v. Forer, 39 Del.Ch. 105, 159 A.2d 295, 296 (1960).

FN11. We are not overly impressed with the observation, [1970-71 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 92,922, at 90,415, that plaintiff would face serious difficulties of proof because the only living members of the Tonopah board involved in the transaction, at suit are defendants McWilliams and Lindsley; that the latter is old, ill and almost deaf; and that because of Tonopah's dissolution in 1965 many of its documents cannot be located. Our recital shows that plaintiff was not far from making a *prima facie* case solely on the basis of the few documents that were discovered; if the distance should be narrowed, for example, by further discovery of documents or by testimony of mining engineers that the process ultimately adopted was known all along, and that, particularly with the power resources of La Luz available, the Rosita mine had much better possibilities than were represented to the SEC, the handicaps arising from unavailability of Tonopah's directors would weigh more heavily on the defendants than on the plaintiff. Furthermore, whatever the state of Tonopah's files, there is no indication that those of Frobisher, Mines, La Luz, and the now merged Falconbridge and Ventures are not available.

FN12. Judge Ryan gave little weight to the defense of limitations, and it was not seriously pressed on appeal. Those supporting the settlement are free to give consideration to the questions raised by Judge Cooper in his 1969 opinion and to make more of the defense on remand if they legitimately can. See generally Note, The Statute of Limitations in Stockholders' Derivative Suits against Directors, 39 Colum.L.Rev. 842 (1939).

The order is reversed and the cause remanded for further consistent proceedings.

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Appellate Court of Illinois,
First District, Fifth Division.

Eli STEINBERG and Gershon Sontag, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellees,
v.
SYSTEM SOFTWARE ASSOCIATES, INC., Roger E. Covey, Terence H. Osborne, Terry E. Notari and Joseph Skadra, Defendants-Appellees (Albert Bachorowski, Michael Connor IRA Rollover, Lucian B. Cox III, Catherine Drozd, Dennis W. Corbin, Retsky Family Limited Partnership, Hung A. Pham, Nathan Schleifer, Jaspal Singh, Ravinder Singh, Donald Sorota and Kim Walter, Objectors and Petitioners and Intervenors-Appellants).

No. 1-97-3952.

June 18, 1999.

Stock purchaser filed a class action complaint against corporation, seeking damages for alleged violations of the Securities Law, common law fraud, the Consumer Fraud and Deceptive Business Practices Act, and negligence. The Circuit Court, Cook County, Lester D. Foreman, J., dismissed following settlement, and denied objectors' petition to intervene. Objectors appealed. The Appellate Court, Theis, J., held that: (1) exclusion of objectors from settlement negotiations did not render the settlement unfair; (2) trial court did not misconstrue its role when it approved the settlement; and (3) trial court's analysis of the settlement did not erroneously exclude defendant corporation's current, improved financial condition.

Affirmed.

West Headnotes

[1] Appeal and Error ⚿422
30k422

Appellate court would not consider whether trial court erred in certifying a class for settlement purposes in securities litigation, where objectors failed to appeal from lower court order certifying class, their notice of appeal, even when read broadly, did not reference or allude to the issue of class certification, and the issue of class certification was not directly engaged below. Sup.Ct.Rules, Rule 303.

[2] Appeal and Error ⚿421
30k421

Appellate court has jurisdiction only of those matters which are raised in the notice of appeal. Sup.Ct.Rules, Rule 303.

[3] Appeal and Error ⚿417(1)
30k417(1)

Notice of appeal is to be liberally construed as a whole. Sup.Ct.Rules, Rule 303.

[4] Appeal and Error ⚿870(1)
30k870(1)

Appeal from a final judgment draws into issue all prior nonfinal orders which produced the final judgment. Sup.Ct.Rules, Rule 303.

[5] Appeal and Error ⚿422
30k422

Unspecified judgment is reviewable if it is a step in the procedural progression leading to the judgment specified in the notice of appeal. Sup.Ct.Rules, Rule 303.

[6] Compromise and Settlement ⚿65
89k65

Exclusion of objectors from settlement negotiations in securities litigation did not render the settlement unfair as a matter of law, despite objectors' assertion that, by virtue of their status under the Private Securities Litigation Reform Act of 1995 (PSLRA) as lead plaintiffs in parallel federal litigation, they should have been apprised of the settlement negotiations before release of the notice of the proposed settlement, so that they could have ensured that the settlement was the product of adequate representation and the adversarial process, that the settlement class and release were precisely and accurately defined, and that notice was proper. Securities Exchange Act of 1934, § 21D(b)(3)(B), as amended, 15 U.S.C.A. § 78u-4(b)(3)(B).

[7] Appeal and Error ⚿949
30k949

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Trial court's decision approving settlement in securities class action could be reversed only on a clear showing that the trial court was guilty of an abuse of discretion.

[8] Compromise and Settlement ⚿57
89k57

Standard to be used in evaluating the compromise settlement of a class action is that the agreement must be fair, reasonable, and adequate.

[9] Parties ⚿35.1
287k35.1

In a class action, the court is the guardian of the interests of the absent class members.

[10] Compromise and Settlement ⚿65
89k65

Trial court did not misconstrue its role when it approved a settlement in a securities class action, despite the court's statement that "it is most important that people be able to rely upon a handshake or acquiescence"; the court's understanding of and attention to the complex legal and financial issues germane to the settlement before it was evident from the record.

[11] Compromise and Settlement ⚿57
89k57

Strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved.

[12] Compromise and Settlement ⚿65
89k65

Trial court's analysis of a proposed settlement in a securities class action did not erroneously exclude defendant corporation's current, improved financial condition; plaintiffs, defendants, and objectors all admitted that corporation's financial condition at the time of the settlement negotiation was dire, record indicated that corporation's ability to obtain financing was directly linked to its ability to resolve the claims at issue, and settlement agreement hedged against the possibility that corporation's financial condition might improve upon recapitalization by including 100,000 shares of corporation's stock as part of the settlement amount.

[13] Parties ⚿40(2)
287k40(2)

Federal class action plaintiffs who had chosen to pursue securities claims in federal court were not necessary parties to a parallel State court action, and thus, denial of their petition to intervene was not an abuse of discretion.

****710 ***179 *159** Dom J. Rizzi, Marvin A. Miller, Patrick E. Cafferty, Jennifer Winter Sprengel of Miller, Faucher, Cafferty & Wexler, L.L.P., Michael J. Freed, Joseph D. Ament, Edith F. Canter, Much Shelist Freed Denenberg Ament Bell & Rubenstein, P.C., Chicago, Robert M. Kornreich, Wallace A. Showman, Wolf Popper, L.L.P., Sanford P. Dumain, Lori G. Feldman, Milberg Weiss Bershad Hynes & Lerach, L.L.P., New York, NY, Steven J. Toll, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Seattle, WA, Mark Willis, Cohen, Milstein, Hausfeld & Toll, P.L.L.C., Washington, D.C., Glen DeValerio, Berman, DeValerio & Pease, L.L.P., Richard Vita, Law Offices of Richard Vita, Boston, MA, Lawrence G. Soicher, Law Offices of Lawrence G. Soicher, Stanley M. Grossman, Patrick V. Dahlstrom, Pomerantz Haudek Block & Grossman, New York, NY, for Intervenors-Appellants.

Arthur T. Susman, Charles R. Watkins, Robert J. Emanuel, of Susman ***160** & Watkins; Ronald L. Futterman, of Futterman & Howard, Chtd., Chicago; Jeffrey H. Squire, of Kaufman Malchman Kirby & Squire, L.L.P., New York, NY, for Plaintiff-Appellee Steinberg.

****711 ***180** Lowell E. Sachnoff, Michael J. Kaufman, Gary S. Caplan of Sachnoff & Weaver, Ltd., Chicago, for Defendants-Appellees.

Justice THEIS delivered the opinion of the court:

Plaintiff-appellee, Eli Steinberg [FN1] (Steinberg), filed a class action complaint in the circuit court of Cook County, Illinois, on January 8, 1997, against defendants-appellees, System Software Associates, Inc. (SSA), and certain of its officers (Roger E. Covey, Terence H. Osborne, Terry E. Notari, and Joseph Skadra). Steinberg, on behalf of a class of purchasers of SSA common stock, sought damages for alleged violations of the Illinois Securities Law of 1953, as amended (815 ILCS 5/1 *et seq.* (West 1996)), common law fraud, the Illinois Consumer Fraud and Deceptive Business Practices Act (815

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ILCS 505/2 (West 1996)), and negligence. Steinberg's complaint stemmed from SSA's use of allegedly overly aggressive accounting practices and revenue recognition policies.

FN1. This action was brought on behalf of a class of purchasers of the common stock of System Software Associates, Inc., during the period from November 21, 1994, through January 7, 1997. At the time of the settlement, plaintiff Sontag withdrew from the case, and the stipulation was entered on behalf of plaintiff Steinberg only.

The day after Steinberg's class action complaint was filed, the appellants, federal class action plaintiffs and objectors below to the circuit court class action settlement (the Objectors), filed a federal securities fraud class action against the same defendants in the United States District Court for the Northern District of Illinois, seeking damages based on essentially the same set of facts. [FN2] Defendants moved to dismiss the consolidated federal complaint and, pursuant to the Private Securities Litigation Reform Act of 1995 (the PSLRA) (15 U.S.C.A. § 78u-4(b)(3)(B) (West 1997)), pretrial discovery in the federal court class action was automatically stayed. The Objectors now appeal from the final judgment of dismissal of the circuit court class action entered on September 30, 1997, and the circuit court's order of October 8, 1997, denying the Objectors' petition to intervene. We affirm.

FN2. The federal class period begins three months earlier and covers August 22, 1994, through January 7, 1997.

*161 BACKGROUND

Defendant SSA develops business information systems for large, industrial sector companies. An October 5, 1995, Wall Street Journal article disclosed that SSA's revenue recognition policies may have been "overly aggressive" in recording certain sales for which it had not yet been paid or on which payment might be withdrawn in the future. The day before Steinberg's complaint was filed, SSA announced that it was restating its revenues and earnings for fiscal years 1994 and 1995, as well as for the first three quarters of 1996.

While discovery was stayed in the federal court, plaintiffs in the circuit court filed discovery requests. In response to those requests, defendants produced approximately 20,000 pages of documents to plaintiff's counsel during April 1997. Documents were subpoenaed from SSA's accountant, Price Waterhouse, which produced approximately 40,000 pages of documents on April 2, 1997. Roger Covey, chairman and chief executive officer of SSA, and Joseph Skadra, chief financial officer of SSA, also gave confirmatory depositions, disclosing their financial condition. The discovery materials obtained in the circuit court class action were later made available to lead counsel in the federal class action.

Settlement discussions began between the parties to the state court class action suit. The parties, unable to reach an agreement, employed a mediator. The mediation resulted in an agreement in principal to a settlement. Pursuant to section 2-806 of the Illinois Code of Civil Procedure (735 ILCS 5/2-806 (West 1996)), the parties applied for an order approving settlement of the lawsuit in accordance with a settlement agreement dated June 26, 1997 (the Agreement).

Under the terms of the Agreement, SSA would pay the plaintiff class $1,700,000 in cash and interest accruing from May 29, 1997, to the date of deposit. Covey was to **712 ***181 contribute 100,000 shares of SSA stock with a guaranteed minimum worth of $5 per share. Therefore, the guaranteed minimum settlement value was $2,200,000. Following the settlement hearing, in September 1997, plaintiffs sold the SSA stock and converted it to cash at prices ranging from 12-7/8 to 13-1/8 per share. Thus, the value of the settlement ultimately exceeded $3 million.

On June 27, 1997, the circuit court entered an order certifying the class for settlement purposes and granting preliminary approval of the settlement set forth in the Agreement. By that order, the circuit court also provided that a settlement hearing be held on September 5, 1997, to determine whether the Agreement was fair, just, reasonable, adequate, in the best interest of the class, and should be approved. In addition, the circuit court's order of June 27, 1997, approved the notice *162 proposed, as to form and content, noted the manner by which class members were to request exclusion from the class, and specified that any member of the class may appear at the settlement hearing and show cause why settlement should not be approved.

By letter dated July 15, 1997, counsel for the defendants informed the judge presiding over the

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federal class action of the developments in the circuit court regarding settlement. Lead counsel in the federal action were also notified of the circuit court settlement by their receipt of a copy of that letter. Defendants were represented by the same counsel in circuit court and federal court.

Attached to defendants' circuit court brief, filed in support of the settlement, was a letter from the mediator to the presiding judge in the circuit court action, dated September 3, 1997. By his letter, the mediator noted that the case settled "after much give and take." The mediator further noted in the letter:

> "There can be no doubt that the financial condition of the company, over which the greater part of our time and effort was spent, and which was clearly, fully, and unmistakably established to the satisfaction of both sides, including that of the mediator, was a key factor in bringing this matter to a reasonable conclusion."

SSA'S FINANCIAL CONDITION

At the September 1997 settlement hearing, counsel for the Objectors noted his awareness of SSA's precarious financial condition at the time the settlement agreement was being negotiated. By affidavit attached to defendants' brief in support of final approval of the proposed settlement, Skadra, SSA's chief financial officer, attested to the truthfulness of the following statements regarding SSA's financial condition. In early 1997, SSA faced a serious liquidity crisis caused primarily by a lack of revenue and profitability over the immediately preceding five quarters and by the high debt-equity leverage in SSA's capital structure. Investment bankers involved in SSA's attempt to refinance expressed concern that the pending class actions could be resolved without a material impact on SSA's financial statement.

In the spring of 1997, while negotiations with plaintiffs were underway, SSA began negotiating with potential investors to accomplish the recapitalization of its balance sheet. During that time, SSA began negotiating for a refinancing with Bain Capital, Inc. (Bain), an investment banking group. Thereafter, other investment banking firms expressed interest in facilitating SSA's refinancing. Prior to the settlement hearing, SSA accomplished its refinancing, and its financial situation had improved significantly.

***163** OBJECTIONS RAISED BEFORE THE CIRCUIT COURT

On August 22, 1997, the Objectors filed a petition to intervene in the circuit court suit. The Objectors maintained: (1) that their status as class members in the circuit court and as plaintiffs in the federal suit conferred upon them the "right to know fully all of the details of any negotiations leading to the proposed settlement"; (2) that they should be allowed to intervene to take discovery to protect their rights; and that (3) intervention was warranted as the representation of their interests by existing parties may be inadequate.

By accompanying motion also filed on August 22, 1997, the Objectors complained the proponents of the settlement had failed to ****713 ***182** show that the compromise was fair and reasonable under each of the factors delineated in *City of Chicago v. Korshak,* 206 Ill.App.3d 968, 972, 151 Ill.Dec. 797, 565 N.E.2d 68, 70 (1990) (the *Korshak* factors). The *Korshak* factors include: (1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching the settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and amount of discovery completed. *Korshak,* 206 Ill.App.3d at 972, 151 Ill.Dec. 797, 565 N.E.2d at 70. Before the circuit court, as on appeal, the Objectors' various complaints of unfairness stemmed, in large part, from their interpretation of recent federal legislation governing class action securities litigation. Consequently, a brief explication is required in order to place the Objectors' arguments in context.

The Private Securities Litigation Reform Act of 1995, the PSLRA, raised the pleading burden for fraud (15 U.S.C.A. §§ 78u-4(b)(1), (b)(2) (West 1997)), imposed mandatory sanctions for frivolous pleadings and motions (15 U.S.C.A. § 78u-4(c) (West 1997)), insulated certain projections and forecasts against claims of securities fraud (15 U.S.C.A. § 78u-5 (West 1997)), and made it more difficult to establish joint and several liability for violations of certain federal securities laws (15 U.S.C.A. § 78u-4(g) (West 1997)). The PSLRA also provides that discovery in a federal class action is automatically stayed upon the filing of a motion to

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dismiss (15 U.S.C.A. § 78u- 4(b)(3)(B) (West 1997)). In addition, under the PSLRA, the party with the largest financial interest is ordinarily entitled to become the lead plaintiff and selects the class attorney (15 U.S.C.A. § 78u-4(a)(3)(B)(iii) (West 1997)).

Shortly after promulgation of the PSLRA, the United States Supreme Court held in *Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), ***164** that state court class action settlements can release exclusive federal claims. However, under certain circumstances, state court class action settlements purporting to release the claims of federal class action plaintiffs are subject to collateral attack in federal court.

Following the Supreme Court's decision in *Matsushita,* the Securities Litigation Uniform Standards Act of 1998 (the Uniform Standards Act) (15 U.S.C.A. § 77a *et seq.* (West Supp.1999)) was passed, amending the Securities Act of 1933 (15 U.S.C.A. § 77a *et seq.* (West 1997)) and the Securities Exchange Act of 1934 (15 U.S.C.A. § 78a *et seq.* (West 1997)). The Uniform Standards Act amended section 16 of the Securities Act of 1933 (15 U.S.C.A. § 77p (West 1997)) to require that certain securities fraud class actions involving nationally traded securities be brought in federal, not state, court (15 U.S.C.A. § 77p(b) (West Supp.1999)). An additional amendment provides that any such action brought in state court involving a covered security shall be removable to the federal district court for the district in which the action is pending (15 U.S.C.A. § 77p(c) (West Supp.1999)). The Uniform Standards Act is not applicable in this instance and applies only to actions filed after the date of its enactment.

OBJECTIONS BEFORE THE CIRCUIT COURT

The Objectors' arguments before the circuit court, though grounded in *Korshak,* were informed by the PSLRA and the perceived potential for unfairness implicit in *Matsushita.* The Objectors argued that the circuit court should not allow the plaintiff in the state court class action to "circumvent the Reform Act and highjack the federal action simply by virtue of accepting a low bid." As to *Korshak* factor number five, the presence of collusion, the Objectors maintained that, regardless of the purported merit of the settlement, the defendants had attempted to manipulate "the process" and "sandbag" the Objectors by excluding lead counsel in the federal class action from the circuit court settlement negotiations.

SETTLEMENT HEARING

At the settlement hearing on September 30, 1997, the discussion centered on SSA's ****714 ***183** ability to pay and the significance of the fact that SSA's financial condition had improved in the four months following agreement as to the terms of the settlement. The Objectors argued the court should consider SSA's changed circumstances in evaluating the settlement's fairness. They maintained that SSA's changed circumstances were foreseen at the time of the settlement, that the settlement was and is not necessary to SSA's financial prosperity, and that ***165** the fairness of the settlement at the time of final approval rather than at the time of negotiation and agreement should control. Consequently, the circuit court questioned the parties regarding SSA's financial condition at the time of the settlement negotiations and at the time of the settlement hearing. The circuit court specifically inquired of the mediator whether he was concerned that SSA's financial condition might improve or that SSA might obtain financing. The mediator responded that he "never saw a glimmer of hope from either side with respect to what could have happened" and that the "[p]otential for financing was very grim." The mediator explained that it was his understanding that SSA either had a loan or was about to get one at very unfavorable rates and that he told the plaintiffs, "you want a company, I can get you a company."

Defendants hired Charles C. Cox (Cox) to render an expert opinion on the issue of damages independent of the issue of liability. Cox's opinion, submitted by affidavit dated September 11, 1997, was attached to defendants' brief in support of final approval of the settlement. Cox, senior vice-president of Lexicon, Inc., a consulting firm that specializes in the application of economics to legal and regulatory issues, served as commissioner of the United States Securities and Exchange Commission (SEC) from 1983 to 1989 and was acting chairman of the SEC in 1987. Assuming liability could be shown and using SSA's disclosure of January 7, 1997, as the curative disclosure, Cox calculated that damages for the entire alleged class period would amount to $3,129,969. Cox further calculated that, if his analysis were to take into account the effect of SSA's alleged partial disclosure to the marketplace on November 4, 1996, alleged damages would

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amount to $4,400,000. Cox stated that, even if the damages of the two announcement periods were considered together, the settlement value of $3,200,000 would amount to approximately 42% of this damage calculation, an amount Cox opined was "well within reason in light of questioned liability and SSA's poor financial condition at the time of the settlement." The Objectors do not challenge these damage calculations, but do suggest that the circuit court case was unfairly settled for litigation costs. [FN3]

> FN3. New restrictions limit damages to the difference between an investor's purchase price and the 90-day average trading price of the stock following any curative disclosure. 15 U.S.C.A. § 78u-4(e) (West 1997).

ANALYSIS

With this context in mind, we turn to the Objectors' specific complaints on appeal. The Objectors assert: (1) the trial court erred as ***166** a matter of law as to the proper standard for reviewing a proposed class action settlement; (2) the named plaintiff and his counsel inadequately represented the class' interests in settlement negotiations; (3) the trial court erred in certifying a class for settlement purposes without making the findings required by section 2-801 of the Illinois Code of Civil Procedure (735 ILCS 5/2-801 (West 1996)); and (4) the trial court erred in denying the Objectors' petition to intervene.

[1] As a threshold matter, we must first determine whether each of the issues presented on appeal is properly before us. The Objectors have appealed from two orders: from the order and final judgment of dismissal entered September 30, 1997, and from the order denying the Objectors' petition to intervene entered October 8, 1997. Defendants correctly note that the Objectors have not appealed from the order of June 27, 1997, certifying the class represented by the named plaintiff and his counsel. Consequently, defendants maintain this court lacks jurisdiction to review Objectors' arguments regarding the settlement class' certification and the named plaintiff's adequacy.

[2][3][4][5] "It is well established that an appellate court has jurisdiction only of those ****715 ***184** matters which are raised in the notice of appeal." *Lewanski v. Lewanski,* 59 Ill.App.3d 805, 815, 16 Ill.Dec. 854, 375 N.E.2d 961, 968 (1978). To that end, Illinois Supreme Court Rule 303 provides that the notice of appeal "shall specify the judgment or part thereof * * * appealed from and the relief sought from the reviewing court." 155 Ill.2d R. 303(b)(2). However, the notice of appeal is to be liberally construed as a whole. *Glassberg v. Warshawsky,* 266 Ill.App.3d 585, 591, 202 Ill.Dec. 881, 638 N.E.2d 749, 753 (1994). Moreover, an appeal from a final judgment draws into issue all prior nonfinal orders which produced the final judgment. *Burtell v. First Charter Service Corp.,* 76 Ill.2d 427, 433, 31 Ill.Dec. 178, 394 N.E.2d 380, 382 (1979). Thus, an unspecified judgment is reviewable if it is a " 'step in the procedural progression leading to the judgment specified in the notice of appeal.' " *Taylor v. Peoples Gas Light & Coke Co.,* 275 Ill.App.3d 655, 659, 211 Ill.Dec. 942, 656 N.E.2d 134, 138 (1995), quoting *Burtell,* 76 Ill.2d at 435, 31 Ill.Dec. 178, 394 N.E.2d at 383.

First and foremost, we note that the Objectors did not directly raise the issue of the propriety of class certification *per se* in the circuit court. There, as here, the Objectors chose an indirect path of attack: they attacked class certification by means of an assault on the fairness of the settlement. With respect to the propriety of class certification, we further note that the Objectors were themselves engaged in class action litigation derived from the same set of facts in federal court.

In *Cunningham Courts Townhomes Homeowners Ass'n v. Hynes,* 163 Ill.App.3d 572, 575-76, 115 Ill.Dec. 416, 517 N.E.2d 1102, 1105 (1987), this court ***167** declined to consider whether the named plaintiffs certified as class representatives were similarly situated with the class where the notice of appeal did not request a review of the order that certified the class. Here, the Objectors failed to appeal from the order of the circuit court certifying the class, and the notice of appeal, even when read broadly, does not reference or allude to the issue of class certification. Nor was the issue of class certification directly engaged below. Accordingly, we decline to consider whether the trial court erred in certifying the class for settlement purposes.

Nevertheless, for purposes of clarification, we do respond to the Objectors' selective references to *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In *Amchem,* the Supreme Court found several requirements for class certification were lacking where, for purposes of effectuating a global

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settlement as to asbestos litigation, the settlement class included both exposure-only plaintiffs and those presently injured. In that context, the Supreme Court decided the role settlement may play in determining the propriety of class certification. The Supreme Court concluded:

> "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, [citation], for the proposal is that there be no trial. But other specifications of the Rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." *Amchem,* 521 U.S. at 620, 117 S.Ct. at 2248, 138 L.Ed.2d at 710.

We find nothing in *Amchem* to suggest that the circuit court abused its discretion or failed in its application of the law when it certified the class for purposes of settlement.

Though we decline to consider the issue of class certification, we will consider the due process concerns raised by this appeal, noting that the context of this litigation and the content of the Objectors' petition to intervene place those issues squarely before us. Initially, we observe that the Objectors' arguments here, as below, are premised upon their belief that they, by virtue of their status under the PSLRA, should have been apprised of the settlement negotiations before release of the notice of the proposed settlement. Had they been so informed, the Objectors maintain they would have ensured that the settlement was the product of adequate representation and the adversarial process, that the settlement class and release ****716 ***185** were precisely and accurately defined, and that notice was proper. These assertions, though advanced in the academy, do not suggest that the absence of Objectors' counsel from the settlement negotiations was erroneous as a ***168** matter of law or resulted in cognizable harm. See M. Kahan & L. Silberman, *Matsushita And Beyond: The Role Of State Courts In Class Actions Involving Exclusive Federal Claims,* 1996 Sup.Ct. Rev. 219, 255-56 (1996) (observing that a state court "should invite counsel for the federal plaintiffs, and in particular counsel for the lead plaintiff if one has been appointed, to a preliminary fairness hearing" (emphasis omitted)).

[6] We find no support for the notion that the Objectors' mere exclusion from the settlement negotiations rendered the settlement unfair as a matter of law. To be sure, global class action settlements, state court settlements that release exclusive federal claims, raise issues of fairness and process that extend beyond those present in nonglobal settlement class actions. These concerns include the fear of inadequate prosecution or discovery, the presence of collusion or "plaintiff shopping," attorney inexperience, and the settlement's potentially preclusive effect on federal claims. Despite these concerns, and the recent promulgation of the Uniform Standards Act notwithstanding, "Congress contemplated the possibility of dual litigation in state and federal courts related to securities transactions." *Orman v. Charles Schwab & Co.,* 179 Ill.2d 282, 293, 227 Ill.Dec. 927, 688 N.E.2d 620, 625 (1997), citing *Matsushita,* 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (for the proposition that Congress contemplated the possibility of dual litigation).

In *Matsushita Electric Industrial Co. v. Epstein,* 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), the United States Supreme Court held that a Delaware chancery court judgment settling shareholders' state and federal claims against an acquiring corporation had preclusive effect in federal courts under the Full Faith and Credit Act (28 U.S.C.A. § 1738 (West 1994)) even though the shareholders could not have pressed their federal claims in chancery court. Thus, *Matsushita* undercuts the Objectors' argument that their exclusion from the settlement negotiations necessarily meant that the product of those negotiations, the agreement, was unfair as a matter of law or that their status under the PSLRA as lead plaintiff in the federal matter required their presence and participation. The record itself undermines the Objectors' suggestion that their exclusion from the negotiations in fact prejudiced the plaintiffs.

Nothing in the record indicates that the concerns present in global class action settlements prejudiced the plaintiffs in this matter. The agreement was the product of adversarial give-and-take overseen by an experienced mediator. Class members received notice and the opportunity to opt out or to participate in the settlement. Out of the 19,000 notices sent, five class members representing an estimated ***169** 1,250 shares of SSA stock requested exclusion from the class. The amount of stock represented is an estimate because one class member who requested exclusion did not indicate how many shares of SSA

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stock he held during the class period. We find no support in the record for the Objectors' claims that prosecution and discovery were inadequate. All parties were represented by able counsel with extensive experience in class action securities litigation. Nor do we find discovery was inadequate. As the circuit court noted, 60,000 pages of discovery were obtained and made available to the Objectors, though discovery in the federal suit was stayed. Despite the Objectors' insinuations, the particular facts of this case do not suggest the presence of collusion or "plaintiff shopping." As for the settlement's potentially preclusive effect on the federal claims, we note that the circuit court was fully apprised that the allegations against SSA were the subject of dual litigation and was briefed on the relative merits of the state and federal claims.

Lastly, the Objectors' complaints regarding the supposed imprecision of the release and the quality of the notice afforded are more properly the subject of the federal litigation that remains after the state court settlement. There, the Objectors remain free to convince the federal court that this ****717 ***186** settlement was the product of inadequate representation and does not deserve full faith and credit.

[7][8][9] Having exposed the premises upon which many of the Objectors' arguments of unfairness rest, we turn now to the question of fairness. As a general matter, we are asked to decide whether the circuit court abused its discretion or erred in its application of the law in finding that the settlement was fair, reasonable, and in the best interest of the class. "[T]he trial court's decision may be reversed only on a clear showing that the trial court was guilty of an abuse of discretion." *City of Chicago v. Korshak,* 206 Ill.App.3d 968, 971-72, 151 Ill.Dec. 797, 565 N.E.2d 68, 70 (1990). "The standard to be used in evaluating the compromise settlement of a class action is that the agreement must be fair, reasonable, and adequate." *Langendorf v. Irving Trust Co.,* 244 Ill.App.3d 70, 78, 184 Ill.Dec. 822, 614 N.E.2d 23, 28 (1992). "In a class action, the court is the guardian of the interests of the absent class members." *Waters v. City of Chicago,* 95 Ill.App.3d 919, 924, 51 Ill.Dec. 185, 420 N.E.2d 599, 603 (1981).

[10] The Objectors first contend the trial court misconstrued its role when it approved the settlement. We disagree. To support this argument, the Objectors reference the circuit court's statement that "it is most important that people be able to rely upon a handshake or acquiescence." The Objectors do not provide the context for the statement, discussion over whether SSA's improved financial condition should be ***170** considered. In addition, the Objectors do not acknowledge what is clearly evident from the record: the circuit court's understanding of and attention to the complex legal and financial issues germane to the settlement before it. Having reviewed the record, we find that the circuit court correctly understood its role.

[11] The strength of plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved. *Korshak,* 206 Ill.App.3d at 972, 151 Ill.Dec. 797, 565 N.E.2d at 70-71. The record shows that the relative merits of the federal and the state claims were thoroughly briefed and vigorously argued before the circuit court. In fact, the court noted its sensitivity to the issues of liability when it stated for the record: "I have great question in my mind as to the total innocence of the officers of this company. * * * So what I'm getting at, maybe this isn't as bad a case as [counsel for defendants] thinks it is." Moreover, it is apparent from the record that the circuit court was apprised of the particular problems posed by dual state and federal settlement class action securities litigation. In addition, the record indicates that the issue of damages was explored in context of the amount of damages potentially recoverable under the PSLRA. The record also shows, and the parties agree, that the circuit court properly focused its attention on SSA's ability to fund the settlement.

[12] We now address the issue most vigorously argued at the settlement hearing, the significance of SSA's improved financial condition. Here, the Objectors maintain the trial court's analysis of the proposed settlement erroneously excluded SSA's then current financial condition. Again, we disagree.

As to the issue of the significance of SSA's improved financial condition, the Objectors' assertions are threefold: (1) SSA's financial condition was not as dire as the mediator was led to believe it was at the time of the settlement negotiations; (2) at the time of the negotiations, the parties did not inform the mediator that SSA's financial condition was improving or disclose to him the likelihood of significant financing in the near future; and (3) the fact that SSA's financial condition improved after it achieved its

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recapitalization rendered the previously negotiated settlement agreement unfair.

We turn first to the issue of SSA's financial condition at the time of the settlement negotiations. Specifically, the Objectors complain that the mediated settlement was unfair because it did not take into account "SSA's positive revenue, working capital, total stockholders' equity and the anticipated financing." Taking all these factors into account, the Objectors claim that, "as of June 27, 1997, the date the settlement agreement was entered, SSA's financial picture ***171** was ****718** far *****187** from bleak." We find no merit in this argument given the position taken by the Objectors at the settlement hearing. There, counsel for the Objectors stated:

> "Your Honor, it is fair to say that SSA was in a severe, likewise, crisis, a higher settlement demand might well have dried up potential source[s] of capital and forced the company into bankruptcy.
> That was what was going on with the negotiations of this settlement. That's what brought about this settlement."

We turn next to the Objectors' second contention that, at the time of the negotiations, the parties did not inform the mediator that SSA's financial condition was improving or disclose to him the likelihood of significant financing in the near future. In support of these assertions, the Objectors point to the following exchange at the settlement hearing:

> "THE COURT: What about the potential for financing?
> [MEDIATOR]: Potential for financing was very grim. As a matter of fact, my recollection is that they either had a loan or were about to get one at very unfavorable rates. They were extremely unfavorable as I recall it. And that's the best they could get.
> If I were advising a client, I would tell them not to take that kind of a loan, but this situation, as a matter of fact, I think, I told the plaintiffs, you want a company, I can get you a company. And my ability--or the facts are here, the key factor certainly was finance. The financial condition of the company. But liability was strenuously argued."

We are not persuaded that this exchange constitutes evidence of collusive conduct on the part of counsel. When read in context, the exchange indicates what was obvious to all parties: the relationship between SSA's financial condition, the settlement negotiations, and the availability of financing. The plaintiffs, defendants, and objectors all admit that SSA's financial condition at the time of the settlement negotiation was dire. Moreover, the record indicates that SSA's ability to obtain financing was directly linked to its ability to resolve the claims at issue here.

In addition, we find no legal basis for the Objectors' contention that the circuit court erred in approving the settlement because SSA's financial condition at the time of the settlement hearing had improved. As a factual matter, we simply note that the settlement agreement itself contemplated the possibility that SSA's financial condition might improve upon recapitalization and hedged against that possibility by including 100,000 shares of SSA stock as part of the settlement amount. Circuit court plaintiffs' counsel stated at the settlement hearing:

> ***172** "We bargained very hard and very long at the mediation progress over how do we protect ourselves in the event you get the financing, and in case the price of the stock goes up, and the solution that we came up with was the hundred thousand shares of stock we got."

[13] Finally, we find no abuse of discretion in the circuit court's order denying the Objectors' petition to intervene. The federal class action plaintiffs chose to pursue their claims in federal, not state, court and were not necessary parties to the circuit court action. Therefore, we conclude that the circuit court did not err when it entered the final judgment of dismissal of the circuit court class action on September 30, 1997, and when it entered the order of October 8, 1997, which denied the Objectors' petition to intervene.

Affirmed.

HOURIHANE, P.J., and GREIMAN, J., concurring.

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Supreme Court of Illinois.

In re ESTATE of Josie A. TOMLINSON.
Katherine D. SHELTON, Appellee,
v.
FIRST NATIONAL BANK OF PEORIA,
Appellant.

Nos. 47956, 47962.

Nov. 15, 1976.
Rehearing Denied Jan. 28, 1977.

The Circuit Court, Peoria County, Robert A. Coney, J., construed clause providing for bequest to 'Cancer Research Fund' as intending to bequeath remainder of estate to American Cancer Society, and adopted daughter of testatrix appealed. The Appellate Court, 30 Ill.App.3d 502, 333 N.E.2d 663, reversed and remanded, and petitions for leave to appeal to the Supreme Court were allowed. The Supreme Court, Ryan, J., held that Attorney General properly intervened by filing petition for leave to appeal, that cy pres doctrine would be applied to carry out charitable purpose expressed in will, and that general charitable purpose expressed in will of benefiting cancer research would properly be carried out by directing that bequest be given to American Cancer Society.

Judgment of Appellate Court reversed and judgment of Circuit Court affirmed.

West Headnotes

[1] Appeal and Error ⇐148
30k148

Interests that will justify appeal by one not a party must be direct, immediate and substantial; such interests must be interests which would be prejudiced by judgment or benefit from its reversal.

[2] Appeal and Error ⇐150(4)
30k150(4)

[2] Charities ⇐50
75k50

Attorney General, who has authority to protect charitable trust and its property either defensively where attack is made on its validity or by action as plaintiff by securing construction of trust instrument and who in suit by others where validity or enforcement of charitable trust may come into question should be made a party defendant, was proper party to appeal in case in which primary issue was whether bequest to nonexisting charitable beneficiary had to fail. Supreme Court Rules, rule 301, S.H.A. ch. 110A, § 301; S.H.A. ch. 14, § 51 et seq.

[3] Charities ⇐10
75k10

Trust for promotion of health is charitable trust.

[4] Charities ⇐36
75k36

[4] Charities ⇐49
75k49

If outright gift of property to charitable corporation without restrictions on its use or disposition is involved, corporation is under duty to apply property to one or more of charitable purposes for which it was organized, which duty is ordinarily enforceable by Attorney General who has authority to enforce and supervise charitable trusts. S.H.A. ch. 14, § 51 et seq.

[5] Wills ⇐775
409k775

Generally, if bequest is given to specific entity and legatee declines to accept bequest or cannot take or is not capable of taking and holding it, bequest fails.

[6] Wills ⇐489(5)
409k489(5)

Where there is mistake in name or description of legatee, whether individual or corporation, or if latent ambiguity exists as to identity of legatee, extrinsic evidence is admissible for purpose of determining identity of intended recipient of bequest.

[7] Charities ⇐37(4)
75k37(4)

Where, although bequest to "Cancer Research Fund" could not be carried out since no organization named "Cancer Research Fund" ever existed, will contained no provision for disposition of remainder of estate in event of failure of charitable bequest and, if bequest

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failed, property would pass to heirs as intestate property contrary to clearly expressed intent of testatrix to disinherit her heirs at law, application of cy pres doctrine to carry out charitable purpose expressed in will was appropriate.

[8] Charities ⚿37(6)
75k37(6)

Absence of gift over or reversion in case of failure of charitable purpose constitutes evidence of general charitable intent.

[9] Charities ⚿37(4)
75k37(4)

Where, although bequest to "Cancer Research Fund" could not be carried out since no organization named "Cancer Research Fund" ever existed, there was no doubt that testatrix intended to make bequest to benefit organization engaged in cancer research, general charitable purpose expressed in will of benefiting cancer research would be carried out by directing that bequest be given to American Cancer Society, which is widely known national organization engaged in raising and distributing funds for cancer research programs.

***385 **110 ***700** William J. Scott, Atty. Gen., Chicago (Fred F. Herzog and Imelda R. Terrazino, Asst. Attys. Gen., of counsel), for appellant State of Illinois.

D'Ancona, Pflaum, Wyatt & Riskind, Chicago (Robert W. Gettleman and David R. Hodgman, Chicago, of counsel), for appellant American Cancer Society.

McConnell, Kennedy, Quinn & Morris, Peoria (Richard N. Gentry, Jr., Peoria, of counsel), for appellee.

RYAN, Justice.

This case involves the construction of the will of Josie A. Tomlinson which was executed in 1951. She died on February 28, 1973. The will was admitted to probate in the circuit court of Peoria County. Katherine D. Shelton, who is also referred to in these proceedings as Catherine D. Shelton, is the adopted daughter of the decedent. She filed the complaint to construe the will. The primary issue is whether a bequest to a nonexisting charitable beneficiary must fail.

The will provided for certain nominal bequests to the plaintiff and other individuals and for bequests to each of three churches. All of the remainder of her estate was given to the First National Bank of Peoria as trustee with directions to convert it to cash and to erect a suitable monument on decedent's grave and to provide for perpetual care of the burial lot. The will then provided:

> 'I order and direct that my said Trustee shall then distribute all of the remainder of my said estate to the CANCER RESEARCH FUND absolutely and forever.'

Following this provision the testator provided that it was her intent to 'generally and specifically disinherit each, any and all persons whomsoever claiming to be or may be ***386** determined to be my heirs at law.'

The complaint alleges that notice of the petition to admit the will to probate and of the other probate proceedings had been given to her, certain other individuals, the ****111 ***701** three churches named in the will, the trustee and the American Cancer Society. It alleges that no notice was given to 'Cancer Research Fund' because there is not now in existence nor was there in existence at the time of the execution of the will or at the date of decedent's death any organization known as 'Cancer Research Fund.'

At the hearing on the complaint an affidavit of an executive vice president of the Illinois Division, Inc., of the American Cancer Society was introduced as evidence. Attached to the affidavit was a list of estates from which the American Cancer Society had received funds although the designations of the beneficiaries in those estates were not the same as the legal name of the society. Three of the 17 estates listed were probated in Illinois. In three of the estates the beneficiary was referred to as 'CANCER RESEARCH FUND,' 'The Cancer Research Fund,' and 'Cancer Research Fund.' No other evidence was introduced in support of the American Cancer Society's claim. The plaintiff, Katherine D. Shelton, introduced into evidence a copy of certain pages from a 1973 publication of an encyclopedia of national organizations of the United States. The pages copied related to health and medical organizations active in the field of cancer research and education. It was stipulated that at the present time, at the time the decedent died and at the time the will was executed there was no organization known as the 'Cancer Research Fund.' The circuit court of Peoria County

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construed the questioned clause in the will as intending to bequeath the remainder of the estate to the American Cancer Society, Inc. The plaintiff appealed.

The appellate court found that there was no evidence in the record which establishes that the decedent intended to give the remainder of her estate to the American Cancer *387 Society, Inc., and held that the bequest failed and the property passed as intestate property. (30 Ill.App.3d 502, 333 N.E.2d 663.) We reverse this holding.

The Attorney General filed a petition for leave to appeal to this court as did the American Cancer Society, Inc. Both petitions were allowed. The plaintiff contends that the Attorney General has no authority to intervene in this case. In the trial court no notice of the hearing on the complaint was given to the Attorney General, and he was not a party to the appeal in the appellate court. He has entered the case by filing a petition for leave to appeal in this court.

[1] We find that the Attorney General properly intervened in this case by filing a petition for leave to appeal. Rule 301 of this court (58 Ill.2d R. 301) provides that '(a)ll rights that could have been asserted by appeal or writ of error may be asserted by appeal.' Prior to the enactment of the Civil Practice Act, one who was not a party to an action had no statutory right of appeal. He could, however, prosecute a writ of error by showing that he would be injured by the judgment or decree or that he would benefit by its reversal. (Gibbons v. Cannaven, 393 Ill. 376, 66 N.E.2d 370.) This court has held that the interests that will justify an appeal by one not a party must be direct, immediate and substantial. It must be an interest which would be prejudiced by the judgment or benefit from its reversal. City of Alton v. County Court, 16 Ill.2d 23, 156 N.E.2d 531.

[2] The interest of the Attorney General in this litigation is sufficient to meet this test. He has the authority to protect a charitable trust and its property either defensively, where an attack is made on its validity, or by an action as plaintiff, by securing the construction of the trust instrument. In a suit by others where the validity or the enforcement of a charitable trust may come into question the Attorney General should be made a party defendant. Bogert, Trusts and Trustees sec. 411 (2d ed. 1964); see also Stoner Mfg. Co. v. Y.M.C.A., 13 Ill.2d 162, 148 N.E.2d 441; Kerner v. *388 Thompson, 365 Ill. 149, 153, 6 N.E.2d 131; Stowell v. Prentiss, 323 Ill. 309, 321, 154 N.E. 120; Attorney General v. Newberry Library, 150 Ill. 229, 236, 37 N.E. 236. See also Leo v. Armington (1948), 74 R.I. 124, 59 A.2d 371; New York East Annual Conference **112 ***702 of the Methodist Church v. Seymour (1964), 151 Conn. 517, 199 A.2d 701.

[3][4] A trust for the promotion of health is a charitable trust. (Restatement (Second) of Trusts sec. 372 (1959).) If an outright gift of property to a charitable corporation without restrictions on its use or disposition is involved, the corporation is under a duty to apply the property to one or more of the charitable purposes for which it was organized. This duty is ordinarily enforceable by the Attorney General. (Restatement (Second) of Trusts sec. 348, Comment (f) (1959); Bogert, Trusts and Trustees sec. 41, at 325 (2d ed. 1964).) The Charitable Trust Act (Ill.Rev.Stat.1973, ch. 14, par. 51 Et seq.) vests in the Attorney General authority to enforce and supervise charitable trusts. For these reasons we hold that the Attorney General is a proper party to this appeal.

[5] Generally if a bequest is given to a specific entity and the legatee declines to accept the bequest or cannot take or is not capable of taking and holding it the bequest fails. See First National Bank v. Elliott, 406 Ill. 44, 92 N.E.2d 66, which distinguishes Volunteers of America v. Peirce, 267 Ill. 406, 108 N.E. 318; Chicago Daily News Fresh Air Fund v. Kerner, 305 Ill.App. 237, 27 N.E.2d 310, and Quimby v. Quimby, 175 Ill.App. 367.

[6] If, however, there is a mistake in the name or description of the legatee, whether an individual or a corporation, or if a latent ambiguity exists as to the identity of the legatee, extrinsic evidence is admissible for the purpose of determining the identity of the intended recipient. Woman's Union Missionary Society of America v. Mead, 131 Ill. 338, 23 N.E. 603; Hitchcock v. Board of Home Missions, 259 Ill. 288, 102 N.E. 741; Daniels v. Brooks, 377 Ill. 44, 35 N.E.2d 362; 4 Page, Wills sec. 34.39 (Bowe-Parker rev. ed. 1961); Thompson, Construction and Interpretation of Wills sec. 141 (1928).

*389 The appellate court found that there was insufficient evidence presented to the trial court to show that the testator intended that the bequest should be given to the American Cancer Society.

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We agree that the evidence is deficient in this regard. Under the facts of this case, however, this should not invalidate the bequest or cause it to fail.

There can be no doubt that the testator intended to make a bequest to benefit an organization involved in cancer research. The parties stipulated, however, that no organization named 'Cancer Research Fund' ever existed. This does not mean that the gift must fail.

[7][8] It is generally held that if a bequest to a particular charitable entity cannot be carried out and does not manifest a general charitable intent, the doctrine of Cy pres is not applied. (Bogert, Trusts and Trustees sec. 436 (2d ed. 1964).) In our case, however, although the bequest to the Cancer Research Fund cannot be carried out, we find in the will evidence that the testator did not intend that the bequest should completely fail under such circumstances. The will contains no provision for the disposition of the remainder of the estate in the event of the failure of the charitable bequest. If the bequest should fail, the property would pass to the heirs as intestate property. Such a disposition would be contrary to the clearly expressed intent of the testator to disinherit her heirs at law. The absence of a gift over or a reversion in case of the failure of a charitable purpose constitutes evidence of a general charitable intent. See Fisch, The Cy Pres Doctrine in the United States 152 (1950); Bogert, Trusts and Trustees sec. 437 (2d ed. 1964); Comment, A Revaluation of Cy Pres, 49 Yale L.J. 303 (1939).

Under the circumstances of this case it is appropriate to apply the Cy pres doctrine to carry out the charitable purpose expressed in the will. Bogert in his treatise states that by the application of Cy pres '(i)f the failed gift was to or for a charitable institution which never existed, or has ceased to exist, or is too vaguely described to be *390 identified, * * * the court will usually either deliver the corpus to another like institution in the same region, to hold out-right or in trust, whether a successor, affiliate, parent, or unrelated institution.' Bogert, **113 ***703 Trusts and Trustees sec. 442 (2d ed. 1964).

It is not necessary that we remand this case to the circuit court of Peoria County for the purpose of ascertaining the manner in which the Cy pres doctrine should be applied. The record before this court contains sufficient facts for such a determination to be made here.

[9] As indicated above there can be no doubt that the testator intended to make a bequest to benefit an organization engaged in cancer research. The affidavit filed on behalf of the American Cancer Society's claim to the bequest states that the American Cancer Society, which maintains an office in Peoria, Illinois, is a widely known national organization engaged in raising and distributing funds for cancer research programs. The general charitable purpose expressed in the will of benefiting cancer research will properly be carried out by directing, as the trial court did, that the bequest be given to the American Cancer Society, Inc.

For these reasons the judgment of the appellate court is reversed and the judgment of the circuit court of Peoria County is affirmed.

Appellate Court reversed; Circuit Court affirmed.

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Appellate Court of Illinois, First District, Second Division.

Effie WATERS, on behalf of herself and all other persons who are similarly situated, Plaintiffs-Appellees, consolidated with John R. Nebel, Jr., on behalf of himself and all other persons similarly situated, Plaintiffs-Appellees,
v.
The CITY OF CHICAGO, a Municipal Corporation, and Clark Burris, Comptroller of the City of Chicago, Illinois, Defendants-Appellees,
Dorothy Epstein, Objector-Appellant,
Barbara Nash Wilson, Objector-Appellant,
Clemen Sherman Williams, Objector-Appellant,
Cooney and Stenn, Objectors-Appellants.

No. 80-701.

April 21, 1981.
Rehearing Denied May 21, 1981.

A class action settlement was approved by the Cook County Circuit Court, Reginald J. Holzer, J., and appeal was taken by certain objectors. The Appellate Court, Stamos, J., held that: (1) a petition to intervene was properly denied in the trial court's discretion; (2) given lack of consideration for rights of subclass of plaintiffs, whose claims were in an amount less than $1,000, trial court's approval of settlement was abuse of discretion; and (3) record failed to sustain amount of attorney fee award.

Vacated and remanded.

West Headnotes

[1] Parties ⚿41
287k41

In action wherein governing statute did not create unconditional right to intervene and particular class member could have avoided being bound by result by opting out of class, intervention as of right required more tangible detriment than speculative additional delay that was predicted, and there was no error in denial of petition to intervene in class action. S.H.A. ch. 110, §§ 26.1, 26.1(1)(a-c), 26.1 comment, 57.5, 57.5(a), 57.5 note.

[2] Compromise and Settlement ⚿57
89k57
(Formerly 307Ak505)

Evaluation of settlement of class action is discretionary matter, but agreement must be fair, reasonable, and in best interest of all affected.

[3] Compromise and Settlement ⚿57
89k57
(Formerly 307Ak505)

In class action, court is guardian of interests of absent class members, and a settlement must be in best interest of all those who will be affected by it, including absent class members.

[4] Appeal and Error ⚿863
30k863

Reviewing court cannot rewrite parties' settlement to excise unfair portions, but can only approve or disapprove of entire agreement for settlement of class action.

[5] Compromise and Settlement ⚿61
89k61
(Formerly 307Ak505)

Given lack of consideration for rights of subclass of plaintiffs, whose claims were in an amount less than $1,000, trial court's approval of settlement of class action was abuse of discretion.

[6] Compromise and Settlement ⚿70
89k70
(Formerly 307Ak505)

As against contention that objectors had no standing to assert rights of subclass, of which no objector was a member, burden was on proponents of class action settlement to prove that the compromise was fair and reasonable, and where objectors could point to unfair or inadequate aspect of settlement, proponents failed to carry burden, irrespective of whether that aspect impinged on rights of objectors personally.

[7] Appeal and Error ⚿187(1)
30k187(1)

[7] Compromise and Settlement ⚿56.1
89k56.1
(Formerly 89k56, 307Ak505)

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Trial court was obligated to consider rights of absent class members, in approving settlement of class action, and evidence that trial court did not do so was proper matter for appellate review, despite contention that objectors waived point by not raising it in trial court.

[8] Attorney and Client ⇐155
45k155

Award of attorney fees in class action is contingent upon success, and upon existence of fund from which fees can be paid.

[9] Attorney and Client ⇐155
45k155

Where it was held on appeal that order approving settlement of class action was to be vacated, both "success" and "fund," as elements required for award of attorney fees, perished.

[10] Attorney and Client ⇐155
45k155

In arriving at attorney fee award for class action, trial court after disallowing time which did not benefit class should determine whether hourly total is reasonable and note whether time was expended by law clerks, associates or senior partners, and then consider complexity of problem and skill of attorneys and fix hourly rate of compensation, which hourly rate can be multiplied depending on contingent nature of recovery and quality of benefit to class.

[11] Attorney and Client ⇐155
45k155

Record of class action failed to sustain attorney fee award.

***920 **600 ***186** Arvey, Hodes, Costello & Burman, Asher, Goodstein, Pavalon, Gittler, Greenfield & Segall, Ltd., Cooney & Stenn, Tully, Roddy, Weinstein & Boyle, Chicago, for objectors-appellants.

Judge, Drew, Cipolla & Kurnik, Ltd., Larry D. Drury, Ltd., Chicago, for plaintiffs-appellees.

STAMOS, Justice:

This matter is now before the appellate court for the second time. In 1975, John Nebel filed a class action lawsuit against the city of Chicago, seeking relief from the defendant city's practice of postponing the payment of tort judgments. The trial court dismissed the complaint, and this court reversed. (Nebel v. City of Chicago (1977), 53 Ill.App.3d 890, 11 Ill.Dec. 620, 369 N.E.2d 74.) On remand, Nebel's class action was consolidated with Effie Waters' similar class action. On October 30, 1979, the class of plaintiffs was certified.[FN1] On November 16, 1979, the parties filed with the court a proposed compromise and settlement of the action. Subsequently, a number of class members appeared and entered their objections to the proposed settlement. Dorothy Epstein objected and also sought leave to intervene as a party plaintiff. The trial court denied the objections, denied the petition to intervene, and approved the settlement. Epstein and three other objectors have appealed.

> FN1. The class includes "all unpaid tort judgment creditors of the defendant, THE CITY OF CHICAGO, as of the date of entry of this order (October 30, 1979)." On November 30, 1979, the class was modified to exclude those judgment creditors who had sold or assigned their judgments prior to November 16, 1979.

***921** Before considering the merits of the settlement, we must first describe the city of Chicago's past practices. Prior to 1980, the city budgeted no more than.$4.5 million per year to satisfy tort judgments rendered against the city. It was the practice of the city to pay judgments in the order in which they were entered, so, as the.$4.5 million judgment fund became increasingly inadequate, delays in the satisfaction of tort judgments increased. Plaintiff Nebel's ****601 ***187** 1975 complaint alleged a 21/2 year delay in paying judgments; by late 1979, when the lawsuit was settled, delays in satisfying judgments had increased to over 4 years. This period of delay did not affect judgment amounts of $1000 or less. The city paid these judgments in the order in which judgment creditors presented them for payment, and delay in satisfying these judgments was relatively minor, as most such awards were paid in the year entered.

Under the terms of the settlement, the city was required to budget $9 million for payment of tort judgments for each of the next 3 years (1980, 1981, and 1982). By January 1, 1983, the city was to budget an amount sufficient to pay all outstanding tort judgments. Under the agreement, the city would

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pay judgment creditors in the order in which the judgments were obtained. An exception was made for judgments of $1000 or less; the city could continue to pay these judgments promptly and prior to larger judgments. On December 10, 1979, the settlement agreement was modified to provide for judgment creditors excluded from the class (i. e., those who had opted out of the class action). The city was required to give priority to class members, but when an excluded judgment creditor's judgment became 52 months old, that creditor was to receive priority. The settlement also provided for fees for the plaintiffs' attorneys and the trustee. These sums were to be assessed against the amounts due the members of the class; the final computation provided that each class member's judgment would be reduced by 1.30887%. A judgment creditor could escape this 1.3% assessment by opting out of the class, but he then lost priority of payment.

A class member holding a judgment for more than $1000 would, like all class members, accept a 1.3% reduction in his judgment. Plaintiffs argue that this reduction is more than offset by the benefit of remaining in the class: the judgment will be paid sooner because the city has doubled its budget for satisfaction of tort judgments.[FN2] If this class member elects to ***922** opt out of the class, the amount of his judgment will not be reduced. He will, however, be paid later than class members whose judgments are more recent. Fifty-two months after the entry of his judgment, he regains priority. By this time, his judgment is older than that of any unpaid class member, so the opting-out judgment creditor then has first priority for payment. The 52 month figure is apparently based on the waiting time as of November 1979, the time of the settlement, when judgment creditors were waiting about 41/3 years for satisfaction. Plaintiffs argue that a judgment creditor who opts out of the class is therefore in the same position he would be in had no action been brought: his judgment is satisfied approximately 52 months after entry.

FN2. The objectors have pointed out that the city's 1980 budget was first prepared in tentative form in August, 1979, and showed a $9 million amount for tort judgment satisfaction. This budget was prepared prior to the settlement and even prior to the settlement negotiations. Plaintiffs point out that this fact was not before the trial court. Further, plaintiffs argue, the settlement binds the city to budget a like amount in 1981 and 1982. Plaintiffs conclude that sufficient consideration has been shown, and, in any event, the point has been waived for appeal. We have not found it necessary to rely on these facts in ruling on the issues presented.

Under the city's previous practice, persons holding judgments of $1000 or less were paid promptly. Under the settlement, these persons continue to receive the same priority. They are also subject to the 1.3% assessment for attorneys' fees. If, however, these small judgment creditors opt out of the class, they are not subject to the 52 month waiting period. Paragraph 7a of the settlement agreement (requiring that class members be paid before those excluded from the class) does not change the order of payment provided in paragraph 7, which is the section referring to judgments of $1000 or less.

The 1.3% assessment for attorneys' and trustee's fees was arrived at by dividing the total fee award ($220,000) by the aggregate amount of unpaid tort judgments held by ****602 ***188** members of the class ($16,808,309).[FN3] The $220,000 amount includes $20,000 for the trustee and $100,000 for the attorneys for each of the two plaintiffs. Plaintiff Nebel is represented by Byron D. Knight of the firm of Judge, Drew, Cipolla and Kurnik, Ltd. Plaintiff Waters is represented by Larry D. Drury. Attorney Knight's petition for fees contains a fully detailed listing of the time spent on the litigation, from December 1974 through December 1979. The 14 page listing shows 656 hours of work, and quotes an hourly rate of $75, for a total of $49,200. The petition also lists $126.66 in costs. Knight requests that the hourly total be multiplied by 3, and seeks a total fee award of $147,726.66. Attorney Drury's fee petition, lacking the specificity of Attorney Knight's, lists 526 hours of work performed between May 1, 1979, and December 10, 1979. The petition adds 125 hours for "Completion of litigation, anticipated time to close case and make refunds over a three year interval," for a total of 651 hours. Drury asks $100 per hour ($65,100), and asks that this figure be trebled ($195,300). A thorough review of the record does not reveal what factors were considered by the trial court in awarding each attorney $100,000.

FN3. 286 judgments, having an aggregate value of $1,532,665, were excluded from the class.

On November 19, 1979, the trial court appointed a trustee to ***923** administer the settlement. The trustee petitioned the trial court for fees on February

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8, 1980. The petition contains the trustee's estimate that he will expend 400 hours over a 3 year period, and asks $40,000. As noted above, the trial court made an award of $20,000.

[1] The objectors first contend that the denial of Epstein's petition to intervene was error. Section 57.5 of the Civil Practice Act states that,

> "Any class member seeking to intervene or otherwise appear in the action may do so with leave of court and said leave shall be liberally granted except when the court finds that said intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class." (Ill.Rev.Stat.1979, ch. 110, par. 57.5(a).)

The Historical and Practice Notes to section 57.5 refer to section 26.1 of the Civil Practice Act, and state that the procedure for intervention and the status of intervenors is controlled by that section. (Ill.Ann.Stat., ch. 110, par. 57.5, Supplement to Historical and Practice Notes, at 116 (Smith- Hurd, 1979 Supp.).) Section 26.1 provides for intervention as of right in certain cases; generally, however, intervention is allowed at the discretion of the trial court, and denial of intervention will not be reversed on appeal absent a clear abuse of that discretion. (See Ill.Rev.Stat.1979, ch. 110, par. 26.1(2); United Steelworkers of America v. Bailey (1975), 29 Ill.App.3d 392, 393, 329 N.E.2d 867.) Epstein's petition to intervene was presented on February 14, 1980. The objectors have not demonstrated that the trial court's denial of the eleventh hour petition was an abuse of discretion. The objectors' assignment of error, therefore, can only be upheld if Epstein's status was that of an intervenor as of right.

Intervention is permitted as of right,

> "(a) when a statute confers an unconditional right to intervene; or (b) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (c) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or an officer thereof." (Ill.Rev.Stat.1979, ch. 110, par. 26.1(1).)

In the case at bar, clause (a) does not apply, since section 57.5, the governing statute, does not create an unconditional right to intervene. Clause (b) does not apply, because, regardless of the adequacy of the class representation, Epstein could have avoided being bound by the result by opting out of the class. The objectors argue that clause (c) applies, since Epstein will allegedly suffer the adverse effects of additional***924 **603 ***189** delay if she opts out of the class, and will suffer a 1.3% fee assessment if she remains in the class. Since the 52 month waiting period was intended to leave opting-out creditors in their status quo ante, the nature of the claimed additional delay is unclear. Intervention as of right requires a more tangible detriment than the speculative additional delay that the objectors predict. The Committee Comments to section 26.1 state that, "Clauses (b) and (c) * * * provide for intervention as of right in the few instances in which the applicant would suffer tangible detriment if denied the right to intervene." (Ill.Ann.Stat., ch. 110, par. 26.1, Joint Committee Comments, at 318 (Smith-Hurd 1968).) We conclude that there was no error in the denial of the petition to intervene, and find it unnecessary to consider plaintiffs' charge that the petition was not timely made.

[2] The next issue is whether the settlement itself should be sustained. Our supreme court has supplied the standard to be used in evaluating the compromise settlement of a class action: the agreement must be fair, reasonable, and in the best interest of all affected. Evaluation of the settlement is a discretionary matter, and a reviewing court will not upset the trial court's judgment without a showing of abuse of discretion. (People ex rel. Wilcox v. Equity Funding Life Ins. Co. (1975), 61 Ill.2d 303, 316, 335 N.E.2d 448 (hereinafter, Equity Funding).) The same standard is used in the federal courts. See Patterson v. Stovall (7th Cir. 1976), 528 F.2d 108, 112.

[3][4][5] Our supreme court in Equity Funding stated that a settlement must be "in the best interest of all those who will be affected by it." (Equity Funding, 61 Ill.2d at 316, 335 N.E.2d 448.) We believe that absent class members are necessarily included in "all those." In a class action, the court is the guardian of the interests of the absent class members. (Zerkle v. Cleveland-Cliffs Iron Co. (S.D.N.Y.1971), 52 F.R.D. 151, 159; see Fiorito v. Jones (1978), 72 Ill.2d 73, 88, 18 Ill.Dec. 383, 377 N.E.2d 1019.) A settlement which is unfair to a subclass or a fraction of the class should not be sustained. (See In re General Motors Corp. Engine Interchange Litigation (7th Cir. 1979), 594 F.2d 1106, 1133, cert. denied (1979), 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95.) In the case at bar, the

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subclass of persons holding judgments of $1000 or less received virtually no benefit from the settlement. Prior to the settlement, these creditors were paid more or less promptly. Under the terms of the settlement, the city is to follow the same payment procedure with respect to this subclass. Although the city has agreed to budget a larger amount for the payment of tort judgments, this promise only benefits the holders of larger judgments who were faced with a waiting period in excess of four years. The only effect of the settlement that the members of the subclass will see is a 1.3% reduction in the amount of their judgments. They could have escaped this assessment by opting out of the class, but few chose to ***925** do so.[FN4] It is understandable that few members of the subclass would perceive the benefit of opting out: the published notice of the settlement did not include paragraph 7a, which contains the provisions for paying judgment creditors excluded from the class. The notice of the proposed settlement was prepared on November 30, 1979; paragraph 7a was inserted in the proposed settlement on December 10, 1979. [FN5] While an amended notice to the ****604 ***190** class would have entailed additional cost and delay, expedience does not justify disregarding the rights of even a fraction of the class. (See In re General Motors, at 1133.) The reviewing court cannot re-write the parties' settlement to excise unfair portions; it can only approve or disapprove of the entire agreement. (In re General Motors, at 1133.) Given the lack of consideration for the rights of the under-$1000 subclass, we find that the trial court's approval of the settlement was an abuse of discretion.

FN4. Six of the 286 excluded creditors held judgments of $1000 or less.

FN5. This defect of notice also raises questions concerning the fairness of the settlement to absent class members holding judgments greater than $1000. While the notice adequately informed class members of their right to opt out, and provided clear instructions on the method of opting out, the notice did not reveal the consequences of opting out, and thus necessarily failed to give class members a basis for evaluating their two options. Even though the settlement gave most class members a quid pro quo (accelerated satisfaction in return for a 1.3% reduction), fairness might dictate that a class member's decision to remain in the class be a fully informed one. In particular, creditors whose judgments were already 52 months old in February 1980 had no way of knowing that remaining in the class would be of no benefit. When one of the objectors' attorneys pointed out this fact to the trial court, he was rebuffed.

[6] Plaintiffs contend that the objectors have no standing to assert the rights of the subclass, since all objectors hold judgments greater than $1000. This argument misses the point. The burden is on the proponents of a class action settlement to prove that the compromise is fair and reasonable. (Zerkle, at 159.) If the objectors can point to an unfair or inadequate aspect of the settlement, then the proponents have failed to carry their burden, irrespective of whether that aspect impinges on the rights of the objectors personally. The very existence of an unfair portion of the settlement also indicates that the trial court has failed to adequately consider the rights of absent class members.

[7] Plaintiffs' argument that the objectors have waived this point by not raising it in the trial court must fail for the same reason. The general rule is that new theories and new claims not considered by the trial court cannot be raised for the first time on appeal. (See Kravis v. Smith Marine, Inc. (1975), 60 Ill.2d 141, 147, 324 N.E.2d 417.) Here, however, the trial court was obligated to consider the rights of absent class members (see Zerkle, at 159), and evidence that it did not is a proper matter for appellate review.

[8][9] ***926** The next issue is whether the trial court's award of attorneys' and trustee's fees was proper. An award of attorney's fees in a class action is contingent upon success, and upon the existence of a fund from which the fees can be paid. (See Fiorito, 72 Ill.2d at 87, 18 Ill.Dec. 383, 377 N.E.2d 1019.) Plaintiffs argue that the promised increased appropriations by the city constitute a fund for the payment of fees. Since we hold that the order approving the settlement must be vacated, both the "success" and the "fund" have perished. Similarly, the trustee's fee is based on his future actions to implement the settlement, so vacation of the lower court's order also necessitates a vacation of the trustee's fee award.

[10] Since the question of attorney's fees will again be presented to the trial court, however, we are obliged to note that the lower court erred in its order for payment of attorneys' fees. As described above, Attorneys Knight and Drury presented the trial court with petitions requesting that their hourly rate

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charges ($49,326.66 and $65,100 respectively) be multiplied by 3. The multiplication factor for class action attorney fees was discussed by our supreme court in Fiorito v. Jones (1978), 72 Ill.2d 73, 89-93, 18 Ill.Dec. 383, 377 N.E.2d 1019. The trial court first considers the number of hours expended by the attorneys. After disallowing time spent that did not benefit the class, the trial court determines whether the hourly total is reasonable, and notes whether the time has been expended by law clerks, associates, or senior partners. The trial court then considers the complexity of the problem and the skill of the attorneys, and fixes an hourly rate of compensation. The hourly rate, multiplied by the allowable hours, is called the "lodestar computation," because it provides the point of orientation for determining the final fee award. (See Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp. (3d Cir. 1973), 487 F.2d 161, 168.) The lodestar computation can then, at the discretion of the trial court, be adjusted by a multiplier. The application of a multiplier depends on two factors: the contingent nature of the class's recovery (an unlikely recovery justifying an increased fee), and the quality of the benefit to the class. The supreme court in Fiorito ****605 ***191** specified that, if the trial court is to award fees greater than the lodestar computation, it should identify the factors that merit the increase, and state the value of the multiplier applied. 72 Ill.2d at 92, 18 Ill.Dec. 383, 377 N.E.2d 1019; see also Lurie v. Canadian Javelin Ltd. (1980), 92 Ill.App.3d 15, 19-21, 47 Ill.Dec. 742, 415 N.E.2d 1055.

[11] In the instant case, a multiplier was evidently applied, as each attorney received $100,000, and the quoted hourly rates totaled $49,200 and $65,100, respectively. The trial court made no findings that warrant the application of a multiplier. We read Fiorito to require that such findings must be specific and in the record.

Furthermore, the hourly rate totals ($49,200 and $65,100) do not appear to have been submitted to the scrutiny demanded in Fiorito. Although Attorney Knight's petition is admirably detailed, there is no evidence that ***927** the trial court made an independent determination of the reasonableness of the hourly rate requested. Attorney Drury's petition contained a very general accounting of time spent, and the trial court might well have inquired into the hourly total, since Drury managed to expend in 7 months nearly as much time as Knight's firm spent over a 5 year span, during which period Knight's firm successfully prosecuted the earlier appeal of this case. The 125 hours charged by Drury for completing the litigation and making refunds is particularly suspect, in light of the fact that it was the trustee's duty to implement the terms of the settlement.

In consideration of the foregoing, the trial court's order denying the petition to intervene is affirmed; the order approving the settlement and the orders approving attorneys' and trustee's fees are vacated, and the cause is remanded for further proceedings in the trial court.

VACATED AND REMANDED.

DOWNING and PERLIN, JJ., concur.

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United States Court of Appeals,
Second Circuit.

William B. WEINBERGER, et al., Plaintiffs-Appellees,
v.
James C. KENDRICK, et al., Defendants-Appellees,
Charles M. Coyne, et al., Appellants.

Nos. 956-959, Dockets 81-7317, 81-7629, 81-7827, 81-7829.

Argued April 19, 1982.
Decided July 14, 1982.
Order on Petitions for Rehearing Jan. 26, 1983.

Final judgments of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, J., 91 F.R.D. 494 and 20 B.R. 186, approved settlement of two class actions against banks that had been large lenders to debtor and officer of the lead bank who had been director of the bankrupt corporation. Holders of securities of the bankrupt appealed. The Court of Appeals, Friendly, Circuit Judge, held that: (1) notice of proposed settlement met requirements; (2) that class was certified and class representatives recognized after settlement, with notice simultaneous with that of the settlement, did not preclude approval; (3) there is no rigid rule against addition of new claims shortly before submission of proposed settlement of class action provided that proper notice and opportunity for opting out are afforded and that settlement fairly and adequately provides for the new claims; (4) common-law fraud claims could be found to be generally less valuable than Rule 10b-5 claims of actual purchasers of securities, and it was not unfair for distribution formula for settlement to reflect same; (5) treatment of state law claims by proposed settlement was fair and adequate; (6) district court did not err in refusing to conduct evidentiary hearing preceded by additional discovery on adequacy of settlement; but (7) sanction of fee award for issuance of subpoenas was not shown to be justified.

Judgment approving settlement affirmed; order imposing sanctions reversed.

West Headnotes

[1] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1699)

In passing on settlements of class actions under rule, judge should not regard himself as umpire in typical adversary litigation but, rather, he sits also as guardian for class members who have not received notice or who lack intellectual or financial resources to press objections. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[2] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

No rigid standards govern contents of notice to class members of proposed settlement, but notice must fairly apprise prospective members of class of terms of proposed settlement and of options that are open to them in connection with the proceedings, and it must be neutral. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[3] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

Notice of proposed settlement of class action was sufficient to meet requirements. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[4] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

Rule requiring notice of proposed settlement of class action requires only that each class member who can be identified through reasonable effort be notified. Fed.Rules Civ.Proc. Rule 23(c)(2), 28 U.S.C.A.

[5] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

Notice to class action members of proposed settlement of class action must be reasonably calculated, under all circumstances, to apprise interested parties of pendency of action and afford them opportunity to present their objections and it must afford reasonable time for those interested to make their appearance. Fed.Rules Civ.Proc. Rule

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23(c)(2), 28 U.S.C.A.

[6] Compromise and Settlement ⚿68
89k68
(Formerly 170Ak1698)

[6] Federal Courts ⚿895
170Bk895

Where prospective class members had some six weeks in which to decide whether or not to accept proposed settlement, notices allowed sufficient time, and although it would have been preferable if affidavits and other papers in support of settlement had been required to be available at date earlier than eve of hearing, failure of district court to demand same did not require reversal. Fed.Rules Civ.Proc. Rule 23(c)(2), 28 U.S.C.A.

[7] Compromise and Settlement ⚿67
89k67
(Formerly 170Ak1697)

Court would permit, but could not require, use of procedure whereby class action settlement is reached by means of settlement classes certified after settlement, but clearer showing of settlement's fairness, reasonableness and adequacy and propriety of negotiations leading to it in such cases would be required than where class has been certified and class representatives have been recognized at earlier date. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[8] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Central question raised by proposed settlement of class action is whether compromise is fair, reasonable and adequate. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[9] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

In determining whether proposed class action settlement is fair, reasonable and adequate, primary concern is with substantive terms of settlement, and trial judge must apprise himself of facts necessary for intelligent and objective opinion of probabilities of ultimate success should claim be litigated, but "all" does not really mean "all." Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[10] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

In determination whether proposed class action settlement was fair and reasonable, important indicia of propriety of settlement included absence of any indication of collusion, protracted negotiations, ability and experience of plaintiffs' counsel, extensive discovery preceding settlement and fact that counsel for all parties, including objectors, had access to materials produced in discovery. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[11] Federal Courts ⚿17
170Bk17

As concerns a class member who had purchased securities prior to and during the "class period," federal district court clearly had jurisdiction to entertain claims arising from mere holding as well as those arising from purchase as a matter of pendent jurisdiction. Securities Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C.A. §§ 78j(b), 78t(a).

[12] Federal Courts ⚿17
170Bk17
Regulation.

Securities Exchange Act's conferral of exclusive jurisdiction on federal courts for violations of that Act permits adjudication of all related claims only in those courts. Securities Exchange Act of 1934, § 27, 15 U.S.C.A. § 78aa.

[13] Compromise and Settlement ⚿66.1
89k66.1
(Formerly 89k66, 170Ak1697)

There is no rigid rule against addition of new claims shortly before submission of proposed settlement of class action provided that proper notice and opportunity for opting out are afforded and providing that settlement fairly and adequately provides for the new claims. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[14] Fraud ⚿58(1)
184k58(1)

[14] Securities Regulation ⚿60.18
349Bk60.18
(Formerly 349Bk117)

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Plaintiff's burden of proof in common-law fraud case, i.e., clear and convincing evidence, is more demanding than in Rule 10b-5 case, and, similarly, Rule 10b-5 is typically regarded as better suited than common-law fraud principles for application to novel theories of securities frauds. Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[15] Compromise and Settlement ⚿65
89k65
(Formerly 170Ak1696)

Common-law fraud claims against defendants could be found to be generally less valuable than Rule 10b-5 claims of actual purchasers of securities, and it was not unfair for distribution formula for settlement of class action to reflect same. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.; Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b).

[16] Fraud ⚿58(1)
184k58(1)

Where application of principle under New York law that plaintiff's burden of proving fraud is somewhat relaxed where fiduciary relation exists between parties to transaction and where one has dominant and controlling force over the other, plaintiffs must affirmatively show existence of fiduciary relationship between defendants and themselves, which requires judicial inquiry into legitimate expectations of parties and, more generally, practical implications of recognition of fiduciary relationship.

[17] Compromise and Settlement ⚿57
89k57
(Formerly 170Ak1699)

Fairness of treatment of claims added on eve of settlement of class action is subject to special scrutiny, but, in case at bar, state law claims were extremely weak, and treatment of such claims by proposed settlement was thus fair and adequate. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.

[18] Compromise and Settlement ⚿69
89k69
(Formerly 170Ak1699)

On record of class action, trial court did not err in declining to furnish evidentiary hearing, preceded by additional discovery, on adequacy of settlement. Fed.Rules Civ.Proc. Rule 23, 28 U.S.C.A.; Bankr.Act, § 301 et seq., 11 U.S.C. (1976 Ed.) § 701 et seq.; Rules Bankr.Proc. Rule 205, 11 U.S.C.A.

[19] Federal Civil Procedure ⚿2737.3
170Ak2737.3
(Formerly 170Ak2737)

Court has exceptional power to shift fees where action has been commenced or conducted in bad faith, vexatiously, wantonly or for oppressive reasons, but there must be high degree of specificity in factual findings of lower courts when attorneys' fees are awarded on the basis of bad faith, and there must be clear evidence that challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes.

[20] Federal Civil Procedure ⚿2742.5
170Ak2742.5
(Formerly 170Ak2737.5)

In view of fact that district court offered little by way of explanation for its attorneys' fee award and that scope of document was narrowed by telephone conversation and trial judge erroneously relied upon assumption that there were no objections to settlement in determining that issuance of subpoenas was improper, record failed to support finding that there was clear evidence of bad faith or vexatiousness in issuing subpoenas which trial court described as "on their face, grossly overbroad," and sanction of fee award was not shown to be justified.

***64** Benedict Wolf and Lester L. Levy, New York City (Wolf, Popper, Ross, Wolf & Jones, and Wolf, Haldenstein, Adler, Freeman & Herz, New York City), for plaintiffs-appellees.

Philip C. Potter, Jr., Ogden N. Lewis and Denny Chin, New York City (Davis, Polk & Wardwell, New York City), for defendants-appellees.

Bradley R. Brewer, New York City (Brewer & Soeiro, New York City), for appellants Coyne, Collins and 580 other named appellants.

I. W. Bader, White Plains, N. Y. (Bader & Bader, White Plains, N. Y.), for appellants Lewy, Anderson, Barrie, Pine, Lapham, Garson, Howe, Barnes & Johnson and Jurkiewicz.

Before WATERMAN, FRIENDLY and MESKILL, Circuit Judges.

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FRIENDLY, Circuit Judge:

These consolidated appeals are from a final judgment of Judge Duffy of the District Court for the Southern District of New York, entered on October 16, 1981, 91 F.R.D. 494, approving, pursuant to F.R.Civ.P. 23, the settlement of two securities class actions consolidated below--*Weinberger, et al. v. Kendrick, et al.*, and *Panzirer v. Peterkin, et al.* The complaints in these actions, filed on October 3, 1975, and October 22, 1976, respectively, asserted claims on behalf of classes consisting of persons who had purchased securities of W. T. Grant Company (Grant) during the 34 months prior to that company's bankruptcy on October 2, 1975 (sometimes referred to hereafter as the class period). The defendants named in the actions were financial institutions (the banks) that loaned Grant more than $600 million prior to its bankruptcy, [FN1] and Dewitt Peterkin, Jr., a former vice-chairman of Morgan Guaranty and a Grant director. The complaints alleged that the defendants had dominated the management of Grant in the years preceding its bankruptcy and had concealed from the public both the seriousness of Grant's financial predicament and the inflated value of Grant securities. The plaintiffs asserted, among other things, claims against the defendant-appellees based on § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, and common law fraud. The complaints in *Weinberger* and *Panzirer* were superseded by a consolidated amended complaint, filed July 25, 1980, along with the proposed settlement. In addition to the claims previously asserted, this advanced state law breach of fiduciary duty claims; the new complaint also expanded the plaintiff class to include persons who merely held Grant securities during the class period. The settlement approved by Judge Duffy would extinguish a number of these ***65** claims [FN2] in return for some $2.84 million, [FN3] which, after allowance of attorneys' fees, would be distributed to the plaintiff class. While no determination has been made how even the gross amount of the settlement compares to the amounts claimed, estimated by objectors' counsel as between $250 million and $1 billion, it is not disputed that the recovery will be only a negligible percentage of the losses suffered by the class. Both the plaintiffs and the defendants below are here as appellees defending the settlement's adequacy.

FN1. The principal lender to Grant was Morgan Guaranty Trust Company of New York (Morgan Guaranty), a wholly owned subsidiary of J. P. Morgan & Co., Inc. The banks named as defendants in the actions below, in addition to Morgan Guaranty are Citibank, N. A., The Sanwa Bank, Ltd., The Chase Manhattan Bank, N. A., Chemical Bank, Irving Trust Company, Marine Midland Bank, Bankers Trust Company, Manufacturers Hanover Trust Company and The Bank of New York. The settlement also applies to a number of other banks that had been major lenders to Grant, because the suits below were brought against Morgan Guaranty both individually and as agent for these banks and also because the loan agreements among the banks and Grant provide for the sharing of obligations and recoveries on the loans to Grant.

FN2. Federal securities and state common law claims asserted against a number of defendants, including certain officers and directors of Grant and Grant's auditors, are not involved in the settlement. In addition, claims against Mr. Peterkin that do not relate to insider trading (Count III of the consolidated amended complaint) are not included in the settlement. Finally, the settlement does not affect claims against Chase Manhattan as Indenture Trustee for Grant's 4 3/4 % Debentures, see note 8, *infra*, or claims asserted in Grant's bankruptcy proceedings on behalf of present debenture holders.

FN3. This was deposited in an interest-bearing account and by the date of oral argument had increased to approximately $3.5 million.

The appellants are a number of persons who purchased or held Grant securities during the class period. One group, the Coyne appellants, allegedly 583 in number, represented by Bradley R. Brewer, fit the above description *simpliciter*. The other group, the Lewy appellants, are the eight named plaintiffs in a class action, Index No. 17857-75, filed in September 1975 in the Supreme Court of New York County which is now against three of the lending banks, Morgan Guaranty, Chase Manhattan and Citibank, asserting some of the claims asserted in the *Weinberger/Panzirer* actions but only under state law. Appellants raise a number of procedural and substantive challenges to the determination that the settlement is fair, reasonable and adequate. We affirm.

I. Background

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On October 2, 1975, Grant, with recorded liabilities of well over a billion dollars, filed a petition in bankruptcy court in the Southern District of New York for an arrangement under Chapter XI of the former Bankruptcy Act. Grant's petition came after two years of declining earnings and credit ratings. When the company's publicly reported earnings for the year ending January 31, 1974, declined by some $85,000,000, rating agencies downgraded Grant's commercial paper, thereby effectively denying the company access to the commercial paper market. As a result, in the spring of 1974, Grant began to obtain financing from commercial banks, first on an *ad hoc* basis with credit lines from numerous lenders throughout the country, and later, in the fall of 1974, under a $600,000,000 committed revolving credit agreement arranged by the company's principal banks. Morgan Guaranty was the lead lender and acted as agent for the other banks, see note 1, *supra*. The revolving credit was secured by Grant's accounts receivable and certain securities it held in a subsidiary.

Despite the new credit, and various other steps taken by its lenders to ameliorate Grant's situation, [FN4] and contrary to rosy predictions by Grant's management, the company's financial position continued to deteriorate. The seriousness of this became fully apparent when an internal study ordered in the summer of 1975 by a new Grant president, Robert Anderson, was completed in late September: this revealed that the company had a negative net worth. The evidence indicates that the news came as a surprise to the banks and Grant's board. Grant's Chapter XI petition quickly followed.

FN4. For example, the banks agreed to the granting of a senior security interest to Grant's vendors in early 1975, extended the maturity of the revolving credit agreement from June 2, 1975, to March 31, 1976, permitted the early repayment of loans due to a number of small banks, and subordinated payments of $300,000,000 of the outstanding bank loans to the payment of Grant's vendors. The last action was taken less than a month before Grant filed its Chapter XI petition. Naturally the objectors place a quite different interpretation upon those actions.

***66** Even more quickly came the first complaint in the *Weinberger* action, filed October 3, 1975. The complaint alleged that, as a result of their large loans, Grant's principal lenders had been in a position to, and in fact did, exercise considerable control over the management of the company in its final years. It further charged that the defendant banks and Grant's management had cooperated in presenting a misleadingly optimistic picture of the company's future to the public. The *Panzirer* complaint, filed on October 22, 1976, elaborated on this theme. It alleged that Peterkin became aware of Grant's true financial predicament in March, 1973, and passed this information to Morgan Guaranty, including the Trust and Investment Division, which thereafter sold virtually its entire holding of Grant securities on the open market. Motions for class certification were filed in *Weinberger* in June, 1977, and in *Panzirer* in August, 1977; the motions were later adjourned during settlement discussions and were not renewed until agreement had been reached.

The development and settlement of the *Weinberger/ Panzirer* action require an understanding of Grant's bankruptcy proceedings. Some six months after the filing of Grant's Chapter XI petition, the Bankruptcy Court, on April 13, 1976, determined that the company could not be reorganized and ordered its liquidation. On July 2, 1976, the principal banks commenced an adversary proceeding seeking enforcement of security interests they held in property of Grant's estate, see p. 64, *supra*. In his September 24, 1976, answer, the trustee in bankruptcy challenged these security interests on the grounds that they were preferential transfers and fraudulent conveyances; more important for our purposes, he also claimed that, because of the control they allegedly exercised over Grant's affairs during the years 1973-75, the company's principal lenders should be equitably subordinated [FN5] to other claimants.

FN5. The Bankruptcy Court defined equitable subordination as requiring proof that "the claimant sought to be subordinated (a) has acted in a fiduciary capacity; (b) has breached a fiduciary duty; [and] (c) that breach resulted in detriment to those claimants to whom a duty was owed," *In re W. T. Grant Co.*, 4 B.R. 53, 74 (Bkrtcy.N.Y.1980). See *Pepper v. Litton*, 308 U.S. 295, 306-07, 60 S.Ct. 238, 245, 84 L.Ed. 281 (1939) ("The essence of the [equitable subordination] test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.").

In an effort to substantiate his charges, particularly his claim to equitable subordination, the trustee conducted investigations throughout the remainder of

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1976 and 1977 into the relationship between Grant and its lenders during the class period. He relied principally on testimony taken under Bankruptcy Rule 205 and on documents subpoenaed from various parties. [FN6] Rule 205 examinations were taken of all the principal officers and directors of Grant, the principal officers at Morgan Guaranty responsible for dealings with Grant, and two officers of other major lending banks. The testimony ran to some 10,000 pages. The trustee also subpoenaed those files of Grant's principal lenders which related to the company--comprising hundreds of thousands of documents. [FN7] In short, the trustee conducted a far- reaching and intensive probe of the banks' involvement in Grant's affairs during the class period.

FN6. The trustee was assisted by the law firm of Weil, Gotshal & Manges and the accounting firm of Price Waterhouse & Co.

FN7. On March 20, 1976, Bankruptcy Judge Galgay ordered that various of Grant's business records be preserved and made available to counsel for the plaintiffs below; Grant's employees also were enjoined from disposing of or destroying any of these documents.

Despite his extensive investigations, Grant's trustee concluded that his chances of proving any fraud or other wrongdoing by the lending banks were extremely slim, *cf.* 4 B.R. at 73-79 (Judge Galgay's approval of similar determinations by the trustee). Accordingly, he attempted, ultimately successfully, to settle the banks' claims. On February 24, 1978, the trustee and the banks entered into a settlement whereby the banks released their security interests in Grant's property in return for allowance ***67** of principal and interest on all prepetition loans which it was estimated would result in their receiving distributions of 55% or more of their claims, 4 B.R. at 59. The Bankruptcy Court, in a careful decision, 4 B.C.D. 597, issued on July 20, 1978, approved the settlement, and shortly thereafter the banks began receiving distributions. The appellees have averred that, despite the settlement, the banks will have lost more than $250,000,000 on their loans to Grant by the time the estate is fully liquidated.

Following approval of the settlement of the banks' claims, negotiations commenced regarding claims of holders of Grant's subordinated debt. [FN8] By April, 1979, an agreement had been reached and the trustee applied to the Bankruptcy Court for permission to offer the proposed settlement to holders of Grant's subordinated debt. On February 20, 1980, after six days of hearings on the proposed settlement, including cross-examination of the trustee, his counsel, and his chief staff assistant regarding the fairness of the settlement, Judge Galgay, in a second lengthy decision, 4 B.R. 53, approved the settlement. He expressly found, among other things, that the banks' relationship with Grant during the class period had been one of "arms-length negotiations" and that Grant's actions "reflected independent policy decisions", 4 B.R. at 76-77. Eleven bondholders appealed this order to the District Court for the Southern District of New York (Conner, J.), which stayed consideration of the appeals so that Bankruptcy Judge Galgay could supervise continuing negotiations among the bankruptcy trustee, the indenture trustee, the banks, and the debentureholders for an improved offer to the latter. Counsel for the debentureholders who had appealed from the order approving the earlier offer stipulated that these appeals be withdrawn with prejudice, and this was so ordered. On June 23, 1981, an amended offer was approved by Judge Galgay. Two groups of debentureholders appealed to the District Court (Duffy, J.) from the order approving the amended offer. In an opinion and order dated March 15, 1982, Judge Duffy affirmed the order, 20 B.R. 186. He rested his decision primarily on the ground of *res judicata,* although he also stated that the appeals were without merit. Two groups of debentureholders have appealed to this court.

FN8. These were holders of Grant's 4 3/4 % convertible subordinated debentures due 1996 ($92,507,000 face amount outstanding) and 4% convertible subordinated debentures due 1990 ($834,000 face amount outstanding). The settlement covered only claims of persons then holding the debentures.

After agreement in principle was reached regarding the claims of Grant's major creditors, efforts focused, in the fall of 1979, on settling the *Weinberger* and *Panzirer* actions. Plaintiffs' counsel had engaged in a wide range of discovery during the four years prior to the commencement of settlement discussions. They had access to, and reviewed, both the bank documents subpoenaed by the trustee and the testimony from the Rule 205 examinations he conducted. In addition, plaintiffs' counsel deposed several officers of Morgan Guaranty, paying particular attention to the

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relationship between that bank and Grant during the class period. Like Grant's trustee and Judge Galgay, however, plaintiffs' counsel found virtually nothing to substantiate their allegations against the banks: "[o]n the basis of all the evidence we were compelled to the conclusion that our chance of prevailing against the banks, while not nonexistent, was slim." With this in mind, and after rejecting as inadequate one settlement offer by the banks, plaintiffs' counsel agreed in late 1979 to the settlement of a number of the class action claims asserted in the *Weinberger/Panzirer* actions. An original settlement fund of $2.6 million agreed upon in May of 1980 was later increased to $2.84 million, which, with interest, now exceeds $3.5 million.

This proposed settlement was submitted to Judge Duffy for approval on July 25, 1980. It was accompanied by a consolidated amended complaint. Count I of the consolidated amended complaint. Count I of the consolidated amended complaint, brought ***68** on behalf of all purchasers of Grant securities during the class period, alleged, as had the *Weinberger* complaint, that the banks "were in a position to, and did, control, influence and participate in Grant's operations, including the disclosure and nondisclosure of information relating to Grant's financial condition," ¶ 28, and that, using this control the banks "engaged in a scheme, plan and continuous course of conduct to present a falsely inflated and optimistic picture of Grant's ... financial condition, and to conceal the true nature of Grant's operations and deteriorating financial condition from the investing public ...." ¶ 30. It also asserted that the purchasers of Grant securities during the class period had relied in purchasing the allegedly overvalued Grant securities upon false or misleading disclosures and nondisclosures resulting from the defendants' "course of conduct." Based on these allegations Count I of the complaint claimed violations of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, ¶ 42, as well as of common law fraud principles, ¶ 44.

Count II of the consolidated amended complaint asserted claims on behalf of a broader class of plaintiffs. In addition to purchasers of Grant securities, the class included persons not previously included in either the *Panzirer* or *Weinberger* classes--persons who merely *held*, rather than *purchased*, Grant securities during the class period, ¶ 48(B). In addition to alleging the claims described above under the federal securities laws, ¶ 49, the complaint charged that the defendants "have committed common law fraud and have breached their fiduciary duties to plaintiffs ....", ¶ 58, the latter theory not having previously been expressly advanced by plaintiffs. All these claims were based upon factual allegations almost identical to those underlying the federal securities law claims. The banks were charged with having "caused Grant to delay disclosing facts relating to the financial condition of Grant" and having caused Grant "to delay for their own benefit the filing of a petition in bankruptcy by Grant," ¶ 56.

Count III of the consolidated amended complaint, asserted on behalf of a class limited to purchasers of Grant common stock during the class period, alleged that Morgan Guaranty and Peterkin had violated Rule 10b-5 by engaging in insider trading during the class period. It also alleged that, during the class period, Morgan Guaranty was a controlling person of Grant under § 20(a) of the Securities Exchange Act of 1934.

The proposed settlement agreement submitted to the district court along with the consolidated amended complaint, was accompanied by the parties' consent to the filing of the new complaint. In addition, the agreement requested the district court to enter an order determining, "for the purpose of effectuating the settlement", ¶ 8(a), that the action be maintained as a class action on behalf of the previously discussed classes of purchasers and holders of Grant securities. Substantively, the settlement agreement provided for the release of the above-described class claims asserted in the consolidated amended complaint, as well as any related claims arising out of the same transactions which might have been asserted, *cf.* note 2, *supra*, in return for the payment to the class of some $2.84 million.

Submitted to Judge Duffy on July 25, 1980, along with the consolidated amended complaint and the proposed settlement agreement, were notices of the pendency of class action, the class action determination, the proposed settlement and settlement hearing, which were to be mailed to prospective class members. These notices, among other things, described the *Weinberger/Panzirer* action, set out the terms of the proposed settlement, defined the class that approval of the settlement would bind, and informed class members that they could opt out of the settlement, by so requesting before January 24, 1981, [FN9] or enter an appearance through counsel. Objections to ***69** the proposed settlement were required to be filed not

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later than two weeks before the scheduled February 18, 1982, fairness hearing; no deadline was set for submission of affidavits supporting the proposed settlement. Pursuant to the July 28, 1980, order of Judge Duffy, these notices were mailed to class members on December 9, 1980, and were published in the *Wall Street Journal*. In a January 19, 1981, motion to vacate the July 25 order, counsel for appellants alleged that the settlement was inadequate and that the class notification procedure was defective in a number of respects. Judge Duffy denied the motion on February 6, 1981.

FN9. Judge Duffy later extended the deadline for opting out as to states represented by Mr. Brewer whose pension funds had invested in Grant securities, but not as to other class members, until February 16, 1981.

On February 17, 1981, the appellees filed papers supporting the settlement, including lengthy affidavits from counsel for both plaintiffs and defendants attesting to the fairness and adequacy of the settlement. Judge Duffy conducted the fairness hearing the next day; appellants tell us that this took no more than 10 minutes. At this hearing counsel for appellants submitted a memorandum requesting that the court treat their January 19 motion and certain letters counsel had written to the court as timely objections to the settlement. Judge Duffy refused to do so, although in his opinion approving the settlement, 91 F.R.D. at 495 n.3, he also rejected the objections as without merit. By May 19, 1981--the deadline for filing proofs of claim--some 26,000 claims had been filed.

[1] On August 13, 1981, Judge Duffy issued an opinion approving the proposed settlement as fair, reasonable and adequate. He found that "able and experienced" counsel for the class had conducted protracted arms-length negotiations in good faith; that "extensive" pre-trial discovery had enabled the parties to "fully ... evaluate the strengths and weaknesses of the class claims"; that both he and the parties properly could rely on factual and legal findings made by Bankruptcy Judge Galgay, *In re W. T. Grant Co.*, 4 B.R. 53 (Bkrtcy.S.D.N.Y.1980) , which dealt with the circumstances underlying the settlement and which indicated that the plaintiffs' "chances of prevailing were slim"; that the plaintiffs' claims were "complex" and "not easily proven", particularly in view of the "heavy burdens of proof" faced by plaintiffs and "vigorous defenses" asserted by defendants; and that a trial would inevitably involve "lengthy and costly litigation". He concluded that, "[i]n view of the difficulties plaintiffs would confront if this case went to trial, the recommendation of experienced counsel and the lack of individual objections to the settlement, I find that the sum offered by the defendants is acceptable". The opinion did not discuss most of the procedural objections considered in this opinion, perhaps because of the judge's finding that no timely objections were filed. [FN10]

FN10. In addition to the January 19 motion, a letter by Mr. Brewer to Judge Duffy dated September 16, 1980, with copies to counsel for the plaintiffs and for the defendants in the *Weinberger* action, clearly raised the objections as to the inclusion of state law claims not previously pleaded and as to the making of class determination only as incident to a settlement considered below. Objections which have been brought to the attention of the court and of counsel for proponents of a settlement by counsel for objectors should not be disregarded simply because they do not precisely comply with the procedures for the filing of individual objections specified in the notice of settlement. See 3 Newberg, Class Actions § 5660d (1977). In passing on settlements of class actions under F.R.Civ.P. 23 the judge should not regard himself as an umpire in typical adversary litigation. He sits also as a guardian for class members who have not received a notice or who lack the intellectual or financial resources to press objections, *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d at 9, 20 (2nd Cir.1981) (citing cases); *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 834- 36 (9 Cir. 1976). Here the judge evidently did consider all the objections, see 91 F.R.D. at 495 n.4 and the February 6 order, although erroneously believing he was not required to do so and accordingly not discussing many of them or doing so only conclusorily.

II. Discussion

A. *The Class Notice*

[2] We deal first with appellants' numerous challenges to the notice of class ***70** action and proposed settlement mailed to prospective class members on December 9, 1980. Appellants

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initially argue that the notice failed adequately to describe the proposed settlement. They also contend that it should have contained a wide variety of additional information more fully describing the terms of the proposed settlement and the manner in which the negotiations leading to it had been conducted. [FN11]

FN11. Appellants also argue that the notice was defective because it did not state what proportion of the class's total loss the settlement fund represented. Appellees meet this by noting that any estimate as to class losses--much less individual losses--would have been highly speculative and more likely to hinder informed decision-making by class members than advance it.

Although no rigid standards govern the contents of notice to class members, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), the notice must "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings", *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8 Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975), *quoting Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F.Supp. 364, 378 (E.D.Pa.1970), *aff'd sub nom., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3 Cir. 1971); see *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. at 314, 70 S.Ct. at 657, and it must be neutral, see *Grunin, supra*, 513 F.2d at 122. Numerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved "very general description[s] of the proposed settlement," *Grunin v. International House of Pancakes, supra*, 513 F.2d at 122. See *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1361-62 (9 Cir. 1979); *Mendoza v. United States*, 623 F.2d 1338, 1351-52 (9 Cir. 1980), *cert. denied*, 450 U.S. 912, 101 S.Ct. 1351, 67 L.E.2d 336 (1981), *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5 Cir. 1981).

[3] The December 9, 1980, class action notice, met the foregoing requirements. It fairly, accurately and neutrally described the claims and parties in the *Weinberger/Panzirer* litigation, as well as the terms of the proposed settlement and the identity of persons entitled to participate in it. The notice described in detail a related state court action--*Lewy v. The Chase Manhattan Bank, N.A., et al.*, App.Div. 437 N.Y.S.2d 263--brought by counsel for the appellants. [FN12] It explicitly informed class members that "[p]articipation in the present settlement would preclude any participation in the *Lewy* case." The notice also explained that class members could exclude themselves from the settlement by requesting this prior to January 24, 1981, or could enter an appearance at the fairness hearing through counsel. Finally, it informed the class that the recovery would be subject to the district court's allowance of attorney's fees and expenses and that counsel expected to apply for fees not exceeding 25% of the settlement fund. There is little question that all this "fairly apprise[d]" prospective class members of the class action's pendency, the relevant terms of the proposed settlement, and their options in connection ***71** with that case. Those who wanted to probe more deeply could, as the notice plainly told them, examine "[t]he settlement stipulation and the papers and documents filed in this action ...." [FN13]

FN12. The Second Amended Complaint in *Lewy* served in March, 1979, named only Chase Manhattan, Morgan Guaranty and Citibank as defendants. The complaint, which relies on factual allegations almost identical to those in the consolidated amended complaint, asserts that the defendants "exercised dominance and control over the board of directors and management of Grant." ¶ 9. In addition, the complaint alleges that the defendants "conceal[ed] negative facts concerning the financial condition and unlawful mismanagement of Grant" thus effecting a manipulation of the securities market. ¶ 11. The complaint goes on to describe numerous acts allegedly committed in furtherance of defendants' conspiracy, dwelling principally upon those set out in the *Weinberger/Panzirer* papers. Like the consolidated amended complaint, the *Lewy* complaint asserts causes of action based on common law fraud, ¶ 1, and on breach of fiduciary duties, ¶¶ 1, 31. So far as we can tell, the *Lewy* action would require proof of fault identical to what would be demanded in the *Weinberger/Panzirer* cases.

FN13. Appellants also allege that the notice was "substantially incorrect and seriously misleading" in a number of respects, Appellants' Br. in No.

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81-7829, at 19-21. The defects cited by appellants either do not exist--owing to misreadings by appellants' counsel of the notice or other publicly filed documents--or are immaterial.

[4] Appellants next contend that the mailing of individual notices to the last known addresses of all class members, as determined from the records of Grant and various brokerage houses and nominees, was inadequate since the addresses of many security-holders might have changed during the period since Grant's bankruptcy. Federal Rule of Civil Procedure 23(c)(2) [FN14] and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974), require only that "each class member who can be identified through *reasonable effort* " (emphasis added), be notified. In *In re Franklin National Bank Securities Litigation*, 574 F.2d 662, *modified*, 599 F.2d 1109 (1978), we discussed the application of the *Eisen* requirement to classes consisting of purchasers of securities, noting the difficulty of ensuring that notice is received by persons whose purchases are recorded in "street names"--typically banks or brokerage houses. We disapproved the practice of sending class notices to street name addresses with a request that the recipient forward the notice to the beneficial holder of the securities but without an offer to defray the resulting expenses, 574 F.2d at 669-70. We indicated approval, however, of the use of bank and brokerage house records to compile a list of actual holders of securities to whom individual notices would be mailed, 574 F.2d at 672. Here appellees compiled such a list, mailed individual notices, and, in addition, published notice of the class action and settlement in the *Wall Street Journal*. Some 26,000 proofs of claim have been filed as a result of these notice procedures. The district court, in its July 28, 1980, order, expressly found this procedure adequate and we see no reason to disturb its finding, particularly since no alternative method of ascertaining class members' identities has been suggested to us, see *Grunin v. International House of Pancakes, supra*, 513 F.2d at 121-22 (individual mailing to last known address, without supplemental newspaper publication, approved, despite evidence that one third of prospective class did not receive notices).

FN14. The subsection provides, in pertinent part, that

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.

[5][6] Likewise, the timing of the notices, which were mailed on December 9, 1980; the opt-out deadline, January 24, 1981; the deadline for the filing of objections, February 4; the date affidavits in support of the settlement were filed, February 17; and the fairness hearing, February 18, were not beyond the authority of the court. According to Professor Moore, "[t]he manner of giving notice is committed to the sound discretion of the court," 3B Moore's Federal Practice ¶ 23.80[3], at 23-513 (1982), as is suggested by Rule 23's statement that notice of settlement shall be "in such manner as the court directs". The notice, however, must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections", *Mullane v. Central Hanover Bank & Trust Co., supra*, 339 U.S. at 314, 70 S.Ct. at 657, and it must "afford a reasonable time for those interested to make their appearance," *id.* Prospective class members had some six weeks in which to decide whether or not to accept the settlement. Although we think it would have been preferable if appellees' affidavits and other papers in support of the settlement had been required to be available at a date earlier than the eve of the hearing, the failure of the district court to demand this does not require reversal. ***72** Objectors were fully apprised of the terms of the proposed settlement and, although they did not avail themselves of the opportunity, had complete access to materials discovered in the case; this provided an adequate base from which objections could be developed. See 3 Newberg, Class Actions § 5660d (1977). The requirement, challenged by appellants, that requests to opt-out be filed prior to the fairness hearing placed prospective objectors in no worse position than occurs when formal class certification precedes settlement; indeed, their position was better in that they knew the terms of the proposed settlement before having to decide whether to opt out.

Appellant's final procedural objections relate to appellees' having engaged in and concluded settlement negotiations prior to class certification and notice. Closely related to this, they challenge the simultaneous notification of class members of the class determination (for purposes of settlement) and the proposed settlement. We shall discuss this initially as if the class certification related solely to

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the class named in the earlier *Weinberger/Panzirer* complaints, i.e., claims arising from the purchase of Grant securities during the class period, and will deal later with the added problems arising from the inclusion of other claims.

In *In re Franklin National Bank Securities Litigation, supra*, 574 F.2d at 671-72 n.6, we questioned in dictum the practice of bypassing the formal class certification procedure and of sending simultaneous notice of the pendency of a class action and of a proposed settlement to prospective class members. We voiced concern that the practice might be "inconsistent with the requirement [of Rule 23] that certification as a class action be determined 'as soon as practicable after the commencement of the action' and the implication that the initial class notice should follow promptly after the certification," *id.*, and said that "[s]o far as we are aware the only cases in which this question has been specifically passed upon have held that the sending of the initial class notice should not be postponed," *id.* Our hesitation to approve the practice echoed the concerns expressed in the *Manual for Complex Litigation* § 1.46, at 60-61 (1977) (*Manual*), which argues that the practice may create the possibility of collusion or improper pressure by defendants on "unofficial" counsel for the class. The *Manual* recommends a firm prophylactic rule prohibiting the bypassing of an early formal class certification and the formation of temporary classes for settlement purposes.

Despite the *Manual's* concerns and the misgivings expressed in the *Franklin National Bank* footnote, we concluded in *Plummer v. Chemical National Bank*, 668 F.2d 654, 656 (2 Cir. 1982), that "[a]lthough negotiations in the instant case were conducted by undesignated class representatives without pretrial discovery, this, standing alone, did not preclude judicial approval", 668 F.2d at 658. See also *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464-66 (2 Cir. 1974). A similar view is taken in Judge Wisdom's thorough opinion in *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 173-78 (5 Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981), which carefully reviews the authorities and commentary on the question. Much like our decision in *Plummer v. Chemical Bank*, the Fifth Circuit concluded that:

> A blanket rule prohibiting the use of temporary settlement classes may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification. Such a firm restriction does not appear necessary or desirable. The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies.
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> * * *
>
> Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most courts have recognized their utility and have authorized the parties to seek to compromise their differences, including class action issues, through this means.

**73 In re Beef Industry Antitrust Litigation, supra*, 607 F.2d at 177- 78, *quoting* 3 Newberg, Class Actions § 5570c, at 479-80 (1977).

Other circuits have held that the absence of class certification prior to the notice of the settlement is not an absolute bar to approval. See *Ace Heating & Plumbing Co. v. Crane Co., supra*, 453 F.2d at 33; *In re Corrugated Container Antitrust Litigation, supra*, 643 F.2d at 223 ("Rule 23 includes no language proscribing combined notice of a class action and a proposed settlement."); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9 Cir. 1977); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 639 (N.D.Cal.1978), *aff'd*, 645 F.2d 699 (9 Cir. 1981), *cert. denied*, 454 U.S. 1126, 102 S.Ct. 976, 71 L.Ed.2d 113 (1981).

[7] Although we thus refuse to adopt a *per se* rule prohibiting approval when a class action settlement has been reached by means of settlement classes certified after the settlement, with notice simultaneous with that of the settlement, we emphasize that we are permitting, not requiring, use of this procedure, and also underscore that, as intimated by us in *Plummer, supra*, 668 F.2d at 658, district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care. This is necessary in order to meet the concerns, noted in the *Manual*, regarding the possibilities of collusion or of undue pressure by the defendants on would-be class representatives. Accordingly, we will demand a clearer showing of a settlement's fairness, reasonableness and adequacy and the propriety of the negotiations leading to it in such cases than where a class has been certified and class representatives have been recognized at an

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earlier date. As discussed below, we are satisfied that the settlement in this case meets these requirements.

B. *The Fairness, Reasonableness and Adequacy of the Proposed Settlement*

[8] The central question raised by the proposed settlement of a class action is whether the compromise is fair, reasonable and adequate. There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation, 3 Newberg, Class Actions § 5570c, at 479-80 (1977); cf. *Williams v. First National Bank*, 216 U.S. 582, 595, 30 S.Ct. 441, 445, 54 L.Ed. 625 (1910). In part to realize these advantages of settlements negotiated by litigants, we have long recognized that a district court's disposition of a proposed class action settlement should be accorded considerable deference, *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2 Cir.), *cert. denied sub nom. Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *Newman v. Stein*, 464 F.2d 689, 692 (2 Cir.), *cert. denied sub nom., Benson v. Newman*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 454-55 (2 Cir. 1974); *Patterson v. Newspaper & Mail Delivery Union*, 514 F.2d 767, 771 (2 Cir. 1975). The trial judge "is exposed to the litigants, and their strategies, positions and proof. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly." *Ace Heating & Plumbing Co. v. Crane Co.; supra*, 453 F.2d at 34. While this principle does not apply in full force when settlement of a class action has been negotiated before a class has been certified and a higher degree of judicial scrutiny is required, particularly when, as here, there is nothing to indicate that the district judge felt compelled to do this, it is not wholly deprived of force.

[9] Determination whether a proposed class action settlement is fair, reasonable and adequate involves consideration of two types of evidence. The primary concern is with the substantive terms of the settlement: "Basic to this ... is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968). See also *Newman v. *74 Stein, supra*, 464 F.2d 689; *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 455. In order to make this comparison, the trial judge must "apprise[ ] himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, supra*, 390 U.S. at 424, 88 S.Ct. at 1163. However, "all" cannot really mean "all". The Supreme Court could not have intended that, in order to avoid a trial, the judge must in effect conduct one. *Saylor v. Lindsley, supra*, 456 F.2d at 904; *Newman v. Stein, supra*, 464 F.2d at 691-92; *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 462. In order to supplement the thus necessarily limited examination of the settlement's substantive terms, attention also has been paid to the negotiating process by which the settlement was reached, and courts have demanded that the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class's interests, *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 463-66.

[10] The appellants, citing *Protective Committee v. Anderson, supra*, argue at great length that the lower court's two page opinion demonstrates that it did not adequately scrutinize either the substantive terms of the proposed settlement or the propriety of the process of negotiations. We see nothing in the latter point. The district court noted the absence of any indication of collusion, the protracted settlement negotiations, the ability and experience of plaintiffs' counsel, the extensive discovery preceding settlement and the fact that counsel for all parties--including the objectors--had access to materials produced in discovery, including the extensive and detailed discovery of Grant's trustee, who commanded financial resources and professional assistance, see note 6, *supra*, not always available to plaintiffs' counsel in class actions. All these considerations, as previous decisions have noted, *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 465; *In re Beef Industry Antitrust Litigation, supra*, 607 F.2d at 176; *Plummer v. Chemical Bank, supra*, 668 F.2d at 658, are important indicia of the propriety of settlement negotiations. Indeed, as discussed more fully below, plaintiffs' presettlement preparation and discovery efforts in this case were substantially more thorough than those in many other decisions where settlements have been approved.

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We are almost equally confident as regards the substantive terms of the proposed settlement. Although the district court's discussion of this was rather cursory, our own examination of the record leads us to conclude that the court had before it sufficient materials to evaluate the settlement and came to the correct conclusion.

Both the defendants and plaintiffs in *Weinberger/Panzirer* submitted lengthy affidavits to the district court. These carefully described the history of the litigation and, more important, thoroughly canvassed the evidence, both that supporting and that refuting plaintiffs' claims. As noted above, this evidence included the materials amassed in the trustee's investigation. Since his claim of equitable subordination required a detailed inquiry into the relationship between the banks and Grant, which is precisely the issue raised in the *Weinberger/Panzirer* actions, his discovery efforts were extremely relevant to the plaintiffs' claims. The lower court also had the unusual and important benefit of several careful and well-reasoned opinions by Bankruptcy Judge Galgay, see pp. 7-8, *supra*. These opinions, particularly as they related to the equitable subordination question, provided excellent guidance from a disinterested source on questions central to the fairness and adequacy of the proposed settlement. Taken together, these materials provided a satisfactory record on which the district court could base its decision.

Moreover, from what we have distilled from the record, we think the district court's decision met the higher standard of scrutiny we believe appropriate in this case. ***75** As plaintiffs' counsel observed, "[i]n weighing the class' chance of prevailing on the merits in the case against the banks it was ... important to differentiate between proving the liability of a bankrupt Grant to the class and proving any liability on the part of the defendant banks, who themselves lost hundreds of millions of dollars by reason of their transactions with Grant during the class period." Levy Affidavit ¶ 59. Central to plaintiffs' claims against the banks under both the federal securities laws and the common law was the allegation that the defendants "were in a position to, and did, control, influence and participate in Grant's operations." Consolidated Amended Complaint ¶ 28. This precise point had been considered by Judge Galgay in Grant's bankruptcy proceedings. He said:

> I am satisfied that in the case of Grant the transactions between the Bank Claimants and Grant are the result of arms-length negotiations conducted in good faith and governed by the dictates of sound business judgment. I have reviewed the evidence and, in particular, the portions of testimony elicited in examinations pursuant to Bankruptcy Rule 205(a) which the [objectants] claim establish control and domination on the part of the Bank Claimants. The excerpts referred to by the [objectants] constitute but a small portion of the vast amount of information, facts and materials considered by the Trustee. To a considerable extent, the "facts" presented by the [objectants] are based upon hearsay testimony, distortions of testimony, out-of-context statements or misstatements.
>
> The record establishes the converse. It appears that the action taken by Grant reflected independent policy decisions and not rigid submission to the dictates of the Bank Claimants. Mr. Sundman, a chief financial officer of Grant who had been appointed a director in 1974, testified that he operated without instructions from the Bank Claimants and that the advisory group organized by the Bank Claimants in 1974 offered neither suggestions nor opinions as to the business operations of Grant. There has been no evidence introduced by the [objectants] which would tend to establish that the Bank Claimants prevented Grant from initiating a proceeding under the Bankruptcy Act in 1974 or 1975. The record demonstrates that prior to the decision made by the Grant Board of Directors during the end of September 1975 to seek relief under the Bankruptcy Act, both the Bank Claimants and Grant management viewed Grant as a turnaround situation and not insolvent. Accordingly, it must be concluded that the probabilities of success as to the prosecution of claims of equitable subordination are very remote. In that context, the Trustee's recommendation is well founded.

4 B.R. at 76-77 (footnote omitted).

Likewise the affidavit of plaintiffs' counsel described the uncontradicted deposition statements of various officers of Morgan Guaranty to the effect that the bank was "not capable or desirous of making management decisions and did not attempt to tell Grant how to run its business."

The evidence adduced in discovery had also failed to support plaintiffs' claims in other respects. Counsel for the plaintiffs averred that the evidence indicated that "the banks themselves were misled by

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Grant's management's statements and projections that the fortunes of Grant would recover." Levy Affidavit ¶ 56. The allegation, advanced in the *Panzirer* action, and Count III of the consolidated amended complaint, that Morgan Guaranty's Trust and Investment Division had sold approximately one million shares of Grant common stock in 1973 based on inside information obtained from Peterkin regarding Grant's financial condition, was also belied by the evidence. Peterkin testified that in 1973 he had not foreseen Grant's later troubles. Harrison U. Smith, Vice-Chairman of Morgan Guaranty's Trust and Investment Committee, testified that the decision to sell Grant securities had been reached in 1972 and that no discussions with Peterkin had occurred. Plaintiffs' counsel frankly conceded, "[***76** w]e do not have any hard evidence to contradict Smith" and admitted that the fact that Morgan commenced selling Grant shares in 1972 severely cut against his case.

We should thus have no difficulty in affirming the approval of the settlement were it not for appellants' contentions based on the inclusion in the consolidated amended complaint and thus in the settlement of "state law" claims arising from the purchase of Grant securities prior to the "class period" but held into or beyond the period--a subject to which we now turn.

C. *The Inclusion of Claims Arising Out of the Mere Holding of Grant Securities*

[11][12] So far as concerns a class member who had purchased Grant securities prior to and during the class period, the court clearly had jurisdiction to entertain the claims arising from mere holding as well as those arising from purchase as a matter of pendent jurisdiction. The requirement of *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966), that federal and state claims share a "common nucleus of operative fact" before the doctrine may apply is satisfied, as our discussion of the similarities between the rule 10b-5 and the state common law claims, pp. 31-35, *infra*, demonstrates. Likewise, there is no question that plaintiffs' Rule 10b-5 claims are constitutionally "substantial". The requirement of "an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim, in order to determine whether 'Congress ... has ... expressly or by implication negated' the exercise of jurisdiction over the particular nonfederal claim," *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373, 98 S.Ct. 2396, 2402, 57 L.Ed.2d 274 (1978), is readily met since the Securities Exchange Act's conferral of exclusive jurisdiction on federal courts, § 27, for violations of that act permits adjudication of all related claims only in those courts, see *International Controls Corp. v. Vesco*, 593 F.2d 166, 175 n.5 (2 Cir.), *cert. denied*, 442 U.S. 941, 99 S.Ct. 2884, 61 L.Ed.2d 311 (1979).

[13] A more difficult jurisdictional question would be raised by the inclusion of persons having only claims arising from purchases prior to the class period, if such there be. Such a person would lack the federal claim necessary as a predicate to pendent jurisdiction; federal jurisdiction with respect to him seemingly would have to rest on the notion that when there is federal jurisdiction over the claims of many parties having both federal and state claims with a common nucleus of law and fact, a federal court, in the exercise of sound discretion, may also join as plaintiffs persons holding only state claims having such a nexus.

The law on this subject, including the Supreme Court's decision in *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), is fully discussed in 3A Moore, Federal Practice ¶ 20.07 [5.-1]-[5.-3] (1982). Although the *Aldinger* Court disapproved of the joinder of a pendent party defendant in the case before it, the Court explicitly limited its conclusion to "the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under [28 U.S.C.] §§ 1343(3) and [42 U.S.C.] 1983", *id.* at 18, 96 S.Ct. at 2422, and noted that "[o]ther statutory grants and other alignments of parties and claims might call for a different result," *id.*, and that "it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction", *id.*

The circumstances here are about as powerful for the exercise of pendent party jurisdiction as can be imagined. The exclusivity of federal jurisdiction over claims for violation of the Securities Exchange Act makes a federal court the only one where a complete disposition of federal and related state claims can be rendered. Cf. the Court's comment in *Aldinger* that "[w]hen the grant of jurisdiction to a federal court is exclusive, for example, as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346, the argument of judicial

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economy and convenience can be coupled with the additional argument *77 that *only* in federal court may all of the claims be tried together," 427 U.S. at 18, 96 S.Ct. at 2422. The concern most frequently voiced with regard to the pendent party doctrine is that it requires a party not otherwise subject to suit in federal court to defend himself in that forum, see *Aldinger v. Howard, supra*, 427 U.S. at 18, 96 S.Ct. at 2422. In this case pendent party jurisdiction serves, see *Almenares v. Wyman*, 453 F.2d 1075, 1084-85 (2 Cir. 1971), *cert. denied*, 405 U.S. 944, 92 S.Ct. 962, 30 L.Ed.2d 815 (1972), to extend federal jurisdiction to a new group of *plaintiffs*. Pursuant to the opt-out procedures established by the district court, plaintiffs who did not wish to have their claim settled in a federal forum and in fact received notice of the settlement needed only to request exclusion. Finally, the state law claims asserted on behalf of the pendent plaintiffs are already before the federal courts, having been asserted on behalf of persons who purchased Grant securities during the class period. [FN15]

FN15. Our holding regarding pendent party jurisdiction is also limited to the peculiar "alignment of parties and claims" involved here, namely, the joinder of plaintiffs in a *settlement* of an action involving Rule 10b-5 and state law claims. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 might be read as discerning a congressional intent to preclude the joinder of mere holders of securities in Rule 10b-5 cases in federal court, because of a desire to prevent disruption of the nation's businesses and to reduce vexatious litigation, 421 U.S. at 739-49, 95 S.Ct. at 1927-31. Whatever the strength of this argument as to claims that are proceeding to litigation, it surely is inapplicable when, as here, extension of pendent party jurisdiction permits the comprehensive settlement of plaintiffs' claims, thus furthering the policies underlying *Blue Chip Stamps*. We need not now decide how *Blue Chip Stamps* would affect the assertion of pendent plaintiff jurisdiction in a case not involving a settlement.

Appellants contend further that what was done here with respect to claims arising out of purchases of Grant securities before the class period was, for all practical purposes, what we condemned in *National Super Spuds, Inc. v. New York Mercantile Exchange* , 660 F.2d 9 (2 Cir. 1981). We disagree. In that case class certification had been ordered fairly early in the game; the class was limited to persons who had purchased May 1976 Maine Potato Future Contracts and were damaged in liquidating such contracts between April 13, 1976, and the close of trading on May 7, 1976. The settlement, executed a year after notice of the certification had been sent and long after the opting out period had expired, purported to settle claims going beyond those asserted on behalf of this class and including the objector's claims for losses on contracts which were not liquidated on or before May 7, 1976, but on which he claimed to have suffered a loss thereafter. However, the proceeds of the settlement were to go solely to persons who had suffered losses on contracts which were liquidated on or before May 7, 1976.

The situation here is quite different. Before the class was certified, it was expanded to include persons holding state as well as federal claims. The notice sent to security holders clearly stated this and afforded an opportunity to opt out. Moreover, the settlement made provision for payments to holders of state claims although these were generally less than to holders of federal claims. We have no intention to depart in any way from *National Super Spuds* ; we simply find it inapplicable to the facts here and hold, in agreement with other courts, that there is no rigid rule against the addition of new claims shortly before submission of a proposed settlement provided that proper notice and opportunity for opting out are afforded, see *Cherner v. Transitron Electronic Corp.* , 221 F.Supp. 48, 50 (D.Mass.1958); *Heddendorf v. Goldfine*, 167 F.Supp. 915, 921, 928 (D.Mass.1958); *Pergament v. Frazer*, 93 F.Supp. 13, 20 (E.D.Mich.1950), *aff'd sub nom., Masterson v. Pergament*, 203 F.2d 315 (6 Cir.), *cert. denied*, 346 U.S. 832, 74 S.Ct. 33, 98 L.Ed. 355 (1953), and that the settlement fairly and adequately provides for the new claims. See also *National Super Spuds v. New York Mercantile Exchange, supra*, 660 F.2d at 18 n.7; *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456 (2nd Cir. 1982).

***78** [14][15] In considering whether the settlement discriminated unfairly against the state versus the federal claims, we confront the reiterated contention by appellants that the state law fraud and breach of fiduciary duty claims faced less worrisome legal obstacles than did the federal securities law claims. Such a position runs counter to generally received learning. 5 Jacobs, Litigation and Practice under Rule 10b-5, § 11.01, at 1-272 to 1-273 (1981) (footnotes omitted) ("it is now generally agreed that [rule] 10b-5 is procedurally more advantageous and substantively broader than the common law.") (citing

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cases); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 239 (2 Cir. 1974) (citing cases). For example, the plaintiff's burden of proof in a common law fraud case--clear and convincing evidence--is more demanding than in a Rule 10b-5 case. *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 330 N.Y.S.2d 33, 280 N.E.2d 867 (1972); *Pierce v. Richard Ellis & Co.*, 62 Misc.2d 771, 773, 310 N.Y.S.2d 266, 269 (Civ.Ct.1970); *Ajax Hardware Mfg. Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2 Cir. 1977); 5 Jacobs, *supra*, at 1-277. Similarly, Rule 10b-5 is typically regarded as better suited than common law fraud principles for application to novel theories of securities frauds--which is admittedly the type of action involved in *Weinberger/Panzirer*, see, e.g., Frohling, The Promoter and Rule 10b-5; Basis for Accountability, 48 Cornell L.Q. 274, 290 (1963). The one element in which Rule 10b-5 is more rigorous against a plaintiff than New York law, which appellants assume would apply to the common law fraud claims, is its requirement that the fraud be "in connection with" the purchase or sale of a security, see *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730, 95 S.Ct. 1917, 1922, 44 L.Ed.2d 539 (1976), in contrast to the rule of New York law whereby persons who merely held Grant securities would have been permitted to show reliance by proving that defendants' alleged misrepresentations and nondisclosures caused them to hold securities they would otherwise have sold. *Continental Insurance Co. v. Mercadante*, 222 A.D. 181, 225 N.Y.S. 488 (1927); 24 N.Y.Jur.Fraud and Deceit § 165, at 233-34 (1962 & 1982 Supp.). This, however, simply shows which claims get into the federal basket, not that those that don't are more valuable than those that do. In the light of all this, we conclude that the common law fraud claims against the defendants were generally less valuable than the Rule 10b-5 claims of actual purchasers of Grant securities, and that it was not unfair for the settlement's distribution formula to reflect this.

[16] We are similarly unimpressed by the appellants' contentions as to the strength of their common law breach of fiduciary duty claims. Appellants make much of the point that under New York law the general rule that plaintiff has the burden of proving fraud is "somewhat relaxed in cases where a fiduciary relation exists between the parties to a transaction, and where one has a dominant and controlling force over the other", 24 N.Y.Jur. § 278, at 360 (1962 & 1982 Supp.). Application of this principle ordinarily has been limited to relationships such as those between "guardian and ward, trustee and cestui que trust, attorney and client, and physician and patient", *id.*, with more recent extensions to relationships such as those between social worker and client, *Hector M. v. Commissioner of Social Services*, 102 Misc.2d 676, 425 N.Y.S.2d 199 (Family Ct. N.Y.City 1980) (ad hoc application only), and nursing home and patient, *Gordon v. Bialystoker Center & Bikur Cholim, Inc.*, 45 N.Y.2d 692, 412 N.Y.S.2d 593, 385 N.E.2d 285 (1978). In order for the principle to apply plaintiffs must affirmatively show the existence of a fiduciary relationship between defendants and themselves, which requires judicial inquiry into the legitimate expectations of the parties and, more generally, the practical implications of recognition of a fiduciary relationship, 24 N.Y.Jur. § 278 (1962 & 1982 Supp.); see *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969); *Frigitemp Corp. v. Financial Dynamics Fund*, 524 F.2d 275, 278-79 (2 Cir. 1975). Plaintiffs would have faced serious difficulties in establishing the existence of a ***79** fiduciary relationship between a lending bank and the security holders of a borrowing corporation. While such a development is not beyond the realm of possibility, it would have required a significant extension of existing procedures. The fiduciary relation recognized in *Diamond v. Oreamuno, supra* --between a manager of a corporation and its shareholders--has been accorded such status for nearly a century. In contrast, appellants have cited us to no decisions in which a fiduciary relationship was found to exist between a bank and its borrower's security holders. Moreover, the extension of fiduciary principles to this relationship would face serious obstacles, such as arguments that lending relations between banks and large corporations are the product of arm's-length bargaining and that it would be anomalous to require a lender to act as a fiduciary for interests on the opposite side of the negotiating table. [FN16] Similarly, Bankruptcy Judge Galgay's findings that "the transaction between the Bank Claimants and Grant are the result of arms-length negotiations" and "the action taken by Grant reflected independent policy decisions", 4 B.R. at 76-77, would cut strongly against the application of fiduciary principles to the banks in this case.

FN16. Cf. *Rader v. Boyd*, 252 F.2d 585, 587 (10 Cir. 1958) ("Parties may assuredly deal at arm's length for their mutual benefit without raising a confidential relationship between them.") In passing on a settlement we are

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> "not to ... resolve unsettled legal questions", *Carson v. American Brands Inc.*, 450 U.S. 79, 88 n.14, 101 S.Ct. 993, 998 n.14, 67 L.Ed.2d 59 (1981), which a theory of recovery based on breach of fiduciary duty by the lenders surely would be.

[17] Even assuming that the banks could be shown to stand in a fiduciary relation to Grant's security holders, the record indicates that neither they nor Peterkin, who as a director concededly was in such a relation, engaged in any wrong-doing. Indeed, as the above-quoted findings of Judge Galgay on the closely-related subject of equitable subordination show, see pp. 24-26, *supra*, there is virtually no evidence that the defendants engaged in any wrongdoing in their dealings with Grant. In light of all this, we agree with appellees that the state law claims were extremely weak and that the proposed settlement's treatment of such claims was fair and adequate, even though the fairness of the treatment of claims added on the eve of settlement is subject to especial scrutiny. Finally, as to the settlement's release of unasserted class claims arising out of the facts underlying the consolidated amended complaint, appellants have suggested no such claims, and we are aware of none, which would have had even the slight chance of success that the Rule 10b-5 and common law claims possessed.

D. *The Lack of an Evidentiary Hearing*

[18] We next deal with appellants' contention that the district court erred in refusing to conduct an evidentiary hearing preceded by additional discovery on the adequacy of the settlement. As the court below observed, counsel for appellants have had complete access to the extensive materials compiled in this litigation in the bankruptcy proceedings, and their state court claim provided them with yet another route for discovery. Appellants appear to have done little to explore any of these options. In addition, they came forward with no specific objections to the substantive fairness of the settlement, and they have provided no specific criticisms of Judge Galgay's careful examination of the relationship between the banks and Grant. Moreover, aside from expressing a desire to cross-examine plaintiffs' counsel regarding their efforts in the litigation, appellants did not suggest what further efforts at discovery might be pursued.

On these facts we see no reason to require an evidentiary hearing preceded by discovery. The only objections raised by appellants which have required serious consideration deal with points of law. Given the adequacy of the existing record and the absence of cogent factual objections to the settlement, we do not see what purpose an evidentiary hearing would have served. As we said in *City of Detroit v. Grinnell Corp., supra*, 495 F.2d at 464:

> ***80** Although the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court, once they have done so, they are not under any recurring obligation to take up their burden again and again *ad infinitum* unless the objectors have made a clear and specific showing that vital material was ignored by the District Court.

III. Propriety of the Fee Award against Appellants

One other matter requires discussion. On February 13, 1981, five days before the scheduled February 18 fairness hearing, Mr. Brewer served subpoenas *duces tecum* on counsel for both plaintiffs and defendants. The subpoena served on lead counsel for the banks, Davis Polk & Wardwell, sought production of "[a]ll documents and records ... relating to the commencement, prosecution and settlement" of the *Weinberger/Panzirer* action, and listed ten categories of documents. Mr. Brewer claims that in a subsequent phone conversation with an attorney at Davis Polk he limited the scope of the subpoena; the attorney averred that even if Mr. Brewer's recollection was correct, he continued to seek production of an extremely wide range of materials, many of which he must have known to be privileged.

On February 17 Davis Polk applied for an order to show cause why an order quashing the subpoena and awarding Morgan Guaranty $1,800 in attorneys' fees and expenses should not be issued. Counsel for the plaintiffs also moved to quash the subpoena, but did not seek a fee award. Judge Duffy did not sign the Davis Polk order, but, in an endorsement on the application, stayed the subpoena. A copy of Judge Duffy's endorsement was delivered to Mr. Brewer on February 17, although it appears he was not then informed of Davis Polk's request for fees. At the February 18 fairness hearing, Judge Duffy briefly questioned Mr. Brewer as to why he had served the February 13 subpoenas. Not satisfied with Mr. Brewer's responses, he imposed two $2,500 fee awards against him, one to plaintiffs' attorneys, and the other to Davis Polk. These were later reduced

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to a single $1,800 award to Davis Polk.

Appellees argue that the award against Mr. Brewer was warranted because he acted "vexatiously both in issuing subpoenas seeking obviously privileged materials ... and in doing so without having properly identified any client or having properly filed any objections." Mr. Brewer vigorously denies these charges, averring that "the subpoenas in question were issued by my office in good faith on my part and in the honest belief and expectation that the proceedings at the hearing on the fairness and adequacy of the proposed settlement would be evidentiary and adversary in nature." Brewer Affidavit ¶ 4. He stated that he intended to use the documents produced to attack the adequacy of plaintiffs' preparations for the case.

[19] "The general American rule governing allocation of the costs of litigation places the burden of counsel fees on each party ...." *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2 Cir. 1980), *citing Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). There is, however, an "exceptional power to shift fees where an action has been commenced or conducted 'in bad faith, vexatiously, wantonly or for oppressive reasons.' " *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974); *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2 Cir. 1977). We have previously found that a procedural step such as the issuance of "dragnet subpoenas", *id.* at 1088-89, may constitute bad faith or vexatiousness. We have required, however, a high degree of specificity in the factual findings of lower courts when attorneys' fees are awarded on the basis of bad faith, *id.* at 1089, and that there be "clear evidence" that the challenged actions "are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes", *Nemeroff v. Abelson, supra*, 620 F.2d at 348, *quoting Browning Debenture Holders' Committee v. DASA Corp., supra*, 560 F.2d at 1088. These requirements are a sound means of ensuring that persons with colorable ***81** claims will not be deterred from pursuing their rights by the fear of an award of attorneys' fees against them, see *id.* at 1088.

[20] The district court offered little by way of explanation for its fee award. At the February 18 fairness hearing, when the awards were initially imposed--even in favor of the plaintiffs who had not sought one--no reasons were stated. In a brief order of March 26, 1981, the court characterized the subpoenas as "on their face, grossly overbroad". The order also relied on the fact that "there were no objections" to the settlement in determining that the issuance of the subpoenas was improper.

The record does not support a finding that there was "clear evidence" of bad faith or vexatiousness. Mr. Brewer contends that he was expecting an evidentiary hearing to be held on February 18 and that he needed to have the documents in court, particularly since the affidavits supporting the settlement were not yet available. His phone conversation with Mr. Lewis narrowing the scope of the document request was at least some evidence that he had not in fact been acting in bad faith in issuing the February 13 subpoenas. As noted previously, the judge erred with respect to the absence of any objections to the proposed settlement. Davis Polk contends that Mr. Brewer had no standing to be heard on February 18 since all his clients who had filed objections had withdrawn them. The judge did not so find and this is not plain to us. In short, while not applauding Mr. Brewer's conduct, we do not think it reached the level at which the sanction of a fee award would be justified.

The judgment approving the settlement is affirmed. The order imposing sanctions on Brewer is reversed. No costs.

FURTHER ORDER ON PETITIONS FOR REHEARING

On September 10, 1982, we entered an unpublished order on petitions for rehearing and suggestions for rehearing in banc filed by both sets of appellants with respect to our opinion of July 14, 1982, slip opinions at 61, in which we affirmed an order of Judge Duffy, in the District Court for the Southern District of New York, approving the settlement of class actions brought by purchasers of W.T. Grant Co. securities alleging violations of federal and state securities law. We corrected a factual statement, slip opinions at 67, full paragraph, last sentence, in a manner stated therein. Beyond that we noted the contention made on behalf of the Coyne appellants that by affirming Judge Duffy's order approving the settlement despite his failure to render more than a cursory opinion, we had placed ourselves in conflict with *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7 Cir.), *cert. denied sub*

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nom. Oswald v. General Motors Corp., 444 U.S. 870 (1979), and *Girsh v. Jepson,* 521 F.2d 153 (3 Cir.1975), and indeed had ignored the command of *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968). We stated that we had no intention of doing anything of the sort but rather had regarded this as a unique situation where, because of the careful and well-reasoned opinions of Bankruptcy Judge Galgay on closely related issues arising in the bankruptcy liquidation of Grant, the district judge could properly have considered himself relieved of what would otherwise have been his obligation to make a detailed assessment of the settlement. See slip opinions at 74. However, because the point had not been adequately brought to our attention, we had not sufficiently focused on the fact that Judge Galgay's findings and conclusions were being seriously attacked in an appeal in the Grant bankruptcy proceedings that would shortly reach this court. We therefore directed that argument on the appeal from the order of Judge Duffy affirming Bankruptcy Judge Galgay's order in the Grant bankruptcy proceedings (hereinafter the Cosoff and Miller appeals) be heard before this same panel and ordered that issuance of the mandate in this case by stayed pending further order of this court.

Because of the number of issues raised in the Cosoff and Miller appeals, the need to supplement the inadequate record that had been filed, and the fact that Judge Duffy had rested his approval in that case primarily ***82** on *res judicata,* disposition of those appeals has taken longer than we had anticipated. However, by decision filed today, *In re W.T. Grant Co.*, we have generally approved Judge Galgay's findings of fact and conclusions of law in his opinion of February 20, 1980, 4 B.R. 53, as supplemented by his order of June 23, 1981, approving the settlement with the subordinated debentureholders there at issue. Specifically, after examining the findings and conclusions submitted by counsel for the trustee in bankruptcy in that case, we have rejected the assertions made by attorney Brewer, both in that case and in this, that Judge Galgay had simply rubber-stamped the submissions of counsel for the trustee, a practice disapproved by *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-67 (1964). Taking note of that decision Judge Galgay said he had adopted the trustee's proposed findings of fact where he had found no reason to do otherwise; however, he formulated his own discussion of the law of equitable subordination, the issue that is of particular moment here. In light of his opinion and our own examination of much of the evidence, we find that the chances of plaintiffs' establishing that the banks promoted a public belief in the viability of Grant which the banks did not share are extremely problematic.

We thus adhere to our opinion of July 14, 1982. In doing so we reaffirm the duty of district judges in this circuit to make a considered and detailed assessment of the reasonableness of proposed settlements of class actions, as held by the Third Circuit in *Girsh, supra,* 521 F.2d 153, 157-58, 159-60, and by the Seventh Circuit in *General Motors, supra,* 594 F.2d 1106, 1132 n. 44.

The factual correction made by our order of September 10, 1982, is further revised as follows: Strike last sentence of the full paragraph on p. 67 and substitute:

> Eleven bondholders appealed this order to the District Court for the Southern District of New York (Conner, J.), which stayed consideration of the appeals so that Bankruptcy Judge Galgay could supervise continuing negotiations among the bankruptcy trustee, the indenture trustee, the banks, and the debentureholders for an improved offer to the latter. Counsel for the debentureholders who had appealed from the order approving the earlier offer stipulated that these appeals be withdrawn with prejudice, and this was so ordered. On June 23, 1981, an amended offer was approved by Judge Galgay. Two groups of debentureholders appealed to the District Court (Duffy, J.) from the order approving the amended offer. In an opinion and order dated March 15, 1982, Judge Duffy affirmed the order, 20 B.R. 186. He rested his decision primarily on the ground of *res judicata,* although he also stated that the appeals were without merit. Two groups of debentureholders have appealed to this court.

The petitions for rehearing are thus granted insofar as concerns the correction of the factual statement but are otherwise denied. The clerk will take appropriate steps with respect to appellants' suggestion for rehearing in banc. The stay of the mandate will be revoked if no judge in regular active service requests rehearing in banc or, if this is done, such a request is denied.

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C

Appellate Court of Illinois, First District, Third Division.

WEISS MEDICAL COMPLEX, LTD., Plaintiff-Appellant,
v.
Sun C. KIM, M.D., and Chusak Ladpli, M.D., Defendants-Appellees.

No. 79-2475.

June 25, 1980.
Rehearing Denied Aug. 13, 1980.

Medical clinic corporation brought action to enforce restrictive covenant contained in employment contracts of two doctors which covenant prevented doctors from practicing within ten-mile area of clinic for one year after leaving clinic and from soliciting, corresponding or contacting any clinic patient except for benefit of clinic during this time period. The Circuit Court, Cook County, George J. Schaller, J., entered an order denying clinic's motion for preliminary injunction, and clinic filed interlocutory appeal. The Appellate Court, McNamara, J., held that: (1) clinic was not entitled to preliminary injunction against one former employee-doctor, whose contract was cancelled by oral agreement with representative of clinic; (2) four members of board of directors of clinic had personal interest in matter before the board of eliminating restrictive covenants, stood to benefit from elimination of covenants, and were thus, disqualified to vote such benefit of removal to themselves; (3) action of board in voting to eliminate restrictive covenants was voidable; and (4) shareholders' refusal to ratify action of board of directors voided action of board.

Affirmed in part; reversed and remanded in part.

West Headnotes

[1] Injunction 138.39
212k138.39
(Formerly 212k137(1))

Medical clinic was not entitled to preliminary injunction preventing former employee doctor from practicing within ten miles of clinic for one year after leaving the clinic and from soliciting, corresponding, or contacting clinic's patients except for benefit of clinic during this time period pursuant to restrictive covenant contained in employment contract where doctor's contract had been cancelled by virtue of oral agreement with representative of clinic.

[2] Corporations 310(1)
101k310(1)

[2] Corporations 314(1)
101k314(1)

Duties imposed upon a director of a corporation as a fiduciary require him to manage the corporation with undivided and unqualified loyalty, and prohibit him from profiting personally at corporate expense or permitting his private interests to clash with those of his corporation.

[3] Corporations 298(5)
101k298(5)

A director for a corporation who has a personal interest in a subject under consideration is disqualified to vote on the matter and may not be counted for the purpose of making a quorum. S.H.A. ch. 32, § 157.37.

[4] Corporations 314(1)
101k314(1)

Whether a director of a corporation is personally interested in a matter before board of directors is a question of fact. S.H.A. ch. 32,§ 157.37.

[5] Corporations 426(1)
101k426(1)

Where there is no quorum because of disqualification of directors, a contract executed pursuant to a resolution of the board is voidable and may be rendered valid by shareholder ratification. S.H.A. ch. 32, § 157.37.

[6] Corporations 298(5)
101k298(5)

Four members of board of directors of medical clinic, whose employment contracts with clinic contained restrictive covenant preventing them from practicing within ten-mile area of clinic one year after leaving clinic and from soliciting, corresponding, or contacting clinic patients during this time period except for benefit of clinic had personal interest in matter before the board of eliminating restrictive covenant, stood to benefit from elimination of covenant, and were thus, disqualified to vote such benefit of removal to themselves. S.H.A. ch. 32, §

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157.37.

[7] **Corporations 298(5)**
101k298(5)

Action of board of directors of medical clinic in voting to eliminate restrictive covenant contained in employment contracts preventing employee doctors from practicing within ten-mile area of clinic one year after leaving clinic and from soliciting, corresponding, or contacting clinic patients during this time period except for benefit of clinic was voidable where qualified majority of board of directors had failed to vote on the matter. S.H.A. ch. 32, § 157.37.

[8] **Corporations 298(1)**
101k298(1)

Medical clinic corporation's shareholders' refusal to ratify action of board of directors, made without a qualified majority of board, eliminating restrictive covenant in employment contracts of employee doctors which prevented doctors from practicing within ten-mile area of clinic for one year after leaving clinic and from soliciting, corresponding or contacting clinic patients during such time period except for benefit of clinic constituted repudiation of the board's action, which was voidable, and resolution to remove restrictive covenants from all existing employment contracts was not binding on clinic.

***111 **960 ***251** Sperling, Slater & Spitz, Chicago (Stephen J. Spitz, Chicago, of counsel), for plaintiff-appellant.

Blumenthal & Stavins, Chicago (Milton M. Blumenthal and Richard Lee Stavins, Chicago, of counsel), for defendants-appellees.

McNAMARA, Justice:

[1] Plaintiff, Weiss Medical Complex, Ltd., brought this action to enforce ***112** a restrictive covenant provision contained in the employment contracts of defendants, Drs. Sun C. Kim and Chusak Ladpli. Following a hearing, the trial court found that the restrictive covenant in Kim's contract was cancelled by virtue of both an oral agreement with a representative of plaintiff and an action of plaintiff's board of directors. The court further concluded that the restrictive covenant in Ladpli's contract was not eliminated by oral agreement but was cancelled by the aforementioned corporate action. Accordingly, the trial court entered an order denying plaintiff's motion for a preliminary injunction. Plaintiff's interlocutory appeal challenges the finding that the board of director's action removed the restrictive covenants. Plaintiff does not, however, contest the court's ruling that an oral agreement rescinded Kim's restrictive covenant. Since Kim admittedly is not bound by the restrictive covenant at issue, the trial court correctly denied plaintiff's request for a preliminary injunction as to him.

Plaintiff, an Illinois corporation, is a medical clinic located in Harvey, Illinois. Defendants are physicians licensed to practice medicine in Illinois. On October 10, 1972, and April 11, 1973, Kim and Ladpli, respectively, entered into employment agreements with plaintiff. Each contract ****961 *****252** contained the following pertinent provisions:

"You agree to be employed by (plaintiff) for a period of one year * * *. After the one-year period, your employment and this understanding will be automatically renewed upon the same understanding as contained in this letter unless either (plaintiff) or you give notice in writing to the other not less than 90 days prior to the end of the year.

You recognize that the services which you will render to (plaintiff) are of unique and extraordinary character and you agree not to perform medical services individually or in connection with any other person, firm, association or corporation within a ten mile radius of the business location of (plaintiff), both during your employment and for one year after the expiration of your employment and for the same period you agree not to solicit, correspond or contact any patient except for the benefit of (plaintiff). In the event it is necessary to continue treating any patients after termination of your employment, the value of your services performed after termination will be fairly determined by (plaintiff). * * * Since we are sure you recognize your uniqueness to (plaintiff), if this paragraph is violated, (plaintiff) at its option shall be entitled, in addition to any other rights, to enjoin you."

Defendants resigned from the clinic on May 31, 1979, but remained affiliated with plaintiff on a part-time basis until September 24, 1979. ***113** During June through September 1979, defendants also performed medical services in their own offices in Park Forest, Illinois.

On October 29, 1979, plaintiff filed a verified complaint for injunctive and other relief alleging that defendants breached their post-employment

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restrictive covenant by treating plaintiff's patients without plaintiff's knowledge or consent and by rendering treatment within a ten mile radius of the facility after leaving the clinic. Defendants filed a verified answer and motion to strike asserting, in pertinent part, that the employment agreements containing the restrictive covenant were cancelled by corporate action of plaintiff's board of directors on February 3, 1977.

On November 16, 1979, a hearing commenced on plaintiff's motion for preliminary injunction and the following relevant evidence was adduced: Beginning in 1972, newly hired physicians entered into written employment contracts with plaintiff which contained the foregoing restrictive covenant and provided for a fixed salary. Because this salary arrangement was not successful financially, plaintiff adopted an "incentive pay plan", effective November 1, 1976, under which physicians were paid on a commission basis with a minimum salary "draw." In February, 1977, plaintiff's by-laws provided that the number of directors on the board should be an odd number not less than the number of shareholders. There were twelve shareholders at the time, of whom seven were elected directors.

All seven directors were present at the meeting of the board of directors on February 3, 1977. Four of these directors, including Ladpli, had written employment contracts containing the restrictive covenant at issue. Thomas Maloney, business administrator of the clinic, also attended the meeting. The corporate minutes of the meeting read in relevant part:
"After some discussion, to make it easier for physicians being 'eased out' of the clinic under the incentive system to leave and to make it easier for future physician recruitment, it was unanimously decided that the 'restrictive covenant' on all existing contracts be removed. Mr. Maloney also stated that new employment agreements are being worked on by Jerry Biederman. (Plaintiff's corporate counsel)."

Witnesses offered different accounts of who initiated the discussion about the restrictive covenants as well as the reasons underlying the board's decision. Dr. Oleg Prozorovsky, then chairman of the board, testified that there was discussion concerning the fact that some doctors were drawing**962 ***253 relatively high salaries unjustified by their production. There was also discussion that removal of the restrictive covenants would make it easier for doctors who were not producing sufficiently to leave the clinic and would facilitate the hiring of new physicians. He did not recall who introduced the topic of restrictive covenants. Dr. Constante F. *114 Vallejos, another director, testified that Maloney indicated some doctors were dissatisfied with the incentive program and might sue plaintiff for their salaries. Vallejos also related that something was mentioned about easing out non-productive doctors by removing restrictive covenants. Vallejos and Prozorovsky, neither of whom had restrictive covenants, testified that deletion of the covenants was in plaintiff's best interest. Ladpli testified that Maloney initiated the discussion concerning the restrictive covenants. Ladpli had no knowledge, however, of any particular doctor being eased out. Maloney, who prepared the minutes, did not remember who presented the subject of restrictive covenants, and did not recall any discussion about plaintiff's intent to eliminate any doctors.

After reviewing the minutes, Mr. Biederman sent a memorandum to Dr. Robert Gloss, president of the clinic, expressing reservations about the vote to terminate restrictive covenants. Biederman explained that the resolution might be void or voidable, and that the directors, being on both sides of the contractual arrangement, may have breached their fiduciary duties. Gloss wrote back to Biederman stating that the board of directors had passed a "preliminary resolution removing the 'restrictive covenant' on all existing contracts." Biederman informed Gloss that the proper way to remove the restrictive covenant and to protect the directors was to obtain shareholder approval. Biederman advised Gloss to meet with Dr. Frederick Weiss, the majority shareholder, to find out if he were amenable to deleting the restrictive covenant from the employment contracts.

On June 6, 1977, a shareholder's meeting was held at which Weiss, among others, was present. The minutes provide, in relevant part, as follows:
"It was requested by Dr. Gloss that the shareholders ratify the actions of the Board of Directors that have taken place since the January meeting. A lengthy discussion followed regarding the new employment agreements which have been drawn up excluding the 'restrictive covenant'."

Weiss testified that the deletion of the restrictive covenant was sought to be ratified. He and other shareholders objected to its removal. Weiss further stated that no ratification of the board's February 3, 1977 resolution was achieved after the discussion.

Ladpli testified that ratification of the board's acts

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was not obtained at the shareholders' meeting, and that he never signed any employment contract excluding the restrictive covenant. Ladpli also testified that in late 1976, prior to the resolution in issue, he had discussions with Kim about leaving the clinic.

***115** At the conclusion of the hearing, the trial court found that the written employment contracts between plaintiff and defendants were not contrary to public policy; that Kim, but not Ladpli, had an oral agreement with plaintiff, through Weiss, deleting the restrictive covenant; and that the restrictive covenants in the employment contracts of both defendants were cancelled by virtue of the February 3, 1977 action of plaintiff's board of directors. The court concluded that the board's action did not constitute self-dealing and was done in fairness and in the best interest of the corporation. The court found that the action was introduced by Maloney, and was instituted primarily for the benefit of Weiss and then for the doctors involved. The court dissolved a temporary restraining order which had been entered and denied plaintiff's request for a preliminary injunction.

On appeal plaintiff challenges the trial court's ruling that the February 3, 1977 resolution of plaintiff's board was binding on the corporation and cancelled Ladpli's restrictive covenant. Specifically, plaintiff urges that it was legal error to allow four ****963 ***254** personally interested directors having restrictive covenants in their employment contracts to be counted toward the quorum and majority vote of plaintiff's board of directors.

A quorum is composed of a majority of the number of directors fixed by the corporation's by-laws. The act of a majority of the directors at a meeting at which a quorum is present is the act of the board of directors. (Ill.Rev.Stat.1977, ch. 32, par. 157.37.) At the time of the resolution in issue, plaintiff's by-laws provided for thirteen directors; thus seven directors constituted a quorum.

[2][3][4][5] Duties imposed upon a director of the corporation as a fiduciary require him to manage the corporation with undivided and unqualified loyalty, and prohibit him for profiting personally at corporate expense or permitting his private interests to clash with those of his corporation. (See Patient Care Services, S. C. v. Segal (1975), 32 Ill.App.3d 1021, 337 N.E.2d 471.) In Illinois, a director who has a personal interest in a subject under consideration is disqualified to vote on the matter and may not be counted for the purpose of making a quorum. (Karris v. Water Tower Trust & Sav. Bank (1979), 72 Ill.App.3d 339, 27 Ill.Dec. 951, 389 N.E.2d 1359; Elward v. Peabody Coal Co. (1956), 9 Ill.App.2d 234, 132 N.E.2d 549; Federal Life Insurance Co. v. Griffin (1912), 173 Ill.App. 5.) The only exception is that a director, irrespective of any personal interest, may vote to establish reasonable compensation to all directors for service to the corporation. (Ill.Rev.Stat.1977, ch. 32, par. 157.33.) Whether a director is personally interested in a matter is a question of fact. (Karris v. Water Tower Trust & Sav. Bank.) Where there is no quorum because of the disqualification ***116** of directors, a contract executed pursuant to a resolution of the board is voidable and may be rendered valid by shareholder ratification. Federal Life Insurance Co. v. Giffin.

Four of the seven directors who voted affirmatively to delete the restrictive covenant from all existing contracts had a restrictive covenant in their own employment contracts with plaintiff. The trial court did not make a determination whether these four directors had a personal interest in the matter under consideration by the board, although it did note that they benefited from the action.

[6] We believe that the evidence conclusively demonstrated that these four directors had a personal interest in the matter under consideration by the board. They were among the intended beneficiaries of the board's resolution. Removal of the restrictive covenant would enable a director to leave the clinic and yet continue to render services to patients previously treated at the clinic. This access to plaintiff's patients would provide clientele and a source of income to physicians leaving the clinic. Consequently, a director who was restrained from such ongoing patient contact by the restrictive covenant in issue stood to benefit from a favorable outcome on the vote to delete the provision from all existing contracts. Contrary to Ladpli's suggestion, it is immaterial that defendants remained with the clinic for over two years after the board's action. Had the resolution been valid, the benefit would still have accrued to defendants upon their departure from the clinic. We conclude, therefore, that the directors with restrictive covenants in their contracts were clearly disqualified to vote this benefit of removal to themselves.

[7] In view of the personal interest of four board

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members, when the matter of restrictive covenants was considered, there were only three directors whose lack of personal interest entitled them to be counted towards a quorum. Consequently, no affirmative action on restrictive covenants was taken by a qualified majority of the board of directors.

Under such circumstances, the board's action was voidable. Although the action could have been ratified by the shareholders, the shareholders expressed objections at a meeting on June 6, 1977, and ratification was not achieved.

**964 ***255 [8] Ladpli asserts that because the action was voidable, plaintiff had to repudiate affirmatively the board's vote and urges further that a refusal to ratify does not constitute sufficient repudiation. In support of this contention, he cites Freeport Journal-Standard Publishing Co. v. Ziv Co. (1952), 345 Ill.App. 337, 103 N.E.2d 153. That case is clearly distinguishable from the present matter. There the court reasoned that where a corporate agent enters into an unauthorized agreement with a third party, the corporation has a duty to repudiate the transaction *117 promptly, and that silence under such circumstances is evidence from which ratification could be found. The case did not address the issue of shareholder ratification of an action taken by a board in the absence of a quorum. Moreover, here no third party contract existed, and, instead of remaining silent, the shareholders objected to removal of the restrictive covenant. The shareholders here refused to ratify the board's decision; no further affirmative acts of repudiation or disavowal of the vote was required.

Relying on Shlensky v. South Parkway Building Corp. (1960), 19 Ill.2d 268, 166 N.E.2d 793, Ladpli maintains that the vote of a personally interested director may be counted towards establishing a quorum and majority if made in fairness to the corporation. In Shlensky, the court addressed the fiduciary duty of corporate directors in transactions between corporations with interlocking directorates. Our supreme court held that transactions between corporations with common directors may be avoided only if unfair, and that the directors who would sustain the challenged transaction have the burden of overcoming the presumption against its validity by demonstrating its fairness.

In reaching its decision in the present case, the trial court apparently applied the fairness test advanced in Shlensky and concluded that the board's action was done in fairness to the corporation. The Shlensky decision, however, is inapposite. There, the court was primarily concerned with transactions between corporations where the directors had potentially conflicting or adverse obligations to more than one corporation. When speaking of a "disinterested" board, the court was referring to one in which the members had loyalty to only one corporation. The case did not consider whether a director with a personal interest in a matter under consideration by a corporation could be counted towards a quorum or could vote on the matter. Shlensky thus did not alter the law governing quorum requirements and the disqualification of directors having a personal interest.

In view of the personal interest of four directors, there was no quorum present at the board meeting on February 3, 1977. And since shareholder ratification was refused, the resolution to remove restrictive covenants from all existing employment contracts was not binding on the corporation. Consequently, the trial court erred in finding that the board's action cancelled the restrictive covenant in Ladpli's employment contract. Having so concluded, it is unnecessary to consider the additional arguments offered by plaintiff.

For the reasons stated, the order of the circuit court of Cook County denying plaintiff's motion for a preliminary *118 injunction against Dr. Sun C. Kim is affirmed; the order denying plaintiff's motion for a preliminary injunction against Dr. Chusak Ladpli is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; Reversed and remanded in part.

SIMON and RIZZI, JJ., concur.

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Chapter 11. Directors, Other Officers and Agents
XXV. Directors and Officers as Fiduciaries or Trustees
A. General Rules
By Beth A. Buday, J.D. and Gail A. O'Gradney, J.D. [FNb]

§ 837.60 DUTY OF LOYALTY.

In discharging their function of managing the business and affairs of the corporation, directors owe fiduciary duties of care [FN1] and loyalty to the corporation. [FN2] The duty of loyalty is a broad encompassing duty, that in appropriate circumstances, is capable of impressing a special obligation upon a director in any of his or her relationships with the corporation. [FN3]

The duty of loyalty is fiduciary in nature, by reason of which the officer is held to something stricter than the morals of the market place. [FN3.50] The duty obtains most directly when the officer is interested personally in a matter affecting the corporation. [FN3.55] The concept of interest is broadly defined and includes cases where the officer has a relationship with a party to the transaction that may reasonably be expected to affect the officer's judgment or is subject to the influence and domination of such a party. [FN3.60] Yet, the duty goes beyond this and is coextensive with the legitimate, enduring interests of the corporation. [FN3.65]

The duty of loyalty takes no canonical form. It is as complex as corporate interests and officer temptations and means of descent from grace. It partakes of the objective as well as the subjective. If, for example, an officer neglects the substantial interests of his or her corporate principal by preferring another in a matter of importance, the officer may well offend his or her duty of loyalty though his or her heart is pure. [FN3.70] In such a case, a court would not concern itself with the officer's subjective intent but with the content of his or her conduct reasonably viewed by objective third persons. The question is whether there is a rational basis for a belief that the officer's action was in the best interest and not whether in fact the officer held such a belief. [FN3.75]

In a leading case, the Delaware Supreme Court stated that an undivided loyalty to the corporation demands that there shall be no conflict between duty and self-interest. [FN4] Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. [FN5] Thus, officers and directors must exert all reasonable and lawful efforts to ensure that the corporation is not deprived of any advantage to which it is entitled. [FN6]

The duty of loyalty in essence involves conflicting economic or other similar interests. [FN7] Multiple loyalties or apparent conflicts are insufficient in themselves to establish a breach of loyalty. [FN7.50] The duty of loyalty is transgressed when a corporate fiduciary, whether director or officer, uses his or her corporate office to promote, advance or effectuate a transaction between the corporation and such person, and that transaction is not substantively fair to the corporation. [FN8] The test as to undivided loyalty of directors is whether corporate action is the result of the exercise by the directors of their unbiased judgment in determining that such action will promote the corporate interests. [FN9]

Even when directors act in good faith, their conduct may unintentionally violate the duty of loyalty. [FN10] Generally, the business judgment rule will not apply where there is a breach of the duty of loyalty. Thus, the duty of loyalty must be satisfied before the business judgment rule is applicable to actions of corporate fiduciaries. [FN11]

Although a corporation may limit or eliminate the liability of a director to the corporation or its shareholders for

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a breach of duty of care, [FN12] Delaware law provides that no provision in a certificate of incorporation shall limit or eliminate personal liability of a director breaching his or her duty of loyalty. [FN13] Courts have recognized the importance of such a distinction by refusing to dismiss claims against directors that have violated the duty of loyalty. [FN14]

Whether a director or officer has properly discharged his or her duty of loyalty is a question of fact to be determined in each case in view of all of the circumstances. [FN15] If a director is found to have breached his or her duty of loyalty, an injunction may be issued, [FN16] or damages may be awarded to the injured shareholders. [FN17]

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[FNb]. And by the Publisher's Editorial Staff

[FN1]. See § 1029 et seq.

[FN2]. United States. Farr v. Farm Bureau Ins. Co. of Nebraska, 61 F3d 677 (CA8 1995) (applying Nebraska law); In re Stat-Tech International Corp., 47 F3d 1054 (CA10 1995) (applying Colorado law); Franklin Music Co. v. American Broadcasting Cos., Inc., 616 F2d 528 (CA3 1979) (applying Pennsylvania law); Perlman v. Feldmann, 219 F2d 173 (construing Indiana law); Commonwealth Finance Corp. v. McHarg, 282 F 560; Lawson v. Baltimore Paint & Chemical Corp., 347 F Supp 967 (applying Maryland law).

Alabama. Van Antwerp Realty Corp. v. Cooke, 230 Ala 535, 162 So 97.

Arizona. Amerco v. Shoen, 184 Ariz 150, 907 P2d 536 (Ariz App 1995).

Colorado. Directors owe separate fiduciary duties to corporation and shareholders. In re Stat-Tech International Corp., 47 F3d 1054 (CA10 1995).

Delaware. Thorpe v. CERBCO, Inc., 676 A2d 436 (Del 1996). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1996--No. 6; Mills Acquisition Co. v. MacMillan, Inc., 559 A2d 1261 (Del 1989); McMillan v. Intercargo Corp., 2000 WL 516265 (Del Ch) (decided April 21, 2000). For an expanded analysis of this case, see 18 Fletcher Corp Law Adviser 6:10 (2000); In re Sea-Land Corp. Shareholders Litigation, 642 A2d 792 (Del Ch 1993); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A2d 13 (Del 1986). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1995--No. 9.

Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).

Illinois. Dixmoor Golf Club v. Evans, 325 Ill 612, 156 NE 785; Dowell v. Bitner, 273 Ill App 3d 681, 652 NE2d 1372 (1995); Veco Corp. v. Babcock, 243 Ill App 3d 153, 611 NE2d 1054 (1993).

Fiduciary obligations of corporate officer or director include: undivided, unselfish, and unqualified loyalty; unceasing effort never to profit personally at corporate expense; and unbending disavowal of any opportunity which would permit fiduciary's private interests to clash with those of his corporation. C.G. Caster Co. v. Regan, 88 Ill App 3d 280, 410 NE2d 422.

Indiana. Perlman v. Feldmann, 219 F2d 173.

Louisiana. In declaratory judgment action, where state law prohibits judges from serving as directors of financial institutions, court properly held that due process was not violated since directors owe a fiduciary duty to efficiently manage business affairs of corporation. Babineaux v. Judiciary Commission, 341 So 2d 396 (La).

Maryland. Lawson v. Baltimore Paint & Chemical Corp., 347 F Supp 967.

Massachusetts. Mackey v. Rootes Motors Inc., 204 NE2d 436 (Mass) (breach of fiduciary duties by regional manager in connection with storage of corporation's motor vehicles).

Michigan. Garwin v. Anderson, 334 Mich 287, 54 NW2d 667 (evidence insufficient to establish breach of fiduciary duty in sale of stock at less than market price or compromise settlement of excessive claims or payment of excessive salaries).

Missouri. Nixon v. Lichtenstein, 959 SW2d 854 (Mo App 1997).

Nebraska. Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb 169, 137 NW2d 701.

New Jersey. It has been stated that in legal contemplation there is no such thing as a "figurehead" director, and

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that the inherent nature of a corporate director's job necessarily implies that the director must have a basic idea of the corporation's activities. Francis v. United Jersey Bank, 162 NJ Super 355, 392 A2d 1233.

New York. Garden Hill Estates, Inc. v. Bernstein, 24 AD2d 512, 261 NYS2d 648 (president properly found to be disloyal).

Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

Pennsylvania. President and director of corporation owes undivided loyalty to his company. Franklin Music Co. v. American Broadcasting Cos., Inc., 616 F2d 528 (CA3 1979).

Texas. Southwest Livestock & Trucking v. Dooley, 884 SW2d 805 (Tex App 1994); Hughes v. Houston Northwest Medical Center, Inc., 680 SW2d 838 (Tex App); Reynolds-Southwestern Corp. v. Dresser Industries, Inc., 438 SW2d 135 (Tex Civ App).

Utah. Hoggan & Hall & Higgins, Inc. v. Hall, 18 Utah 2d 3, 414 P2d 89; Glen Allen Min. Co. v. Park Galena Min. Co., 77 Utah 362, 296 P 231.

Wisconsin. Modern Materials, Inc. v. Advanced Tooling Specialists, Inc., 206 Wis 2d 434, 557 NW2d 835 (1996).

[FN3]. United States. Astarte, Inc. v. Pacific Industries Systems, Inc., 865 F Supp 693 (D Colo 1994) (applying Colorado law); Thompson's Point Inc. v. Safe Harbor Development, 862 F Supp 594 (D Me 1994) (applying Maine law).

Colorado. Director must act with extreme candor, unselfishness, and good faith. Astarte, Inc. v. Pacific Industries Systems, Inc., 865 F Supp 693 (D Colo 1994).

Delaware. Hoover Industries, Inc. v. Chase, CA No. 9276 (Del Ch 1988). Georgia. Former elected officer did not breach his fiduciary duties of loyalty, good faith, and fair dealing toward corporate employer during his employment, though he planned to go into a competing business with one of the corporation's employees, incorporated a competing business, and took steps to obtain a business license and tax identification number during his employment with the corporation. Instrument Repair Service, Inc. v. Gunby, 238 Ga App 138, 518 SE2d 161 (1999).

Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).

Illinois. Dowell v. Bitner, 273 Ill App 3d 681, 652 NE2d 1372 (1995); Veco Corp. v. Babcock, 243 Ill App 3d 153, 611 NE2d 1054 (1993).

Maine. Thompson's Point Inc. v. Safe Harbor Development, 862 F Supp 594 (D Me 1994).

Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

Texas. Southwest Livestock & Trucking v. Dooley, 884 SW2d 805 (Tex App 1994).

[FN3.50]. Mississippi. Omni Bank v. United Southern Bank, 607 So 2d 76 (Miss 1992).

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Conflicts of interest, see generally §§ 861, 913.

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[FN3.65]. Mississippi. Omni Bank v. United Southern Bank, 607 So 2d 76 (Miss 1992).

[FN3.70]. Favoring certain shareholders of corporation, see § 1012.

[FN3.75]. Mississippi. Omni Bank v. United Southern Bank, 607 So 2d 76 (Miss 1992).

[FN4]. Delaware. Guth v. Loft, Inc., 5 A2d 503 (Del 1939).

Oregon. See also Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

[FN5]. Arizona. Amerco v. Shoen, 184 Ariz 150, 907 P2d 536 (Ariz App 1995).

Delaware. Mills Acquisition Co. v. MacMillan, Inc., 559 A2d 1261 (Del 1989); Guth v. Loft, Inc., 5 A2d 503

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(Del 1939).
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Illinois. Veco Corp. v. Babcock, 243 Ill App 3d 153, 611 NE2d 1054 (1993).
Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

[FN6]. Arizona. Amerco v. Shoen,184 Ariz 150, 907 P2d 536 (Ariz App 1995).
Delaware. Mills Acquisition Co. v. MacMillan, Inc., 559 A2d 1261 (Del 1989); Weinberger v. UOP, Inc., 457 A2d 701 (Del 1983); Guth v. Loft, Inc., 5 A2d 503 (Del 1939).
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

[FN7]. United States. Thompson's Point Inc. v. Safe Harbor Development, 862 F Supp 594 (D Me 1994) (applying Maine law).
Delaware. Solash v. Telex Corp., CA No 9518 (Del Ch 1988).
Georgia. Former elected officer did not breach his fiduciary duties of loyalty, good faith, and fair dealing toward corporate employer during his employment, though he planned to go into a competing business with one of the corporation's employees, incorporated a competing business, and took steps to obtain a business license and tax identification number during his employment with the corporation. Instrument Repair Service, Inc. v. Gunby, 238 Ga App 138, 518 SE2d 161 (1999).
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Illinois. Dowell v. Bitner, 273 Ill App 3d 681, 652 NE2d 1372 (1995); Veco Corp. v. Babcock, 243 Ill App 3d 153, 611 NE2d 1054 (1993).
Maine. Thompson's Point Inc. v. Safe Harbor Development, 862 F Supp 594 (D Me 1994).
Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9. Texas. Southwest Livestock & Trucking v. Dooley, 884 SW2d 805 (Tex App 1994).

[FN7.50]. United States. Astarte, Inc. v. Pacific Industries Systems, Inc., 865 F Supp 693 (D Colo 1994) (applying Colorado law).
Colorado. Astarte, Inc. v. Pacific Industries Systems, Inc., 865 F Supp 693 (D Colo 1994).

[FN8]. Delaware. In re Sea-Land Corp. Shareholders Litigation, 642 A2d 792 (Del Ch 1993). For expanded analysis of this case, see Fletcher Corp Law Adviser, 1995--No. 9; Solash v. Telex Corp., CA No 9518 (Del Ch 1988).
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Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).

[FN9]. United States. Perlman v. Feldmann, 219 F2d 173 (following Indiana law); Schaffer v. Below, 174 F Supp 505.
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Indiana. Perlman v. Feldmann, 219 F2d 173.
New York. Chelrob v. Barrett, 293 NY 442, 57 NE2d 825; Price v. Standard Oil Co., 55 NYS2d 890 (Misc).
Director of membership corporation has obligation to keep himself informed as to the corporation's policies and activities so that he may do his duties and carry out his responsibilities. Hyman v. Jewish Chronic Disease Hospital, 15 NY2d 317, 258 NYS2d 397, 206 NE2d 338.
Ohio. See Apicella v. Paf Corp., 17 Ohio App 3d 245, 479 NE2d 315.
Texas. Hughes v. Houston Northwest Medical Center, Inc., 680 SW2d 838 (Tex App).

[FN10]. Delaware. In re Sea-Land Corp. Shareholders Litigation, 642 A2d 792 (Del Ch 1993). For expanded

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analysis of this case, see Fletcher Corp Law Adviser, 1995--No. 9; Blasius Industries, Inc. v. Atlas Corp., 564 A2d 651 (Del Ch 1988); AC Acquisition Corp. v. Anderson, Clayton & Co., 519 A2d 103 (Del Ch 1986).
Oregon. Horton v. Whitehill, 121 Or App 336, 854 P2d 977 (1993). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1993--No. 9.

[FN11]. Delaware. In re Sea-Land Corp. Shareholders Litigation, 642 A2d 792 (Del Ch 1993). For expanded analysis of this case, see Fletcher Corp Law Adviser, 1995--No. 9; Revlon, Inc. v. Mac Andrews & Forbes Holdings, Inc., 506 A2d 173 (Del 1986); Lewis v. Figua, 502 A2d 962 (Del Ch 1985).
The business judgment rule, see § 1036 et seq.

[FN12]. Statutes eliminating or limiting liability, see Bishop, Law of Corporate Officers and Directors, Indemnification and Insurance, § 7.18 et seq.

[FN13]. Del Code Ann tit 8 § 102(b)(7).
Delaware. In re General Motors Class H Shareholders Litigation, 734 A2d 611 (Del Ch 1999) (no breach); Zirn v. VLI Corp., 621 A2d 773 (Del 1993) (certificate cannot limit shareholder action for fraud).

[FN14]. Delaware. See Zirn v. VLI Corp., 621 A2d 773 (Del 1993); In re Dataproducts Corp. Shareholder Litigation, CA No. 11164 (Del Ch 1991).

[FN15]. Arizona. Amerco v. Shoen, 184 Ariz 150, 907 P2d 536 (Ariz App 1995).
Delaware. Thorpe v. CERBCO, Inc., 676 A2d 436 (Del 1996). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1996--No. 6.
Georgia. Former elected officer did not breach his fiduciary duties of loyalty, good faith, and fair dealing toward corporate employer during his employment, though he planned to go into a competing business with one of the corporation's employees, incorporated a competing business, and took steps to obtain a business license and tax identification number during his employment with the corporation. Instrument Repair Service, Inc. v. Gunby, 238 Ga App 138, 518 SE2d 161 (1999).
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Illinois. Dowell v. Bitner, 273 Ill App 3d 681, 652 NE2d 1372 (1995).
Tennessee. Fitch v. Midland Bank & Trust Co., 737 SW2d 785 (Tenn Crim App).

[FN16]. Delaware. Kumar v. Racing Corp. of America, CA No. 12039 (Del Ch 1991); Mills Acquisition Co. v. MacMillan, Inc., 559 A2d 1261 (Del 1989).

[FN17]. Delaware. Thorpe v. CERBCO, Inc., 676 A2d 436 (Del 1996). For an expanded analysis of this case, see Fletcher Corp Law Adviser, 1996--No. 6; MacLane Gas Co., L.P. v. Enserch Corp., CA No. 10760 (Del Ch 1992); Weinberger v. UOP, Inc., 457 A2d 701 (Del 1983).
Idaho. Weatherhead v. Griffin, 123 Idaho 697, 851 P2d 993 (Idaho App 1992).
Illinois. Veco Corp. v. Babcock, 243 Ill App 3d 153, 611 NE2d 1054 (1993).

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Newberg on Class Actions

Third Edition

Volume 2
Chapters 6-11

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December, 1992

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Newberg on Class Actions, Third Edition

Chapter 11

Settlement of Class Actions

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December, 1992

16di-002038

recommendations before it, to assure that the interests of absent class members are protected.[236] If no outside objections to the settlement are raised, all parties of record who are proposing the settlement are obligated in any event to furnish adequate information to enable the court to reach a reasonable determination of fairness. When absent class members or third parties, who have proper standing, interpose objections to a proposed settlement, these objections must be taken into consideration by the court independently weighing the considerations for settlement approval. Although theoretically the original settling parties may be said to have the burden of establishing the fairness of the settlement in relation to third-party objectors, the invocation of these concepts does not really add to the ordinary obligation of the settling parties to furnish adequate information for the purpose of enabling the court independently to reach its own determination of reasonableness and fairness.

The Manual for Complex Litigation (2d) states:

> Counsel for the parties are the main source of information concerning the settlement. They must fully disclose to the court all agreements and understandings and be prepared to explain how the settlement was reached and why it is fair and reasonable. They must also disclose any facet of the settlement that may adversely affect any member of the class or does not treat all members of the class in the same manner.[237]

The *Manual* editors go on to recognize that there are practical limitations on the ability of counsel for the parties to justify a settlement, including the very real danger of jeopardizing their client's future litigation position if the settlement is not approved or if the settlement is with fewer than all defendants:

> The justification given by counsel for the proposed settlement, although important, has practical limits. Attorneys who have been engaged in serious advocacy cannot be expected instantaneously to lay bare the strengths and weaknesses of their respective cases. Moreover, the settlement may be based in part on matters which, if disclosed, might be damaging if the settlement is disapproved or if claims remain against nonsettling parties. To press counsel

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[236] See §11.41.

[237] Manual for Complex Litigation, Second §30.42 (1985).

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too hard for detailed explanations of their settlement calculus may, therefore, be unwise. The court's evaluation of the settlement should take into account the presumptions of counsel, but may also be based on other sources—including comments from class representatives and class members, the judge's own knowledge of the case obtained during pretrial proceedings, and information provided by persons who in unusual cases may be appointed by the court as special masters under Fed. R. Civ. P. 53 or as experts under Fed. R. Evid. 706 to assess the settlement.[238]

§11.43 General Criteria for Settlement Approval

The criteria generally utilized in determining whether a settlement is fair, reasonable, and adequate are:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery or evidence
3. Settlement terms and conditions
4. Recommendation and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties, if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion

These and other similar criteria have been used to determine the fairness of the settlement.[239] *The Manual for Complex Litigation, Second* states:

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[238] *Id.*

[239] *Detroit v Grinnell Corp*, 495 F2d 448, 463 (2d Cir 1974) (antitrust). A variation on the criteria determining fairness of settlement was designed by the court as follows:

1. Complexity, expense, and likely duration of litigation
2. Reaction of class to settlement
3. Stage of proceedings and amount of discovery completed
4. Risks of establishing liability
5. Risks of establishing damages
6. Risks of maintaining class action through trial
7. Ability of the defendants to withstand greater liability

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come of the litigation and the terms of the settlement agreement and must weigh the remedies the class could secure from the settlement against the probable costs and results of continued litigation.[230] "The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. . . . It may only approve or disapprove the proposal."[231] Once it enters a final judgment in the form of an order approving a settlement agreement, the district court cannot alter the class under Rule 23, except in the face of egregious error.[232]

§11.42 Burden of Proving Fairness on Proponents

The burden of proving the fairness of the settlement is on the proponents.[233] An initial presumption of fairness is usually involved if the

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[230] *Bryan v Pittsburgh Plate Glass Co*, 494 F2d 799 (3d Cir), *cert denied*, 419 US 900 (1974), *rehg denied*, 420 US 913 (1975).

Moore v City of San Jose, 615 F2d 1265 (9th Cir 1980) (sex). The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just. The federal district court did not abuse its discretion when it approved an agreement settling an assistant policewomen's Title VII action against the city. The court's findings were sufficient to support belief that the assistant policewomen probably would have prevailed if the matter had been fully litigated, and evidence supported its findings that no existing employees would lose their jobs under the agreement.

Grunin v International House of Pancakes, 513 F2d 114 (8th Cir), *cert denied*, 423 US 864 (1975) (antitrust) (the most important factor is the strength of the case on the merits balanced against the amount offered as settlement).

Eltman v Grandma Lee's, Inc, [1986-1987 Transfer Binder] Fed Sec L Rep (CCH) ¶92,798 (EDNY May 28, 1986) (securities). Settlement was approved in a securities fraud class action, despite provision for a cash payment to a named defendant auditor when a collateral difference between the company and the auditor threatened the settlement, when continued litigation against the auditor would have implicated jurisdictional uncertainties, and when there were no objections to the proposed settlement. Extensive negotiations were conducted at arm's length and there were questions involving the collectibility from the defendant company of any judgment obtained against it.

See **§11.43**; Manual for Complex Litigation, Second §30.41 (1985).

[231] *Jeff D v Andrus*, 888 F2d 617, 622 (9th Cir 1989).

[232] *Jeff D v Andrus*, 899 F2d 753 (9th Cir 1989).

[233] *In re General Motors Corp Engine Interchange Litig*, 594 F2d 1106 (7th Cir), *cert denied*, 444 US 870 (1979) (Magnuson-Moss Act) (though proponents of any class settlement always bear the burden of proof on the issue of fairness,

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settlement is recommended by class counsel after arm's-length bargaining.[234] As a practical matter, the overwhelming majority of proposed settlements are approved when the court is satisfied that arm's-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement.[235]

The use of burden of proof concepts in the context of settlement approvals for class or derivative actions goes primarily to the burden of providing the court with sufficient factual background concerning the ease or difficulty in proving the merits and defenses for or against claims raised and the scope and extent of potential relief available after adjudication as compared to relief obtained in settlement. In any proposed settlement, both the plaintiffs and the settling defendants have come to a proposed compromise of the controversy, and both are interested in obtaining court approval. Thus, in the absence of any third-party objectors, both the plaintiffs and the settling defendants are the proponents of the settlement and are no longer in an adversarial position with respect to requesting court approval. However, as noted earlier, the court must independently analyze the evidence and

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proponents who improperly negotiate a settlement should bear the heavier burden of establishing fairness by clear and convincing evidence).

Foster v Boise Cascade, Inc, 420 F Supp 674 (SD Tex 1976), *affd*, 577 F2d 335 (5th Cir 1978) (the court's duty to investigate the provisions of proposed settlement is not to be delegated to litigants' attorneys; the burden should be placed on parties, especially class representatives, to prove to district court and class members that all of the components of the recommended settlement are fair, reasonable, and adequate).

Grunin v International House of Pancakes, 513 F2d 113, 123 (8th Cir), *cert denied*, 423 US 864 (1975) (antitrust); *Norman v McKee*, 290 F Supp 29, 32 (ND Cal 1968), *affd*, 431 F2d 769 (9th Cir 1970), *cert denied*, 401 US 912 (1971); *Greenspun v Bogan*, 492 F2d 375, 378 (1st Cir 1974) (derivative).

[234] *In re Jiffy Lube Sec Litig*, [1989-1990 Transfer Binder] Fed Sec L Rep (CCH) ¶94,859 (D Md Jan 2, 1990) (securities). Although the fact of early settlement may, in some cases, tend to indicate collusion among the settling parties, other factors in this securities fraud action, including the overall extent of discovery and the qualifications of counsel, offset any inference of collusion based on the early posture of the litigation at the time of the proposed settlement.

[235] *Wellman v Dickinson*, 497 F Supp 824 (SDNY 1980), *affd*, 682 F2d 355 (2d Cir 1982) (securities); *Armstrong v Board of School Directors*, 471 F Supp 800 (ED Wis 1979), *affd*, 616 F2d 305, 325 (7th Cir 1980); *Cotton v Hinton*, 559 F2d 1326 (5th Cir 1977) (Title VII race); *Flinn v FMC Corp*, 528 F2d 1169 (4th Cir 1975), *cert denied*, 424 US 967 (1976) (Title VII sex).

16di-002042

Formerly cited as IL ST CH 14 ¶ 65

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 760. TRUSTS AND FIDUCIARIES
ACT 55. CHARITABLE TRUST ACT

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Current through end of the 2000 Regular Session of the 91st General Assembly

55/15. Duties of charitable trustees

§ 15. (a) Charitable trustees are subject to certain duties otherwise defined in Illinois statutes and case law, which include but are not limited to the following:

(1) To avoid "self-dealing" and conflicts of interest;

(2) To avoid wasting charitable assets;

(3) To avoid incurring penalties, fines, and unnecessary taxes;

(4) To adhere and conform the charitable organization to its charitable purpose;

(5) To not make non-program loans, gifts, or advances to any person, except as allowed by the General Not For Profit Corporation Act of 1986; [FN1]

(6) To utilize the trust in conformity with its purposes for the best interest of the beneficiaries;

(7) To timely file registration and financial reports required by this Act; and

(8) To comply and to cause the charitable organization to comply with this Act and, if incorporated, the General Not For Profit Corporation Act of 1986.

(b) Every person subject to this Act shall maintain accurate and detailed books and records at the principal office of the organization to provide the information required in this Act. All books and records shall be open for inspection at all reasonable times by the Attorney General or his authorized representative.

CREDIT(S)

1992 Main Volume

Laws 1961, p. 2094, § 15, added by P.A. 87-755, § 1, eff. Jan. 1, 1992.

FORMER REVISED STATUTES CITATION

1992 Main Volume

Formerly Ill.Rev.Stat.1991, ch. 14, ¶ 65.

[FN1] 805 ILCS 5/101.01.

<General Materials (GM) - References, Annotations, or Tables>

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WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 760. TRUSTS AND FIDUCIARIES
ACT 55. CHARITABLE TRUST ACT

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Current through end of the 2000 Regular Session of the 91st General Assembly

55/16. Misuse of charitable assets--Injunctive relief

§ 16. (a) Any person who, intentionally and in breach of fiduciary duty with malice, misuses charitable assets is subject to punitive damages in an appropriate amount upon a trial on the issue.

(b) Upon an application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of the trustees is sought, the Court shall exercise its discretion as the equities require and may, as part of the injunctive relief, and after a hearing where the trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest.

CREDIT(S)

1992 Main Volume

Laws 1961, p. 2094, § 16, added by P.A. 87-755, § 1, eff. Jan. 1, 1992.

FORMER REVISED STATUTES CITATION

1992 Main Volume

Formerly Ill.Rev.Stat.1991, ch. 14, ¶ 66.

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IL ST CH 760 § 55/16

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Formerly cited as IL ST CH 32 ¶ 108.05

WEST'S SMITH-HURD ILLINOIS COMPILED STATUTES ANNOTATED
CHAPTER 805. BUSINESS ORGANIZATIONS
NONPROFIT CORPORATIONS
ACT 105. GENERAL NOT FOR PROFIT CORPORATION ACT OF 1986
ARTICLE 8. DIRECTORS AND OFFICERS

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Current through end of the 2000 Regular Session of the 91st General Assembly

105/108.05. Board of directors

§ 108.05. Board of directors. (a) Each corporation shall have a board of directors, and except as provided in articles of incorporation or the bylaws, the affairs of the corporation shall be managed by or under the direction of the board of directors.

(b) The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this State or a member of the corporation unless the articles of incorporation or bylaws so prescribe. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

(c) Unless otherwise provided in the articles of incorporation or bylaws, the board of directors, by the affirmative vote of a majority of the directors then in office, shall have authority to establish reasonable compensation of all directors for services to the corporation as directors, officers or otherwise, notwithstanding the provisions of Section 108.60 of this Act.

(d) No director may act by proxy on any matter.

CREDIT(S)

1993 Main Volume

P.A. 84-1423, Art. 8, § 108.05, eff. Jan. 1, 1987. Amended by P.A. 87- 854, § 2, eff. May 8, 1992.

FORMER REVISED STATUTES CITATION

1993 Main Volume

Formerly Ill.Rev.Stat.1991, ch. 32, ¶ 108.05.

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

P.A. 87-854, in the subsection stating that each corporation shall have a board of directors, inserted the exception relating to the management of the affairs of a corporation.

Prior Laws:
Laws 1943, vol. 1, p. 481, § 17.
Ill.Rev.Stat.1985, ch. 32, ¶ 163a16.

LIBRARY REFERENCES

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properly be issued against them individually. Northwest Suburban Congregation Beth Judea, Inc. v. Rosen, App. 2 Dist.1982, 59 Ill.Dec. 751, 103 Ill.App.3d 1137, 432 N.E.2d 335.

805 I.L.C.S. 105/108.05

IL ST CH 805 § 105/108.05

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

EXHIBITS TO OBJECTIONS OF DEFENDANTS JUDITH TERRA, PAUL HAYES TUCKER, AND ALAN K. SIMPSON TO THE PROPOSED SETTLEMENT

July 19, 2001

16di-002061

EXHIBIT 1

16di-002062

EXHIBIT 1

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TERRA MUSUEM OF AMERICAN ART

BOARD OF DIRECTORS MEETING

April 25, 1990

By Daniel J. Terra

While this is an Annual Meeting of the Board of Terra Museum of American Art, i is my suggestion that, in addition to recent analyses, we try to assess the present circumstances in relation to the full period of the existence of the Museum, now ending its 10th year; seven of those years the Museum was in Evanston and the last three years in Chicago.

Before doing this, in order to acquaint Directors with as much historical perspective as possible, I would like to present events which eventually led to the opening of the Museum in Evanston, going back to the earliest collecting periods of Daniel and Adeline Terra.

The first phase covers the period when Daniel and Adeline were independent collectors. The first painting, an English landscape by Benjamin Leader, was purchased in May 1937 at Marshall Fields for $35.00. We were engaged at that time and were buying pieces of furniture for an apartment where we would live after our marriage which took place August 7, 1937. Adeline was an Art History Major at Northwestern University, then attended the Art Institute and had one of the finest "eyes for fine art" I have known.

16di-002063

Lawter was started just 50 years ago this month on April 1, 1940, and to [illegible] directors a brief early history of Lawter. It began to make progress after [illegible] and this made it possible for us to continue to expand the collection. During this period from 1945 until 1950, only English paintings were acquired - about 130 of them. From 1950 to 1955, we concentrated on old masters which DJT really, at that time, thought he liked best. Our means began to improve further and from 1955 to 1960 we went through the relatively short French Impressionist period, and acquired a collection which was housed in Kenilworth. The year 9[illegible] was a critical year in that Lawter went public that year and Adeline and Dan found American paintings through an invitation to dinner in New York where we saw a magnificant collection of American paintings in a home environment. Prior to that time, we had only noticed American paintings in museums. From that evening on, all the attention was on American Art. Gradually, we sold pr[illegible] the French Impressionist paintings to buy American Impressionist paintings. In retrospect, even financially, this was a good move. French Impressionist paintings had increased in value since we had acquired them and American paintings were available at extremely low prices. We continued selling as much as possible of the French paintings and the old masters, too, though some were retained at Adeline's insistence. She also would never agree to sell the English paintings. They were in her estate. I sold them in London in 1984, two years after her death to raise money for the new museum.

As we continued to buy American paintings, both Impressionist period and of the periods of the first three quarters of the nineteenth century, values of American paintings began to escalate at a slow, orderly rate. We continue buying starting in 1970 through 1975 when our improved financial circumstances

16di-002064

made it possible to acquire many of the fine masterpieces which are now in the collection. The funding of these acquisitions really was made possible because our means was improving rapidly because Lawter was doing well as a public Company and I personally sold stock of Lawter through five underwritings at multiples of 23 to 55 times earnings. These registrations were successful because of the guidance of two marvelously professional investment bankers. The first three were done by Winfield Ellis and the next two by Ronald Melvin, both with the then named firm - Blunt, Ellis & Simmons.

By 1975, we had accumulated quite a good collection of American paintings which since their acquisition had risen in value far more than we could have imagined. These paintings were not bought for profit but merely because we liked them. At this point, it was suggested by counsel that we examine our estates which were growing but losing liquidity. It was estimated that the worth of the paintings had become a very large portion of DJT's and to some degree ART's estate, as well.

This led us to examine the concept of orderly giving works of art to museums of American art or to colleges with American art collections, all located along the Eastern Seaboard. All of the American paintings were in DJT's estate and all the English paintings were in ART's estate. The thought was to start an orderly disposition of the paintings to the artistically logical recipients during our life time. During this time, there were twenty odd small musuems of American art, part of liberal arts colleges, along the East Coast and the two major American Museums, also on the East Coast, the Pennsylvania Academy in Philadelphia and the Whitney Museum in New York.

In 1977, a friend in New York suggested at lunch one day that we really had the where with all to start a small museum, an idea previously not thought of by us and added that there was not a museum of American Art within 400 miles of Chicago. This is how it all started. We acquired the Evanston property in 1978, refurbished it for use as a museum and we opened there in May of 1980 while DJT was full time National Finance Chairman for Ronald Reagan.

I went with then "Governor" Ronald Reagan's campaign starting in the summer o 1979 against the advice of some leading Republicans who did not think Governo Reagan had a chance. I do not wish to dwell on the political side of my experience, but merely wanted to mention it since all of these events took pl ce at about the same time.

Before the Museum opened in Evanston, we had met with Bob Strotz, then the President of Northwestern Univeristy, and told him the story of what we were about, proposed that the Museum and Northwestern University each put in $50,0C per year to hold a series of symposia of American Art. We had a sort of a "sixth sense" that a large University connection might be important to the museum, and this really turned out to be the case. The first symposia was hel at Northwestern, using primarily the Northwestern University mailing list, and we had over 1,000 people come in June, 1980, just a few weeks after the Museum opened. Subsequent symposia, addressed by the finest American Art scholars in the nation, became more and more successful. Using John Wilmerding, the foremost American Art authority from the National Gallery as our speaker, we filled Cahn auditorium with 1,300 people and turned several hundred away. To

16di-002066

this day, it was probably the only time, (I believe we have photos of this incident) that people were scalping tickets for an art lecture. Later, the following year, we had to move into much larger Northwestern quarters and at a peak meeting, we had 2,100 people come to hear Tom Armstrong, Director of the Whitney Museum which was, and still is, the ranking musuem of American art in the nation. The success of these jointly sponsored symposia continued to be successful until 1983 when the Administration at Northwestern was critized by faculty groups for a wide variety of projects, one of which was the arrangement the University had with the Museum. President Strotz had no choice but to bow out of the arrangement and from then on, it was not the same, although the meetings still drew 500 to 700 people, far more than any art lectures in the country. By 1984, despite a difficult location in Northwest Evanston, attendance and financial support was making headway and we were encouraged that interest in historical American art was growing in the Chicago Area and in the Middle West in general.

When thinking of a Chicago location, it was decided that North Michigan Avenue would be our best for visibility and attendance. The first property, the Southwest corner of Michigan and Erie, was acquired in late 1984 and the other three properties in the next block were acquired in 1985. As you all know, the original Southwest corner of Erie and Michigan was sold in 1988 to both raise cash and because a careful study had revealed that it could not be used in the future as part of the Museum because it was not in the same block as the other three properties. Further, the three properties in the same block, which were then and are still owned by the Museum, were considered to be adequate for any future needs of the Museum.

16di-002067

Now, we come to the part about which I believe you are more familiar although might be well to repeat things that have been reported to the Board after t opening of the Museum in April of 1987.

In 1986, we hired Michael Sanden, as the new Director of the Museum. Michael Sanden had been Director of the Oklahoma Art Museum in Oklahoma City He was given full responsibility for both the reconstruction and the new construction of the buildings and all other matters for opening a new Museum When looking at the record and the costs incurred during this period, we simply had to find someone else to run the Museum and asked Michael Sanden to resign and replaced him with the current Director in July of 1987.

The record attached herewith (Page 6A) shows the 6-year operating record of the Musuem which starts for the audited fiscals 1986 thru 1989 and projections to fiscal 1990 and a budget for 1991. After reaching a peak in fiscal 1988, we have, starting in fiscal 1989, experienced both a decline in support and a reduction of expenses. The largest attendance was achieved in fiscal 1988 (126,231) and began to decline substantially in 1989 (36,173). In fiscal 1990, a continuation of the decline in financial support is projected and a nominal increase in attendance. Attendance during fiscal 1990 will be about 52,000.

This analysis of the 6-year period including the budget for fiscal 1991, speak for itself. Had it not been for the infusion of funds from the Terra family and the profits from the sale of the SW corner building and the profit from First Illinois and Mercury Finance stock, the deficits during fiscal 1988 and fiscal

16di-002068

Terra Museum of American Art

NON-TERRA SUPPORT

em	1986	1987	1988	1989	Projected 1990	Budgeted 1991
gular Membership	$ 27,500	$ 25,306	$ 19,116	$ 9,607	$ 34,000	$ 113,000
staining Support	-0-	238,570	165,590	38,890	50,000	-0-
rporate Support	223,277	349,875	322,745	312,739	100,000	125,000
ndations	22,666	26,805	27,520	23,200	10,000	20,000
lividuals	4,092	437,762	619,422	463,460	210,000	250,000
issions	42,911	158,148	421,479	91,054	85,000	188,250
erest and Dividends	113,226	263,057	410,718	417,312	20,000	25,000
t	60,949	232,147	646,417	464,734	510,000	626,734
als	$ 494,621	$ 1,721,660	$2,663,007	$1,809,996	$1,019,000	$1,337,984

EXPENSES

enses	$1,269,308	$2,896,518	$4,596,672	$4,015,141	$3,400,000	$2,771,332
icits	$ (774,668)	$(1,174,858)	$(1,963,665)	$(2,205,145)	$(2,381,000)	$(1,433,348)

16di-002069

1989 would have been substantial. The budget for fiscal 1991, attached herewith, was prepared internally by Harold O'Connell and other Museum personnel. My own analysis of their 1991 budget is that it is overly optimist because, I believe the deficit will be in the $1.5 million range rather tha $1.2 million level shown.

How the Museum is going to be supported in the future while I am active and o it will be supported after I am gone have become a growing concern and should given proper attention at this meeting.

At this point, it might be well to analize the present book value of the Museum and its potential unrealized gains from its owned properties, namely its rea estate and its art, both of which have increased in value since they were acquired. The approximate book value of the Museum at this time is $50 million and current debt is about $2,000,000.

It seems reasonable to assume that the real estate has a current value of at least $20 million more than the present book value since we have had an unsolicited oral offer of $40 million and the paintings in the collection, wich were acquired primarily in the past three years, have a value of possibly $20 million greater than the book value on the Balance Sheet. This means, of course, that if one wants to think in terms of true market value, the book value could well be in the general range of $90 million.

16di-002070

An important part of the total picture that I believe Directors should be acquainted with is my own personal circumstances and I will try to outline, in general terms, an analysis of current worth.

(SEE PAGE 8A. -- To be passed out and retrived)

My present Will calls for a total of approximately $50 million of the total for my wife, son and grandson and other non-museum philanthropic projects. Based o values outlined above, the Museum would get the Daniel J. Terra collection and the remainder of the liquid portion less the $50 million outlined above.

Now that the Museum has been in existance at both locations for ten years, it seems to be a good time to take stock of the future prospects for this institution. The first item that seems bothersome is the amount of money that is tied up in this institution be it while I am alive or at my demise. If one were to assume that the Museum would have 60,000 visitors next year, the assets utilized would be in excess of$5,000 per visitor in fiscal 1991. Another factor with which we should be familiar is that the two major Museums of American Art, namely the Whitney Museum of American Art in New York with a budget of approximately $16 million, and the Pennsylvania Academy of Philadelphia (the oldest Museum of American Art, 1805) with a budget of about $11 million, are both having trouble making ends meet. The Whitney is running deficits three out of four years and has, for the past four years, had much publicized trouble raising funds for a needed addition at Madison Avenue. At the Pennsylvania

16di-002071

Academy in Philadelphia which comprises an important art school and a fine Museum of historical American art is having even greater financial problems as has, in recent years, been using up part of their endowments to make ends meet. This has given me cause for concern about the whole concept of a Museum of American art which, though tremendously important to our nation's future, might be reexamined from the standpoint of future viability.

Another factor that has become increasingly important in the past ten years has been the trend of younger Americans having less interest in historical American art and a great deal more interest in contemporary art, be it American or otherwise. We even see this trend in our own way on North Michigan Avenue. The shows which draw the best are modern and contemporary exhibitions. All of those factors, together with the fact that there will probably be a growing need for increasing the budget of the Museum and to improve its outreach and hence its interest and attendance.

Another problem is one of the difficulty a museum of this size and character has in attracting visiting/traveling exhibitions. It is a fact that the Art Institute of Chicago, a world class general museum, would always be the first choice of sponsors of American art exhibitions because of its greater constituency and reputation. In the contemporary area, the Museum of Contemporary Art, if it should some day solve its financial problems, would also give us stiff competition for exhibitions in the modern American field.

16di-002072

The questions seems to me that in light of this 6-year record and based upon t years of experience, is this, a good time to re-examine our goals and what, if any, might be alternative options.

These options come to mind.

Option #1: We could embark upon a campaign to raise a certain amount of money perhaps $20 million for an endowment. This might be very difficul particularly since there is not yet a well established constituenc and the hostility of the press has not helped our chances to achie such a goal.

Option #2: We could deaccession one or several of the important paintings owne by the Museum. The Mary Cassatt oil, "Summertime", is being considered at a net price to the Museum of $10 to $15 million. Thi is a decision that should probably be considered at this meeting. The deal would be private and we would try to avoid adverse publicity. Incidentally, the proceeds, if this could be consummated, would be 50% of the total amount paid by the Museum fo the fifty-nine paintings now owned by the Museum. We have not made a commitment to sell this painting, but it should be noted that an important expert, Warren Adelson, thinks it would bring a price in this range.

16di-002073

Option #3: DJT could, while alive, continue to make contributions to c[illegible] deficits. In the current fiscal year, this contribution would amount to about $2.2 million.

Option #4: Increase the budget by $300,000 in fiscal 1991 which would be [illegible] e to encourage the organization of important American exhibitions, grants to be given to historians from such a fund and approved [illegible] y small blue ribbon committee of renowned historians and professo s. The Terra Museum itself would not be given priority in the decisio process but the idea might be helpful.

Option #5: Sell the North Michigan Avenue real estate and move the Museum to the original Evanston location or to a new, centrally locate [illegible] s t The move back to Evanston would make available proceeds from the sale of the North Michigan Avenue real estate of perhaps $40 milli which would become ~~to~~ an endowment. The move to another central less visible and less valuable location would probably cost an estimated $30 million, leaving a potential endowment of $10 mill on

All the above options should be considered in light of the present circumstances, amounts to acceptance of an annual budget deficit f between $1.5 million and $2.5 million.

16di-002074

Option #6: Close the North Michigan Avenue Museum, sell the real estate and u
the foundation with assets in the $70 million range (assumes that
paintings owned by the Museum would be retained) for undergraduate
scholarships and graduate fellowships for American Art, help fund
much needed archives of American art, and support national and
international exhibitions of American art.

All these options should be considered in the context of future receipt of $20 to $50 million from DJT's estate.

Now, we would like to take up the subject of the French Project at Giverny, nea
Vernon.

This village is 50 miles from Paris and is one hour away by train, bus or car. It is the home of the now restored Monet Garden and his home converted to a Museum and the three ateliers which Monet built in the 39 years he lived and worked at Giverny. He was there from 1887 until he died in 1926.

The Monet complex was restored by Gerard and Florence VanderKamp, who had previously restored Versailles. American money was used in both cases. The Monet restoration was completed in 1983 at a cost of $21 million.

It is open from April 1st to October 31st (seven months) and last year drew 310,000 visitors from over one hundred countries around the world. This year, it is expected to draw in excess of 350,000 visitors or 50,000 per month.

16di-002075

In September 1986, 20 months before the opening of the Museum on Nort. Michi g Avenue, we had been advised by a Smithsonian scholar who had just been there that he saw them put up a "for sale" sign at the Perry House, ateliers and garden. Lilla Cabot Perry lived there with her husband and three children f o 1887 til 1899. She was a noteworthy American artist from Boston, although h r greatest achievements were that she played a strong hand in helping Monet plan his garden and was probably his closest American friend. Being socially prominent, and having been inspired by the great new French art movement called "Impressionism", she influenced some of her friends to buy these great works an today, 90% of the great French Impressionist paintings at the Art Institute (m to two major Chicago families thru Mrs. Perry's urging. The important French collection at the Museum of Fine Arts in Boston and the Philadelphia Museum a_s were brought to the States by friends who were influenced by Mrs. Perry ar i some cases, especially in Philadelphia, by Mary Cassatt.

The price was the equivalent of $135,000 for the house, the garden and the fo r ateliers where American artists worked for many years. It was an absolute bargain bought by the Museum and it was thought a small museum of American ar could be built on this three-quarter acre piece of land. The house and garden could be restored as a wonderful showcase of American art for the hundreds of thousands of people from all over the world, an excellent critical captive audience. The Perry property is contiguous to the Monet property. Its address is 82 rue Claude Monet.

16di-002076

The project was rejected for lack of parking, so the Museum later bought three acres of land across the street (some historians have written that Monet did hi 30 grain stack pictures in 1891 on this, now our Museum site. The Museum's present total investment in Giverny is $1,100,000.

In the three and one-half years since the purchase of the Perry property, we have had to combat one road block after another, until a new mayor, more sympathetic to the project, was elected. The Council of Giverny and the Mayor approved the project finally in December, 1989. The Department approved it in February, sent it tc Paris, and it was there approved a few days later by Jacque Lang, the Minister of Culture under Mitterand. Lang was reappointed in 1988 after losing out two years earlier. It is known that both Mitterand and Lang are quite enthusiastic about this project. They have both been there, as has Barbara Bush, who is also enthusiastic about the project, and who would like to come and help dedicate the finished product as she did the Museum on North Michigan. President Reagan and President Bush also know of the project.

DJT is slated to have meetings during May 2nd to May 6th with the French architect, Philippe Robert, who has developed a plan very much to everyone's liking. The building nestles into the hill, is half underground and is surrounded by shubbery and flowers as is the entire roof of the building. From a helicopter, it will seem as another beautiful Giverny garden.

I would like to show you some of the plans and drawings of this little masterpiece of a building.

16di-002077

(Explain.)

The cost is estimated at $8.75 million and DJT, under this plan, would contribute a total of $10 million (to allow for over-runs) in accordance with the following schedule as shown below and on Page 16. (If DJT should not survive its completion, provision will have been made to make the remaining needed funds available from the DJT estate.)

Contribution by Daniel J. Terra

for Giverny Museum

Date	Amount
March 1990	$ 100,000
April 1990	115,000
May 1990	115,000
June 1990	130,000
July 1990	240,000
August 1990	150,000
September 1990	160,000
October 1990	270,000
November 1990	180,000
December 1990	190,000

16di-002078

January 1991	$ 300,000
February 1991	210,000
March 1991	220,000
April 1991	330,000
May 1991	240,000
June 1991	250,000
July 1991	360,000
August 1991	270,000
September 1991	280,000
October 1991	390,000
November 1991	300,000
December 1991	310,000
January 1992	$ 420,000
February 1992	330,000
March 1992	340,000
April 1992	450,000
May 1992	360,000
June 1992	370,000
July 1992	480,000
August 1992	390,000
September 1992	400,000
October 1992	510,000
November 1992	420,000
December 1992	430,000

16di-002079

This museum will support itself from the day it opens.

It would not work except for the captive audience. There are about 110 paintings in the collection done by Americans in France. These are the nucle is of the French collection; of these, about 60 are in the DJT estate and about 50 are owned by the Museum.

The operating budget for this project is $800,000 per year including maintenance and security. Total annual revenue is estimated at $1,200,000 in the first ye r after paying a small percentage fee to the Village for extra costs incurred by virtue of the presence of the museum. In the first three years, any "profit" is taxable in France at regular corporate rates and the museum would pay real estate taxes to the Department. After three years, taxes to the French Government would no longer be required and the museum would become a non-ta, entity.

There has been tremendous effort to get this project going. All in the art world, both in the U.S. and abroad who learn of it, become excited about it.

We hope to have your questions on any phase of this entire report and hope that you will support this magnificent project in Giverny.

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16di-002081

EXHIBIT 2

EXHIBIT 2

KLEER-FAX
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Terra Foundation
Strategic Planning Committee
Minutes
August 7, 2000

In attendance:
Mr. Dean Buntrock
Dr. Stephanie Pace Marshall
Dr. Paul Tucker

By Phone: Mr. Ron Gidwitz, Chair
Mrs. Margaret Daley
Dr. Theodore Stebbins
Mrs. Judith Terra

Staff: Mr. Donald Ratner

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner
Dr. John Neff

The meeting was called to order at 10:10 AM on August 7, 2000. Mr. Ratner is to send out to each Board member the four proposals we received. These include:

- The Art Institute of Chicago
- The Corcoran
- Museum of Fine Arts (MFA) in Boston
- National Gallery

Dr. Tucker indicated that the purchase of today's meeting was therefore:

- To make sure we are all conceptually on the same page
- To move us along on the matrix/criteria for making decisions
- To have a construct within which to make decisions

Dr. Tucker revisited prior discussions with the Strategic Planning Committee and discussed the following:

- The cost of maintaining the Chicago museum
- The assets of the Chicago museum
- The importance of Giverny as central to the Foundation's educational mission.
- The need for an alliance because the lack of depth of the collection would not support two museums

TFA SP 01596
CONFIDENTIAL

- That there has been a clear consensus of the Strategic Planning Committee on the above points

Mr. Buntrock asked why Giverny is more of a focus in education than education in the U.S. There was consensus and agreement that education in the U.S. is as important as in Giverny.

Dr. Stebbins asked the question, "Does education follow the collection?". There was discussion and consensus that the art is the centerpiece.

Mr. Gidwitz asked, "What is the most efficacious way to promote/propagate the collection and/or Giverny in order to propagate American art. In other words how do we maximize/leverage the collection?

Mr. Lerner indicated that one way to leverage the collection is to have an "affiliate" institution. In exchange for the loan of the Terra Collection, they would mount a certain number of collections per year at Giverny. Mr. Lerner suggested that we would never want to give up the autonomy of Giverny or the collection. Mr. Gidwitz asked how we measure success in the propagation of American art. There was discussion that the affiliation should be with someone who could support a major American art showing in Giverny and also someone who could help "travel" the exhibit.

Dr. Tucker indicated that we need a partner with major clout both in the U.S. and abroad and, hopefully, one who also has a history of doing this. Dr. Stebbins indicated that we should probably look for an institution deeply interested in education.

Mr. Gidwitz suggested that we should probably look for an institution that has mechanisms set up that we could "piggyback" on without having to recreate the wheel.

Dr. Tucker said that this would probably include exhibitions, a web-site, educational programs, etc., but that it is unlikely that any one institution could do everything we want them to do in education. Therefore, this would give us the ability to remain somewhat independent.

Dr. Marshall suggested what we needed to decide with everyone at the table. She suggested that in order to move forward expeditiously, we should have a sufficient conversation to be able to draft the contract criteria and to be able to respond to Mr. Gidwitz's question, "what does success look like?". Discussion ensued and indicated that the criteria would be the following:

- Propagating American art
- Showcasing art

TFA SP 01597
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- Showcasing Giverny

Mr. Hearwole suggested that the Board needs to be consistent and have a clear vision statement of what they want the Foundation to be. He then asked what the assets of the Foundation were.

Dr. Tucker responded that the assets included the following:

- Good Collection
- Significant financial assets not related to the collection
- Real Estate
- Board connectiveness and Board intelligence
- Excellent staff

Dr. Stebbins noted that if we decided to concentrate on only one of our museum locations, we do have an adequate collection and have adequate financial assets.

Dr. Tucker replied that he wouldn't want Giverny to be isolated and, therefore, since Giverny is the center focus, we needed a partner to help to Giverny.

Discussion then arose about where the center of education should be set; whether it should be in Giverny or in the U.S.

Dr. Marshall noted that aligning with an art museum does not negate aligning with an educational institution in addition.

Dr. Tucker restated that Giverny is central, that we can not stand alone with our collection, that we need to be part of an alliance for institutional stature, and therefore, the Foundation needs to be in a partnership to achieve this. He also indicated that we want Giverny to be "an arts center". Dr. Tucker suggested that we need an analysis of costs of "small learning centers". He asked that we do a comparative cost study with other centers including The American Academy, Yaddo, and Skowhegan. He envisions that we would have a learning center for approximately ten people at one time. He than asked if such a learning center plus our exhibits might maximize the propagation of American art.

Mrs. Daley indicated we need to stop reacting and need to decide at the September meeting which direction to go. Mr. Gidwitz reiterated that the purpose of our focus was to propagate American Art through leveraging of the collection.

Dr. Marshall suggested we need to hone down our decision categories and decide what would be the "non negotiables".

Dr. Tucker suggested that certainly there would be cost issues. Mr. Lerner suggested that we need to decide what we want and then we can figure out how to get it. Discussion ensued and included that what we want is support of American art, support of Giverny and name recognition.
A question was asked what the impact of adding our collection to the other museums would be. Response was as follows:

Museum	Effect Would Be
The Met	The Best
The Corcoran	Equal to the Met, MFA, National Gallery
MFA	The Best
Art Institute	Respectable
National Gallery	The Best

Note that the three museums, the Met, the MFA and the National Gallery are all at the forefront of American Art and that, with the addition of the Terra collection, any one would clearly have "the Best" collection.

It was then asked what institution would help us have most accessibility to the whole country. It was discussed that optimizing our collection is really a very important thing.

Mr. Gidwitz asked if we should take Philadelphia off the list (that was agreed to) and the National Gallery off the list (hat was not agreed to).

To summarize the issues and try to determine what was negotiable versus non-negotiable, the current positions are as follows:

NON-NEGOTIABLE

- Support for the expanded vision of Giverny
- Propagate American art through:
  - Exhibitions
  - Education
- Preserve/enhance the Terra name
- Retain control of principle of the Endowment Fund
  - A1
  - B2
  - D4

OTHER ITEMS (Negotiable)

- Collection should stay as a collection
- The arrangement will probably have to be revenue neutral for both institutions

Dr. Marshall indicated that we needed to move into the detail and the criteria.

Mr. Ratner was then given the assignment of gathering the detail information for the proposing museums. Mr. Lerner reiterated that we were not going to be stand alone in Chicago, that we need to support American art and that we want to support Giverny. Dr. Tucker indicated that he would send out the conclusions that appeared to be drawn from this meeting with the four proposals and the relevant material.

A poll was then taken of the members as to whether we should be a stand-alone museum in Chicago. All voted no except for Mr. Dean Bumrock who said we should be stand alone in Chicago.

The next step will be that Mr. Ratner will send out the packages to the entire Board of the proposals and criteria as well as the data collected from the four museums. Mr. Lerner will put a draft together of a "proposed contract". Dr. Tucker should be in touch with all four "suitors" to keep the door open and will tell Philadelphia that we are not interested.

Mr. Bumrock indicated that we need to focus on our educational needs.

In September after a full day of a Strategic Planning meeting, we hope to present a preferred institution. At that time, we hope that they will be able to make a Board decision to authorize Dr. Tucker to negotiate.

We'll schedule one more meeting of this committee before September and at that time all members of the Board will be invited to participate. Dr. Marshall suggested that we call this a regular Board meeting with one agenda item.

The meeting was adjourned at 2:00pm.

Respectively submitted,

_____
Donald H. Ratner
Vice President Finance & Administration

16di-002089

EXHIBIT 3

EXHIBIT 3

WEBER-MX RECYCLED
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30% P.C.W.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

VERIFIED COMPLAINT
FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of Terra Foundation for the Arts, an Illinois not-for-profit corporation, for their Complaint against the Defendants, state as follows:

Nature of this Action

1 This is an action for declaratory, injunctive and other relief seeking to enjoin defendants' illegal and wasteful conduct in connection with the management and operations of Terra Foundation for the Arts, an Illinois not-for-profit corporation ("Terra Foundation").

2 In this action Plaintiffs seek to enjoin defendants from (1) holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws; (2) taking any action

to elect or remove any member of the Board of Directors or changing any committee assignm

(3) taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and (4) taking any other action contrary to the by-laws of the Terra Foundation or defendants' fiduciary duties as directors of an Illinois Not For Profit Corporation.

The Parties

3 Plaintiff Buntrock is a resident of DuPage County, Illinois, a prominent businessperson, and a benefactor of the arts. Since 1998, Buntrock has served as a director and officer of Terra Foundation. He presently serves as Terra Foundation's treasurer, is chairman of its finance and investment committee, and is a member of its Executive Committee.

4 Plaintiff Gidwitz is a resident of Chicago, Cook County, Illinois, a former CEO of Helene Curtis Corporation, and a benefactor of the arts. Since 1982, Gidwitz has served as a director and officer of Terra Foundation. He presently serves as chairman of Terra Foundation's strategic planning committee and is a member of its Executive Committee.

5 Defendant Paul Hayes Tucker ("Mr. Tucker") is a resident of Massachusetts. Mr. Tucker is a director, chairman and president of Terra Foundation and is a member of its Executive Committee.

6 Defendant Judith Terra is a resident of Washington, D.C. Judith Terra is a director and vice chairman of Terra Foundation, and is a member of its Executive Committee.

7 Defendant Senator Alan K. Simpson is a resident of Wyoming and a former United States senator from that state. Sen. Simpson is a director of Terra Foundation and a member of its finance and investment committee.

8 Defendant Naftali Michaeli ("Mr. Michaeli") is an Israeli citizen and a resident of Washington, D.C. Mr. Michaeli is a close personal friend of Judith Terra, and has no official position with Terra Foundation.

9 Defendant Terra Foundation is an Illinois not-for-profit charitable corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit collections of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate museums in Chicago and France.

10 Because of Dan Terra's extraordinarily generous gifts to Terra Foundation in his lifetime, and his bequest to Terra Foundation of most of his estate, Terra Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art.

11 Terra Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Ave., Chicago, Illinois.

12 Terra Foundation currently has eleven directors, the maximum number allowed under the by-laws of Terra Foundation. The Board includes Margaret Daley, a well-known benefactor of education and the arts and the wife of Mayor Richard M. Daley, and Arthur A. Hartman, the former United States Ambassador to France. The Board also includes Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Catherine A. Stevens, the wife of United States Senator Ted Stevens, was the Executive Director of Terra Foundation from August of 1996 through April, 2000 until terminated by Tucker.

Creation of Terra Foundation

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13 Dan Terra established Terra Foundation in December 1978 under the Illinois General Not For Profit Corporation Act. It was Dan Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art. As set forth in the original Articles of Incorporation, the purpose of Terra Foundation was:

> to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions.

(See Articles of Incorporation, attached hereto as Exhibit 1).

14 To ensure that the primary mission and purpose of Terra Foundation was carried out, the Terra Museum was opened in 1982 in Evanston, Illinois. In 1987, the Museum relocated to 66 N. Michigan Avenue, Chicago, Illinois, and remains at that location until today.

15 Throughout the 1980s and early to mid-1990s, Dan Terra contributed cash, stock and art for the continued growth and viability of the Terra Foundation and the Terra Museum in Chicago. To ensure that his contributions would further the goals and mission of Terra Foundation for the benefit of the public, Dan Terra created two restricted endowments, the "B2 Endowment," restricted to the acquisition of art for Terra Foundation, and the D4 Endowment restricted to education endeavors relating to American art.

16 In the early 1990s, Terra Foundation constructed and developed the Musee d'Art Americain Giverny ("Giverny Museum"), an art museum in Giverny, France dedicated to the exhibition of American art and American art education.

17 Primarily because of Dan Terra's gifts and bequests, the value of Terra Foundation has grown substantially since its creation. Currently, Terra Foundation holds net assets worth approximately $450 million. The value of the art alone located at the Terra Museum in Chicago exceeds $100 million, with the overall value of Terra's Foundation's art collection exceeding $173 million.

18 Pursuant to its by-laws, the Board of Directors of Terra Foundation is required to hold an annual meeting during the month of September of each year for the purpose of electing directors and officers and for the transacting of other business. If the election of the directors and officers is not held at such meeting, the Board of Directors may cause the election to be held at a meeting of the Board of Directors as soon thereafter as may be convenient. The Board of Directors may only elect officers and directors by a majority vote.

19 In periods of time between the quarterly Board of Director Meetings, the by-laws provide that as Terra Foundation's Executive Committee has the authority to take action on behalf of Terra Foundation, except on specific issues delegated to the Board of Directors pursuant to the Illinois General Not For Profit Corporation Act. Since October, 1999, Terra Foundation's Executive Committee has consisted of plaintiffs Buntrock and Gidwitz, defendants Edith Terra and Mr. Tucker, and director Stephanie Marshall.

Dan Terra's Dedication To Chicago

20 Dan Terra was a successful entrepreneur and businessman who resided predomin in the Chicago area. A large portion of his wealth enured through investments in companies locatec in and around Chicago. As result, Dan Terra made the decision to start the Terra Foundation with the intent to benefit of the citizens of Illinois and the Chicago area. Terra Foundation became Terra's principal charitable endeavor.

21 Dan Terra described his decision to establish Terra Foundation in Illinois and to open Terra Museum in the Chicago area for the people of Illinois as follows:

> [W]hat's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do.

(See Grace Glueck, *American-Art Museum Opening in Chicago*, N.Y. Times, April 19, 1987 at B14, attached hereto as Exhibit 2). On many occasions, Dan Terra articulated his intent to benefit the people of Illinois through the creation of Terra Foundation in Illinois and the opening of Terra Museum as " major institution in Chicago." (See, e.g., Dodie Kazanjian, *Daniel J. Terra, America's First Ambassador-at-large for Cultural Affairs Pursues the Best in American Painting for His New Museum in Chicago*, House & Garden, May 1987, at 52, attached hereto as Exhibit 3).

22 Shortly after the creation of Terra Foundation, Dan Terra's first wife, Adeline died. In 1986, Dan Terra married Judith Terra. Judith Terra acknowledged in a prenuptial agreement that she fully understood that the bulk of Dan Terra's estate would go to the Terra Foundation, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the prenuptial agreement. Under the prenuptial agreement, Judith Terra agreed she would receive only a fixed amount of money and assets upon Dan Terra's death. Judith Terra became a member of the Board of Directors of Terra Foundation.

23 On information and belief, after Judith Terra became a member of the Board of Directors of Terra Foundation, she suggested to Dan Terra that the Terra Museum be closed and Terra Foundation be moved out of Chicago. This was never done during Dan Terra's lifetime.

Terra's Death And The Will Contest

24 On June 28, 1996, Dan Terra died after suffering a stroke. As the sole residuary beneficiary under his will, Terra Foundation was to receive $125 million.

25 As the first step in a plan to seize control of Terra Foundation, Judith Terra immediately attempted to transfer Dan Terra's probate proceedings from the Circuit Court of Cook County to Washington, D.C. After a five-day trial, the Chief Judge of the Probate Division denied the motion to transfer, finding that the motion was without merit in law or fact.

26 Judith Terra next embarked on a scheme to seize tens of millions of dollars that Dan Terra intended for Terra Foundation.

27 Under the prenuptial agreement between Dan Terra and Judith Terra, Judith Terra was to receive $4.5 million in cash plus approximately $2.6 million in other assets, for a total of $7.1 million.

28 Contrary to her promise in the prenuptial agreement, after Dan's death, Judith Terra immediately filed an action challenging the prenuptial agreement and contesting Dan Terra's will. Judith Terra sought for herself $43 million of the $125 million bequest to Terra Foundation.

29 Judith Terra's attempt to seize $43 million of Dan Terra's bequest to Terra Foundation put her in irreconcilable conflict with the interests of Terra Foundation and, therefore, with the people of the State of Illinois as the beneficiaries of the charitable trust created by Dan

Terra. As a result, Judith Terra was forced to take a leave of absence as a director of T a Foundation.

30 The Terra Foundation hired Tyrone Fahner, former Attorney General of Illinois, an Howard McCue III of Mayer, Brown & Platt as special counsel with respect to Judith Terra's attempt to seize the $43 million bequest. Both Terra Foundation's special counsel and the counsel for Dan Terra's estate found that Judith Terra's claims lacked substantial merit. However, to avoi protracted litigation, the estate and Terra Foundation entered into a settlement with Judith Terr whereby she received approximately $1 million more than she was entitled to under the prenuptial agreement. This allowed Terra Foundation to receive virtually all of Dan Terra's $125 million bequest as intended under Dan Terra's will.

Mismanagement of Terra Museum After Dan Terra's Death

31 Following the settlement of her claims against the Dan Terra's Estate, Judith Terra sought reinstatement to her position as director of Terra Foundation. Thereafter, changes were made within Terra Foundation and the Museum that were contrary to the best interests of Terra Foundation and therefore contrary to the public interest that was intended to benefit from Terra Foundation.

32 Beginning in mid-1998, Judith Terra launched a scheme to gain control of Terra Foundation to carry out her own agenda of closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C. Judith Terra owns a home in Washington, D.C. and desires to move the Foundation there to obtain a prominent place in the social circles of Washington, D.C. Judith Terra believes that if she is able to move a foundation as large as Terra Foundation to

16di-002098

Washington, D.C., she would be able to establish herself in Washington, D.C. as a large benefactor of the arts, thereby placing herself in the elite social circles of Washington, D.C.

33 To accomplish her scheme of seizing control of Terra Foundation, Judith Terra began stacking Terra Foundation's Board with persons loyal to her alone. For example, Judith Terra recommended and sought the election of her friend Sen. Simpson to the Board. Sen. Simpson became a director in mid-1999. At his first Board of Directors meeting in October 1999, Sen. Simpson announced to the Board that his purpose for being on Terra Foundation's Board of Directors was "to protect Mrs. Terra's interests."

34 Prior to October 1999, Judith Terra orchestrated a plan to replace Arthur Hartman as Terra Foundation's president and chairman with her loyalist, Mr. Tucker. Although Terra Foundation had been searching for a new president for more than two years from outside the Board of Directors, Judith Terra and her new allies on the Board replaced Arthur Hartman as president and chairman with Mr. Tucker. As was later discovered, the decision to place Mr. Tucker in the position of president and chairman was made to further Judith Terra's attempt to gain control of Terra Foundation and to further her own agenda contrary to the mission and intent of Dan Terra in creating Terra Foundation.

35 Mr. Tucker and Judith Terra further entrenched their power through the hiring of Donald Ratner and the unauthorized expansion of his authority within Terra Foundation. Mr. Ratner was originally retained as a consultant to the Foundation on an interim basis. During the January 25, 2000 meeting of the Board of Directors a motion was made to give Mr. Ratner the title of vice president of finance and administration. The Board members present at the meeting voted in favor of the motion. However, because not all Board Members were present, the motion was made subject

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to the ratification by each of the absent Board members. In a subsequent poll of Board memb the motion failed to receive unanimous approval as required by the vote at the January 25, 2000 meeting. Nonetheless, pursuant to Mr. Tucker's dictate, Mr. Ratner has continued to serve as a purported officer of Terra Foundation, and has taken direction from Board members loyal to Judith Terra.

36 Judith Terra also furthered her scheme to gain control of Terra Foundation by causing the removal of the attorneys that had counseled and represented Terra Foundation since its inception. In 1982, Dan Terra asked James Collins, an attorney at the law firm of Bell, Boyd & Lloyd, to act as both general counsel and an officer of Terra Foundation. Collins served in the capacity of general counsel and secretary of Terra Foundation from 1978 until his removal in October 1999. He also served as treasurer from August 1996 through October 1999. During this time, Collins had represented the interests of Terra Foundation through many difficult issues, including Judith Terra's attempt to confiscate $43 million of Dan Terra's bequest to Terra Foundation.

37 Defendants next forced the resignation of Terra Foundation's special counsel, Ty Fahner and Howard McCue III of Mayer, Brown & Platt. Terra Foundation hired Mayer, Brown & Platt as special counsel when Judith Terra sued Dan Terra's estate for the $43 million residual bequest to Terra Foundation. Mayer, Brown & Platt also represented Terra Foundation in connection with its interests in the now defunct Mercury Finance Company.

38 Specifically, on or about August 11, 2000, Mr. Ratner, acting in his *ultra vires* capacity at the direction of defendants, told Mayer, Brown & Platt that Terra Foundation would not pay its fees for any time incurred in dealing with or responding to any issues not specifically requested by either Mr. Tucker or Mr. Ratner. Mayer, Brown & Platt rejected this arrangement

recognizing that it would be contrary to its duties and obligations as special counsel to Terra Foundation and its directors. In resigning its position as special counsel to Terra Foundation, Mayer, Brown & Platt stated in a letter to Mr. Tucker:

> In our original engagement letter of December 11, 1996, sent by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all of its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

(Emphasis added) (See August 18, 2000 Letter, attached hereto as Exhibit 4).

39 In furtherance of her plan to seize control of Terra Foundation, Judith Terra, Mr. Tucker and Sen. Simpson have ignored the requirements of Terra Foundation's by-laws regarding management of Terra Foundation. Article III, Section 11 of the by-laws provides that the executive committee is to operate Terra Foundation between the quarterly Board of Director meetings. (See By-laws of Terra Foundation, attached hereto as Exhibit 5, at Article IV, Section 9). With few exceptions relating to bringing in new counsel for Terra Foundation, issues were not brought before the executive committee. By not having meetings of the executive committee, Judith Terra, Mr. Tucker, Sen. Simpson were able to control the operations of Terra Foundation for their own benefit, contrary to the provisions of the by-laws.

40 Judith Terra, Mr. Tucker, Sen. Simpson have also consulted with and taken advice from Mr. Michaeli. Mr. Michaeli has been making decisions for Terra Foundation even though he is not an officer or director of Terra Foundation, or even an employee. Mr. Michaeli's only connection to Terra Museum is his relationship with Judith Terra.

41 Judith Terra also began treating the art collection of Terra Foundation as if it re her own personal property. Judith Terra ordered that art from the collection held by Terr Foundation be transported from the Giverny Museum to her personal residence. The curator of th Giverny Museum objected to any piece of the collection leaving the Giverny Museum. However at Judith Terra's direction, Mr. Tucker ordered the curator of the Giverny Museum to transport the art to Judith Terra's residence for her personal use.

42 Under the control of Judith Terra, Mr. Tucker, Sen. Simpson and Mr. Michael substantial waste and mismanagement has occurred which jeopardizes the continued viability of Terra Museum. This waste and mismanagement includes, but is not limited to, the following:

a. Grossly mismanaging Terra Museum in a manner that has resulted in the los or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

b. Causing the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, anc jeopardizing the security of the $100 million of art displayed and collected at Terra Museum;

c. Permitting a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information anc belief, representing the interests of private clients at the same auction;

d. Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

e. Attempting to invade the D4 Endowment restricted to educational purposes for the unauthorized purpose of acquiring art;

f. Bypassing the lawfully elected Executive Committee operating Terra Foundation and Terra Museum;

g. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel;

h. Misusing the art collection of Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

i. Allowing Mr. Michaeli to participate the management, control and operation of Terra Foundation and Terra Museum.

43 Members of the Board of Directors have repeatedly questioned the manner in which Mr. Tucker, Judith Terra and Sen. Simpson have been operating Terra Foundation in the past year. For example, on March 2, 2000, Margaret Daley wrote to John Neff, Director of Terra Museum, regarding the significant problem occurring at Terra Museum as a result of the high turnover of key employees. Specifically, Mrs. Daley stated:

> Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler. John, Ginny worked tirelessly on the School Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their herculean efforts, it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation. Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner. In my working with her on education issues, I believe she has always gone "above and beyond" her duties .... I couldn't leave without letting you and the Board know my feelings and deep concerns.

(See March 2, 2000 Letter, attached hereto as Exhibit 6).

44 Other members of the Board of Directors, including Buntrock, as well employees of both Terra Foundation and Terra Museum have repeatedly and vigorously challenged the manner and lack of direction in which Terra Foundation has been operated and managed under the direction of Mr. Tucker. (See Arthur A. Hartman letter dated November 7, 1999, attached hereto as Exhibit 7).

45 On information and belief, the pattern of mismanagement and waste occurring at Terra Museum is a conscious effort on the part of Judith Terra, Mr. Tucker and Sen. Simpson to cause the failure of Terra Museum in Chicago to justify closing Terra Museum in Chicago and

moving Terra Foundation from Chicago to Washington, D.C. for their own purposes and in u disregard for the people of Illinois intended to benefit from Dan Terra's museum and foundation.

Judith Terra's Plan To Move Terra Museum From Chicago To Washington

46 Despite the fact that Terra during his life had rejected any suggestion of moving Terra Museum from Chicago and therefore depriving the people of the State of Illinois of the charitable trust that he had created, Judith Terra has never abandoned her personal scheme to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. In the last year, after Mr. Tucker obtained the position of president and chairman, Judith Terra, Mr. Tucker and Mr. Michaeli have been actively seeking to close Terra Museum in Chicago.

47 To this end, and in breach of their fiduciary duties to Terra Foundation and the people of Illinois, Judith Terra and Mr. Tucker have engaged in negotiations relating to a merger - affiliation between Terra Foundation and The Corcoran Gallery of Art in Washington, D.C. ("the Corcoran"). As part of the proposed merger of affiliation, certain positions on the Board of The Corcoran would be filled by individuals on the Board of Directors of Terra Foundation. Also, the proposal provides that the president and chairman of Terra Foundation, Mr. Tucker, would assume the position of vice-chairman of The Corcoran.

48 The overall plan and method whereby Judith Terra and Mr. Tucker would secure their mission of obtaining prominent positions in Washington, D.C., in breach of their fiduciary duties to the people of Illinois, was clearly evidenced at the recent Board of Directors meeting held on August 24, 2000. There, Mr. Tucker made clear that it was his intention to close Terra Museum in Chicago. Mr. Tucker stated that under his thinking, there were potential problems with the

continued operation of the museum in Chicago. Mr. Tucker went to state clearly and unambiguously,

> the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

(Emphasis added) (See Minutes of August 24, 2000 Board of Directors Meeting, attached hereto as Exhibit 8, p. 2). In fact, many of the "problems" with the Chicago museum were of the defendants' own making.

49 Buntrock objected to Mr. Tucker's improper interpretation of the mission of Terra Foundation and stated that the closing of Terra Museum in Chicago had never been discussed or considered by the full Board of Directors. Mr. Tucker agreed that this critical issue had never been discussed by the full Board of Directors, but stated that a decision had already been reached to close Terra Museum in Chicago. According to Mr. Tucker, the Strategic Planning Committee was prepared to make a recommendation on this issue to the Board of Directors. Mr. Tucker stated that the Board of directors "definitely" must make a decision on the closing of the Chicago museum during the annual Board of Directors meeting in September 2000.

50 In conjunction with their overall plan, Judith Terra and Mr. Tucker have attempted to create the impression that Terra Museum in Chicago needs to be abandoned as a mission of Terra Foundation.

Defendants' Plan To Remove Buntrock
From Board Of Directors To Further Their Goals

51 Notice was mailed to the directors informing them that the annual Board of Directors meeting of Terra Foundation was scheduled for Tuesday, September 26, 2000 in France. Although various events and committee meetings were scheduled to occur between September 23, 2000 and

September 26, 2000, the annual meeting of the Board of Directors was scheduled for Septembe , 2000.

52 As set forth in the agenda for the annual Board meeting that was distributed to each Board member, the election of officers and directors for the upcoming year was to be held during the September 26, 2000 meeting. (See Agenda for September 26, 2000 Board of Directors Meeting, attached hereto as Exhibit 9). As set forth in the agenda, the elections were to occur and then the chairman of each committee would make a presentation to the Board. (Id.) As indicated in the agenda, Mr. Buntrock was scheduled to give a presentation to the Board as the chairman of the finance and investment committee immediately subsequent to the election of the directors and officers.

53 The defendants have now contrived a plan to ensure that the directors are elected with the exception of Buntrock. Defendants intend to see that Buntrock is not retained as a director in order to allow them to more easily accomplish their unlawful personal objective of closing the museum in Chicago and moving Terra Foundation to Washington, D.C. Buntrock has recognized defendants' efforts and has continued to question the Board's authority to move the charitable assets of the people of the State of Illinois to Washington, D.C. in contravention of the Board's fiduciary duties to the people of Illinois.

54 Plaintiffs have just recently learned of the defendants' improper plan to remove Mr. Buntrock from the Board of Directors. Subsequent to the dissemination of the agenda for the September 26, 2000 meeting of the Board of Directors, and only days prior to the directors leaving for France, Mr. Ratner was directed to send a letter to all directors, without any consultation, informing them that a 30-minute Board of Directors meeting was scheduled for September 24, 2000,

two days prior to the properly noticed and scheduled meeting of the Board of Directors. (*See* September 15, 2000 Letter, attached hereto as Exhibit 10). This improperly noticed meeting has been scheduled because defendants will not have a sufficient number of directors available on September 26, 2000 to remove Mr. Buntrock from the Board of Terra Foundation.

55 Defendants' attempt to hold the elections for directors and/or officers at a Special Meeting of the Board of Directors on September 24, 2000, is violative of the by-laws of Terra Foundation for at least two reasons. First, Ratner does not have the authority to provide notice of a meeting of the Board of Directors as he is not the secretary of Terra Foundation, nor is he even a duly elected officer or director. Pursuant to the by-laws of Terra Foundation, only the secretary of Terra Foundation is empowered to provide notices required under the by-laws. (Exhibit 5, Article IV, Section 9). Any attempt by Ratner to send notice of a meeting of the Board of Directors constitutes an *ultra vires* act.

56 Second, under the by-laws an election of the officers and directors may occur only at one of two occasions. First, the election may take place at the annual meeting of the Board of Directors. Second, if the election is not held at the scheduled annual meeting, a special meeting may be held subsequent to the annual meeting. (Id. at Article III, Section 3). The by-laws provide no authority for the holding of elections of officers or directors prior to the scheduled annual meeting. For this additional reason, defendants' attempt to hold the elections of directors and officers at the improperly noticed meeting on September 24, 2000 constitutes and *ultra vires* act, as well as a clear breach of their fiduciary duty to Terra Foundation and the people of Illinois.

57 Without relief from this Court, defendants will carry out their improper plan to ensure that Buntrock does not remain as a director and officer, to close the Terra Museum in Chicago and

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to undermine the effort of the other directors to ensure that fiduciary duties to the Terra Founda n, and its beneficiaries -- the people of the State of Illinois -- are followed. The Defendants' plan i motivated by their own self-interests and desires, and inconsistent with their fiduciary obligation as directors of a charitable trust intended to benefit the people of Illinois.

58 Moreover, if defendants are permitted to carry out their plan to remove Buntrock there is a real and serious danger that other members of the Board of Directors will resign thei positions thereby leaving the Terra Foundation in great jeopardy, and leaving the people of Illinoi without protection on the Board. Once Buntrock and other similar "obstructionist" directors are removed or resign, defendants will have no opposition to carrying out their plan of depriving the people of Illinois of the public trust created over twenty years ago by Dan Terra for their benefit

COUNT I
(Declaratory Relief)

59 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 58 of this Complaint as though fully set forth in this Paragraph 59.

60 By and through the creation Terra Foundation as a not-for-profit Illinois corporation, Dan Terra intended that a museum of American art be operated in the Chicago area to be held in trust for the benefit of the people of the State of Illinois.

61 At various times after the creation of Terra Foundation, Terra reaffirmed his mission of operating a museum in the Chicago area for the benefit of the people of Illinois through the collection of American art and the education generally of the public on the issue of American art.

62 The Board of Directors of Terra Foundation are the trustees of the charitable st created by Dan Terra responsible to the people of Illinois as the beneficiaries of the public trust.

63 As directors of Terra Foundation, plaintiffs Buntrock and Gidwitz, as well as many others, have donated their time, efforts and resources to accomplish the goals and mission started over twenty years ago by Terra.

64 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to protect Terra Foundation from waste and mismanagement caused by defendants.

65 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to see that Terra Foundation continues to carry out the mission for which it was started for the benefit of the people of Illinois.

66 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the Terra Foundation and the people of Illinois to protect the charitable assets of Terra Foundation and to act in their interests by furthering the charitable purpose and mission started by Terra more than twenty years ago.

67 Notwithstanding their fiduciary duties to the people of Illinois to further the charitable purpose and mission started by Dan Terra more than twenty years ago, Judith Terra, Sen. Simpson and Mr. Tucker used their positions as directors and/or officers of Terra Foundation to intentionally mismanage Terra Museum in Chicago to further their own self interests in closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C.

68 The foregoing improper conduct of Judith Terra, Sen. Simpson and Mr. Tucker has caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois as the beneficiaries of the public trust established for Terra Museum in Chicago as a unique center for American art.

69 Plaintiffs have no adequate remedy at law.

70 An actual controversy exists between the parties hereto concerning Terra Foundation's obligation and purpose to maintain a museum in the Chicago area for the benefit of the people of Illinois as originally intended by Dan Terra at the time of the creation of Terra Foundation.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation as a public trust for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Dan Terra in creating Terra Foundation was to operate the museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants are precluded from closing Terra Museum in Chicago and moving the Foundation to a location outside of the Chicago area;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of the Chicago area would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

B. A temporary, preliminary and permanent injunction enjoining defendants from closing Terra Museum in Chicago or transferring the museum or its art to Washington, D.C. or any other location outside of Illinois.

C. For such additional relief as the Court deems fair and just.

COUNT II
(Statutory *Ultra Vires Acts*)

71 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 70 of this Complaint as though fully set forth in this Paragraph 71.

72 The above acts and conduct of defendants have been taken without lawful authority, capacity, or power and will continue unless enjoined.

73 Section 103.15 of the General Not for Profit Corporation Act of 1986 allows this Court to enjoin defendants' unlawful acts.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

B. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

C. An accounting of all assets of the Terra Museum and Terra Foundation.

D. For such additional relief as the Court deems fair and just.

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COUNT III
(Breach of Fiduciary Duty)

74 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 73 of this Complaint as though fully set forth in this Paragraph 74.

75 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the people of Illinois to act in their interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago.

76 Defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust. Defendants improper conduct included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law;

d. Contrary to the by-laws of Terra Foundation, attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation.

77 The foregoing breaches of fiduciary duty of Judith Terra, Sen. Simpson and Mr. Tucker have caused, and will continue to cause, irreparable harm to Terra Foundation, i irreparable harm to the people of Illinois, as the beneficiaries of the public trust by endangering the

future of Terra Foundation and the continued viability of Terra Museum in Chicago as a unique center for American art.

78 Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Terra in creating Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art to Washington, D.C. or any other location outside of Illinois;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of Illinois would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Sen. Simpson and Mr. Tucker have breached their fiduciary duty to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties;

(7) Defendants have acted improperly and breached their fiduciary duties by seeking to defeat Mr. Buntrock's re-election as director in order to further their own agenda;

(8) The letter sent by Ratner to the members of the Board of Directors dated September 15, 2000 is a nullity and does not comply with the by-laws of Terra Foundation for scheduling a meeting of the Board of Directors for the election of directors and/or officers.

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B. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation o Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Director or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

C. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

D. An accounting of all assets of the Terra Museum and Terra Foundation.

E. For such additional relief as the Court deems fair and just.

COUNT IV
(Inducing A Breach of Fiduciary Duty)

79 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 78 of this Complaint as though fully set forth in this Paragraph 79.

80 As set forth more fully above, defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust established by Dan Terra. Defendants improper conduct included, but is not limited to, the following acts:

a. Intentionally mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

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b. Seeking to close Terra Museum in Chicago and transfer or re-establish the museum to Washington, D.C. or some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois;

d. Attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation

81 Defendant Mr. Michaeli colluded with Judith Terra, Sen. Simpson and Mr. Tucker in committing breaches of fiduciary duty, or otherwise induced or participated in their breaches of duty to Terra Foundation and the people of Illinois as the various ways, including, but not limited to the following:

a. Knowingly providing advice to Judith Terra, Mr. Tucker and Sen. Simpson that was contrary to the fiduciary duties owed by them as directors of Terra Foundation;

b. Acting with Judith Terra, Mr. Tucker and Sen. Simpson to make decisions for Terra Foundation in contravention of the by-laws of Terra Foundation;

c. Advising Judith Terra, Mr. Tucker and Sen. Simpson to take action relating to Terra Foundation that constituted waste and mismanagement in an attempt to justify the closure of Terra Museum in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

d. Colluding with or advising Judith Terra, Mr. Tucker and Sen. Simpson in the decision to replace Jim Collins and the law firm of Bell, Boyd & Lloyd in order to gain control over the operations of Terra Foundation for their own improper purpose in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

e. Colluding with, advising or participating in the plan to remove Mr. Buntrock from the Board of Directors in order to remove opposition to their plan to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

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82 The conduct of Mr. Michaeli has caused, and will continue to cause, damage to T -a Foundation and the people of Illinois. If the conduct of Mr. Michaeli is not stopped, the public trus created by Dan Terra may be destroyed to the detriment of the people of Illinois.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining Mr. Michaeli, his agents or assigns from colluding with, inducing or participating in any further breaches of fiduciar duty with Judith Terra, Sen. Simpson and Mr. Tucker.

B. An award of exemplary damages for Mr. Michaeli's intentional, deliberate, and ongoing inducement of Judith Terra's, Sen. Simpson's and Mr. Tucker's breaches of its fiduciary duties to Terra Foundation.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ, Directors of Terra Foundation of the Arts

By: _____
One of Their Attorneys

Dated: September 22, 2000

William R. Quinlan
James R. Carroll
Michael I Rothstein
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Firm ID No. 33745

VERIFICATION

DEAN L. BUNTROCK, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

BY: DEAN L. BUNTROCK

VERIFICATION

RONALD GIDWITZ, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

By: _____
RONALD GIDWITZ

TERRA FOUNDATION FOR THE ARTS

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: BOARD MEETING AGENDA :

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Telephone Conference

Wednesday, August 1, 2001

10:00 a.m.

Kellogg, Huber, Hansen, Todd & Evans, PLLC

1615 M Street, N.W.

Suite 400

Washington, D.C. 20036

In attendance: Judith Terra

Emily Murphy

Larry Levinson, Esq.

David Ross, Esq.

PROCEEDINGS

MS. TERRA: This is Judith.

MR. SIMPSON: How are you? Good morning.

MALE SPEAKER: We are waiting for about three people we are trying to get a hold of. We have some callers. We are waiting for Ted, Don.

MS. TERRA: That's fine, Don. I would like to make one comment as everybody is getting settled, and that is I do have present with me a court reporter who will be recording this discussion. And my attorneys from Verner, Liipfert and Kellogg, Huber.

MALE SPEAKER: Judith, I think that's inappropriate. This meeting is being recorded by the operator. Conference call operator and regular counsel. They have their counsel present and so I do not believe that it's appropriate for you to have your attorney present. Mr. Levinson asked to come to this meeting and was told he could not by me.

MS. TERRA: Okay. I will have the attorneys leave, but I will continue to have the meeting transcribed.

MALE SPEAKER: That's fine, Judith. That's no problem. Good morning, Dean.

MR. BUNTROCK: Good morning, Dean.

(Whereupon, the attorneys departed the conference room.)

MALE SPEAKER: Dr. Forster, I just want to apologize for the misspelling of your name in the agenda. I missed it when I was proofreading this thing so I hope you accept the apologies.

MS. FORSTER: I'm sorry. I haven't seen the agenda. I think this material was faxed to my office and I am at home.

MALE SPEAKER: It was Federal Expressed -- it was faxed yesterday.

MS. FORSTER: It came in after I left the building so I didn't know about it until this morning.

MALE SPEAKER: Is there a fax number at home where I can fax it to you?

MS. FORSTER: No. I'm sorry.

MALE SPEAKER: It was not Don's fault. I actually put the names in that section of the agenda and I missed it.

MS. FORSTER: It's quite all right.

MALE SPEAKER: Blame it on the lawyers.

MS. FORSTER: That is generous of you.

MR. FIELD: Kathy, this is Marshall Field. We are a part of the new crowd.

MS. FORSTER: All right. We are both catching up here.

MALE SPEAKER: What do we need for a quorum?

MALE SPEAKER: Did somebody come on?

THE OPERATOR: This is the conference operator. I am going to dial Helene Arhweiler. It will be just one moment.

MS. FORSTER: This is Kathy Forster here. I am wondering if anyone can send me this material by e-mail. I can print it out at home.

MALE SPEAKER: The attachments?

MALE SPEAKER: Kathy, we don't have the attachments on e-mail. I can tell you that. Give me your e-mail address.

MALE SPEAKER: I will call Diane.

MS. FORSTER: I will have to hang up and pull the document up and call in again because I only have one single telephone line for my modem. I am trying to catch Helene.

THE OPERATOR: This is the conference operator. A Madam Arhweiler will be joining you in one moment.

MS. FORSTER: Just give me the high sign when you have sent that off.

Helene, how are you? Bonjour.

MS. ARHWEILER: Bonjour.

MALE SPEAKER: Hi, Helene. How do you do?

MS. ARHWEILER: I am well.

MS. TERRA: Hi, Helene. This is Judith.

MS. ARHWEILER: Yes, hello.

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MS. DALEY: Hello. It's Maggie.
MS. ARHWEILER: I am waiting for a reply.
FEMALE SPEAKER: I am so sorry. They told me they faxed it to you.
MS. ARHWEILER: Okay. I shall find it.
MS. SIMPSON: Alan Simpson. How are you?
MS. ARHWEILER: How are you, Alan?
MR. SIMPSON: I am fine. Thank you.
FEMALE SPEAKER: We were unable to locate him from what I was told.
FEMALE SPEAKER: I am told that he was unable to be reached.
MS. ARHWEILER: You will not come.
FEMALE SPEAKER: Rich had to give a speech in California.
FEMALE SPEAKER: Okay. He confirmed that months ago. That letter should have gotten to you last week by fax. I'm sorry.
FEMALE SPEAKER: It is necessary for

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you --
FEMALE SPEAKER: I will be sure it gets to you today.
MS. ARHWEILER: Okay. Okay. Let me say that I haven't received the settlement. I just -- I just received the settlement in the hands of Paul, but I haven't received it, let's say, essentially efficiently. I haven't yet received the settlement agreement.
MR. FIELD: We will have to send you one. This is Marshall Field and I am one of the newcomers.
MALE SPEAKER: Helene, I don't think that Don had faxed it out to everybody, but we will be happy to do that for you so it can come directly.
MS. ARHWEILER: I am not in France. I have no faxes here where I am.
MS. FORSTER: Do you want us to send it to your place in Athens?
MS. ARHWEILER: No. I am in the islands now and it's quite impossible even to

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call you. I don't think I am able to still have this call for a long time.
MS. FORSTER: We understand, Helene.
MS. ARHWEILER: Anyhow, I am waiting. I know I must have all of the articles of the settlement but I don't know the expiration.
MS. FORSTER: We will make sure you get it. I am waiting. I am going to leave as soon as I know there is something for me to pick up.
MALE SPEAKER: Why don't you hang up and see if you get it?
MS. FORSTER: Okay. I will talk to you in a minute.
MALE SPEAKER: Hello. This is Fred again. We were disconnected.
MALE SPEAKER: Hello.
MS. ARHWEILER: Hello.
MS. DALEY: Don, it's Maggie.
MR. FIELD: Hi, Maggie. How are you? This is Marshall. We are waiting for Kathleen Forster to get an agenda. We sent it by e-mail.

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When she gets back on we will have almost everybody. The only one missing is Stephanie and she may be late.
FEMALE SPEAKER: Helene, how are you?
MS. ARHWEILER: Thank you. It's very cold where I am.
MALE SPEAKER: Helene, when will you be back in France?
MS. ARHWEILER: I shall be back in a few days, but only for one day. I have to go there for a seminar because it is a very bad situation and he will go special and I happen to be there for two days only. I mean the beginning of the next week.
MALE SPEAKER: Right. We will try to call you while you are there.
MS. ARHWEILER: You can call me also in the number you have here? I shall give you another number also, and you have my -- I shall give you my mobile number.
MALE SPEAKER: Okay.
MS. ARHWEILER: Just a moment because

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I don't know that by heart. But I shall give you my mobile and you will find me everywhere. Well, the mobile is the Greek mobile 0030937073596. With this mobile you can find me all over Europe.
MALE SPEAKER: Okay. Thank you.
MALE SPEAKER: Is Kathy on?
MALE SPEAKER: She is not going to be on the call. Absent are Professor Hamada, Jim Donnelley. Stephanie we are expecting. That should be shortly after 10:00.
MS. ARHWEILER: I don't think that Jack is in France. I think that he is --
MALE SPEAKER: We haven't been able to reach him so we have been calling and leaving messages. We have not been able to reach him at all.
MALE SPEAKER: I will call him when I am back in France.
MS. ARHWEILER: You can call me on this phone.
MALE SPEAKER: I will.
MS. ARHWEILER: You better. You will

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find me if I am not in Paris.
MS. FORSTER: This is Kathy Forster. It hasn't come so I decided it was wasting time and I got back on line.
MR. TUCKER: Thank you all. Before we begin this gathering tonight we want to make a statement that is to say that my presence at this meeting or this gathering along with that of Judith and Alan is especially and solely to object to the transaction of any business because this meeting has not been properly called and convened.
I ask that the record reflect that our presence today is not a waiver of our objection as is our right under the bylaws. Notice of this meeting was under the bylaws and at this time I would move that this group be adjourned for the reasons set forth in the letter of July 30, 2001, as well as for the reasons reflected in the complaint which was filed on July 1, 2001 to July 31 of 2001 to avoid adding to the significant problems that unfortunately already exist.

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I make a motion and ask for a second made.
MR. SIMPSON: This is Al Simpson. I will second the motion. I am here to object to the transaction of any business that the meeting was not lawfully called and convened and would second the motion for adjournment.
MS. TERRA: This is Judith, and I would add my response to the former two statements. I certainly am here solely to object to the transaction of any business at this meeting. The lawyers are no longer with me. But I did have them with me at the beginning because I am very concerned that issues exist regarding conflict of interest on the part of the attorneys for the foundation which have been raised but have not yet been resolved.
MR. STEBBINS: This is Ted. What was wrong with the notice of the meeting?
MALE SPEAKER: Don indicated as to who had actually called the meeting and it was regarding specifically the demand by the court

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vis-a-vis the settlement.
MS. TERRA: We have a motion, Paul.
MALE SPEAKER: Does Paul have legal assistance, sir?
MALE SPEAKER: No, I do not.
MALE SPEAKER: I think a motion to adjourn is undebatable.
MS. TERRA: That's correct.
MALE SPEAKER: Let's vote on that.
MALE SPEAKER: Do you have the --
MALE SPEAKER: I think we ought to take a vote under the motion that has been moved and seconded.
MALE SPEAKER: Okay. I vote no.
MALE SPEAKER: I vote no.
MR. BUNTROCK: I vote no.
MALE SPEAKER: Votes no.
MALE SPEAKER: Votes no.
MR. FIELD: Marshall Field votes no.
MALE VOICE: Votes no.
MS. TERRA: Judith Terra votes yes.
MR. SIMPSON: Alan Simpson votes yes.

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MS. FORSTER: This is Kathy Forster. I hope that I am allowed to abstain from this vote.
MALE SPEAKER: You are.
MALE SPEAKER: Is that everybody? I did not hear Dean.
MR. BUNTROCK: Yes. I voted no.
MALE SPEAKER: I voted no.
MS. TERRA: I would like to raise an objection to the proposed new board members being allowed to vote in this particular issue.
MALE SPEAKER: Who is speaking?
MS. TERRA: This is Judith.
MALE SPEAKER: It seems to me if you actively stated your objection then the business at hand is not for you to engage in.
MALE SPEAKER: There is a motion before the body that is undebatable and I think you ought to call the vote.
MALE SPEAKER: The motion was defeated by a vote of seven to three with one abstention and Helene apparently dropped off the line and we

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did not here her call.
MALE SPEAKER: Clearly if Paul and Judith and Alan are not going to participate in this meeting, we need to have another chairman for this meeting and I would like to nominate Dean.
MALE SPEAKER: I will step away and I will see you in another forum. Good-bye.
MALE SPEAKER: All right. I am to remain and I will not participate in a meeting, but I am not waiving any objections to the defects of the notice or my rights later on.
MS. TERRA: While this unlawful meeting continues I am going to also remain present for the meeting, although I will not participate in the meeting. But I am not going to waive my objections to the defects in the notice either.
MALE SPEAKER: Is there a second for my motion?
MALE SPEAKER: Second.
MR. FIELD: Second.

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MALE SPEAKER: Let's make sure that Marshall is seconded as well in case there is some argument with respect to Marshall.
All in favor? A discussion on the motion?
MALE SPEAKER: I'm sorry. You faded out. Could you repeat the motion?
MALE SPEAKER: My motion is for Dean to preside as president. Chairman Buntrock.
MALE SPEAKER: I seconded it.
MALE SPEAKER: I second it.
MALE SPEAKER: Discussion?
Call the vote.
MALE SPEAKER: I vote Aye.
MALE SPEAKER: Votes Aye.
MR. BUNTROCK: Dean Buntrock votes Aye.
FEMALE SPEAKER: Votes Aye.
MR. FIELD: Marshall Field Aye.
MR. STEBBINS: Ted Stebbins votes yes.
MS. FORSTER: Kathy Forster votes yes.
MALE SPEAKER: Votes yes.

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MALE SPEAKER: We have not been able to get back. Has anyone not voted? So that motion carried by my count eight to zero.
MALE SPEAKER: Congratulations, Dean.
MALE SPEAKER: With several people not voting.
MR. BUNTROCK: Okay. I will act as chairman to get the meeting started. I assume that we duly called it to order, and, Mark, do you need any further role call or has that been established?
MALE SPEAKER: We did a role call with people on the phone, but let me read what my record shows.
The meeting commenced with Alan Simpson, Marshall Field, Maggie Daley, Paul Tucker, Arthur Hartman, Fred Krehbiel, Kathy Forster, Judith Terra, Dean Buntrock, Helene Arhweiler and Ron Gidwitz all participating at the outset.
MALE SPEAKER: Thank you, Mark.
First of all, I would like to

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recognize the new directors and we all appreciate them coming on board and taking on this new challenge.

The first order of business will be to select a new chair for the foundation. I would like to make a motion that we elect Marshall Field to that position. Is there a second?

MALE SPEAKER: I second.

MALE SPEAKER: Dean, actually the first item on the agenda that sets out --

THE OPERATOR: Conference operator. I will try to get Madam Arhweiler back on the line.

MR. STEBBINS: Dean, the first item on the agenda was the removal of the existing officers. This is Ted Stebbins. I would like to move for the removal of the executive officers.

MR. HARTMAN: I second that.

MALE SPEAKER: Ted has made the motion. Arthur has seconded that.

Is there any discussion on the motion?

MALE SPEAKER: It's required under the consent order.

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All in favor signify by saying Aye.

SPEAKERS: Aye.

MALE SPEAKER: Are there any no's?

Motion is unanimously carried.

Thank you.

MALE SPEAKER: Dean, do we need to recognize, just for the sake of housekeeping, the new directors officially or are we satisfied that the votes will be before the mediation session as well as the vote that was taken that was signed by the judge is sufficient?

MALE SPEAKER: We can officially recognize those that are at the meeting and I guess those that are not. Jim Donnelley is not on the phone.

MALE SPEAKER: I am suggesting -- Mark, do we need another vote?

MALE SPEAKER: We have looked at this-- and we also talked to Billy Austin about their opinion. And we have both concluded that the resolution that was passed at the last board meeting was very clear that the new board members

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were elected effective as of the date the judge entered the court order. It was felt it was a self-propelling resolution. So we believe that the five new board members became board members on July 26 when the judge entered her order.

The same thing is true with respect to the amendments to the bylaws that were passed by those same resolutions which put in the modifications to those bylaws that were mandated under the settlement agreement. As of that same date were the effective bylaws and the decision under which we are attempting to offer. There is no need to reconfirm those actions in the judgment of either.

MALE SPEAKER: Okay.

MALE SPEAKER: Okay. Thank you. We can take up the next order of business to elect a new chairman.

MALE SPEAKER: I believe that would be the correct procedure, Dean.

MR. STEBBINS: Dean, I would like to nominate Marshall Field. This is Ted.

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MALE SPEAKER: I would like to second that motion.

MALE SPEAKER: Okay. Marshall Field has been nominated for the new position and it has been seconded by Arthur. We can take a vote on that.

All in favor of this motion signify by saying Aye.

SPEAKERS: Aye.

MALE SPEAKER: Are there any no's?

MALE SPEAKER: Okay, Dean. Before we take the vote let's ask if there are any other nominations for chairman. That's the protocol you would go through.

MR. BUNTROCK: Thank you. Thank you, Mark. Are there any other nominations for chairman?

MALE SPEAKER: If not, I think you can ask for the vote.

MR. BUNTROCK: Thank you, Mark.

We will take the vote for the position of chairman. Marshall Field has been nominated--

duly nominated -- and seconded. We will take a voice vote.
All in favor say Aye.
SPEAKERS: Aye.
MALE SPEAKER: Are there any no's?
That motion is carried.
Congratulations, Marshall. You are our new chairman and I will turn the meeting over to you.
MR. FIELD: Thank you, Dean. I thought I would just pick up where Dean left off and nominate some officers. And I think it would be wise to have a vice chairman and I would like to nominate Arthur Hartman to be my vice chairman if that is okay with him.
MALE SPEAKER: I would second the motion.
MALE SPEAKER: Fine with me.
MR. FIELD: Are there any discussions?
MALE SPEAKER: Second that.
MR. FIELD: And any discussion on that? I am assuming, Arthur, you are saying okay.

So let's have a vote.
All in favor?
SPEAKERS: Aye.
MR. FIELD: Anyone opposed?
Okay. At the moment until we know more where we are going we have a president and vice president -- or had -- and I think we should just leave that blank for now.
MALE SPEAKER: I would like to move that, Marshall, you carry both positions until we fill the office of president. If there is any discussion I would like to hear it. Otherwise, I would like to move that you also be elected to the office of president.
MALE SPEAKER: I second that.
MALE SPEAKER: Yes.
MR. FIELD: All right. I guess it's in the bylaws so we have to do something.
MALE SPEAKER: We need to have a president, yes.
MALE SPEAKER: I think you should assume that just the way -- that you have both

titles until we later fill that other position of president with a professional. You carry both titles.
MR. FIELD: All in favor.
SPEAKERS: Aye.
MR. FIELD: Anyone opposed to that?
Okay. Secretary.
MALE SPEAKER: Marshall, I would like to nominate Stephanie Marshall. Unfortunately Stephanie is not here.
MALE SPEAKER: I talked to her last night and she would accept that.
FEMALE SPEAKER: I second that.
MS. ARHWEILER: Okay. Okay.
MR. FIELD: All in favor?
SPEAKERS: Aye.
MR. FIELD: Anyone opposed?
All right.
Now treasurer. And I would like to nominate Jim Donnelley for chairman if the chairman is allowed to do that.
MR. BUNTROCK: I will second that.

MR. FIELD: Any discussion on that?
I know that Jim has been talking so I would like to call a vote.
All in favor?
SPEAKERS: Aye.
MR. FIELD: Any opposed?
Anybody have anything else they would like to add about the slate of officers before I move on? Okay.
Our next job is to vote for new committee heads.
MR. STEBBINS: Marshall, I would like to suggest that you be head of the executive committee. This is Ted.
MR. FIELD: All right.
MALE SPEAKER: I second that.
MR. FIELD: Any discussion?
MALE SPEAKER: Yes. Actually, if I may break in. Under the terms of the judge's order, the officers of the corporation and the committee heads of the corporation are automatically members of the executive committee.

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So with that in mind the officers that we just elected consisting of Marshall Field, Stephanie Marshall and Jim Donnelley and Arthur Hartman will be on the executive committee.
MALE SPEAKER: Right.
MALE SPEAKER: And I don't know how large -- the consideration I am raising to you -- how large your executive committee should be to be a workable group size, and that plays into, I think, to a certain extent the people that are put in as a chairperson or committee heads for various committees. I don't have any recommendations. I just wanted people to be aware of that aspect of the judge's order.
MALE SPEAKER: Is that pretty consistent?
MALE SPEAKER: I think that's right, Ron.
MALE SPEAKER: Mark, does the judge's order say anything about the chairman of the executive committee to which it should be?
MALE SPEAKER: I don't think that the

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judge's order says anything except we are to elect a committee head.
MALE SPEAKER: We need to elect somebody and I made a motion.
MALE SPEAKER: And I second it.
MALE SPEAKER: I believe that's correct. The resolution -- either the order nor the resolution dictates who the chair of the committee is. It has been the chairman of the board.
MALE SPEAKER: I think that's right.
MALE SPEAKER: We move that the chairman take --
MALE SPEAKER: Ted, we are trying to keep notes here. Did you move that Marshall be head of the executive committee?
MR. STEBBINS: Yes, I did.
MALE SPEAKER: And I seconded it.
MR. FIELD: All in favor?
SPEAKERS: Aye.
MALE SPEAKER: Opposed?
Okay. So ordered.

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Election committee we need a chairman.
MR. GIDWITZ: I would like to nominate Ted.
MR. HARTMAN: I will second that.
MR. FIELD: Chairman of the election committee. Anybody want to second that? Ron made the nomination. Arthur Hartman seconded.
Ted, will you do it?
MR. STEBBINS: I will be glad to.
MR. FIELD: Any discussion on that?
MR. STEBBINS: I will insist on excellent new members.
MR. FIELD: I think that --
FEMALE SPEAKER: I volunteer.
MR. FIELD: I think Ted -- I will ask when this is done the chairmen talk with whoever they want and at the next meeting make their proposal of who the members will be. We can fill it out. I will try to get another meeting called not too far out because I think we have a lot of business to do. And I'm not sure where all the court proceedings are, but until the court's

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final adjudication I believe we should run it as the present judge ordered. So if I can I will assist as chairman and then you will have to figure out what to do.
I will call a vote on Ted.
All in favor?
SPEAKERS: Aye.
MR. FIELD: All right.
Next is the education committee. Currently Maggie Daley was the chairman.
FEMALE SPEAKER: I think --
MALE SPEAKER: I can't hear you.
MS. DALEY: I was thinking about this. And we have a number of people who I know do a remarkable job, but I would suggest and I would like to nominate Bob Hamada. Bob has resigned from being the dean of the graduate school in Chicago and he has done a remarkable job, and I think he has a lot of time to give to this. Which I think this is what this chairmanship needs so I would like to nominate Bob.
MR. STEBBINS: This is Ted. It's a

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question whether he would have time to do -- do you think he has time to chair two committees?
MALE SPEAKER: I don't think he is a chairman.
MALE SPEAKER: I was going to nominate him as chair of the strategic planning committee. So it's a preliminary -- but I would like to ask whether you think he has time for both.
MS. DALEY: Well, I'm not sure about that. But I think one of the things we have all been talking about is thinking out of the box on this committee, and I think because of his experience in education he will come into it with a national and international thinking about the possibilities and bringing that to us. So I think it's -- he would be good.
MALE SPEAKER: I think he would be excellent, but we have other educators but I'm not sure if we have another strategic planner of his ability and experience.
MS. DALEY: I think we do.
MALE SPEAKER: I think if you want to

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go that route why don't we put it off? We will discuss the strategic planning committee and see where that comes back, and depending on that, we will choose on the education committee last.
MALE SPEAKER: Okay. Perfect.
MALE SPEAKER: Maggie, you may want to withdraw your motion and make it later.
MS. DALEY: All right. I withdraw.
MALE SPEAKER: Maggie has withdrawn the motion.
Marshall, you will step down?
MALE SPEAKER: I will step down from the finance and investment committee.
MALE SPEAKER: I would like to nominate Jim Donnelley.
MR. BUNTROCK: I will second that. This is Dean Buntrock.
MR. FIELD: All in favor?
SPEAKERS: Aye.
MR. FIELD: Opposed?
Okay. So ordered.
Strategic planning committee

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nominations. Anyone have a statement?
MALE SPEAKER: I would like to nominate Fred. You had a nomination for Bob Hamada.
MR. FIELD: Is there any -- Fred Krehbiel and Bob Hamada. Is there any discussion on this?
MR. KREHBIEL: This is Fred Krehbiel. I think Bob Hamada would be terrific. He is not there or Jim or Stephanie. He is treasurer. He should do it. I am kidding.
MR. FIELD: Fred, are you saying you would like to see Bob do it?
MR. KREHBIEL: Maggie, you were very nice to think of me, but I think Bob would be terrific.
MR. FIELD: All right. It appears we have one candidate and we need to have the second on Bob Hamada.
MALE SPEAKER: I second.
MR. FIELD: All in favor?
MALE SPEAKER: Who said second?

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MR. KREHBIEL: Fred Krehbiel.
MALE SPEAKER: Maggie, do you want to withdraw your nomination for Fred?
MS. DALEY: Sure.
MALE SPEAKER: All in favor?
SPEAKERS: Aye.
MR. FIELD: No opposition. All right. All right.
Now the question is we have down here -- excuse me. I forgot education. Bob is now running strategic planning.
MALE SPEAKER: Would Maggie agree to continue to do that temporarily to give it some continuity?
MS. DALEY: I would rather not. I think that what I would do is I will certainly help whoever and do what I can.
MALE SPEAKER: I would like to nominate Stephanie Marshall then for education committee.
Do you think she is willing to do it?
MALE SPEAKER: I do.

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MALE SPEAKER: Okay. I will second that.
MALE SPEAKER: I will second that. I think that's good.
MR. FIELD: All right. Then I will -- does anyone else have anything else they want to add? I will ask for all in favor?
SPEAKERS: Aye.
MR. FIELD: Anyone opposed to that?
Okay. On the agenda I was given is for additional directors on the committee.
MALE SPEAKER: That was an item new directors.
MALE SPEAKER: Marshall, why don't we suggest putting that off and give us an opportunity to express the various committee heads.
MR. FIELD: That will be greet.
MALE SPEAKER: Do you want to move that?
MALE SPEAKER: Second.
MR. FIELD: All in favor?

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SPEAKERS: Aye.
MR. FIELD: And, again, as I say, we are going to try to have another meeting in less than a month some time in August. Depending on what is going on.
MALE SPEAKER: Marshall, I know that it has been our past practice to have one meeting a year in Giverny, and you might want to give that some thought possibly for some subsequent meeting.
MR. FIELD: What I would like to do at a subsequent meeting -- I think it's a great idea. In keeping with the conversations I heard I don't think anyone at the moment is for killing Giverny. I would like to get a couple of meetings under our belt and get the final court business out of the way so when we go to France we are either with Paul's group, but we are not all in limbo. So I have that in mind. And my goal would be to have one meeting a year in Giverny, but I'm not sure we want to do it right off.

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MALE SPEAKER: That sounds very wise.
MALE SPEAKER: I think you should just get the staff to kind of find out when people are free so we can get tentative dates for that.
MR. FIELD: I will do that. I think what we have to do on that is to -- I think I will ask you to call around.
The other thing I want to bring up today -- because I am uncomfortable with it myself -- at least it is my understanding that the board here is paid a salary. And there may be some people -- call it what you want. There may be some people who feel they really need that. I would like between now and the next meeting to put that stipend on hold and have a discussion on it at our next meeting, but I know-- I for one don't want anything. I do think that we should probably pay people's direct expenses if it is things like flying to France, but I would like a discussion on the whole subject if that's all right with this group.
MALE SPEAKER: Fine with me.

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MR. FIELD: During the next week or two if people have issues they would like to get on the agenda I think we should just tell him.
MALE SPEAKER: Marshall, do we need to have -- you elected all the officers that would include an assistant treasurer and an assistant secretary.
MALE SPEAKER: Ron, I think you need an assistant secretary to help out.
MALE SPEAKER: I would like to make a motion that we appoint Don rather. Don, you are assistant treasurer?
MALE SPEAKER: No, I am not.
MALE SPEAKER: Ron, we didn't specifically unelect Don, but if you want to re-elect him.
MALE SPEAKER: I thought we elected the officers.
MALE SPEAKER: Only the specific ones on the agenda that were by name -- the board member officers -- but if you want to do that also that's fine.

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MR. FIELD: I think it is worth doing to show our support because of everything I hear he is doing a good job. I would be happy to keep him.

MALE SPEAKER: I will second.

MR. FIELD: All in favor?

SPEAKERS: Aye.

MALE SPEAKER: My only concern if someone checks is that we have somebody from the auditors in terms of a check and balance, so to speak, so you get with Mark to make sure we are protected.

MALE SPEAKER: They already looked at that.

MALE SPEAKER: I, for one, don't know what the system is for the moment. I would like to suggest we have the attorneys work with you to make sure we have an approved auditor to make sure that we have the appropriate checks and balances.

MALE SPEAKER: We have a letter which Stephanie has with -- at the media review and the

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company changed that and said they were comfortable with the checks and balances.

MALE SPEAKER: That's fine. I want to make sure that's consistent. That's all.

MALE SPEAKER: Mr. Chairman, did we elect a treasurer? Was Jim Donnelley elected treasurer?

MALE SPEAKER: Yes, he was.

MALE SPEAKER: As I understand, the motion that was made was to re-elect Don as assistant secretary. We have done that. The motion, as I understand it, was not to elect him to the additional position of the assistant treasurer. What I would like to do -- based on your comments -- is sit down with Don -- and if you recall at a prior meeting, I believe it was perhaps in the finance committee, the question of the appropriateness of having the finance administrative head also be the assistant treasurer was put to the auditors and they have responded to that. I would like to see their response about who should be assistant treasurer.

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MALE SPEAKER: That sounds fine. If we finish discussing this one.

MS. MARSHALL: Good morning. This is Stephanie. I am just joining the call.

MR. FIELD: It's Marshall Field. We elected new officers. You will be glad to know.

MS. MARSHALL: All right.

MR. FIELD: And Stephanie --

MALE SPEAKER: You were elected secretary and chairman of the education committee.

MS. MARSHALL: All right. I will accept both of those. Thank you.

MALE SPEAKER: Ron moved and Maggie seconded your election as secretary. And Dean moved and Ted seconded that. It was both unanimous in the election for you to be head of the election committee as well.

MALE SPEAKER: Why don't you run through the other positions?

MALE SPEAKER: Stephanie, I should also tell you, Stephanie, that at the beginning

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of the meeting Alan Simpson, Judith Terra and Paul Tucker, who is in the room with us, attended the meeting for the purpose of objecting to the meeting. And did not participate after that. Alan hung up. Judith and Paul are on the phone.

In addition to them we have with us Marshall Field, Maggie Daley, Arthur Hartman, Fred Krehbiel, Kathy Forster, Ted Stebbins, Dean Buntrock, Helene Arhweiler and Ronald Gidwitz.

MS. MARSHALL: Good morning everybody.

MALE SPEAKER: As far as the officers' slate was concerned, Marshall Field was elected to the post of chairman. Arthur Hartman was elected vice chairman. Marshall Field was elected to serve as the president. You were elected secretary, and Jim Donnelley elected treasurer.

Moving to the committee heads, Marshall was elected chairman of the executive committee.

Ted Stebbins was elected the committee head for the elections committee.

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Donnelley was elected to head the finance committee.
Bob Hamada to head the strategic committee.
And you were elected to chair the -- or head the education committee.
MS. MARSHALL: Okay. Thank you.
MALE SPEAKER: You are now up to speed. We are talking about planning for the --
MR. HARTMAN: Before we get to the plans, I would like to raise the question of giving some support from this board for the work that Elizabeth Glassman has been doing in holding things together in this difficult period. I don't think any of us are ready to say what we want to do in a permanent way, but I think she deserves the support to be able to carry that support to the staff in both museums from us as a new board.
MALE SPEAKER: I couldn't agree more, Arthur, and I hope Marshall will at his first duty sit down with Don to express our support.

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And sit down with Elizabeth because she has done an -- as far as I can tell -- a superb job. And is a very good people person, and a good art person and is doing a good job keeping the thing together. They need a sense of continuity.
MR. FIELD: I am hoping -- this is Marshall. I am hoping to call and get a half a day or something with everyone. So we will do that the first opportunity.
MALE SPEAKER: Good.
MR. FIELD: And then I can assume, Arthur, you would like the minutes to show that we said that she is doing a great job and we have no intention of changing the role in the foreseeable future.
MR. HARTMAN: I think that we need -- all of that has to be thought through, but I think it's important to give support for what she has been doing and hope that she will carry on.
MR. FIELD: I do, too, but I would like to show it in the minutes.
FEMALE SPEAKER: I want to add another

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thank you to Paul for you bringing Elizabeth to us. I know you looked for someone to head both museums during this period and I think she is there because you asked her to be here. I just want to thank you for that.
MALE SPEAKER: Thank you, Stephanie.
MR. FIELD: If we can let's have minutes to show that, too.
MS. MARSHALL: That would be very nice, Marshall.
MR. FIELD: I have other issues I want to aim for at the next meeting. That is -- I think we have to sign off on a budget. And since this meeting already started it seems the sooner the better. And Don said he can have that ready. So that will be an item. If it's readily available I ask we send it out to everybody.
The second thing I would like to put on that meeting is a review and discussion of the mission and with that I am out of gas. I think if we can look at those things in the meeting -- we may not solve them all right away.

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MALE SPEAKER: The mission will be a short discussion, Marshall.
MR. FIELD: Anyone with anything else to add to that get a hold of Don. He can talk to me and I will be more than happy.
Does anyone else have anything else they would like to bring up?
MALE SPEAKER: I would like to express our appreciation for you taking on the task.
MR. FIELD: I am looking forward to it. I majored in American Art. History of American Art. So here is a great chance to use it. And I was an admirer of what Dan did and this collection will be a fabulous treasure for Chicago. I am honored to have this.
MALE SPEAKER: Great. I make a motion to adjourn.
MR. FIELD: One question as Don suggested. Is there a time of day that is better for everybody? Do people like mornings or afternoon or lunch hour? What have you been doing?

MALE SPEAKER: If it's in the next little while I prefer morning since I will be in France.

MR. FIELD: All right. That will make a difference.

FEMALE SPEAKER: I think it would be helpful, Marshall, when you start working with staff -- my assumption is that within the year the board will meet in Giverny because I agree with you wholeheartedly that this is a wonderful treasure for Chicago and a wonderful opportunity for the Terra Foundation in its international vision. And I think the way that it can be exemplified in some way is for this new board to be physically present in Giverny to hear the impact of the Terra Foundation internationally as well as within Illinois and Chicago. So I hope at some point we will schedule a board meeting in France.

MR. FIELD: The answer is yes. I am hopeful we will have one a year -- a meeting in France -- because it will be one of the most

important things. You don't want to have the next meeting now --

FEMALE SPEAKER: I agree.

MR. FIELD: -- until we have our feet under us. And I would like to know as soon as possible where the legal matters are so people aren't looking around saying what is going on? I think we have to wait for the dust to settle. The eye is on the agenda.

MALE SPEAKER: I want to ask the question. We had quarterly board meetings and they lasted a day. A whole day. Is that what you will tender? We do it in France, but I would like everyone on the phone.

MR. FIELD: I like to do the meetings in person. Whether we need a whole day I think that has to be reviewed between Don and myself, and any of the officers who want to get things in and let's see what is the most effective thing. All right.

Unless anyone else has anything they want to add.

MS. MARSHALL: I have a question on the committees. Did the member stay intact or did we add some folks? I apologize for not being on the call earlier.

MR. FIELD: What I imagine between now and the next meeting is that every chair think through who they would like and bring that with them to the next meeting.

FEMALE SPEAKER: Okay. Thank you.

MR. FIELD: Anyone want to bring up anything else? You have anything else?

Meeting adjourned.

(Whereupon, the meeting was adjourned at 11:31 a.m.)

+++

CERTIFICATE OF REPORTER

I, Bonnie L. Keeder, do hereby certify that the foregoing transcript is a true record of the proceedings, that I am not related to or employed by any of the parties involved in these proceedings, and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the proceedings.

_____

Bonnie L. Keeder

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

UNSEALED EXHIBITS TO OBJECTIONS OF DEFENDANTS JUDITH TERRA, PAUL HAYES TUCKER, AND ALAN K. SIMPSON TO THE PROPOSED SETTLEMENT

August 1, 2001

EXHIBIT 1

TERRA MUSUEM OF AMERICAN ART

BOARD OF DIRECTORS MEETING

April 25, 1990

By Daniel J. Terra

While this is an Annual Meeting of the Board of Terra Museum of American Art, it is my suggestion that, in addition to recent analyses, we try to assess the present circumstances in relation to the full period of the existence of the Museum, now ending its 10th year; seven of those years the Museum was in Evanston and the last three years in Chicago.

Before doing this, in order to acquaint Directors with as much historical perspective as possible, I would like to present events which eventually led to the opening of the Museum in Evanston, going back to the earliest collecting periods of Daniel and Adeline Terra.

The first phase covers the period when Daniel and Adeline were independent collectors. The first painting, an English landscape by Benjamin Leader, was purchased in May 1937 at Marshall Fields for $35.00. We were engaged at that time and were buying pieces of furniture for an apartment where we would live after our marriage which took place August 7, 1937. Adeline was an Art History Major at Northwestern University, then attended the Art Institute and had one of the finest "eyes for fine art" I have known.

16di-002136

made it possible to acquire many of the fine masterpieces which are now in the collection. The funding of these acquisitions really was made possible because our means was improving rapidly because Lawter was doing well as a public Company and I personally sold stock of Lawter through five underwritings at multiples of 23 to 55 times earnings. These registrations were successful because of the guidance of two marvelously professional investment bankers. The first three were done by Winfield Ellis and the next two by Ronald Melvin, both with the then named firm - Blunt, Ellis & Simmons.

By 1975, we had accumulated quite a good collection of American paintings which since their acquisition had risen in value far more than we could have imagined. These paintings were not bought for profit but merely because we liked them. At this point, it was suggested by counsel that we examine our estates which were growing but losing liquidity. It was estimated that the worth of the paintings had become a very large portion of DJT's and to some degree ART's estate, as well.

This led us to examine the concept of orderly giving works of art to museums of American art or to colleges with American art collections, all located along the Eastern Seaboard. All of the American paintings were in DJT's estate and all the English paintings were in ART's estate. The thought was to start an orderly disposition of the paintings to the artistically logical recipients during our life time. During this time, there were twenty odd small musuems of American art, part of liberal arts colleges, along the East Coast and the two major American Museums, also on the East Coast, the Pennsylvania Academy in Philadelphia and the Whitney Museum in New York.

this day, it was probably the only time, (I believe we have photos of this incident) that people were scalping tickets for an art lecture. Later, the following year, we had to move into much larger Northwestern quarters and at a peak meeting, we had 2,100 people come to hear Tom Armstrong, Director of the Whitney Museum which was, and still is, the ranking musuem of American art in the nation. The success of these jointly sponsored symposia continued to be successful until 1983 when the Administration at Northwestern was critized by faculty groups for a wide variety of projects, one of which was the arrangement the University had with the Museum. President Strotz had no choice but to bow out of the arrangement and from then on, it was not the same, although the meetings still drew 500 to 700 people, far more than any art lectures in the country. By 1984, despite a difficult location in Northwest Evanston, attendance and financial support was making headway and we were encouraged that interest in historical American art was growing in the Chicago Area and in the Middle West in general.

When thinking of a Chicago location, it was decided that North Michigan Avenue would be our best for visibility and attendance. The first property, the Southwest corner of Michigan and Erie, was acquired in late 1984 and the other three properties in the next block were acquired in 1985. As you all know, the original Southwest corner of Erie and Michigan was sold in 1988 to both raise cash and because a careful study had revealed that it could not be used in the future as part of the Museum because it was not in the same block as the other three properties. Further, the three properties in the same block, which were then and are still owned by the Museum, were considered to be adequate for any future needs of the Museum.

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Terra Museum of American Art

NON-TERRA SUPPORT

Item	1986	1987	1988	1989	Projected 1990	Budgeted 1991
Regular Membership	$ 27,500	$ 25,306	$ 19,116	$ 9,607	$ 34,000	$ 113,000
Sustaining Support	-0-	238,570	165,590	38,890	50,000	-0-
Corporate Support	223,277	349,875	322,745	312,739	100,000	125,000
Foundations	22,666	26,805	27,520	23,200	10,000	20,000
Individuals	4,092	437,762	619,422	463,460	210,000	250,000
Admissions	42,911	158,148	421,479	91,054	85,000	188,250
Interest and Dividends	113,226	263,057	410,718	417,312	20,000	25,000
Rent	60,949	232,147	646,417	464,734	510,000	626,734
Totals	$ 494,621	$ 1,721,660	$2,663,007	$1,809,996	$1,019,000	$1,337,984

EXPENSES

Expenses	$1,269,308	$2,896,518	$4,596,672	$4,015,141	$3,400,000	$2,771,332
Deficits	$ (774,668)	$(1,174,858)	$(1,963,665)	$(2,205,145)	$(2,381,000)	$(1,433,348)

16di-002139

An important part of the total picture that I believe Directors should be acquainted with is my own personal circumstances and I will try to outline, in general terms, an analysis of current worth.

(SEE PAGE 8A. -- To be passed out and retrived)

My present Will calls for a total of approximately $50 million of the total for my wife, son and grandson and other non-museum philanthropic projects. Based on values outlined above, the Museum would get the Daniel J. Terra collection and the remainder of the liquid portion less the $50 million outlined above.

Now that the Museum has been in existance at both locations for ten years, it seems to be a good time to take stock of the future prospects for this institution. The first item that seems bothersome is the amount of money that is tied up in this institution be it while I am alive or at my demise. If one were to assume that the Museum would have 60,000 visitors next year, the assets utilized would be in excess of$5,000 per visitor in fiscal 1991. Another factor with which we should be familiar is that the two major Museums of American Art, namely the Whitney Museum of American Art in New York with a budget of approximately $16 million, and the Pennsylvania Academy of Philadelphia (the oldest Museum of American Art, 1805) with a budget of about $11 million, are both having trouble making ends meet. The Whitney is running deficits three out of four years and has, for the past four years, had much publicized trouble raising funds for a needed addition at Madison Avenue. At the Pennsylvania

16di-002140

The questions seems to me that in light of this 6-year record and based upon ten years of experience, is this, a good time to re-examine our goals and what, if any, might be alternative options.

These options come to mind.

Option #1: We could embark upon a campaign to raise a certain amount of money, perhaps $20 million for an endowment. This might be very difficult, particularly since there is not yet a well established constituency, and the hostility of the press has not helped our chances to achieve such a goal.

Option #2: We could deaccession one or several of the important paintings owned by the Museum. The Mary Cassatt oil, "Summertime", is being considered at a net price to the Museum of $10 to $15 million. This is a decision that should probably be considered at this meeting. The deal would be private and we would try to avoid adverse publicity. Incidentally, the proceeds, if this could be consummated, would be 50% of the total amount paid by the Museum for the fifty-nine paintings now owned by the Museum. We have not made a commitment to sell this painting, but it should be noted that an important expert, Warren Adelson, thinks it would bring a price in this range.

16di-002141

Option #6: Close the North Michigan Avenue Museum, sell the real estate and use the foundation with assets in the $70 million range (assumes that paintings owned by the Museum would be retained) for undergraduate scholarships and graduate fellowships for American Art, help fund much needed archives of American art, and support national and international exhibitions of American art.

All these options should be considered in the context of future receipt of $20 to $50 million from DJT's estate.

Now, we would like to take up the subject of the French Project at Giverny, near Vernon.

This village is 50 miles from Paris and is one hour away by train, bus or car. It is the home of the now restored Monet Garden and his home converted to a Museum and the three ateliers which Monet built in the 39 years he lived and worked at Giverny. He was there from 1887 until he died in 1926.

The Monet complex was restored by Gerard and Florence VanderKamp, who had previously restored Versailles. American money was used in both cases. The Monet restoration was completed in 1983 at a cost of $21 million.

It is open from April 1st to October 31st (seven months) and last year drew 310,000 visitors from over one hundred countries around the world. This year, it is expected to draw in excess of 350,000 visitors or 50,000 per month.

16di-002142

The project was rejected for lack of parking, so the Museum later bought three acres of land across the street (some historians have written that Monet did his 30 grain stack pictures in 1891 on this, now our Museum site. The Museum's present total investment in Giverny is $1,100,000.

In the three and one-half years since the purchase of the Perry property, we have had to combat one road block after another, until a new mayor, more sympathetic to the project, was elected. The Council of Giverny and the Mayor approved the project finally in December, 1989. The Department approved it in February, sent it to Paris, and it was there approved a few days later by Jacque Lang, the Minister of Culture under Mitterand. Lang was reappointed in 1988 after losing out two years earlier. It is known that both Mitterand and Lang are quite enthusiastic about this project. They have both been there, as has Barbara Bush, who is also enthusiastic about the project, and who would like to come and help dedicate the finished product as she did the Museum on North Michigan. President Reagan and President Bush also know of the project.

DJT is slated to have meetings during May 2nd to May 6th with the French architect, Philippe Robert, who has developed a plan very much to everyone's liking. The building nestles into the hill, is half underground and is surrounded by shubbery and flowers as is the entire roof of the building. From a helicopter, it will seem as another beautiful Giverny garden.

I would like to show you some of the plans and drawings of this little masterpiece of a building.

16di-002143

January 1991	$ 300,000
February 1991	210,000
March 1991	220,000
April 1991	330,000
May 1991	240,000
June 1991	250,000
July 1991	360,000
August 1991	270,000
September 1991	280,000
October 1991	390,000
November 1991	300,000
December 1991	310,000
January 1992	$ 420,000
February 1992	330,000
March 1992	340,000
April 1992	450,000
May 1992	360,000
June 1992	370,000
July 1992	480,000
August 1992	390,000
September 1992	400,000
October 1992	510,000
November 1992	420,000
December 1992	430,000

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16di-002145

EXHIBIT 2

Terra Foundation
Strategic Planning Committee
Minutes
August 7, 2000

In attendance:
Mr. Dean Bumrock
Dr. Stephanie Pace Marshall
Dr. Paul Tucker

By Phone: Mr. Ron Gidwitz, Chair
Mrs. Margaret Daley
Dr. Theodore Stebbins
Mrs. Judith Terra

Staff: Mr. Donald Ratner

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner
Dr. John Neff

The meeting was called to order at 10:10 AM on August 7, 2000. Mr. Ratner is to send out to each Board member the four proposals we received. These include:

- The Art Institute of Chicago
- The Corcoran
- Museum of Fine Arts (MFA) in Boston
- National Gallery

Dr. Tucker indicated that the purchase of today's meeting was therefore:

- To make sure we are all conceptually on the same page
- To move us along on the matrix/criteria for making decisions
- To have a construct within which to make decisions

Dr. Tucker revisited prior discussions with the Strategic Planning Committee and discussed the following:

- The cost of maintaining the Chicago museum
- The assets of the Chicago museum
- The importance of Giverny as central to the Foundation's educational mission.
- The need for an alliance because the lack of depth of the collection would not support two museums

TFA SP 01596
CONFIDENTIAL

- Showcasing Giverny

Mr. Hearwole suggested that the Board needs to be consistent and have a clear vision statement of what they want the Foundation to be. He then asked what the assets of the Foundation were.

Dr. Tucker responded that the assets included the following:

- Good Collection
- Significant financial assets not related to the collection
- Real Estate
- Board connectiveness and Board intelligence
- Excellent staff

Dr. Stebbins noted that if we decided to concentrate on only one of our museum locations, we do have an adequate collection and have adequate financial assets.

Dr. Tucker replied that he wouldn't want Giverny to be isolated and, therefore, since Giverny is the center focus, we needed a partner to help to Giverny.

Discussion then arose about where the center of education should be set; whether it should be in Giverny or in the U.S.

Dr. Marshall noted that aligning with an art museum does not negate aligning with an educational institution in addition.

Dr. Tucker restated that Giverny is central, that we can not stand alone with our collection, that we need to be part of an alliance for institutional stature, and therefore, the Foundation needs to be is a partnership to achieve this. He also indicated that we want Giverny to be "an arts center". Dr. Tucker suggested that we need an analysis of costs of "small learning centers". He asked that we do a comparative cost study with other centers including The American Academy, Yaddo, and Skowhegan. He envisions that we would have a learning center for approximately ten people at one time. He than asked if such a learning center plus our exhibits might maximize the propagation of American art.

Mrs. Daley indicated we need to stop reacting and need to decide at the September meeting which direction to go. Mr. Gidwitz reiterated that the purpose of our focus was to propagate American Art through leveraging of the collection.

Dr. Marshall suggested we need to hone down our decision categories and decide what would be the "non negotiables".

TFA SP 01598
CONFIDENTIAL

- Collection should stay as a collection
- The arrangement will probably have to be revenue neutral for both institutions

Dr. Marshall indicated that we needed to move into the detail and the criteria.

Mr. Ratner was then given the assignment of gathering the detail information for the proposing museums. Mr. Lerner reiterated that we were not going to be stand alone in Chicago, that we need to support American art and that we want to support Giverny. Dr. Tucker indicated that he would send out the conclusions that appeared to be drawn from this meeting with the four proposals and the relevant material.

A poll was then taken of the members as to whether we should be a stand-alone museum in Chicago. All voted no except for Mr. Dean Bumrock who said we should be stand alone in Chicago.

The next step will be that Mr. Ratner will send out the packages to the entire Board of the proposals and criteria as well as the data collected from the four museums. Mr. Lerner will put a draft together of a "proposed contract". Dr. Tucker should be in touch with all four "suitors" to keep the door open and will tell Philadelphia that we are not interested.

Mr. Bumrock indicated that we need to focus on our educational needs.

In September after a full day of a Strategic Planning meeting, we hope to present a preferred institution. At that time, we hope that they will be able to make a Board decision to authorize Dr. Tucker to negotiate.

We'll schedule one more meeting of this committee before September and at that time all members of the Board will be invited to participate. Dr. Marshall suggested that we call this a regular Board meeting with one agenda item.

The meeting was adjourned at 2:00pm.

Respectively submitted,

_____
Donald H. Ratner
Vice President Finance & Administration

16di-002149

EXHIBIT 3

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

VERIFIED COMPLAINT
FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of Terra Foundation for the Arts, an Illinois not-for-profit corporation, for their Complaint against the Defendants, state as follows:

Nature of this Action

1 This is an action for declaratory, injunctive and other relief seeking to enjoin defendants' illegal and wasteful conduct in connection with the management and operations of Terra Foundation for the Arts, an Illinois not-for-profit corporation ("Terra Foundation").

2 In this action Plaintiffs seek to enjoin defendants from (1) holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws; (2) taking any action

8 Defendant Naftali Michaeli ("Mr. Michaeli") is an Israeli citizen and a resident of Washington, D.C. Mr. Michaeli is a close personal friend of Judith Terra, and has no official position with Terra Foundation.

9 Defendant Terra Foundation is an Illinois not-for-profit charitable corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit collections of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate museums in Chicago and France.

10 Because of Dan Terra's extraordinarily generous gifts to Terra Foundation in his lifetime, and his bequest to Terra Foundation of most of his estate, Terra Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art.

11 Terra Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Ave., Chicago, Illinois.

12 Terra Foundation currently has eleven directors, the maximum number allowed under the by-laws of Terra Foundation. The Board includes Margaret Daley, a well-known benefactor of education and the arts and the wife of Mayor Richard M. Daley, and Arthur A. Hartman, the former United States Ambassador to France. The Board also includes Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Catherine A. Stevens, the wife of United States Senator Ted Stevens, was the Executive Director of Terra Foundation from August of 1996 through April, 2000 until terminated by Tucker.

Creation of Terra Foundation

16 In the early 1990s, Terra Foundation constructed and developed the Musee d'Art Americain Giverny ("Giverny Museum"), an art museum in Giverny, France dedicated to the exhibition of American art and American art education.

17 Primarily because of Dan Terra's gifts and bequests, the value of Terra Foundation has grown substantially since its creation. Currently, Terra Foundation holds net assets worth approximately $450 million. The value of the art alone located at the Terra Museum in Chicago exceeds $100 million, with the overall value of Terra's Foundation's art collection exceeding $173 million.

18 Pursuant to its by-laws, the Board of Directors of Terra Foundation is required to hold an annual meeting during the month of September of each year for the purpose of electing directors and officers and for the transacting of other business. If the election of the directors and officers is not held at such meeting, the Board of Directors may cause the election to be held at a meeting of the Board of Directors as soon thereafter as may be convenient. The Board of Directors may only elect officers and directors by a majority vote.

19 In periods of time between the quarterly Board of Director Meetings, the by-laws provide that as Terra Foundation's Executive Committee has the authority to take action on behalf of Terra Foundation, except on specific issues delegated to the Board of Directors pursuant to the Illinois General Not For Profit Corporation Act. Since October, 1999, Terra Foundation's Executive Committee has consisted of plaintiffs Buntrock and Gidwitz, defendants Edith Terra and Mr. Tucker, and director Stephanie Marshall.

Dan Terra's Dedication To Chicago

23 On information and belief, after Judith Terra became a member of the Board of Directors of Terra Foundation, she suggested to Dan Terra that the Terra Museum be closed and Terra Foundation be moved out of Chicago. This was never done during Dan Terra's lifetime.

Terra's Death And The Will Contest

24 On June 28, 1996, Dan Terra died after suffering a stroke. As the sole residuary beneficiary under his will, Terra Foundation was to receive $125 million.

25 As the first step in a plan to seize control of Terra Foundation, Judith Terra immediately attempted to transfer Dan Terra's probate proceedings from the Circuit Court of Cook County to Washington, D.C. After a five-day trial, the Chief Judge of the Probate Division denied the motion to transfer, finding that the motion was without merit in law or fact.

26 Judith Terra next embarked on a scheme to seize tens of millions of dollars that Dan Terra intended for Terra Foundation.

27 Under the prenuptial agreement between Dan Terra and Judith Terra, Judith Terra was to receive $4.5 million in cash plus approximately $2.6 million in other assets, for a total of $7.1 million.

28 Contrary to her promise in the prenuptial agreement, after Dan's death, Judith Terra immediately filed an action challenging the prenuptial agreement and contesting Dan Terra's will. Judith Terra sought for herself $43 million of the $125 million bequest to Terra Foundation.

29 Judith Terra's attempt to seize $43 million of Dan Terra's bequest to Terra Foundation put her in irreconcilable conflict with the interests of Terra Foundation and, therefore, with the people of the State of Illinois as the beneficiaries of the charitable trust created by Dan

Washington, D.C., she would be able to establish herself in Washington, D.C. as a large benefactor of the arts, thereby placing herself in the elite social circles of Washington, D.C.

33 To accomplish her scheme of seizing control of Terra Foundation, Judith Terra began stacking Terra Foundation's Board with persons loyal to her alone. For example, Judith Terra recommended and sought the election of her friend Sen. Simpson to the Board. Sen. Simpson became a director in mid-1999. At his first Board of Directors meeting in October 1999, Sen. Simpson announced to the Board that his purpose for being on Terra Foundation's Board of Directors was "to protect Mrs. Terra's interests."

34 Prior to October 1999, Judith Terra orchestrated a plan to replace Arthur Hartman as Terra Foundation's president and chairman with her loyalist, Mr. Tucker. Although Terra Foundation had been searching for a new president for more than two years from outside the Board of Directors, Judith Terra and her new allies on the Board replaced Arthur Hartman as president and chairman with Mr. Tucker. As was later discovered, the decision to place Mr. Tucker in the position of president and chairman was made to further Judith Terra's attempt to gain control of Terra Foundation and to further her own agenda contrary to the mission and intent of Dan Terra in creating Terra Foundation.

35 Mr. Tucker and Judith Terra further entrenched their power through the hiring of Donald Ratner and the unauthorized expansion of his authority within Terra Foundation. Mr. Ratner was originally retained as a consultant to the Foundation on an interim basis. During the January 25, 2000 meeting of the Board of Directors a motion was made to give Mr. Ratner the title of vice president of finance and administration. The Board members present at the meeting voted in favor of the motion. However, because not all Board Members were present, the motion was made subject

recognizing that it would be contrary to its duties and obligations as special counsel to Terra Foundation and its directors. In resigning its position as special counsel to Terra Foundation, Mayer, Brown & Platt stated in a letter to Mr. Tucker:

> In our original engagement letter of December 11, 1996, sent by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all of its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

(Emphasis added) (See August 18, 2000 Letter, attached hereto as Exhibit 4).

39 In furtherance of her plan to seize control of Terra Foundation, Judith Terra, Mr. Tucker and Sen. Simpson have ignored the requirements of Terra Foundation's by-laws regarding management of Terra Foundation. Article III, Section 11 of the by-laws provides that the executive committee is to operate Terra Foundation between the quarterly Board of Director meetings. (See By-laws of Terra Foundation, attached hereto as Exhibit 5, at Article IV, Section 9). With few exceptions relating to bringing in new counsel for Terra Foundation, issues were not brought before the executive committee. By not having meetings of the executive committee, Judith Terra, Mr. Tucker, Sen. Simpson were able to control the operations of Terra Foundation for their own benefit, contrary to the provisions of the by-laws.

40 Judith Terra, Mr. Tucker, Sen. Simpson have also consulted with and taken advice from Mr. Michaeli. Mr. Michaeli has been making decisions for Terra Foundation even though he is not an officer or director of Terra Foundation, or even an employee. Mr. Michaeli's only connection to Terra Museum is his relationship with Judith Terra.

h. Misusing the art collection of Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

i. Allowing Mr. Michaeli to participate the management, control and operation of Terra Foundation and Terra Museum.

43 Members of the Board of Directors have repeatedly questioned the manner in which Mr. Tucker, Judith Terra and Sen. Simpson have been operating Terra Foundation in the past year. For example, on March 2, 2000, Margaret Daley wrote to John Neff, Director of Terra Museum, regarding the significant problem occurring at Terra Museum as a result of the high turnover of key employees. Specifically, Mrs. Daley stated:

> Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler. John, Ginny worked tirelessly on the School Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their herculean efforts, it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation. Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner. In my working with her on education issues, I believe she has always gone "above and beyond" her duties .... I couldn't leave without letting you and the Board know my feelings and deep concerns.

(See March 2, 2000 Letter, attached hereto as Exhibit 6).

44 Other members of the Board of Directors, including Buntrock, as well employees of both Terra Foundation and Terra Museum have repeatedly and vigorously challenged the manner and lack of direction in which Terra Foundation has been operated and managed under the direction of Mr. Tucker. (See Arthur A. Hartman letter dated November 7, 1999, attached hereto as Exhibit 7).

45 On information and belief, the pattern of mismanagement and waste occurring at Terra Museum is a conscious effort on the part of Judith Terra, Mr. Tucker and Sen. Simpson to cause the failure of Terra Museum in Chicago to justify closing Terra Museum in Chicago and

continued operation of the museum in Chicago. Mr. Tucker went to state clearly and unambiguously,

> the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

(Emphasis added) (See Minutes of August 24, 2000 Board of Directors Meeting, attached hereto as Exhibit 8, p. 2). In fact, many of the "problems" with the Chicago museum were of the defendants' own making.

49 Buntrock objected to Mr. Tucker's improper interpretation of the mission of Terra Foundation and stated that the closing of Terra Museum in Chicago had never been discussed or considered by the full Board of Directors. Mr. Tucker agreed that this critical issue had never been discussed by the full Board of Directors, but stated that a decision had already been reached to close Terra Museum in Chicago. According to Mr. Tucker, the Strategic Planning Committee was prepared to make a recommendation on this issue to the Board of Directors. Mr. Tucker stated that the Board of directors "definitely" must make a decision on the closing of the Chicago museum during the annual Board of Directors meeting in September 2000.

50 In conjunction with their overall plan, Judith Terra and Mr. Tucker have attempted to create the impression that Terra Museum in Chicago needs to be abandoned as a mission of Terra Foundation.

Defendants' Plan To Remove Buntrock From Board Of Directors To Further Their Goals

51 Notice was mailed to the directors informing them that the annual Board of Directors meeting of Terra Foundation was scheduled for Tuesday, September 26, 2000 in France. Although various events and committee meetings were scheduled to occur between September 23, 2000 and

two days prior to the properly noticed and scheduled meeting of the Board of Directors. (*See* September 15, 2000 Letter, attached hereto as Exhibit 10). This improperly noticed meeting has been scheduled because defendants will not have a sufficient number of directors available on September 26, 2000 to remove Mr. Buntrock from the Board of Terra Foundation.

55 Defendants' attempt to hold the elections for directors and/or officers at a Special Meeting of the Board of Directors on September 24, 2000, is violative of the by-laws of Terra Foundation for at least two reasons. First, Ratner does not have the authority to provide notice of a meeting of the Board of Directors as he is not the secretary of Terra Foundation, nor is he even a duly elected officer or director. Pursuant to the by-laws of Terra Foundation, only the secretary of Terra Foundation is empowered to provide notices required under the by-laws. (Exhibit 5, Article IV, Section 9). Any attempt by Ratner to send notice of a meeting of the Board of Directors constitutes an *ultra vires* act.

56 Second, under the by-laws an election of the officers and directors may occur only at one of two occasions. First, the election may take place at the annual meeting of the Board of Directors. Second, if the election is not held at the scheduled annual meeting, a special meeting may be held subsequent to the annual meeting. (Id. at Article III, Section 3). The by-laws provide no authority for the holding of elections of officers or directors prior to the scheduled annual meeting. For this additional reason, defendants' attempt to hold the elections of directors and officers at the improperly noticed meeting on September 24, 2000 constitutes and *ultra vires* act, as well as a clear breach of their fiduciary duty to Terra Foundation and the people of Illinois.

57 Without relief from this Court, defendants will carry out their improper plan to ensure that Buntrock does not remain as a director and officer, to close the Terra Museum in Chicago and

16di-002158

63 As directors of Terra Foundation, plaintiffs Buntrock and Gidwitz, as well as many others, have donated their time, efforts and resources to accomplish the goals and mission started over twenty years ago by Terra.

64 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to protect Terra Foundation from waste and mismanagement caused by defendants.

65 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to see that Terra Foundation continues to carry out the mission for which it was started for the benefit of the people of Illinois.

66 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the Terra Foundation and the people of Illinois to protect the charitable assets of Terra Foundation and to act in their interests by furthering the charitable purpose and mission started by Terra more than twenty years ago.

67 Notwithstanding their fiduciary duties to the people of Illinois to further the charitable purpose and mission started by Dan Terra more than twenty years ago, Judith Terra, Sen. Simpson and Mr. Tucker used their positions as directors and/or officers of Terra Foundation to intentionally mismanage Terra Museum in Chicago to further their own self interests in closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C.

68 The foregoing improper conduct of Judith Terra, Sen. Simpson and Mr. Tucker has caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois as the beneficiaries of the public trust established for Terra Museum in Chicago as a unique center for American art.

69 Plaintiffs have no adequate remedy at law.

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72 The above acts and conduct of defendants have been taken without lawful authority, capacity, or power and will continue unless enjoined.

73 Section 103.15 of the General Not for Profit Corporation Act of 1986 allows this Court to enjoin defendants' unlawful acts.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

B. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

C. An accounting of all assets of the Terra Museum and Terra Foundation.

D. For such additional relief as the Court deems fair and just.

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future of Terra Foundation and the continued viability of Terra Museum in Chicago as a unique center for American art.

78 Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Terra in creating Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art to Washington, D.C. or any other location outside of Illinois;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of Illinois would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Sen. Simpson and Mr. Tucker have breached their fiduciary duty to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties;

(7) Defendants have acted improperly and breached their fiduciary duties by seeking to defeat Mr. Buntrock's re-election as director in order to further their own agenda;

(8) The letter sent by Ratner to the members of the Board of Directors dated September 15, 2000 is a nullity and does not comply with the by-laws of Terra Foundation for scheduling a meeting of the Board of Directors for the election of directors and/or officers.

b. Seeking to close Terra Museum in Chicago and transfer or re-establish the museum to Washington, D.C. or some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois;

d. Attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation

81 Defendant Mr. Michaeli colluded with Judith Terra, Sen. Simpson and Mr. Tucker in committing breaches of fiduciary duty, or otherwise induced or participated in their breaches of duty to Terra Foundation and the people of Illinois as the various ways, including, but not limited to the following:

a. Knowingly providing advice to Judith Terra, Mr. Tucker and Sen. Simpson that was contrary to the fiduciary duties owed by them as directors of Terra Foundation;

b. Acting with Judith Terra, Mr. Tucker and Sen. Simpson to make decisions for Terra Foundation in contravention of the by-laws of Terra Foundation;

c. Advising Judith Terra, Mr. Tucker and Sen. Simpson to take action relating to Terra Foundation that constituted waste and mismanagement in an attempt to justify the closure of Terra Museum in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

d. Colluding with or advising Judith Terra, Mr. Tucker and Sen. Simpson in the decision to replace Jim Collins and the law firm of Bell, Boyd & Lloyd in order to gain control over the operations of Terra Foundation for their own improper purpose in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

e. Colluding with, advising or participating in the plan to remove Mr. Buntrock from the Board of Directors in order to remove opposition to their plan to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

16di-002162

VERIFICATION

DEAN L. BUNTROCK, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

BY: Dean L Buntrock
DEAN L. BUNTROCK

16di-002164

EXHIBIT 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

FILED
SEP 25 2000
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

No. 00 CH 13859

ATTORNEY GENERAL'S COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION, BREACH OF FIDUCIARY DUTY, REMOVAL, ACCOUNTING, RECEIVER AND APPOINTMENT OF NEW DIRECTORS

D.O.D.

for Temporary Restraining Order on that date.

5. Defendant the TERRA FOUNDATION FOR THE ARTS, an Illinois not-for-profit corporation (hereinafter "the FOUNDATION"), was incorporated on December 13, 1978, and was created specifically as an Illinois charitable trust with certain obligations and commitments to the ultimate beneficiaries, the PEOPLE OF THE STATE OF ILLINOIS (Attached hereto and incorporated herein by reference as Group Exhibit "A" is a copy of the FOUNDATION's original Articles of Incorporation). Said FOUNDATION currently holds net assets worth approximately $450 million, and is registered and reports to the Illinois Attorney General under the Illinois Charitable Trust Act.

6. The FOUNDATION's specific charitable purpose is to preserve, promote and exhibit collections of American art, and to expand the artistic horizons of the public through educational art programs.

7. In furtherance of its charitable purpose and obligations to the PEOPLE OF THE STATE OF ILLINOIS, the FOUNDATION owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Avenue, Chicago, Illinois.

7. Defendant JUDITH TERRA is a Director of the FOUNDATION, and is the widow of Daniel Terra, one of the founding Trustees of the FOUNDATION, who at all relevant times, is a resident of Washington D.C., and is a member of the FOUNDATION's Executive Committee.

8. Defendant PAUL HAYES TUCKER is the Chairman and President of the FOUNDATION.

9. Defendant PAUL HAYES TUCKER and Defendant ALAN K. SIMPSON are each Directors of the FOUNDATION, and are each members of the FOUNDATION's Executive

(1) To avoid "self-dealing" and conflicts of interests;
(2) To avoid wasting charitable assets;
(3) To avoid incurring penalties, fines, and unnecessary taxes;
(4) To adhere and conform the charitable organization to its charitable purpose;
(5) To not make non-program loans, gifts, or advances to any person, except as allowed by the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.];
(6) To utilize the trust in conformity with its purposes for the best interest of the beneficiaries;
(7) To timely file registration and financial reports required by this Act; and
(8) To comply and to cause the charitable organization to comply with this Act and, if incorporated, the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 et seq.].

(760 ILCS 55/15(a) (1997).)

15. Daniel Terra, a successful Chicago area businessman established the FOUNDATION in December 1978 under the Illinois General Not For Profit Corporation Act. The FOUNDATION's first board was Daniel Terra, his son James Terra and Robert Sugrue.

16. From the time of its inception the FOUNDATION has had as its central and core purpose the establishment of an art museum in the Chicagoland area, specializing in bringing American art to the public and the People of the State of Illinois. It was Daniel Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art and, Daniel Terra publicly stated that the FOUNDATION was committed to building and operating a world class museum in the Chicagoland area.

17. From its inception the FOUNDATION was substantially funded by Daniel Terra who contributed hundreds of millions of dollars to and for the Terra Museum.

18. As a result of the foregoing others became supportive of said charitable purpose and made contributions to the Terra Museum and the FOUNDATION.

19. Daniel Terra died on June 28, 1996.

b) Attempting to gain position and self recognition in a Washington DC charitable organization in exchange for the delivery of the assets of the FOUNDATION, the termination of operations in Chicago and the end of a Terra museum in the United States.

c) Attempting to cause the closing of the FOUNDATION's operations in Illinois contrary to Dan Terra's intentions and suggesting a use of its assets contrary to the use Dan Terra intended.

d) Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

e) Caused the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, which jeopardizes the security of the $100 million of art displayed and collected at Terra Museum;

f) Permitted a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

g) Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

h) Attempting to invade endowment funds restricted to public art educational purposes for the unauthorized purpose of acquiring art;

i) Bypassing the lawful authority of the Board and the Executive Committee in operating Terra Foundation.

her, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the said prenuptial agreement. (Attached hereto and incorporated herein by reference as Exhibit "C" is a copy of the said prenuptial agreement entered into between Daniel Terra and Defendant JUDITH TERRA.)

29. Under the aforesaid prenuptial agreement, Defendant JUDITH TERRA agreed she would receive only a fixed amount of money and assets upon Daniel Terra's death, and that the bulk of his estate would go to the FOUNDATION. The said prenuptial agreement provided that if the parties remained married, JUDITH TERRA would receive $1.5 million from Daniel Terra's estate if he died prior to the 5th anniversary date of their marriage; or $ 3 million if his death was between the 5th and 10th date of their marriage; or $4.5 million if his death occurred after the 10th anniversary date of their marriage. (See Exhibit "C", prenuptial agreement page 6.)

30. Several days prior to his death on June 28, 1996, Daniel Terra was confined to a hospital, his life being sustained by the use of life supporting devices. Shortly after midnight on June 28, 1996, the tenth anniversary date of his marriage to JUDITH TERRA, the life supporting devices employed to keep Daniel Terra alive were ceased. Technically Daniel Terra lived past the ten year anniversary of his marriage to JUDITH TERRA, and Defendant JUDITH TERRA sought and received from Dan Terra's estate $4.5 million pursuant to the terms of the aforesaid prenuptial agreement.

31. The Prenuptial agreement also provided that while Daniel Terra was alive, JUDITH TERRA would not agree to be a member of the board of directors of the FOUNDATION.

32. Defendant Judith Terra was not a member of the FOUNDATION's Board of Directors until Daniel Terra's aforesaid illness and death in 1996.

33. In January 1997, Defendant JUDITH TERRA filed four further and

of service to the FOUNDATION has been terminated as regular counsel to the FOUNDATION.

39. The final accounting of the Daniel Terra Estate has been presented by James Terra and Bell, Boyd and Lloyd , it has been reviewed and approved by the FOUNDATION's special counsel Mayer, Brown and Platt and the Illinois Attorney General's office, both of whom participated in the many aspects of the estate matters. Despite Mayer, Brown & Platt's approval the FOUNDATION now has undertaken to hire yet another set of attorneys to review the actions of James Terra and Bell, Boyd and Lloyd, and the FOUNDATION is bearing the cost of such.

40. Upon information and belief, the aforesaid termination of Bell. Boyd and Lloyd and review of the actions of James Terra and Bell, Boyd and Lloyd were done at the behest of Defendants out of retaliation for the adverse position James Terra and Bell Boyd and Lloyd took against Defendant JUDITH TERRA in the aforesaid litigation of the $42 million in claims against the Estate of Daniel Terra.

41. In addition to the foregoing, based on the verified allegations set forth in Director GIDWITZ's and Director BUNTROCK's Verified Complaint, and incorporated herein by reference as though fully set forth herein, Defendant JUDITH TERRA with the aid of Defendant Tucker has caused works of art of the FOUNDATION to be brought to her home, over objection from Museum staff.

42. Furthermore, Defendant Judith Terra has engaged in discussions with defendant Director PAUL HAYES TUCKER to have the FOUNDATION close the Terra Museum in Chicago and move its operation to Washington D.C., where JUDITH TERRA resides, and /or to cause the FOUNDATION to merge with another institution in Washington D.C., which intended acts are contrary to Daniel Terra's intent and the mission to maintain a museum in Chicago.

that Defendant JUDITH TERRA set upon a course of conduct and convinced other directors to join her in her efforts to promote her self interests, close the Terra Museum in Chicago, and move the FOUNDATION to Washington D.C. where she lives to effect self interests. In addition certain acts of the board now appear to be designed to punish those that had opposed her acts of self interest as aforesaid.

47. As related by directors GIDWITZ and BUNTROCK in their verified statements, Defendant ALAN K. SIMPSON announced when he joined the FOUNDATION Board of Directors that he was there only "to protect Judith Terra.." As a consequence, Defendant ALAN K. SIMPSON, by his own admission was not there to do the acts required of an independent Director. Defendant ALAN K. SIMPSON's comment to the board is most significant in light of the fact that Director ALAN K. SIMPSON joined the Board of the FOUNDATION in fiscal year end 1999, at a time when the only issues concerning JUDITH TERRA was her personal need to seek revenge upon those that had opposed her before.

48. The totality of the issues presented here in this Complaint establish that the FOUNDATION is a charitable trust in jeopardy, whose long term institutional employees have quit, whose controlling number of Board members are more interested in their own vision, self interest, and/or personal goals of promoting their status in society, than in properly safeguarding the FOUNDATIONS mission. A small group of Directors, loyal to the announced purposes of the organizations principal benefactor, Daniel Terra, are being subjected to retaliation, removal or neutralization.

49. There is no doubt that Daniel Terra expected the Terra Museum to remain in Chicago and there is no doubt that the other donors over the years relied upon the institutional nature of the FOUNDATION as an Illinois-based charity, expecting it to be rooted here and to remain in

General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and he seeks injunctive relief and removal of such trustees, the Court may, as part of the injunctive relief, and after a hearing where such trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest."

(760 ILCS 55/16(b) (1997).)

56. As alleged by directors GIDWITZ and BUNTROCK , the defendants opposed the election and actions of GIDWITZ and BUNTROCK to further their improper actions as aforesaid.

57. By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Alan Simpson and Mr. Tucker owed fiduciary duties to the People of Illinois to act in the Peoples interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago and supported and funded by him and others through his death in 1996.

58. Defendants Judith Terra, Alan Simpson and Mr. Tucker by the foregoing breached their fiduciary duties by acting in a manner that was intended to further personal interests to the detriment of the People of the State of Illinois, the ultimate beneficiaries of each and every charitable trust within the state.

59. As aforesaid, improper conduct here included, but is not limited to, the following acts:

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to any location outside of Illinois would violate the charitable trust establish by the operation of the Terra Foundation to date , the intent of Dan Terra, the common law, the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Alan Simpson and Paul Tucker have breached their fiduciary duty to Terra Foundation and the People of the State of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the People of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties and permitted to remain in control of the subject Foundation;

(7) Defendants have acted improperly and breached their fiduciary duty and the equities require that the court exercise supervisory authority over the charitable trust at issue here and appoint receivers and additional fiduciaries and directors to protect the Terra Foundation;

B. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding any further meetings of the Foundation's Board of Directors, until a new board is constituted by this court;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment or governing instruments;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

(5) Transferring, moving, disbursing, selling or exchanging any assets of the Terra Foundation.

Certificate 38125

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, *Articles of Incorporation duly signed and verified of*

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 13th *day of* December *A.D. 1978 as provided by the "GENERAL NOT FOR PROFIT CORPORATION ACT" of Illinois, approved July 17, 1943, in force January 1, A.D. 1944.*

Now Therefore I, ALAN J. DIXON, *Secretary of State of the State of Illinois, by virtue of the powers vested in me by law do hereby issue this Certificate of Incorporation and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.*

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois.*

Done at the City of Springfield, this 13th *day of* December *A.D. 19* 78 *and of the Independence of the United States the two hundred and* 3rd [redacted]

(SEAL)

Alan J. Dixon

[redacted] part of the net earnings of the corporation shall inure to the benefit of or be distributable to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 5 hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributions of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

7. Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

NOTE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)

Daniel J. Terra
James D. Terra
Robert J. Sugrue
Incorporators

ACKNOWLEDGMENT

STATE OF ILLINOIS,
County of Cook } ss.

I, Margaret Solyomi, a Notary Public do hereby certify that on the 11th day of December, 19 78, Daniel J. Terra, James D. Terra, and Robert J. Sugrue (Names of Incorporators)

personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE NOTARIAL SEAL HERE

Margaret Solyomi
Notary Public

PAID
DEC 13 1978
ALAN J. DIXON
Secretary of State

FILED
DEC 13 [illegible]

FO F-29

ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT
CORPORATION ACT
of

SECRETARY OF STATE
CORPORATION DEPARTMENT
TELEPHONE: (217) 782-7880

(Three Articles Must Be Executed and Filed in Duplicate)

Filing Fee $50.00

ANTENUPTIAL AGREEMENT

This ANTENUPTIAL AGREEMENT made and entered into this 24th day of June, 1986, by and between DANIEL J. TERRA, of Kenilworth, Illinois, hereinafter called the "first party", and JUDITH F. BANKS, of Washington, D.C., hereinafter called the "second party".

WHEREAS, the parties hereto intend to be married to each other in the near future; and

WHEREAS, each of the parties has heretofore been married, but not to each other, and DANIEL J. TERRA has one child from his former marriage and JUDITH F. BANKS has no children; and each of the parties has property and an estate and they desire, in contemplation of entering into said marriage, to settle and adjust all property rights that each may have or claim in the property and estate of the other and to determine and declare what rights, if any, each of them shall have in the property and estate of the other upon their entering into such marriage; and

WHEREAS, each of the parties desires to retain and reserve full and complete right, power and authority, to the extent permitted by law, to manage, control, use, sell, lease, mortgage, pledge, encumber and otherwise dispose of his or her respective property and estate in any and every manner or way, including gifts, in trust or otherwise of his or her respective property and estate in any and every manner or way, including gifts, in trust or otherwise, during his or her lifetime and by will or other testamentary disposition

[redacted]

NOW, THEREFORE, in consideration of the premises, and the covenants and agreements hereinafter set forth, and in further consideration of the sum of ONE DOLLAR ($1.00), each to the other in hand paid, receipt whereof is hereby acknowledged, it is covenanted and agreed by and between the parties as follows:

FIRST: Each of the parties hereto has made to the other party a complete statement of such party's present assets and liabilities, which has been fully examined and investigated by the other party and their respective legal counsel, and each party hereby acknowledges, certifies, and declares that he or she has been fully informed and knows the nature, extent, and value of the property and estate, both real, personal, and mixed, of the other party. Each of the parties covenants and agrees that this Antenuptial Agreement shall, when properly signed by the parties and upon the consummation of the marriage between the parties, become equally binding upon them and shall be valid in all respects.

SECOND: The first party hereby covenants and agrees that he will, upon the consummation of the marriage between the parties hereto, assume from his own personal estate the necessary expense of the support and maintenance of the second party during the period of marriage to each other.

THIRD: The first party hereby covenants and agrees to pay, to the second party during their marriage, in addition to ordinary support and maintenance provided for in ARTICLE SECOND of this Agreement, the following sums for her sole and individual use including for all of her clothing and otherwise as she may see fit:

FIFTH: If the second party is alive at the death of the first party and at the time of his death the parties were married to each other without either having filed for a Decree of Dissolution of Marriage or Separate Maintenance, the second party agrees that her claim upon the estate of the first party shall be limited to (1) sole exclusive legal title to the parties' principal marital residence and to all furniture, antiques, and other household personal property located there, specifically excluding, however, works of art whether foreign or American; and (2) a monetary amount determined as follows:

(a) One and one half Million Dollars ($1,500,000) if the first party dies prior to the fifth anniversary date of their marriage;

(b) Three Million Dollars ($3,000,000) if the first party dies after the fifth anniversary date, but prior to the tenth anniversary date, of their marriage; and

(c) Four and one half Million Dollars ($4,500,000) if the first party dies after the tenth anniversary date of their marriage.

SIXTH: The rights granted to second party pursuant to ARTICLE FIFTH of this Agreement shall be in full satisfaction of any and all claims and demands of every kind and character which the second party may have against the estate of the first party, and in consideration of such rights granted to her the second party hereby covenants and agrees to release, waive, and disclaim all other right, title, and interest in and to any and all of the real and personal property owned or possessed by the first party, at the time of their marriage, or any property owned or possessed by the first

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EIGHTH: It is further understood and agreed by the parties that, at the request of either party, the other party shall execute, sign, seal, acknowledge, and deliver any deed or deeds or other documents thought necessary by counsel to convey property of the other, or to extinguish any right of dower, curtesy, homestead, or of inheritance in each other's estate.

NINTH: The purpose of this agreement is to define and limit the claims and demands which each of the parties shall have against the estate of the other and to promote marital harmony and to discourage either party from seeking a monetary benefit by instituting divorce proceedings.

Should either party die during the pendency of this contract the claims herein stipulated and defined shall be the limit which either party may have against his or her estate. It is understood that the first party is a widower and has one child surviving that marriage. The second party is fully aware that under the present laws of the State of Illinois she would be entitled to one-half (1/2) of the net estate by intestacy if the first party died before second party while married or one-third (1/3) of the net estate by exercising her right of renunciation of his will, if it were not for this agreement. First party is fully aware that he would have similar rights in that he would be entitled to all of the second party's net estate if she died while married by intestacy or one-half (1/2) by exercising his rights by renunciation since she has no descendants.

THIRTEENTH: No amendment or waiver of any of the provisions of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement. No waiver of any breach or default hereunder shall be deemed a waiver of subsequent breach of the same or similar nature.

FOURTEENTH: All matters affecting the interpretation of this Agreement and the rights of the respective parties hereunder shall be governed by the laws of the State of Illinois.

This Agreement may be executed simultaneously in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the said parties have hereunto interchangably set their hands and seals at Chicago, Illinois, the day and year first above written.

Daniel J. Terra

Witness

Witness, Attorney for First Party

Daniel J. Terra, being first duly sworn on oath, deposes and says that he has read the above and foregoing Antenuptial Agreement by him subscribed and that he knows the contents thereof and that the same is true.

Daniel J. Terra

Subscribed and Sworn to
before me this 27 day
of June, 1986.

Notary Public

My Commission Expires: 7/27/87

A Vision for the Future

From the lengthy strategic planning discussions that we have had as a Board over the last ten months, I believe we have all come to recognize that we are at a critical point in the history of the Foundation. I also believe that we will have the opportunity at our Board meeting in Giverny to make some of the most important decisions about our future since Dan Terra began his quest to establish American art as one of the preeminent achievements of Western culture.

From my conversations with you, I know that we all understand the weight of our responsibilities and the concurrent seriousness of our deliberations. We occupy a position of enormous privilege that will probably not be reclaimed in our lifetime, at least not within the art world. The art world also recognizes how significant our decisions will be, which should encourage us to sharpen our focus and enhance our sense of purpose. I believe, as I have from the beginning, that we are poised for greatness and that the decisions we are about to take will have lasting impact.

Given these unique circumstances, and several recent developments that I will review in greater detail in Giverny, I thought I should share with you my sense of how we should proceed. I do so having spent many hours with each of our potential suitors and an equal amount of time mulling over the possibilities that lie in front of us. I also have the added advantage of having curated exhibitions for each of the institutions, which has afforded me an insider's understanding of their operations. I know the collections of each institution well, am friends with the directors and their staffs, and count many of the curators, conservators, exhibition planners, and educators as some of my closest colleagues. In addition, I have a sense of the culture of each institution and how we would fit, or not fit, as the case may be.

That said, let me begin this white paper by sketching my vision for Giverny. I then will speak about the future of the Foundation and end with a suggestion for a strategic alliance.

[redacted]

I think it would be inappropriate to try to make Giverny into an academic center linked to a college or university and awarding academic credit. First and foremost, such an initiative would be frightfully expensive. It would also be an administrative nightmare. I think we should be engaged in various educational initiatives in Giverny. We might consider having the director or the curator of MAAG teach in one of the programs in Paris, for example. We also should encourage those institutions to come to Giverny for lectures, symposia, and workshops. But I do not believe we should convert Giverny into an academic outpost. (The American Academy in Rome spends $500,000 a year just on its library.)

This is not to say that we should not have a core library in Giverny for the use of our fellows and museum personnel. But once again, I do not think we should try to imitate or equal collections available elsewhere. (To jump start the process of building a library, I think we should purchase the libraries of two recently retired art historians of American art--Elizabeth [illegible]hns and William Gerts--both of whom had extensive holdings.)

By having a wide range of fellows at Giverny, we could provide a rich supplement to MAAG'S educational programs. And we could distinguish ourselves as the only such program in Europe. I believe it would be highly sought after and a significant contribution to our mission of propagating American art in the broadest possible terms.

TERRA FOUNDATION CENTER FOR THE STUDY OF AMERICAN ART

I believe we should establish a center for the study and propagation of American art here in the United States. This center should be completely independent of any other institution, should bear the Terra name, and should be located in a city that would have the best resources for the understanding and advancement of American art. While several cities could make a claim to being the most appropriate site for this center, I believe there is really only one that would serve the center's needs in the fullest, most effective manner. That is Washington, D.C.

Washington is home to the richest trove of material that would support this center: the Library of Congress, the National Archives, the Archives of American Art, the National Museum of [illegible]ican Art, the Center for Advanced Study of the Visual Arts at the National Gallery, and the Smithsonian, to name only the most prominent. No other city can imitate this concentration of resources. No other city is also such a center of political

The Pharmaceutical Building could also be a place to stage small exhibitions of the Terra Collection or boutique shows related to works in the collection that would draw on other collections in Washington or beyond. Being adjacent to the State Department, the building would afford the Foundation ample opportunity to extend its influence and activities outside the Mall and the Beltway.

THE FUTURE OF THE TERRA FOUNDATION COLLECTION

I am completely convinced that the Terra Foundation collection should be in the same city as the Foundation itself. It would be foolish to have it any other way, especially if the Foundation is to be more than a grant-making organization. It therefore follows that the collection should be housed in Washington, with a sizable part of the collection designated to be exhibited in Giverny.

I believe that it would be wisest to strike a strategic partnership with the National Gallery. The Gallery is the preeminent museum in the city, and the most respected in the art world internationally. It has the most fire power when it comes to loans from museums here and abroad, it has the most secure financing, and it has the strongest educational component of any of our present suitors.

The Terra Collection would join some of the most important and historically heralded collections ever formed by Americans, the two most notable being the Samuel Kress Collection and the Chester Dale. The Terra Collection would also be a superb complement to the Gallery's rich holdings of American art, while the Gallery's larger collection would be an undeniable asset to exhibitions that we would want to mount in Giverny and perhaps send to other European venues.

The Kress and the Chester Dale collections were not outright gifts to the Gallery. They remained on long-term loan for up to twenty years. The Gallery is therefore accustomed to a prolonged engagement period and would not be pressuring us to make a commitment at any time soon.

The Terra Foundation would also not have to make any financial contribution to the Gallery for this relationship.

Terra Foundation
Board Meeting
Minutes
August 24, 2000

In attendance by Conference Call:

Dr. Paul Tucker, Chair
Hon. Jacques Andreani
Mr. Dean Buntrock
Mrs. Margaret Daley
Senator Alan Simpson
Dr. Theodore Stebbins, Jr.
Dr. Stephanie Pace Marshall
Mrs. Judith Terra

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner

Staff:

Mr. Donald Ratner

By Invitation:

Dr. Derrick Cartwright
Dr. John Hallmark Neff

The meeting was called to order at 1:08 PM. Dr. Tucker indicated that the purpose was to review the four proposals and detailed data we had received from our four potential partners allow us to be better prepared for the September meeting. The minutes from the August 7, 2000 Strategic Plan meeting were reviewed and unanimously approved by the Strategic Planning Committee.

There were significant discussions around whether Giverny was "central" to the focus of the Foundation's mission. A decision was made to examine this question at the Board meeting in September.

Dr. Stebbins suggested that we had already decided on the central importance of Giverny.

Dr. Tucker reviewed the background that resulted in the decision of making Giverny central. Mr. Buntrock indicated that he saw that there is a difference between the importance of Giverny and making it central. Dr. Marshall discussed alternatives at this point:

1. Agree that there are unresolved issues and put them aside and then look at the proposals in front of us; or
2. Focus on the issues and then refer them back to a small group to make a presentation at the next meeting and end the call now.

[redacted]

Mr. Lerner walked the Board through each part of the draft contract. From that review there emerged the following items:

1. Ownership of the collection. Would it be donated and who holds title.
2. Where the collection would be housed, how much would be exhibited and for how long.
3. The question of a study center.
4. The question of office space.
5. Whether we should contribute money for construction or a naming opportunity.
6. Who would curate the collection and who that person would work for.
7. On what subjects the aligned institution would have to consult with the Terra Board.
8. What works should never be sold.
9. Issues regarding exhibitions, publications, etc. resulting from the possible alliance.
10. How the acquisition fund should be handled and who should maintain control of it.
11. Educational issues.
12. The status of the art at Giverny and what needs to stay there permanently versus what might rotate.

The Board concluded that it will have to address the above 12 issues as well as the issue of determining a strategic partner.

Mr. Ratner was asked to finalize the above list and send it out with the minutes by the end of next week.

At the September meeting, we need to be prepared to discuss what qualities of the educational programs we want to have included in this plan.

Dr. Marshall asked if we should send out an RFP to all four suitors on education. Senator Simpson suggested that we need to decide what we want as opposed to what they're going to give us.

Dr. Tucker suggested that the next step should be the following:

1. Get proposals on education from the four institutions as to how they would see working with the Foundation.
2. Equalize the general portion of the proposals on affiliation from all four institutions.

TERRA FOUNDATION FOR THE ARTS

STATEMENT 1

FORM 990PF, PART I - CONTRIBUTIONS, GIFTS AND GRANTS RECEIVED

NAME AND ADDRESS	
MR. DANIEL J. TERRA - FOUNDER 926 ROSLYN ROAD KENILWORTH, ILLINOIS 60043	38,400,000.
BELL, BOYD & LLOYD 70 WEST MADISON CHICAGO, IL. 60602	6,000.
DONNELLEY FOUNDATION CHICAGO, ILLINOIS	35,000.
MISCELLANEOUS CONTRIBUTIONS	2,884.
MCMASTER CARR ELMHURST, ILLINOIS	2,000.
MACARTHUR FOUNDATION CHICAGO, ILLINOIS	33,200.

[redacted]

STATEMENT 1

16di-002186

EXHIBIT 5

File Number _____

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

Whereas, ARTICLES OF AMENDMENT TO THE ARTICLES OF INCORPORATION OF

TERRA FOUNDATION FOR THE ARTS

INCORPORATED UNDER THE LAWS OF THE STATE OF ILLINOIS HAVE BEEN FILED IN THE OFFICE OF THE SECRETARY OF STATE AS PROVIDED BY THE GENERAL NOT FOR PROFIT CORPORATION ACT OF ILLINOIS, IN FORCE JANUARY 1, A.D. 1987;

Now Therefore, I, George H. Ryan, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law, do hereby issue this certificate and attach hereto a copy of the Application of the aforesaid corporation.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, at the City of Springfield, this* 26TH *day of* AUGUST *A.D. 19* 94 *and of the Independence of the United States the two hundred and* 19TH.

George H. Ryan

SECRETARY OF STATE

C-218.1

Attachment
Articles of Amendment
Terra Foundation For The Arts

RESOLVED, that the first paragraph of Article V of the articles of incorporation of the corporation be amended to read as follows:

> The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

RESOLVED, that the officers of the corporation are authorized to execute such documents and take such actions they deem necessary or advisable to effect the foregoing resolutions.

16di-002190

EXHIBIT 6

RESTATED BYLAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these bylaws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess business holdings, as defined in Section 4943(c), from making any investments in such manner as to

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The bylaws of the corporation were restated on July 18, 1994, amended on August 17, 1996 and amended on January 27, 1998.

(b) Directors need not be residents of Illinois.

Section 3. Regular Meetings. A regular annual meeting shall be held during the month of September of each year, for the purposes of electing directors and officers and for the transaction of such other business as may properly come before the meeting. If the election of directors and officers shall not be held at such meeting, the board of directors shall cause the election to be held at a meeting of the board of directors as soon thereafter as conveniently may be. The Board of Directors shall provide by resolution the time and place, either within or without the State of Illinois, for the holding of the regular annual meeting and additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two directors. The person or persons authorized to call special meetings of the board may fix any reasonable place, either within or without the State of Illinois, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any meeting of the Board of Directors shall be given at least five days previously thereto by written notice delivered personally or sent by mail or telegram to each director at his address as shown by the records of the corporation. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail in a sealed envelope so addressed, with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of waiver of notice of such meeting, unless specifically required by law or by these Bylaws.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the board, except that if less than a majority of the directors are present at such meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these Bylaws.

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors.

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ARTICLE IV

Officers

Section 1. Officers. The officers of the corporation shall be a chairman, one or more vice chairmen, a president, one or more vice presidents, a secretary and a treasurer. The Board of Directors may appoint such other officers, including one or more assistant secretaries and one or more assistant treasurers as it shall deem desirable, such appointed officers to have the authority to perform the duties prescribed from time to time by the Board of Directors. Any two or more offices may be held by the same person, except the offices of president and secretary.

Section 2. Election and Term of Office. The officers of the corporation shall be elected by the Board of Directors at its regular annual meeting. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be.

Vacancies may be filled and new offices created and filled at any meeting of the Board of Directors. Each elected officer shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been duly elected and shall have qualified. Election or appointment of an officer or agent shall not of itself create contract rights.

Section 3. Removal. Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed.

Section 4. Chairman. The chairman shall be the chief executive officer of the corporation and shall in general supervise and control all of the affairs of the corporation. He shall preside at all meetings of the Board of Directors. He shall have the power to execute all documents that the board of directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the board of directors or by these bylaws to some other officer or agent of the corporation, or shall be required by law to be otherwise signed or executed, and in general shall perform all duties incident to the office of chairman and such other duties as the board of directors may from time to time prescribe.

Section 5. Vice Chairman. In the absence of the chairman or in the event of his inability or refusal to act, the vice chairman, or in the event there is more than one in the order designated by the Board of Directors (or if none, in the order of election), shall perform the duties of the chairman and when so acting shall have all the powers of the chairman. These duties shall not include the duty to preside at meetings of the Board of Directors in the event of the absence, inability or refusal to act of the chairman, which is expressly granted to the president. Each vice chairman shall perform such other duties as from time to time may be assigned to him by the chairman or the Board of Directors.

Section 6. President. The president shall be the principal operating officer of the corporation and shall in general supervise and control all the day-to-day business and affairs of the corporation. In the absence of the chairman or in the event of his inability or refusal to

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enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors. In the absence of such determination by the Board of Directors, such instruments shall be signed by any two elected officers of the corporation.

Section 3. Deposits. All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select.

Section 4. Gifts. The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the corporation.

Section 5. Loans. No loan of money shall be contracted on behalf of the corporation and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. Such authority may be general or confined to specific instances.

ARTICLE VI

Books and Records

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board of Directors and its committees.

ARTICLE VII

Fiscal Year

The fiscal year of the corporation shall begin on July 1 of each year and end on June 30 of the succeeding year.

ARTICLE VIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the form of a circle and shall have inscribed thereon the name of the corporation and the words "Corporate Seal, Illinois".

16di-002194

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to Bylaws

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a majority of the directors then in office and present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new Bylaws at such meeting.

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16di-002196

EXHIBIT 7

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AFFIDAVIT OF JOHN H. LONGWELL IN SUPPORT OF
DEFENDANTS' OBJECTIONS TO PROPOSED SETTLEMENT

The undersigned, upon oath, does hereby depose and state as follows:

1. I, John H. Longwell, am an associate at the law firm of Kellogg, Huber, Hansen, Todd & Evans, PLLC. The firm represents defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson in Buntrock v. Terra, Case No. 00 CH 13859.

2. On July 16, 2001, I attended an interview of Assistant Attorney General Floyd D. Perkins, chief, Bureau of Charitable Trusts and Solicitations, at the Office of the Attorney General on West Randolph Street in Chicago, Illinois. The interview was scheduled at the suggestion of the Court and upon request of our firm. Mr. Perkins declined our initial request to conduct the interview under oath and on the record. We asked Mr. Perkins to reconsider recording the interview, dispensing with the oath, and he again declined. Therefore, K. Chris Todd, a partner in our firm who conducted the interview, asked me to accompany him to take notes. During the interview, I attempted to record questions and answers in as much detail as possible. Upon my return to Washington, D.C., I typed these notes to create an informal record of the interview in question and answer format. However, I was not able to produce a verbatim record.

3. The statements in this affidavit are based on my notes and recollections of the interview. The full text of my notes is attached at Exhibit A to this affidavit.

4. Mr. Perkins stated that he believes it is his job to ensure that not-for-profit and other charitable institutions based in Illinois utilize their assets in Illinois. Whenever possible, Mr. Perkins attempts to ensure that fiduciary vacancies at such institutions are

KCT: Did you do anything in addition to relying on the Gidwitz and Buntrock complaint?

TI: There was a time to litigate these issues.

FP: If you have charges against me, bring them on. If you don't know anything about the facts, try to figure it out.

LB: We can't figure them out because you say this is none of our business.

FP: This is none of your business.

7. Mr. Perkins also stated that he possessed discretion in determining the target, subject matter and timing of any investigations.

8. In response to questions about Stephanie Pace Marshall, Mr. Perkins stated that after a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins acknowledged that he was aware of a letter dated May 20, 2001, in which Dr. Marshall criticized the attorney general's role in mediation and rejected Mr. Perkins proposals. Mr. Perkins believed that he had been "snookered" into going along with mediation and had lost valuable time preparing for litigation. Mr. Perkins stated that he was concerned about the management of the finances of the Foundation and the fact that there were too many "part-time officers." He began to investigate Stephanie Pace Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He became aware of these issues and considered them for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr.

INTERVIEW OF FLOYD D. PERKINS
ASSISTANT ATTORNEY GENERAL OF ILLINOIS
BUREAU OF CHARITABLE TRUSTS AND SOLICITATIONS
July 16, 2001

Present:

Floyd Perkins
Tom Iopollo
Therese Harris
Attorney General's Office

K. Chris Todd
John H. Longwell
Kellogg, Huber, Hansen, Todd & Evans

Laurel Bellows
Bellows & Bellows
For Defendants Judith Terra, Paul Tucker, Alan Simpson

Jim Carroll
John Kennedy
Quinlan & Crisham
For Plaintiffs Ronald Gidwitz and Dean Buntrock

Scott Zsala
Winston & Strawn

Susan Stone
Sidley Austin
For Defendant Terra Foundation for the Arts

KCT: We have asked that you reconsider our request to conduct this interview under oath and on the record. Do you still decline?

FP: Yes, at the advice of my lawyer.

TI: This is not a deposition, not an interrogation.

KCT: Will you reconsider at least putting this on the record?

FP: No.

KCT: What is your job title?

would accept, how it would be governed. Everybody had various pieces of evidence. If there were things that your side had, they should have presented them during mediation. Your side lost their position in mediation.

KCT: (Repeating question whether FP knew of evidence reflected in Exhibits FP 2-7 regarding donor intent when filed complaint.)

FP: I'm not getting into that. This was a 4 month process. These affidavits did not exist in September 2000. Some of these affidavits are from people I never heard of. If there was evidence, where was it? That part of the case is resolved. I'm not going to spend time trying to convince you.

KCT: Were there any terms that the AG required as preconditions to entering mediation?

JK: The parties entered an agreement that the mediation remain confidential. I object to this line of questioning.

KCT: Does your objection include premediation documents?

JK: It would include any positions and assertions of the parties during mediation.

LB: Does the parties' agreement extend beyond the judge's order?

JK: The agreement was among the parties and provided that no statements made by the parties could be used. It goes beyond the order.

FP: We did sit down with counsel at the beginning of mediation, and said we could not imagine a scenario where we would agree to any settlement in which the Foundation would leave Illinois. This was no secret because it came up in meetings in chambers. We started mediation with that in mind.

KCT: So the AG's position was that mediation would begin from the point that the Foundation would not leave Illinois?

FP: Yes. And the defendants wanted a global release.

KCT: Showing **EXHIBIT FP-14.** What was the date of this filing?

FP: Late December.

KCT: And when were these conversations about mediation?

FP: The end of January, beginning of February.

KCT: Did you talk to the Attorney General, James Ryan?

TI: That is irrelevant.

FP: I'm not going to get into it. But no, I did not talk to Jim Ryan.

KCT: If I went down a list of all the people you might have talked to, you wouldn't answer any of those questions?

FP: No.

KCT: Did you talk to any members of the Board of Directors before filing?

FP: No.

KCT: Describe generally what you did in order to prepare and file your complaint.

TI: That is protected by the work product privilege.

KCT: Showing **EXHIBIT FP-9.** (KCT read passage in ¶ 49, "There is no doubt that Dan Terra expected the Terra Museum to remain in Chicago.") Showing **EXHIBIT 24.** Were you aware of this amendment to the Articles of Incorporation at the time you filed the complaint.

FP: I don't recall. Probably not. We attached the original Articles to the complaint, so if we were aware of the amendment we probably would have attached it.

KCT: Did you have any discussions with Jim Collins between September 2000 and the present?

FP: I have spoken to him several times, about this case and other matters.

KCT: Did you have conversations that would touch upon the allegations in your complaint?

JK: Objection. This is beyond the proper scope of questioning and protected by the work product privilege.

KCT: Is Mr. Kennedy representing you?

TI: I agree that this irrelevant and work product. What your getting at now is not going to lead to any sort of relevant evidence.

KCT: Are you instructing him not to answer?

TI: No, Floyd can take care of himself.

KCT: Showing **EXHIBIT FP-21.** (Referring to Ted Stebbins statement on page 42, that he "aborr[ed]" the AG's threatening tactics.) Have you seen this?

FP: I listened to the tape.

KCT: Dr. Stebbins said he dislike the AG's threatening tactics. Do you agree that Dr. Stebbins believed that he had been threatened or intimidated?

SZ: I object. We know that despite his reservations, Mr. Stebbins voted for the settlement. There is probably some other way you can ask about this, but I object to the question as phrased.

TI: He also said he was voting his own conscience.

KCT: Did you employ any threatening tactics?

FP: No.

KCT: Showing **EXHIBIT FP-14.** Attached to this motion are notes from Mr. Neff. How did you get those notes?

TI: This question does not go to threatening or intimidating tactics.

FP: Someone gave them to us.

KCT: Who? What were the circumstances?

FP: I don't recall. They probably came from someone in the case. I don't see how this is relevant.

KCT: Was there any discovery going on at that time?

FP: Probably not.

KCT: When you filed your original complaint, FP-9, Dr. Stebbins was not a defendant. Why was he named as a defendant in the draft complaint you circulated in March 2001?

FP: We drafted the amended complaint to bring the pleadings in line with the proof. Documents that were filed in December and January contained new issues that we brought up as we became aware of them.

KCT: In the original complaint, there is an allegation in ¶ 23(f) that a director had a conflict of interest from representing multiple parties at art auctions. That director was Dr. Stebbins, correct? Was there any reason you did not name Dr. Stebbins at that time?

FP: No.

KCT: Did you know IMSA was 95% funded by the State of Illinois.

FP: I read that somewhere in your materials. I knew it was a state school. I don't know whether it comes directly from the state.

KCT: You sent a notice of your investigation to IMSA on May 25?

FP: We wouldn't call it an investigation. When we are involved in making these inquiries, pursuant to an administrative subpoena, we are careful in how we characterize it because we don't want to damage anyone.

KCT: So it's not an investigation. What do you call it?

FP: An inquiry and review.

KCT: Do you have discretion as an assistant AG as to which cases to investigate, and when?

FP: The office enjoys some discretion in that regard.

KCT: Who decided to write to IMSA regarding your inquiry?

FP: I did.

KCT: Did you talk to anybody before you did this?

FP: Some staff members, but nobody above me.

KCT: Who?

FP: Some people in the office on the staff. Ms. Harris for example. But I made the decision. I did all of the sending.

KCT: Are there any writings which memorialize your thinking as to why you were inquiring of IMSA?

FP: I don't think so, no. Except for the subpoena.

KCT: May I request a copy of that?

TI: I don't see how that is relevant.

SS: Has anybody consulted with Marshall or IMSA about this? They may have privacy interests. I know I don't really have standing to be raising objections

(After brief recess, SZ stated that in further discussion, Mr. Perkins had stated that it was his impression that Mr. Roberts had realized that the investigation had been resolved with the discussion of the two issues. KCT asked Mr. Perkins whether he agreed with the statement that a US Atty is not a US Psychiatrist.)

KCT: Did Roberts say anything [indicating that he knew investigation was over]?

FP: Roberts left the meeting thinking that we had resolved the issues. We pretty much communicated that to him.

LB: I want to tie down dates. What was the date of the administrative subpoena?

FP: May 25, 2001. It went out in the mail to the Academy that day.

LB: How long had you had the information?

FP: A couple of days. After the May 11 mediation session, there was a lot of discussion that people were dissatisfied. I figured the mediation was over. And I feld that we had been snookered into not being ready to proceed with the litigation. We wanted to file an amended complaint and we were going to make it more focused. We wanted to put it in different shape. And we had become concerned that there were a lot of part-time managers of the Foundation. We focused on who the officers were and started looking at Stephanie Marshall, because she was the treasurer and we had some concerns about the financial dealings of the Foundation, like travel expenses. We were looking to see what we could allege about part-time officers of the Foundation. We knew that Marshall was on the Board of the Frye Foundation, we learned that from Scott McHue, who used to be counsel for the Foundation. So Marshall was a director of Frye and Terra; we were looking at what she was paid, to see if she was capable of doing both jobs [in addition to IMSA]. We were working with public records and filings from charities. We came across things that caused us to make inquiry of her Math Academy.

KCT: What is the Illinois practice -- is it permissible to have ex parte communications with the court?

FP/TI: No.

FP: With respect to the Math Academy, we have administrative subpoena power, there is no court proceeding involved at all. The judge would not have known about it.

JL: Did you have meetings with the mediator where counsel for other parties were not present?

16di-002206

EXHIBIT 8

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 8 Remains Under Seal.

16di-002208

EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF PAUL HAYES TUCKER IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Paul H. Tucker swears under penalty of perjury as follows:

1. I am Chairman of the Board of Directors and President of the Terra Foundation for the Arts ("Foundation"), a plaintiff in the above-captioned action. I was elected to the Board of Directors of the Foundation ("Board") in October 1998 and became Chairman of the Board and President in 1999. I make this affidavit in support of plaintiffs' motion for a temporary restraining order.

2. I hold a Ph.D. in the History of Art from Yale University and am a chaired professor of Art History at the University of Massachusetts Boston. My primary area of study has been the life and work of Claude Monet. I first met Ambassador Daniel J. Terra (1911-1996) in 1990 in connection with my work on an exhibition of Monet's works held in Boston, Chicago and London.

3. The Foundation is a private Illinois not-for-profit corporation organized in 1978 by Mr. Terra to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Mr. Terra served as the Chairman of the Board and President of the Foundation from the date of its incorporation until his death in 1996. During this period the Foundation, in keeping with Mr. Terra's vision, took an extremely aggressive and committed view of its mission, as stated in the Articles of Incorporation, to "expand the artistic horizons of a growing art public." Indeed, this broad focus was made clear by the amendment of

D.C., where he then resided. However, in June 1996, Mr. Terra suffered a stroke in his Washington residence and died. He bequeathed to the Foundation most of its current assets.

8. After Mr. Terra's death, the position of Chairman of the Board and President of the Foundation fell first to Helene Arhweiler, former president of the Center Georges Pompidou in Paris. She was succeeded by Arthur A. Hartman, former U.S. Ambassador to France and Russia, and then, in 1999, by myself. Other current members of the Board include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard University's John F. Kennedy School of Government; Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French ambassador to the United States; Theodore Stebbins, curator of American Art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive officer of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis.

9. I joined the Board in 1998 because I believed strongly in the Foundation's fundamental purpose, as expressed to me by Mr. Terra and others -- to propagate American art in the United States and abroad through public education. The establishment of a museum in France, among other things, convinced me of the broad scope of the Foundation's efforts. I viewed participation in the Foundation as an excellent opportunity to further the goals of my life's work in promoting public education in the arts on a national and international scale. Since becoming a Board member, I have supported its continued efforts to advance arts education inside and outside the Chicago area. Examples of major non-Chicago projects include the recent award of a $500,000 grant to a New York production company for a documentary on American

13. I was then asked by various Board members to stand for election. I did so after giving due notice to Mr. Hartman and despite his objections was elected by a majority of the Board. Mr. Hartman expressed anger over his ouster. He eventually joined forces with Mr. Gidwitz, Mr. Buntrock and Mrs. Daley in opposition to efforts by the Foundation to maintain its independence and chart its own course for the future.

14. Despite the maneuvers of Messrs. Gidwitz and Buntrock, the majority of the Board remained committed to the Foundation's broader purpose and interests. Like most other Board members, I believed that the Foundation needed to conduct a thorough reassessment of its assets and endeavors and to explore all possible options to arrive at a strategic plan for the future. As part of this effort, at my insistence in early 2000 the Foundation began to consider various opportunities including offers of cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. I believed that consideration of all possible options -- in effect, a fully competitive bidding process -- was clearly in the best interests of the Foundation.

15. In preparation for the Board's September 2000 meeting in Giverny, I asked members to focus on long-term planning options. I proposed that each member should circulate a position paper, setting out his or her ideas and proposals. Thereafter I circulated a memorandum, entitled "A Vision for the Future," in which I argued, among other things, that a collaboration with the National Gallery in Washington, D.C., would be in the best interests of the Foundation. My paper was designed to stimulate debate and further deliberation. In addition, I discussed with several Board members whether Buntrock, who had repeatedly expressed impatience with the work of the Board, should choose not to stand for reelection at the upcoming

threats to peel away layers of resistance to their takeover of the Foundation. They had already garnered the support of Mrs. Daley and Mr. Hartman. On an 11-member Board, they needed two additional votes to gain control. They targeted Dr. Stebbins and Dr. Marshall.

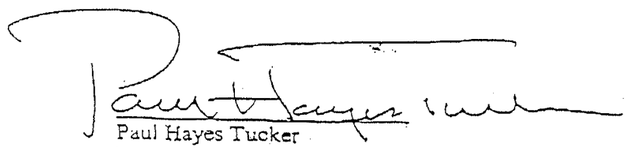
19. In March 2001, the Attorney General drafted a complaint seeking appointment of a receiver for the Foundation and removal of several directors, including myself and Dr. Stebbins. The draft complaint named Dr. Stebbins as a defendant for the first time in the litigation. It included exaggerated and false allegations of impropriety against Dr. Stebbins, including alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions. The Attorney General successfully used this complaint to cause Dr. Stebbins to threaten to resign and eventually align with Messrs. Gidwitz and Buntrock.

20. Meanwhile, as the litigation proceeded to mediation, Mr. Gidwitz, Mr. Buntrock and the Attorney General sought a settlement proposal that would achieve their objectives of anchoring the Foundation to Chicago and ensuring local control. By May of 2001, a draft "settlement" was presented for consideration by the parties. The "settlement" forces the Foundation to "maintain and exhibit" its collection in Illinois for 50 years and to negotiate a relationship with another Chicago institution with the goal of ceasing operations as a stand-alone museum. Most tellingly, the "settlement" radically changes the Foundation's corporate governance structure to make the State of Illinois the dominant force. The size of the Board will be increased to 15 members, with no less than eight of the directors to be Illinois residents.

21. In late May of 2001, the Attorney General's office informed Dr. Marshall that it was considering an investigation of the Illinois Academy of Mathematics and Science. Dr. Marshall has now reportedly decided to support the substance of the "settlement," with serious

23. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of June, 2001

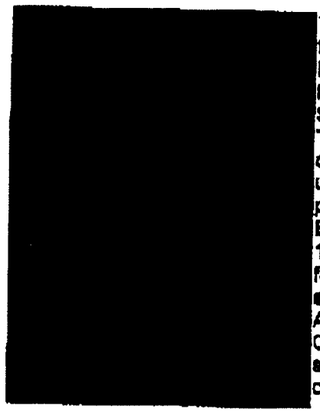


Paul Hayes Tucker

TERRA

About Daniel J. Terra

Daniel J. Terra (1911-1996) was an energetic blend of scientist, businessman, and art lover. With a chemical engineering degree from Pennsylvania State University, the child of Italian immigrants founded Lawter Chemicals in Chicago in 1940. The success of Terra's globally-based enterprise gave him the means to further his interest in culture by collecting works of art and by becoming involved in several Chicago arts institutions. When President Ronald Reagan appointed Terra to the post of Ambassador-at-large for Cultural Affairs, an appointment he held from 1980 to 1988, Terra's enthusiasm for promoting American art expanded to a national and international audience. At one time, President Reagan lauded Terra for "doing more for American art than any other man in the history of the country." The entrepreneurial scientist's irrepressible desire to share his ardor for American art resulted in the founding of two new American art museums. Initiating an American art museum in Evanston, Illinois in 1980--the only one in a 400-mile radius of Chicago at that time--was a notable accomplishment. Its later relocation in 1987 to Chicago's Magnificent Mile with a collection that was increased ten times was even bolder. Establishing a museum of American art in France was courageous. Terra's desire to share with diverse audiences his enthusiasm for American art not only introduced a significant collection to America's heartland and to Europe but also realized his vision of establishing a forum celebrating the cultural and patriotic value of American art. The critical mission for Terra's museums is arts education with a focus on both public instruction and scholarly research.



Terra's personal collection was first exhibited at the Palmer Museum of Art on the campus of his alma mater, Pennsylvania State University in 1977. When Terra Museum of American Art officially opened in Evanston, the uniquely American theme of a prized painting, George Caleb Bingham's *The Jolly Flatboatmen*, 1877-78, represented the founder's idea of art as an expression of national identity. After relocating the museum to Chicago, Terra unabashedly stated, "We read so much about our industrial and economic

16di-002216

Press Releases

George H. Ryan
Governor

FOR IMMEDIATE RELEASE
April 15, 1999

GIDWITZ NAMED STATE BOARD OF EDUCATION CHAIR

SPRINGFIELD – Governor George H. Ryan today announced the appointment of Chicago businessman Ronald J. Gidwitz as the chair of the Illinois State Board of Education.

Gidwitz replaces retiring Board Chair Louis Mervis of Danville, who is retiring after 15 years of service to the State Board of Education. Gidwitz, 54, is a partner of GCG Partners, a private investment firm.

"Ron Gidwitz shares my belief that Illinois schools should be among the best in the nation when it comes to preparing children and young adults for life and opportunity," Ryan said. "He is committed to improving the use of technology in our schools, expanding workforce training efforts and making sure that educational opportunities are equal for all children in Illinois."

Gidwitz's appointment requires confirmation by the Illinois Senate.

16di-002218

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF DAVID LEVY IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

David Levy swears under penalty of perjury as follows:

1. I am President, Director and Chief Executive Officer of the Corcoran Gallery of Art, the oldest museum of art in Washington, D.C.

2. In 1991 Daniel Terra contacted me and sought my advice on his plan to share his collection, housed in Chicago, and his estate (via his foundation) with independent art museums across the nation, both to provide greater exposure to his collection of historical American art and to support museums with an interest in this subject through the distribution of his wealth through his foundation. Mr. Terra told me he was concerned about the viability of the Chicago Museum.

3. Subsequently, in 1991 and 1992, we discussed an alternative approach, which would involve the creation of a Terra Museum Trust to be guided by an independent Board of Trustees drawn from the Whitney Museum of American Art in New York, the Corcoran Museum in Washington and the museums operated by Terra in Chicago and Giverny. Mr. Terra approved the proposal and he, I, and Robin Martin, then Chairman of the Corcoran Board of Trustees, thereafter engaged in discussions with Leonard Lauder and David Ross, respectively the Chairman of the Board and the Director of the Whitney Museum. These discussions centered on placing the American collections of these museums under a common curatorial management arrangement so as to provide national and international exposure to the combined collections. After extended discussions with the Whitney, the proposal did not materialize because issues of control of the collection, raised by the Whitney, could not be satisfactorily resolved.

Dated: June 22, 2001

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF PETER SOLMSSEN IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Peter Solmssen swears under penalty of perjury as follows:

1. I am president emeritus of the University of the Arts, located in Philadelphia, Pennsylvania.

2. Daniel Terra and I were close friends and colleagues dating back to the early 1980's, when he was appointed ambassador-at-large for cultural affairs by President Reagan.

3. Starting around 1990, Daniel Terra and I had a number of conversations in which he told me that he expected that the Terra Foundation would close the Terra Museum in Chicago and sell the real estate. Among other proposals, we discussed the possibility of moving the art collection to the Pennsylvania Academy of Fine Arts in Philadelphia and establishing a different kind of charitable activity in Chicago.

4. I introduced Ambassador Terra to the leaders of the Pennsylvania Academy and he entered into lengthy conversations with them about bringing the collection housed at the museum in Chicago to Philadelphia. In his negotiations with the Pennsylvania Academy, Ambassador Terra was prepared to provide significant funds in addition to his collection, but because he believed that the Terra Foundation should have ownership of his collection as well as the Academy's collection, negotiations with the Academy did not result in an agreement.

5. Ambassador Terra was particularly interested in Philadelphia because he had grown up there. He told me how he had walked past the Academy every day on his way to high school.

6. Ambassador Terra and I also engaged in discussions about a collaboration between the Terra Foundation and the University of the Arts, of which he was a trustee. We discussed

16di-002222

EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF JOSEPH ZORC IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Joseph Zorc swears under penalty of perjury as follows:

1. I am a real estate agent with the firm Pardoe real estate ERA in Washington D.C. specializing in commercial real estate.

2. In the Spring of 1996, Daniel Terra came to me and said he wanted to locate and buy property for the purpose of moving the headquarters of the Terra Foundation from Chicago to Washington D.C. .

3. During 1996, I showed him a number of properties, and assisted him in his purchase of 1072 Thomas Jefferson, in the Georgetown area of Washington, D.C. to be used to house the temporary headquarters of the Terra Foundation. Copies of documentation regarding 1072 Thomas Jefferson are attached as Exhibit B to this declaration.

4. At one time I had listed a piece of property on Connecticut Avenue, at Calvert Street that Mr. Terra had initially intended to sell. However, after six months, Mr. Terra rescinded our listing agreement and told me that he wished to use the property as a museum.

5. Mr. Terra told me that his intention was to create an institute of American Art and expressed the desire to look at additional properties that would be suitable for a building of a minimum of one million square feet. Based on his intentions, we had discussed a helicopter tour of a number of larger spaces offered by the Department of the Interior about which Mr. Terra had express strong interest.

6. We also looked at several other commercial sites including a site directly adjacent to George Washington University, owned by the University, a second site just east of

16di-002224

EXHIBIT 13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DECLARATION OF BELINDA REEDER IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Belinda Reeder swears under penalty of perjury as follows:

1. I am an architect with the firm Archetype located in the Adams Morgan area of Washington, D.C.

2. Sometime during the spring of 1996, I was commissioned by Daniel Terra to draw plans for a building in Washington, D.C. at what is now 2519 Connecticut Avenue, at the corner of Calvert Street.

3. I spoke with Daniel Terra at that time and he told me he intended to use the location to house the Terra Foundation's headquarters, part of the collection of art from the Terra Museum in Chicago and an extensive sculpture garden.

4. He told me that he intended to use the facility for elaborate events and fundraising for the Terra Foundation.

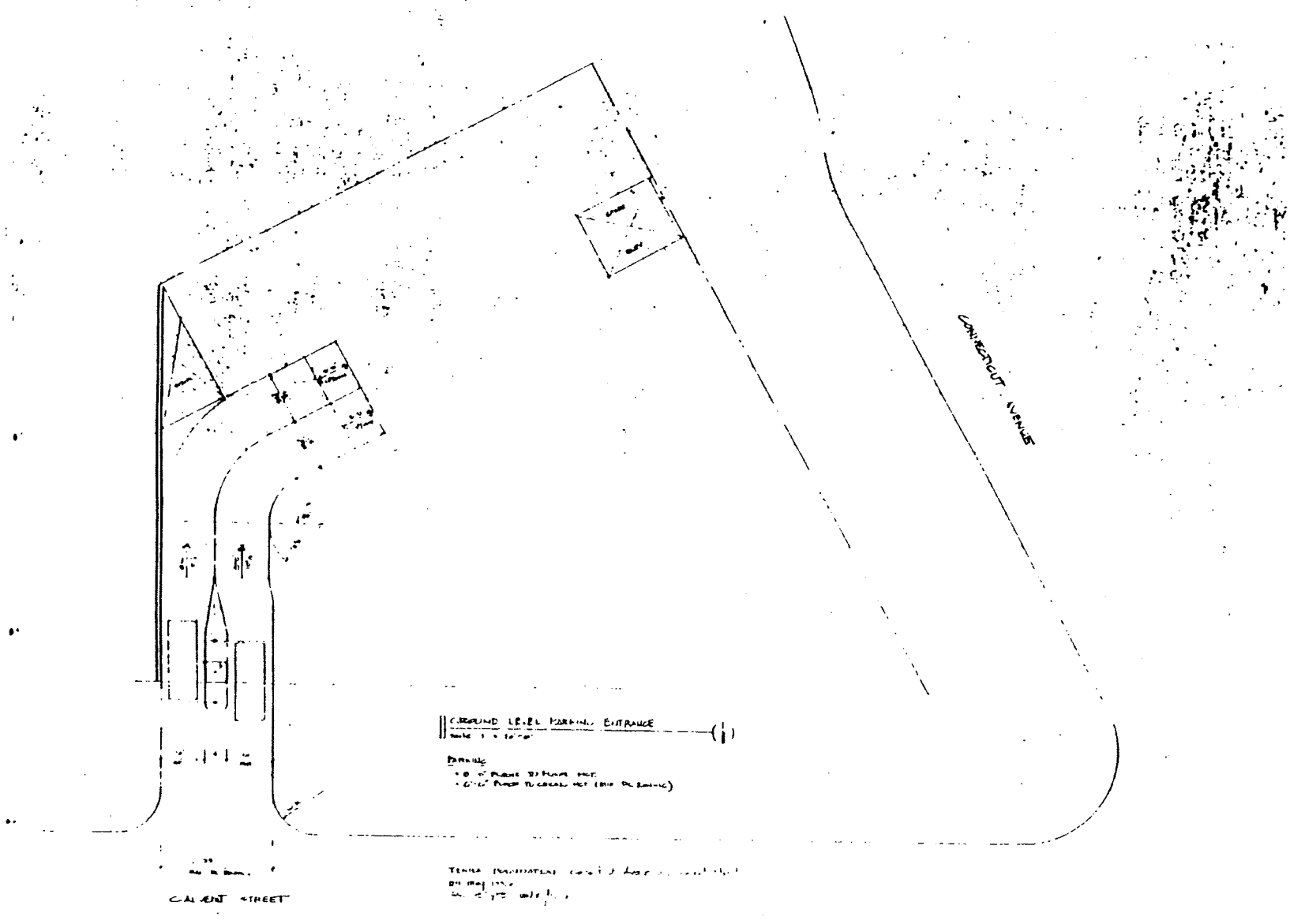
5. In May of 1996, I completed the schematic plans for the building and presented them to Mr. Terra. Copies of the plans that I drew for Daniel Terra are attached as Exhibit A to this declaration.

6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 27, 2001

Belinda Reeder

DISTRICT OF COLUMBIA
BELINDA C. REEDER
No. 39506
REGISTERED
ARCHITECT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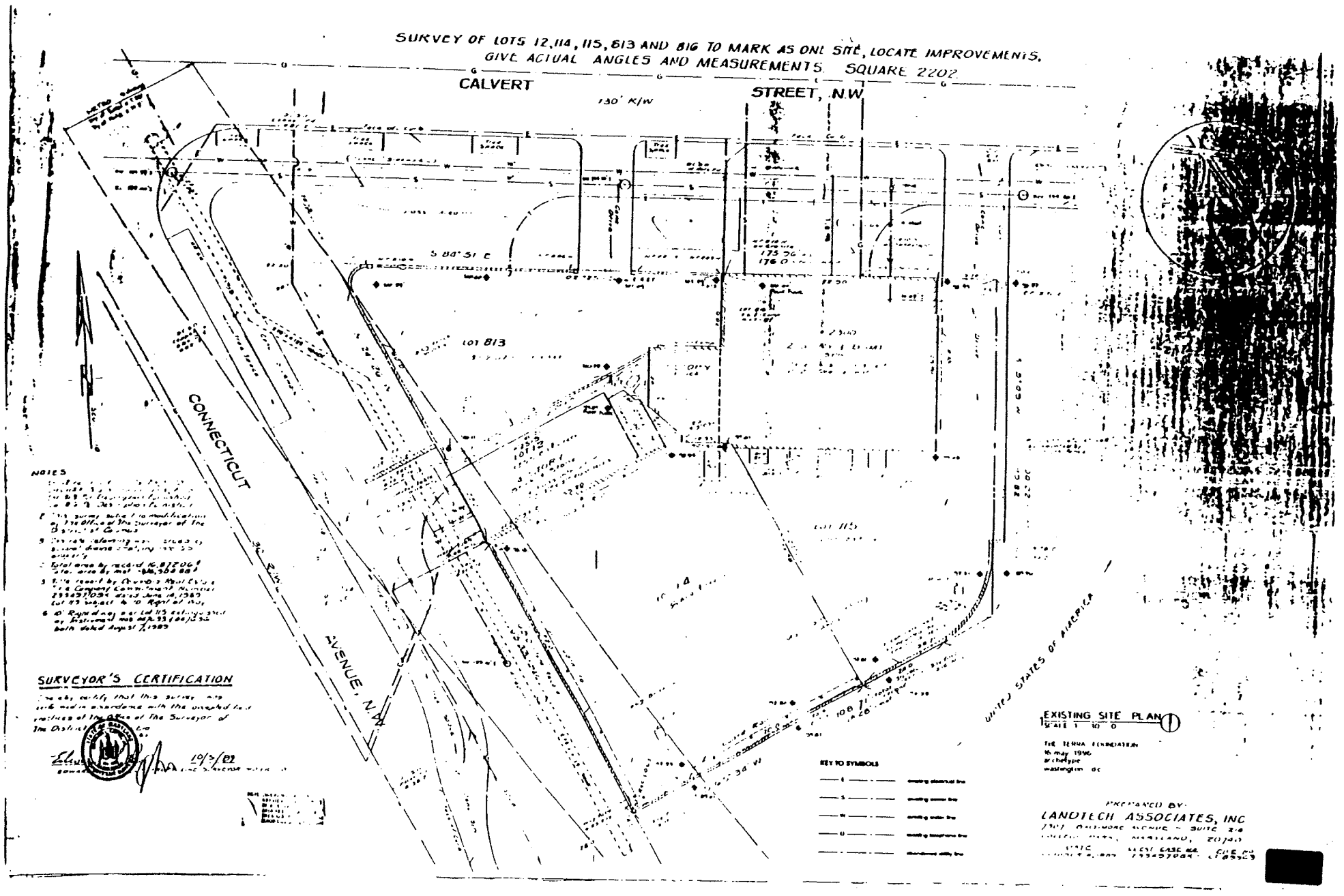
CALVERT STREET


SURVEY OF LOTS 12, 114, 115, 813 AND 816 TO MARK AS ONE SITE, LOCATE IMPROVEMENTS.
GIVE ACTUAL ANGLES AND MEASUREMENTS. SQUARE 2202.
CALVERT
130' R/W
STREET, N.W.
S 88° 51' E
LOT 813
CONNECTICUT
AVENUE, N.W.
UNITED STATES OF AMERICA
NOTES
SURVEYOR'S CERTIFICATION
EXISTING SITE PLAN
SCALE 1" = 10' 0"
KEY TO SYMBOLS
PREPARED BY:
LANDTECH ASSOCIATES, INC

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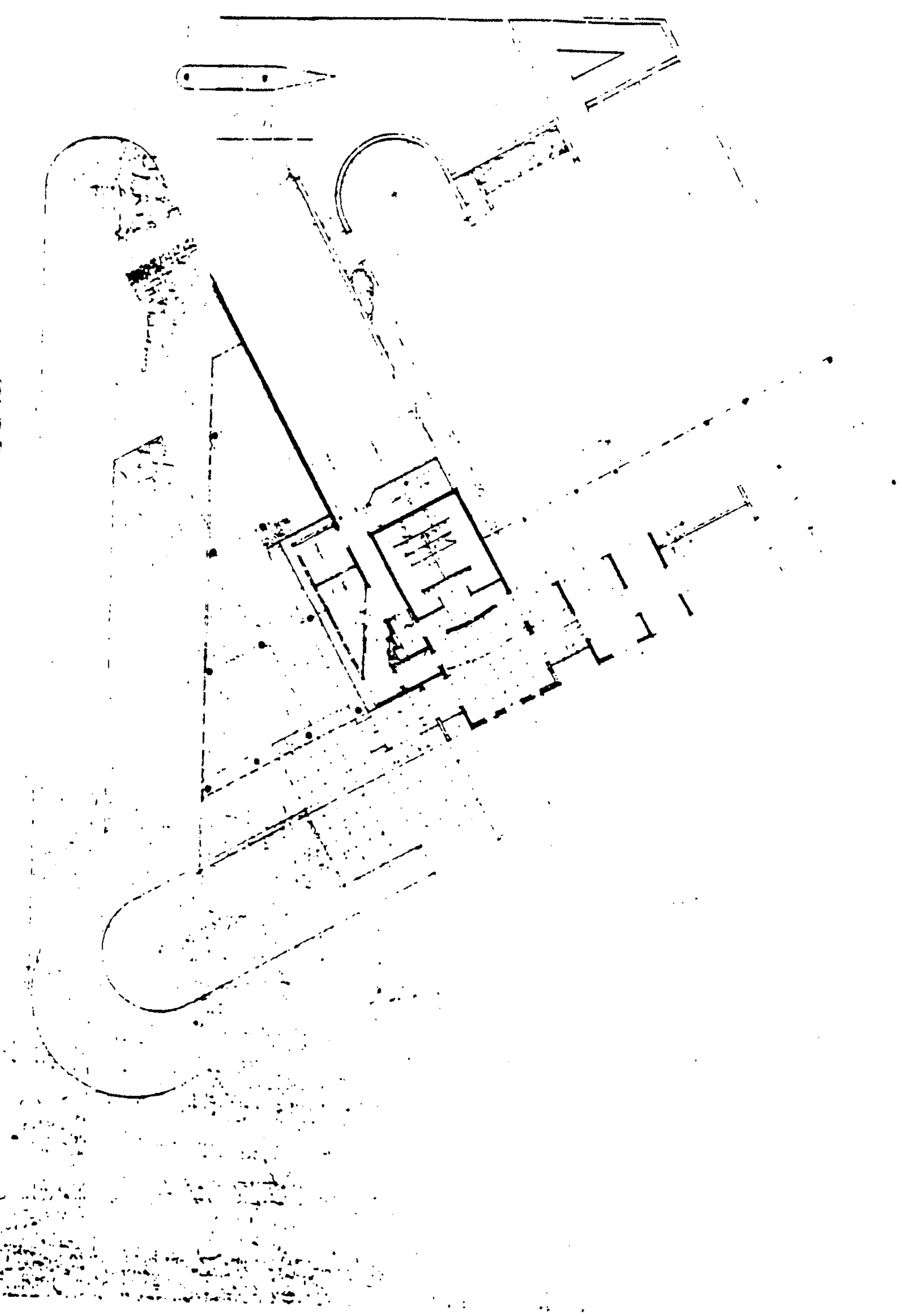

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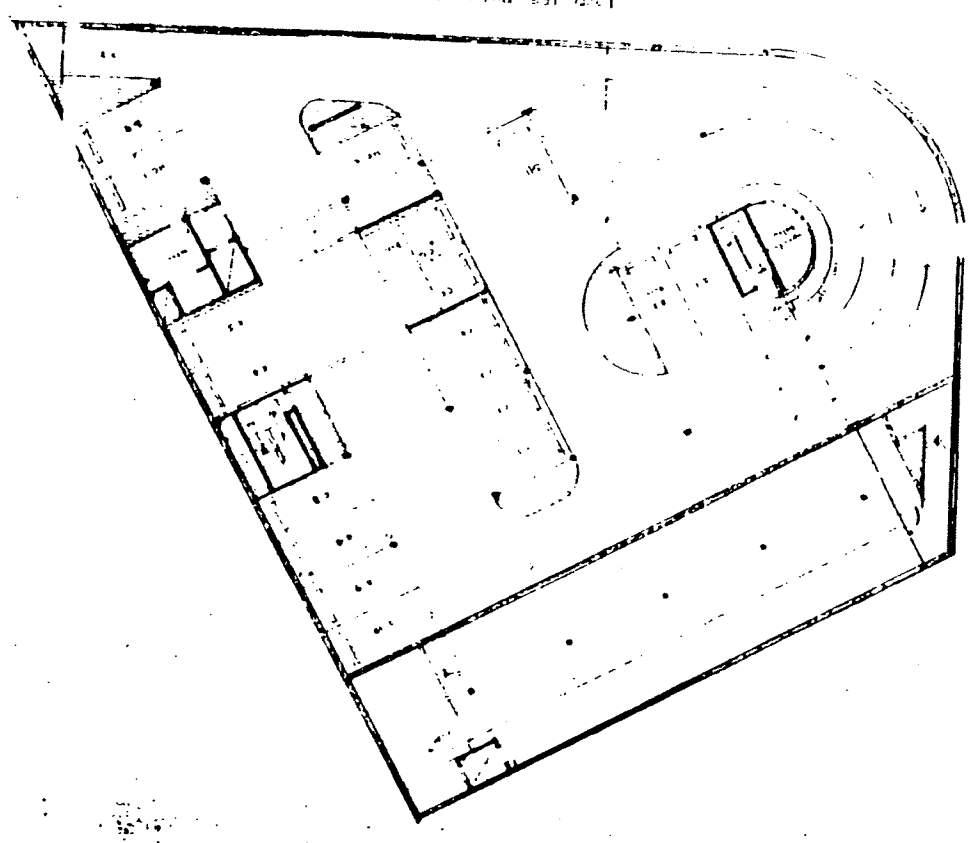
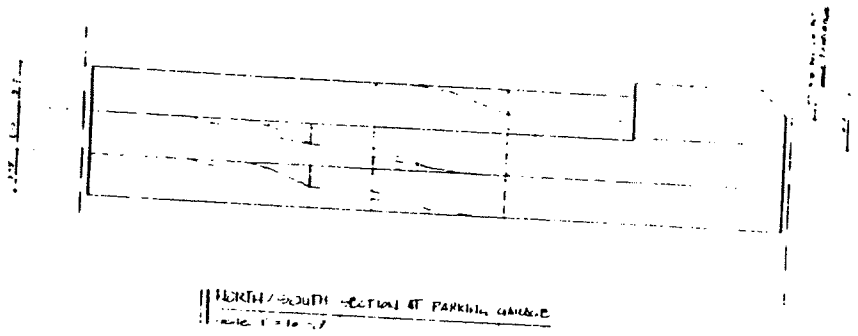
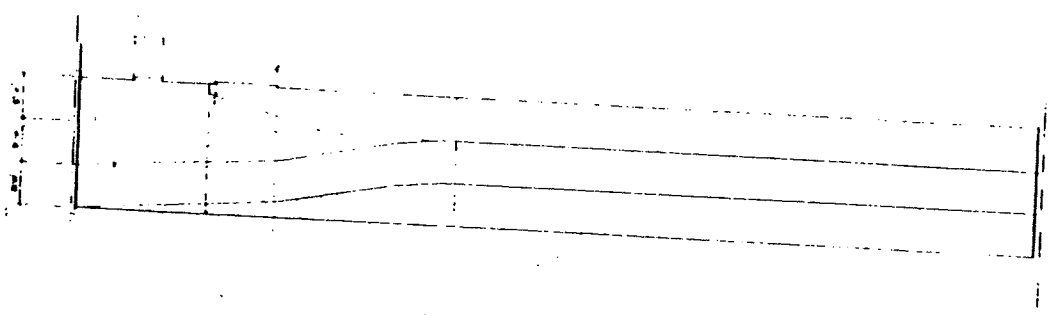




NORTH / SOUTH SECTION AT PARKING GARAGE
SCALE 1" = 10'-0"



EAST / WEST SECTION AT PARKING GARAGE
SCALE 1" = 10'-0"

TERRA FOUNDATION / Concrete Arcade and Culvert Sheet
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D LOWER LEVEL PARKING - P2
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PARKING SPACES - P2.
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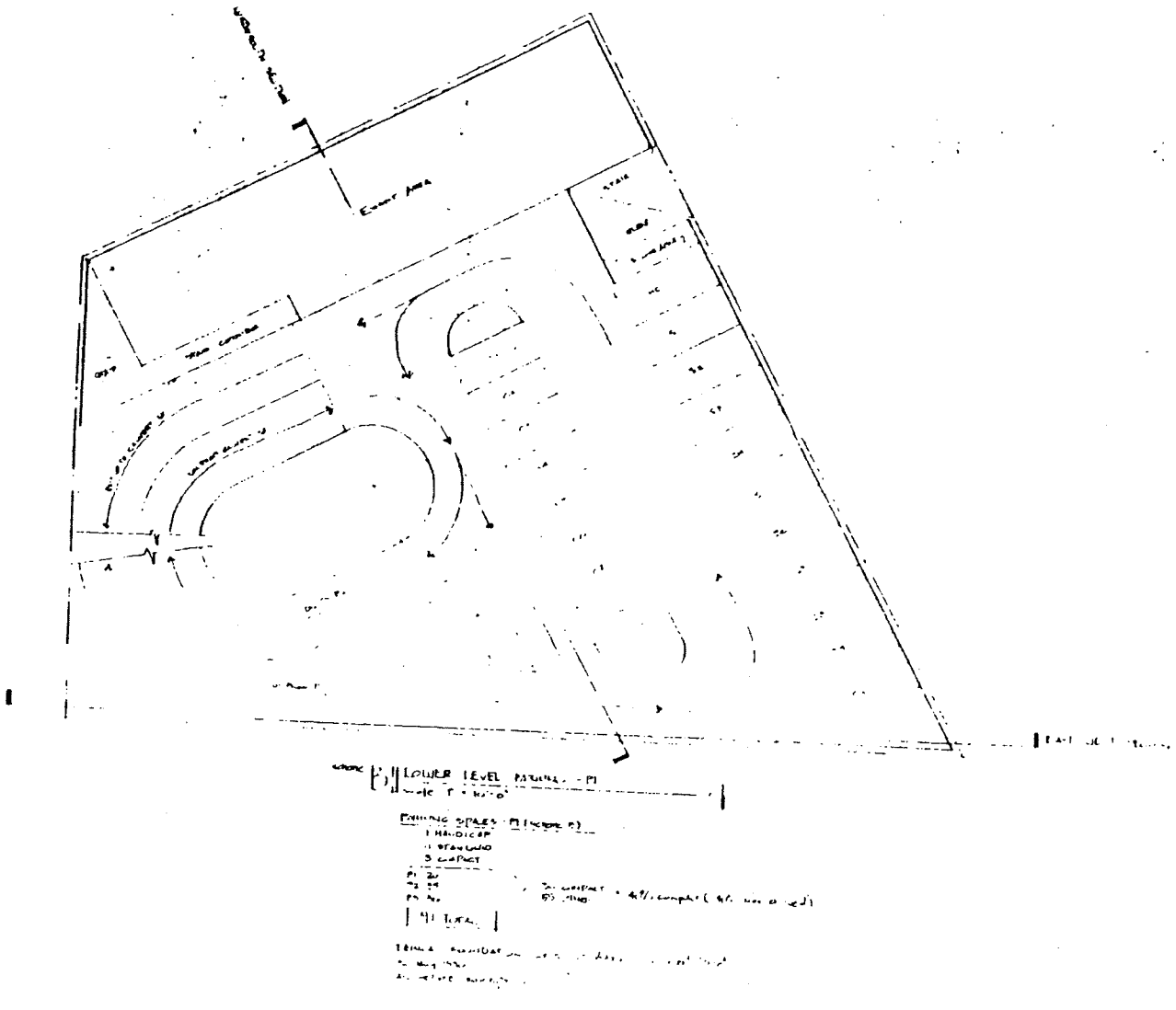

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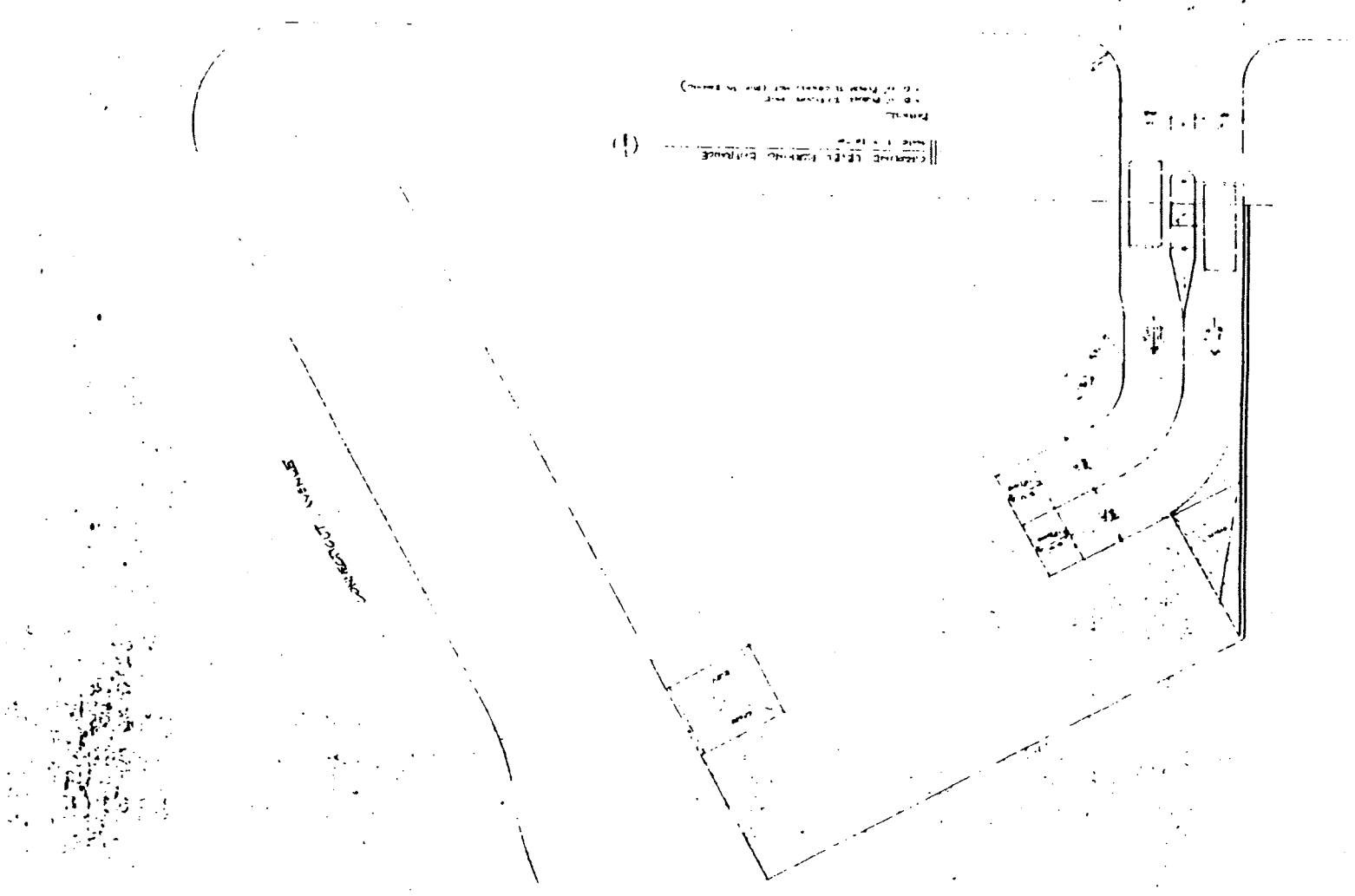

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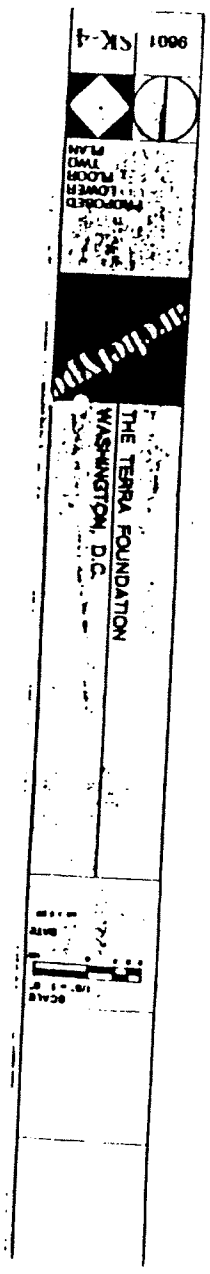
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PROPOSED
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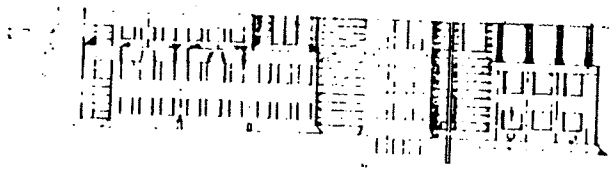
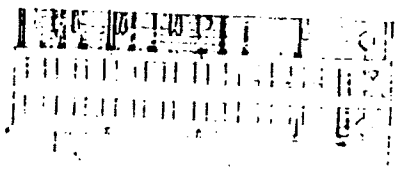
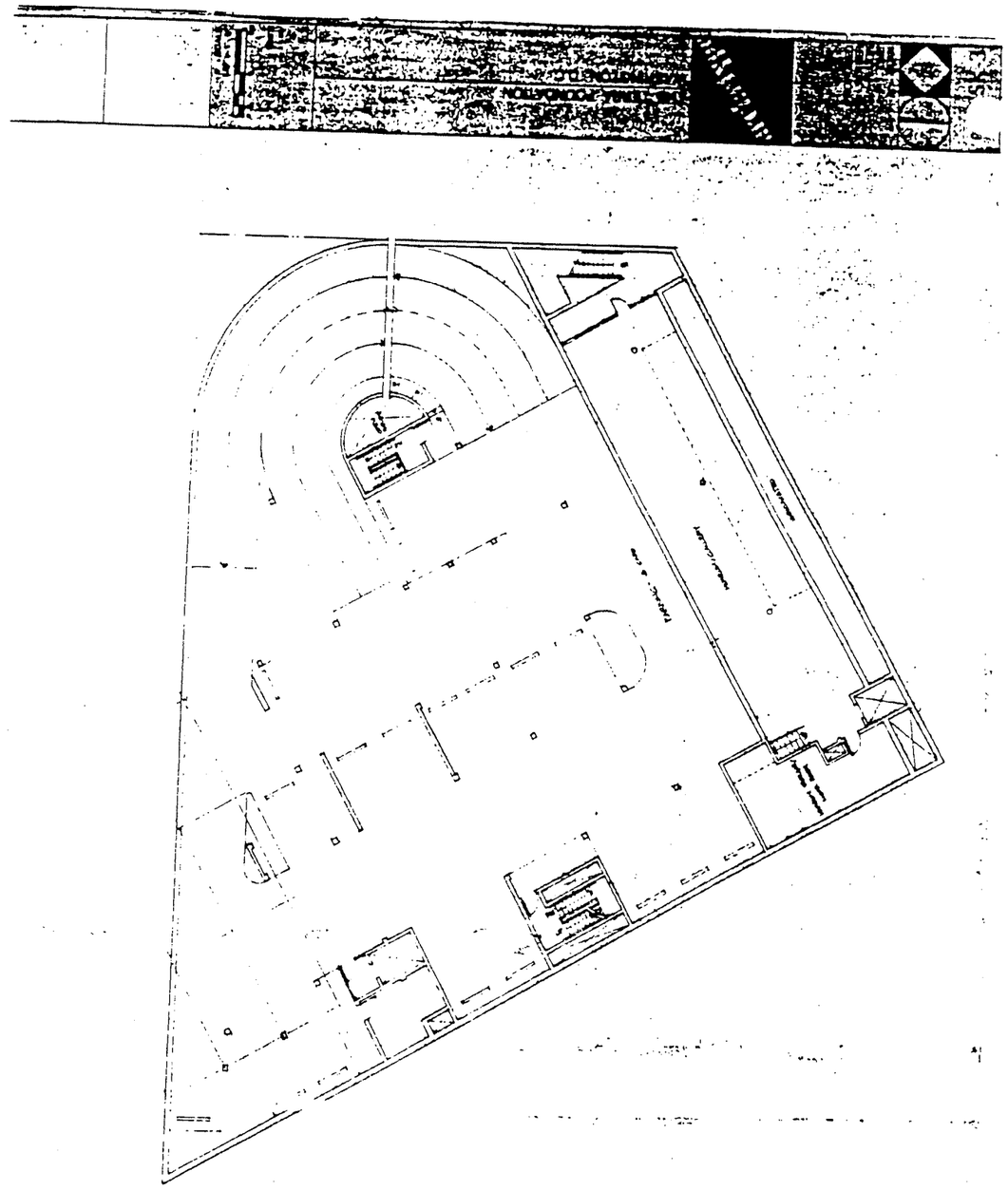
architect ypo
THE TERRA FOUNDATION
WASHINGTON, D.C.







16di-002238

EXHIBIT 14

NEW MAILING ADDRESS

TERRA FOUNDATION FOR THE ARTS
1072 THOMAS JEFFERSON STREET
WASHINGTON, D.C. 20007
TEL. 202/337-1777
FAX. 202/337-2366 Stored as # 11 for [illegible]

6/19/96

Stuart:
All Terra and Terra Foundation mail should be directed to above address. Please change all your records -
DJT

Please take care of enclosed bill in proper manner
DJT

16di-002239

EXHIBIT 15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

THE TERRA FOUNDATION FOR THE ARTS An Illinois Not-For-Profit Corporation ALAN K. SIMPSON, Director, The Terra Foundation for the Arts JUDITH TERRA, Director, The Terra Foundation for the Arts PAUL HAYES TUCKER, Director, Chairman and President, The Terra Foundation For the Arts, Plaintiffs v. JAMES E. RYAN, Attorney General, State of Illinois FLOYD PERKINS, Assistant Attorney General State of Illinois RONDALD GIDWITZ, Chairman of the Illinois State Board of Education Defendants	)

DECLARATION OF ALAN K. SIMPSON IN SUPPORT OF THE PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Alan K. Simpson swears under penalty of perjury as follows:

1. I am a plaintiff in this cause of action and I am a Director of the Terra Foundation for the Arts. From 1979 until 1997, I served in the United States Senate from the State of Wyoming. Among other numerous activities, I have served as a member of the Board of Regents of the Smithsonian Institution, a member of the Folger Shakespeare Library Committee, a member of the Board of Trustees of the Kennedy Center, Chairman of the Board of Trustees of the Buffalo Bill Historical Center, Chairman of the Capital Campaign for Distinction of the University of Wyoming and as Director of the Institute of Politics at Harvard University. I currently serve as a member of the Independent Board of Directors of the IDS

16di-002242

EXHIBIT 16

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 16 Remains Under Seal.

16di-002244

EXHIBIT 17

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 17 Remains Under Seal.

16di-002246

EXHIBIT 18

Museum
of Fine Arts
Boston

465 Huntingto
Avenue

Boston
Massachusetts
02115

phone
617.267.9300

February 11, 1997

Mr. James W. Collins
Bell, Boyd & Lloyd
70 West Madison Street
Suite 3300
Chicago, IL 60602-4207

Dear Jim,

I am pleased to enclose the report which the trustees of the Terra Foundation for the Arts have asked Charles Moffett, John Wilmerding, and myself to prepare. We are glad to be of help, and we hope that our report will be found both thoughtful and useful. Needless to say, each of us stands ready to elaborate on the report at a meeting with the trustees, and we are ready also to work with trustees if we can be helpful in the future in implementing some of our suggestions.

With best wishes,

Yours sincerely,

Ted

Theodore E. Stebbins, Jr.
John Moors Cabot Curator of American Paintings

ext: 3406
fax: 617-247-3728
e-mail: jmccarthy@mfa.org

rank, along with such venerable institutions as the Clark Art Institute, the National Museum of American Art, and the museums at Saint Louis, Cincinnati, and Worchester (see attached list). The Terra Collection is a specialized one, with impressive, deep holdings in the works of the American Impressionists. In the American Impressionist field alone, it would rank among the top three or four holdings in the nation. Both major and minor figures are richly represented (with the caveat that several minor figures are too richly represented), and there is great depth and strength in the works of Chase, Cassatt, Sargent, Whistler, Prendergast, Tarbell, Hassam, Theodore Robinson, and Twachtman, as well as excellent related works by Curran, Bunker, Metcalf, Wendel, Frieseke, Miller, and other American painters who went to Giverny. There are, however, two weaknesses in the Impressionist collection: first, while there are extensive holdings in Whistler and Sargent, there are no major works by either painter; once the Foundation has been stabilized and program developed, at least one major work by each painter should be sought. Secondly, many of the works in the Impressionist collection are on paper (prints, drawings, and watercolors), and these must not be on view for more than a short period in any given year, for conservation reasons; as a result, much of the collection must necessarily remain in storage much of the time.

The remainder of the collection includes many outstanding works, but lacks enough strength or balance to make the collection as a whole a fine, or even satisfactory survey of American painting from Colonial times to 1940.

1.) The holdings in American Modernism would rank next in terms of quality; there are fine works by Bellows, Hopper, Stuart Davis, Dove, Sheeler, O'Keeffe, and Hartley. This area is sufficiently good for survey purposes.

2.) However, the work of The Eight, the American Realists who followed Impressionism and preceded Modernism (roughly speaking) is not well represented, except for works by John Sloan and Robert Henri. This is a gap which should be filled.

3.) Hudson River School. This part of the collection is fairly good with fine examples by Church (a tiny work), Fitz Hugh Lane, Sanford Gifford, Thomas Cole, William Bradford, George Inness, and others by Whittredge, Silva, and Britcher. With some weeding out and some additions, this could become a distinguished part of the collection. Major works are needed by Church, Bierstadt, Durand, and others.

16di-002248

II.) THE TWO BUILDINGS AND THEIR PROGRAMS

A.) Chicago. We feel strongly that the present building in Chicago is inappropriate as a museum. Although is has been effectively retrofitted, and though many fine exhibitions have been seen in it, it will never be a wholly satisfactory museum space, and its location in a retail area seems not the best use of the real estate. The building should be sold, and the collection moved to a more appropriate space.

The program in Chicago up to this time has had good and bad features. The education program, with good professional leadership and effective use of volunteers, has been successful. The exhibition and publication programs, on the other hand, have suffered from being understaffed professionally and have not reached the level of consistent quality that one would expect from an institution with the Terra's financial and artistic resources. There have been a number of beautiful exhibitions, some organized by the Terra and some taken on a touring basis, but there has rarely been a Terra publication of outstanding scholarly quality or importance. In general, however, visitors to the Terra Museum in Chicago have been treated to well installed, pleasing, educational exhibitions of American art, drawn both from the permanent collection and borrowed from other institutions.

B.) Giverny. The Terra Foundation has built a handsome, unobtrusive structure in the town of Giverny, one that is well designed and well suited for its function as a small gallery or museum. However, there are some major problems with the Giverny program, in our opinion. If this museum is to be "dedicated to the understanding of the interrelationship of French art with American art," as suggested by the mission statement, it is accomplishing only a fraction of what it might. One problem is that Giverny has only a seasonal (April - October) audience, one that consists largely of American, Japanese, and European tourists. Monet's gardens draw around 500,000 visitors annually, but the Museum of American Art has so far been able to draw only a fifth of this number at best. We feel strongly that a better program in Giverny, with broader efforts to promote it, could result in a considerably larger audience for the Terra program.

The collection in Giverny, consisting largely of works by Americans who worked in France, is of very mixed quality, and seems an inappropriate vehicle for persuading the French or European audience that America produced good art. The fact is that many of the American painters in Giverny were mediocre painters, many of

16di-002249

3.) Emphasize the Terra Collection as a complete, excellent survey of American art in the United States. Under this option the trustees would build and weed the collection in order to make it a free-standing museum of American paintings, with appropriately high quality exhibitions, publications, and educational programs. They would consider keeping the collection in Chicago (while perhaps considering a merger with the Art Institute or Northwestern), or moving it to another city with a complimentary collection with whom either a merger or a cooperative relationship could be considered (the Corcoran or the National Museum of American Art in Washington, the Pennsylvania Academy in Philadelphia, or the like). Alternatively, they might also consider moving the Foundation to a city with a fine museum that lacks American art, such as Denver, Seattle, or Los Angeles.

IV.) RECOMMENDATIONS

1.) We strongly recommend that the Foundation trustees immediately begin a search for a highly qualified executive director or president of the Foundation. The ideal founding director would be a nationally recognized senior figure, whose appointment could lend much needed credibility to the Terra program as it evolves. Ideally, the executive director would be both a senior expert and scholar in American art and someone with extensive museum and administrative experience. If such a person could be found, even for a one or two year term, he or she could work with the trustees to plan the program and the future of the Foundation, and would set both the direction and the standards for future excellence. The Foundation would have to be prepared to pay competitively in terms of salary and support, as the right candidate would have to be lured from another position or from retirement, and the salary of $200,000 to $250,000 would have to be paid. A distinguished appointment could help enormously to win credibility for the Foundation and its program.

The new executive director or president would then hire a curator and other such positions as are deemed necessary.

2.) The board should be expanded and strengthened, with the addition of four or five outstanding representatives of the museum, academic, and foundation professions. The Amon Carter Museum in Ft. Worth, Texas, for example, has profited from such representation on its board.

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Leading Collections of American Paintings of the Period 1670 to 1940

Metropolitan Museum of Art, New York
Museum of Fine Arts, Boston
National Gallery of Art, Washington, DC

Yale University Art Gallery, New Haven, CT
New-York Historical Society
Philadelphia Museum of Art
Fine Arts Museums of San Francisco
Cleveland Museum of Art
Detroit Institute of Arts
Wadsworth Atheneum, Hartford, CT
Pennsylvania Academy of the Fine Arts, Philadelphia, PA
Corcoran Gallery of Art, Washington, DC
Brooklyn Museum

National Museum of American Art, Washington, DC
Sterling and Francine Clark Art Institute, Williamstown, MA
Art Institute of Chicago
Toledo Museum of Art
Addison Gallery of American Art, Andover, MA
Amon Carter Museum, Fort Worth, TX
Harvard University Art Museums, Cambridge, MA
Whitney Museum of American Art, New York
Terra Foundation of American Art (Chicago & Giverny)
Saint Louis Art Museum
Cincinnati Art Museum
Worcester Art Museum
Freer Gallery of Art, Washington, DC
The Phillips Collection, Washington, DC

Munson-Williams-Proctor Institute Museum of Art, Utica, NY
Nelson-Atkins Museum of Art, Kansas City, MO
Abby Aldrich Rockefeller Folk Art Center, Williamsburg, VA
Bowdoin College Museum of Art, Brunswick, ME
Newark Museum
Carnegie Museum of Art, Pittsburgh, PA
Reynolda House, Museum of American Art, Winston-Salem, NC
Museum of Fine Arts, Springfield, MA
Museum of Art, Rhode Island School of Design, Providence, RI
Dallas Museum of Art
New York State Historical Association, Cooperstown, NY
Mead Art Museum, Amherst, MA
Hirshhorn Museum, Washington, DC
Chrysler Museum, Norfolk, VA
Butler Institute of American Art, Youngstown, OH
Baltimore Museum of Art
Albany Institute of History and Art, Albany, New York

16di-002252

EXHIBIT 19

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

AFFIDAVIT OF PAUL HAYES TUCKER IN SUPPORT OF DEFENDANTS' OBJECTIONS TO PROPOSED SETTLEMENT

The undersigned, upon oath, does hereby depose and state as follows:

1. I am Chairman of the Board of Directors and President of the Terra Foundation for the Arts ("Foundation"), a defendant in Buntrock v. Terra, Case No. 00 CH 13859. I was elected to the Board of Directors of the Foundation ("Board") in October 1998 and became Chairman of the Board and President in 1999. I make this declaration in support of defendants' objections to entry of the proposed Consent Judgment and Order in this litigation.

2. On June 29, 2001, six members of the Board purported to approve a proposed settlement that would destroy the vision of Daniel Terra by crippling his Foundation in its mission to propagate American art in the United States and abroad. I voted against the settlement because that was the only action I could take consistent with my fiduciary duties to the Foundation.

3. The provisions of the settlement that restrict the Terra Collection to Chicago for 50 years and install an Illinois majority on the Board of the Foundation are plainly antithetical to the purposes of the Foundation. The charter, the By-Laws, and the well-documented evidence of Daniel Terra's intent to propagate American art worldwide render preposterous any claim that the Illinois-centric provisions adhere to the Foundation's purpose. Just days before Daniel Terra opened the Terra Museum in Chicago, he was in Giverny, France, negotiating the purchase of a piece of property with the intention of establishing a foreign outpost.

6. The tactics of Assistant Attorney General Floyd D. Perkins throughout the course of this litigation have been repugnant in many respects. First, it has been clear to me that Mr. Perkins does not respect the mission of the Foundation, as set forth in its charter and By-Laws, to propagate American art in the United States and abroad. His only desire has been to capture the Foundation's assets in the State of Illinois and to make the Foundation "parochial," as he himself has stated.

7. Second, it is obvious that Mr. Perkins has been willing to use the power of his office to intimidate Board members and make personal attacks that inhibit their ability to act in the best interests of the Foundation. This was particularly evident in the cases of Stephanie Pace Marshall and Theodore Stebbins.

8. Dr. Stebbins has long been a supporter of considering all options, within and without Chicago, that will best achieve the Foundation's goals for the future. Starting with his first report to the Board as an advisor in 1997, through strategic planning sessions in 2000, Dr. Stebbins encouraged review of both in-state and out-of-state options. He has been an especially strong advocate of maintaining a stand-alone museum. However, when the plaintiffs and Mr. Perkins turned the focus of the litigation upon him and threatened to sully his well-deserved reputation with exaggerated and unfounded charges of impropriety, Dr. Stebbins was pressured to avoid further litigation. He therefore spearheaded the idea of mediation and—after Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant—urged acceptance of a settlement that is in serious tension with his long-stated views about the Foundation's best interests.

9. Dr. Marshall was also the subject of a highly inappropriate use of prosecutorial power that resulted in a clear conflict of interest. I believe that it was inappropriate

16di-002255

EXHIBIT 20

Terra Foundation
Strategic Planning Committee
Minutes
May 10, 2000

In attendance:

M. Daley
J. Terra
P. Tucker
D. Ratner, staff

By phone:

S. Pace Marshall
T. Stebbins

By Invitation

S. Weil

The meeting was called to order at 11:15 AM at Floor, 664 N. Michigan, TFA Offices.

Paul Tucker introduced Steve Weil, a consultant from the Hershhorn.

Steve began by indicating that the 1st question that need to be answered was "who is it that TFA intends to benefit, i.e., who is the primary beneficiary. He asked if there was consensus on this question. The discussion indicated the following:

- National and International Art Scholars (scholarship)
- General Public, national and international (US and Europe)
  - All ages from kindergarten to the grave
- Publics' awareness of American art, including understanding and appreciation

Is the status quo doing that? Paul Tucker suggested that the museums are not attracting large enough numbers and that the education is not at a high enough level.

Stephanie Pace Marshall indicated that we needed more leverage, power to influence and visibility.

Paul Tucker noted that:

- We don't have a premiere collection which could attract the numbers needed
- We don't have the "chits" with other museums to attract exhibits
- We don't have the clout with other museums to attract exhibits

Ted Stebbins asked that we flesh out two models: non partnership and partnership.

Paul Tucker said we could generate national and international shows.

Steve reminded us that there were issues of collection maintenance. He further suggested that art needs to be accessible, we need to maximize accessibility, and other programs need to be responsive to public needs.

Margaret Daley asked if the French taxes (which tax us if the art is permanently residing in France) was a consideration.

Steve Weil said that when the collection is in Giverny, it is in "exile". Therefore, this would lead us to the conclusion that the collection needs to be housed somewhere else, if we are responsive to the needs of the art.

A "non-partnership" model would not work if we used Giverny as the only location.

Judith Terra suggested that we have not really gotten to a way to make American Art more accessible. Discussion then ensued around the Chicago property.

The committee asked Donald Ratner to summarize the multiple options and issues that need to be addressed. They then discussed what needs to be reviewed at the June board meeting. Steve Weil said that if we reached consensus that Paul Tucker should go to the Board and indicate what the consensus position was and see if the Board concurs.

Paul Tucker said that we agreed on the following:

- Mission Statement
- Status quo is not acceptable
- Non partnership with the collection going to Giverny is not acceptable
- Partnership seems the only way to go

Paul Tucker suggested that the partnership issues need to be explored. He also said we need to review how well Giverny is used. He then asked if we need to consider the question of opening up our collection to more contemporary art.

The concept of a decision matrix arose again. The committee discussed the need to decide which partnership gives Giverny the best access to shows. We need to evaluate all suitors and need to do a review to rank the suitors.

Margaret Daley asked how we would do a SWOT analysis. Steve Weil suggested that with only one museum, we would not have the clout to generate significant exhibits on its own, but that it needed a partner. At 12:30 Stephanie Pace Marshall had to leave the call. Ted Stebbins again asked which partner would be better to help Terra fulfil its mission

16di-002258

EXHIBIT 21

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 21 Remains Under Seal.

16di-002260

EXHIBIT 22

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHEALI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor
vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants

ATTORNEY GENERAL'S MOTION TO ENJOIN THE TERRA FOUNDATION'S USE OF THE CURRENT SPECIAL LITIGATION COMMITTEE AND FOR APPOINTMENT OF A RECEIVER TO CONDUCT THE INDEPENDENT INVESTIGATION

NOW COMES the People of the State of Illinois by the Attorney General pursuant to §16(b) of the Charitable Trust Act and for reasons set forth herein, move the court to enjoin Defendant Terra Foundation from using the current Special Litigation Committee to direct

16di-002261

severely limited in his ability to assist in directing the independent investigation. Thus, it appears the hands on direction will be left to Director Stebbins.

4) Most problematic, however, is the service of Director Stebbins on this special litigation committee. Certain allegations in the complaint concern his purported conflict of interest conduct in auction bidding on behalf of the Terra Foundation. The ability of the Attorney General to ascertain facts and make allegations has been limited because no discovery has yet been conducted. There are matters concerning Director Stebbins' conflicts which come directly from the Foundation's own records.

5) Attached hereto as Group Exhibit A are recent 1999 memos written by the Terra Museum's Chicago Director and curator John Neff, who raises concerns about conflicts concerning Director Ted Stebbins. Neff's memos disclose that Director Stebbins was representing others in reviewing, evaluating and bidding for art at auction, while at the same time doing such for the Terra Museum. In his memos, curator Neff explains that he was to control the bidding, yet Director Stebbins on more than one occasion acted for the Terra contrary to Neff's direction and in circumstances in conflict with his fiduciary duties to the Terra Foundation. The memos show that Neff shared these concerns with individual Defendant Director Tucker. These are curator Neff's contemporaneous notes as a record made as an employee of the Foundation The Attorney General has been unable to interview him or depose him, but his statements in Foundation records must be explored in an independent investigation. Clearly Director Stebbins cannot do so.

6) These matters are raised in the complaint without Stebbins being named, but he accepted the appointment to the special litigation committee knowing that these concerns were directed to his conduct and thus he has forced the details herein being set forth.

7) Defendant Tucker is the person who nominated Director Stebbins to the board. As the facts herein show, there are serious concerns about Stebbins' conduct, and it appears that after being informed of such, Tucker aided or allowed the conduct to continue. In these circumstances, it is unacceptable to allow Stebbins to control or serve upon the independent special litigation committee. Courts have found it

11) The factual allegations of the Plaintiffs against individual Directors named as Defendants require the special litigation committee to conduct an investigation. In addition to the issues regarding Director Stebbins presented by the Neff memos, Judith Terra did in fact have museum art taken from the Giverney museum and placed on display in her home in France. A film exists confirming such. Clearly even the temporary appropriation of the Foundation's property by an individual Director is a serious breach of fiduciary duty and must be independently investigated.

12) The case also involves the significant public policy concern that certain members of the Board of Directors are attempting to cause the Foundation to move its museum from Chicago. (See : attachments to the People's complaint, the August 2000 board minutes and Tucker's September 2000 white paper). Those seeking to move the museum now claim that the Terra museum is just not effective at its location. However, in a October 22, 1999 Report to the Board of Terra Foundation made by Terra Museum art Director John Neff, he observes " the Terra finished FY-99 with record attendance,... membership doubled ... and (there is) a growing awareness of and interest in the museum and its programs." This October 1999 report by John Neff explains expansive program development, commitments to Chicago based educational programs and a dedicated staff at the Terra. A copy of John Neff's October 22, 1999 Report to the Board is attached as Exhibit C.

13) Plaintiffs have alleged that those currently controlling the Foundation have mis-managed the operations causing a loss of staff in year 2000 and thus caused the current declines in the Terra museums attendance and function. Defendant Tucker was elected Chairman just last October 1999, just after the aforesaid Neff Report. In less than a year under his management many of the museum technical and professional staff are gone and he and certain board members are now claiming the museum is ineffective at its current location. The Plaintiffs' contentions regarding mis-management clearly require substantial independent investigation.

b) order a limited hearing on this matter;

c) allow limited discovery on these matters;

d) appoint a receiver to conduct the independent investigation and litigation on behalf of the Foundation.

e) enter such further relief that the court deems necessary and equitable under the circumstances.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595

16di-002264

16di-002265

EXHIBIT 23

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 23 Remains Under Seal.

16di-002267

EXHIBIT 24

FAX TRANSMISSION

Charitable Trusts and Solicitations Bureau, 100 W. Randolph Street, 11th Floor, Chicago, IL 60601-3175
Phone: (312) 814-2595 Fax: (312) 814-2596

To: Brian Crowe/Jim Wilson
William Quinlan/James Carroll
Susan Stone/Stephen Carlson

Date: March 21, 2001

Fax #:

312-527-4011 J. Wilson
312-527-5921 Shefsky
312-263-5013 Quinlan
312-853-7036 Sidley

Pages: 40

From: Floyd Perkins

Subject: Terra Foundation for the Arts

COMMENTS: Attached is the Attorney General's draft First Amended Complaint. It is a draft, it is not being filed, but rather supplied to set forth the issues and causes that the Attorney Genral believes are at issue and which are being discussed in settlement.

This FAX may contain attorney-client, attorney work product or other privileged and/or confidential information. This FAX is intended only for the use of the individual or whom or entity to which it is addressed. If you have received this FAX in error, please notify the sender at the above telephone number and destroy his FAX. If you are not the intended recipient, you are hereby notified that any retention or dissemination of this FAX and/or the information it contains is strictly prohibited.

ORIGINAL (check one) __X__ WILL _____ WILL NOT BE SENT BY MAIL

16di-002269

EXHIBIT 25

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 25 Remains Under Seal.

16di-002271

EXHIBIT 26

Terra Foundation for the Arts

Board Meeting/Conference Call

June 29,,2001

12:30 p.m.

RONALD GIDWITZ: Hello?

MALE VOICE: Hello.

RONALD GIDWITZ: Hello?

STEPHANIE MARSHALL: Yes, who's – is that Ron?

RON GIDWITZ: Yes.

STEPHANIE MARSHALL: Ron, good afternoon. Stephanie.

RON GIDWITZ: Hi, Stephanie.

STEPHANIE MARSHALL: Is there anyone else on the line?

ARTHUR HARTMAN: Yes, Art Hartman is on.

STEPHANIE MARSHALL: Good afternoon, Arthur. Where are you?

ARTHUR HARTMAN: I'm just in from Moscow and France.

STEPHANIE MARSHALL: So you're home?

ARTHUR HARTMAN: In France, yes.

STEPHANIE MARSHALL: Oh, you're in France. Okay. Okay. Well, we're just – just gathering.

ARTHUR HARTMAN: Where are you, Stephanie?

STEPHANIE MARSHALL: I'm at my office.

STEPHANIE MARSHALL: Yeah, that's better.

THEODORE STEBBINS, JR: Okay. Arthur is very clear. Where are you, Arthur?

ARTHUR HARTMAN: I'm in France.

THEODORE STEBBINS, JR: Good. Who else have we got here?

STEPHANIE MARSHALL: Ron is in his office and that's all of us so far.

RON GIDWITZ: Yeah, Ted, I'm here.

THEODORE STEBBINS, JR: Okay, Ron, hi.

RON GIDWITZ: Hi. Are you out on the Cape? Ted?

THEODORE STEBBINS, JR: No, I'm at home in Brooklyn.

RON GIDWITZ: Ah, there you go.

STEPHANIE MARSHALL: Welcome, whoever has joined us. Who has joined us? Hello? Anyone join us? Ted, are you still there?

THEODORE STEBBINS, JR: I'm here.

STEPHANIE MARSHALL: All right. Everybody still there?

RON GIDWITZ: Yep.

STEPHANIE MARSHALL: Okay.

ARTHUR HARTMAN: Here.

STEPHANIE MARSHALL: Okay. Hello, has anyone just joined us? Hm, okay.

FEMALE VOICE: There are people on.

MALE VOICE: Don't tie up this line.

FEMALE VOICE: Okay.

MARGARET DALEY: Yes, nice to talk to you, Stephanie. Have you walked past the Taste of Chicago yet?

STEPHANIE MARSHALL: No, but I've been waiting in traffic. (Laughing)

ARTHUR HARTMAN: What's that?

MARGARET DALEY: Oh, the Taste of Chicago?

ARTHUR HARTMAN: Yeah.

STEPHANIE MARSHALL: It's a huge gastronomical extravaganza where all the restaurants in Chicago, or at least the better ones, sort of lay out their wares along the Lake. It's terrific.

ARTHUR HARTMAN: Ah-ha.

STEPHANIE MARSHALL: And you sample your way to high cholesterol levels.

ARTHUR HARTMAN: (Laughing)

MALE VOICE: (Inaudible)

STEPHANIE MARSHALL: I understand they will have Lipitor salesmen standing by.

ARTHUR HARTMAN: (Laughing) I can tell you that Mevacor works.

STEPHANIE MARSHALL: (Laughing) Don, have you heard from anyone? We know Helene will not be on the call, but have you heard from Judith or Paul or Alan?

DON RATNER: Expected to be on the call, so we're just sort of waiting for them all to –

RON GIDWITZ: And we're expecting Jacques?

DON RATNER: Yes.

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Yes, Judith, good afternoon.

JUDITH TERRA: Hi, I've been on the line a minute. I just didn't want to interrupt. Ah, have you started things?

STEPHANIE MARSHALL: No, not at all. We're still waiting for – well, we were waiting for you and for Paul and for Alan, and Jacques. Everyone else is here, except Helene who was not going to be on the call.

JUDITH TERRA: Okay.

STEPHANIE MARSHALL: So, no, we've not started anything.

JUDITH TERRA: Okay. So who is "we" – who is –

STEPHANIE MARSHALL: We have just – we have just – ah, the question was asked who are the legal counsel present, and we have Mark Heatwall, who is in Chicago at the Foundation office, as the regular Foundation counsel. And we have Susan Stone and John Sabl, who are here with me in Aurora, and Steve Carlson who is in the Foundation office, all representing Sidley Austin. I was just asking every other Board member on the line are there any other legal counsel present.

ARTHUR HARTMAN: Not here in France.

STEPHANIE MARSHALL: Anyone else? Ron?

RON GIDWITZ: No, I'm all by myself.

STEPHANIE MARSHALL: Judith?

MALE VOICE: Susan Stone and who?

FEMALE VOICE: So right now, who's missing? Jacques, Helene –

MALE VOICE: Jacques, Helene and Paul – and Alan.

MALE VOICE: Have you tried to call them?

STEPHANIE MARSHALL: Don, is there any way we might call people to see if – if they are available? Were you able to get the faxes to everyone, as far as you know?

DON RATNER: I talked to everybody. Everybody said they were going to be on the call. If you've heard from Helene since, fine. I talked to Jacques, and he said Helene was going to be on the call.

STEPHANIE MARSHALL: Oh.

DON RATNER: I've talked to Andréani, I've talked to Paul, I've talked to Alan. Everybody –

STEPHANIE MARSHALL: Oh, okay. Has anyone joined us now?

MALE VOICE: It sounds like Don did a good job reaching everyone.

STEPHANIE MARSHALL: Yes. I mean, we do have a quorum now, but I think in fairness, we'll wait just a few more moments. Hello, has anyone joined us? Arthur, are there challenges when you call in from Russia?

ARTHUR HARTMAN: No.

STEPHANIE MARSHALL: No, okay. I know that's where Alan –

ARTHUR HARTMAN: Well, I'm calling from France.

STEPHANIE MARSHALL: I know you are, but Alan is in Russia, so I was just curious.

ARTHUR HARTMAN: No, the same system applies there.

RON GIDWITZ: Could someone please share with me what happened – while we're waiting – in court today? What's all that about?

STEVE CARLSON: I guess I can. This is Steve Carlson from Sidley Austin.

STEPHANIE MARSHALL: Steve, could you speak up a little bit, please?

STEVE CARLSON: I'm speaking pretty loud for this room.

STEPHANIE MARSHALL: Oh, okay, I'm sorry.

STEVE CARLSON: (Inaudible) if I don't blow everybody out I'll keep speaking up. There was a motion filed by Mrs. Terra and Dr. Tucker and Senator Simpson for a temporary restraining order to try to stop this meeting from going ahead. I –

ARTHUR HARTMAN: What court was this in, Steve?

STEVE CARLSON: It was in the state court, in front of Judge Kinaird, who we've been in front of in the litigation (inaudible).

ARTHUR HARTMAN: Right.

RON GIDWITZ: Who were they representing? I mean, who – they filed it themselves, or was it – because yesterday, apparently, they filed on behalf of the Foundation. Were they doing that again today?

STEVE CARLSON: They had Joel Bellows from the firm of Bellows & Bellows, and Laurel Bellows was there as well. Leonard Garment, who's he –

MALE VOICE: (Inaudible)

STEVE CARLSON: (Inaudible) Todd. Basically the same people from yesterday in the Federal court, but today they were representing only the individual defendant directors in this main lawsuit. And they sought a TRO to block this meeting from going

ARTHUR HARTMAN: Thank you.

RON GIDWITZ: Thank you.

STEPHANIE MARSHALL: Is there anyone else on the call? Jacques? Helene? Judith, you are on the call. Paul and Alan?

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Yes, Judith is that you?

JUDITH TERRA: Yes.

STEPHANIE MARSHALL: Yes. Yes, go ahead, Judith.

JUDITH TERRA: No, I was just responding. I had to step out. Emma came to get me.

STEPHANIE MARSHALL: Oh, yeah, we're still waiting for Jacques, Helene, Alan and Paul.

JUDITH TERRA: Right. There was a call on my other line.

MALE VOICE: Jacques, how are you? Tally?

MALE VOICE: You've got Tally, too? I'm sorry, I didn't hear an answer to that. Tally is on the call as well? That's a question.

STEPHANIE MARSHALL: Uh, it's not appropriate for anybody to be on the call other than the Directors and the legal counsel that we have so noted already.

MALE VOICE: Is Don there?

MALE VOICE: No, he just left.

FEMALE VOICE: Why is Tally talking to Don?

MALE VOICE: Tally called Don. He left.

STEPHANIE MARSHALL: Okay, then I think, uh – I think we will begin. As you all know, this is Stephanie, and I hereby call this meeting to order. Could we please have a roll call of all present? Jacques Andréani. Helene Arweiler. Dean Buntrock.

DEAN BUNTROCK: Present.

STEPHANIE MARSHALL: Maggie Daley.

MARGARET DALEY: Present.

STEPHANIE MARSHALL: Ron Gidwitz.

RON GIDWITZ: Present.

STEPHANIE MARSHALL: Arthur Hartman.

ARTHUR HARTMAN: Present.

STEPHANIE MARSHALL: Stephanie Marshall. Present. Alan Simpson. Ted Stebbins.

THEODORE STEBBINS, JR: Present.

STEPHANIE MARSHALL: Judith Terra.

JUDITH TERRA: Present.

STEPHANIE MARSHALL: Paul Tucker. As we know, also present are Don Ratner, Susan Stone, Steven Carlson, John Sabl, and Mark Heatwall..

MARK HEATWALL: Stephanie, Scott Sbla from my office, who was in court this morning observing the proceedings, has joined us. That's Scott S-B-L-A.

STEPHANIE MARSHALL: Scott is from Winston, Mark?

MARK HEATWALL: Yes, ma'am.

or on behalf of Ms. Montrock and Gidwitz, and the Attorney General of the State of Illinois, and" – and from there on, I would suggest that we take out "any other document they believe necessary or advisable in connection with the settlement of the litigation." So consider that part of my resolution – amending that phrase.

FEMALE VOICE: What paragraph are you –

DON RATNER: We can't find it. Could you – this is on the first page of the resolution, or is it page 10 of your –

THEODORE STEBBINS, JR: Paragraph 4 –

DON RATNER: Wait a minute. Let me get my – page 10 of your fax.

PAUL TUCKER: Sorry, everyone, I've just finally made it through the Terrace Vidley to be here.

STEPHANIE MARSHALL: Oh, hi, Paul.

THEODORE STEBBINS, JR: That's all.

PAUL TUCKER: Hi, Steph. Hi, Ted.

STEPHANIE MARSHALL: Paul, Ted is – we have called the meeting to order and Ted is – Ted has almost concluded his resolution, and Don is helping people find the appropriate section.

DON RATNER: Page 10, first paragraph, Ted, I think it starts out "Further resolved."

THEODORE STEBBINS, JR: Further resolved.

DON RATNER: Okay. Now what do you want to change?

set up to be sued. And this strikes me, the way that this has been drafted, that it – it doesn't release the defendants and therefore is permissive in terms of having them sue me.

STEPHANIE MARSHALL: I think –

THEODORE STEBBINS, JR: And I want protection.

MALE VOICE: Well, I'd like to –

STEPHANIE MARSHALL: I think, Ted, I think –

THEODORE STEBBINS, JR: Stephanie, why don't we ask legal counsel their opinion, because I'm –

MALE VOICE: Can you speak to as why you want to include this?

THEODORE STEBBINS, JR: I want to be accommodative –

STEPHANIE MARSHALL: May I – let me take the privilege of the Chair one moment. We are in the middle of a proposed resolution. I recommend that – or proposed motion. I recommend that Ted make his motion. I will see if there is a second. If there is not a second, the motion fails. There may be a second, and then we have discussion. In my view, it is not appropriate to argue the language or the merits of a motion until the motion is duly put on the table.

RON GIDWITZ: Absolutely. I will –

STEPHANIE MARSHALL: So, let's – Ted, it may be useful –

THEODORE STEBBINS, JR: Okay, my motion includes the slight change to the resoltuions. It includes in the Consent Order making it, "The parties, including plaintiffs and defendants, hereto desire." And it includes, under Section 7 of the same Consent

would like legal counsel to address one of the changes that Ted referred to, because I – although I want to be able to vote for this motion, I would not be able to do so with one of the changes that he's – he's suggested, because it's my understanding that it is simply not possible for the Foundation to make this judgment. So I would really like legal counsel, so that we're all clear, on exactly where we are and – where we are at this point in time. I personally don't have any problem with the other modifications that, Ted, you made. But I would not be able to support the motion as it presently.

THEODORE STEBBINS, JR: Let's try to let the lawyers lead us through this problem here.

STEPHANIE MARSHALL: Yes.

MALE VOICE: (Inaudible; whispering)

STEPHANIE MARSHALL: Yes, I've asked legal counsel to do that.

MALE VOICE: Do you have any preference as to who addresses it? Do you want Susan to address it, or John, or –

STEPHANIE MARSHALL: Susan can address it.

SUSAN STONE: I can address it. This is Susan Stone from Sidley, Austin, Brown & Wood. I understand, Stephanie, you would like guidance with respect to whether paragraph 2 of the proposed Consent Judgment and Order could be amended to change the description of the parties giving the relief to be a more general description, which would include all of the parties, including the plaintiffs and the individual defendant Directors. Is that correct?

STEPHANIE MARSHALL: That's correct.

SUSAN STONE: From Ron. Ron, even if you purport to have the Foundation require the individual defendant Directors to release rights, that requirement may not be binding. In other words, it might not be a valid release, because –

RON GIDWITZ: I understand, but there's no damage done.

SUSAN STONE: Well, I do not believe that the Foundation can do this. I do not believe the Foundation can take away the legal rights of another party.

RON GIDWITZ: I understand that. But we have – what my concern is, Susan, is that we have a document that was written and agreed to by six Directors wherein if it doesn't materially affect the execution of the document, why are we making changes?

SUSAN STONE: No. The question is, what can the Foundation counsel put in front of the Board as a document which the Board could pass that has a possibility of standing up to judicial scrutiny, if the Board decides it wants to pass it. And I'm telling you that whatever six individual members of the Board might have done in the last mediation session, that was not an act of the Foundation. The Foundation is a corporation. It can only act through a majority vote of the Board of Directors at a duly called meeting. That has not happened until today. And so the question is, what can the Board do at this point in time. The Board of the Foundation, which is one party to this litigation, cannot unilaterally take away the rights of other parties to the litigation.

RON GIDWITZ: I keep hearing that, and frankly my counsel has also reported to me on numerous occasions that you have made the case that, unless we have a duly called meeting, there's a difference of opinion. And the real issue here, it seems to me, is we'd like to get – we'd like to get this litigation settled, and therefore we'd like to have a

MALE VOICE: That's fine, Mark. Ron's point is, which I agree, then it doesn't have to be taken out because the matter can be decided by the courts.

MARK HEATWALL: But if you vote in favor of it and Ron votes in favor of it, what I'm telling you is it would work to your detriment. And I'm not your lawyer –

MALE VOICE: No, I understand.

MARK HEATWALL: – but – but you've got a situation where the – everything I know about this situation tells me – force Paul, Judith and Alan to settle a case that they don't want to settle. And that means that this is a one-way – potentially a one-way settlement by you and Ron against them, and their not waiving rights against you.

MALE VOICE: Fine.

STEPHANIE MARSHALL: I – I have to say, just to weigh in on this personally, that I mean it's no secret that – that this motion and any changes in bylaws require the vote of at least Directors. And I cannot support the motion as it is currently stated with this amendment to number two. I can certainly support and will support the other changes, Ted, that you made, in both the resolution and the Consent Judgment Order. They seem reasonable. But I cannot and will not support this motion which frankly means you do not have six votes. So I came prepared, I read the motions, I read the Consent Judgment – I mean, I read the resolution, I read the Consent Judgment, I am prepared to support this, but this is a last-minute, 11th-hour change, and I cannot be more clear than I'm being right now. I cannot and will not support this change as it is currently stated.

MALE VOICE: Which change is that, Stephanie?

STEPHANIE MARSHALL: That's fine.

MALE VOICE: Who's this speaking?

STEPHANIE MARSHALL: This is Dean.

MALE VOICE: Hi, Dean.

DEAN BUNTROCK: Hey. First of all, I'd like you to respond. You made your position very, very clear, but when counsel for the Foundation and counsel on the lawsuit have both said, as Susan has said, that you can't do it, what difference does it mean to leave the language in there? I cannot see why you take such a strong position.

STEPHANIE MARSHALL: I guess I take –

DEAN BUNTROCK: (Inaudible) out. Can you respond to that?

STEPHANIE MARSHALL: Yeah. It is my understanding – well, based on what legal counsel is saying, Dean, I would be voting for something which is – which is judged not to be legal and/or appropriate. I will not vote –

MALE VOICE: But no one – no one has said –

STEPHANIE MARSHALL: I will not vote to force anyone into a position that – that four attorneys are saying is inappropriate. The Foundation I don't think, or certainly I do not want to approve a settlement that contemplates a release that – that doesn't exist.

MALE VOICE: Stephanie, they haven't. All they've said is that you legally can't do that, so –

MALE VOICE: I appreciate the fact that –

MALE VOICE: If you can't do it, you can't do it. And I think changing – unnecessary.

STEPHANIE MARSHALL: And I really – I think, frankly, that, Dean, to your question, and Ron, that if you wanted a release from the defendants, then I think it was essential at the time we were in mediation that there was – there was another line or sentence or something that would have induced the individuals to settle. But that was not part of the mediated agreement. And as I said, at this point, I feel it's a highly significant 11-hour change, and I'll stand with what I said before. I came to this meeting as I trust we all did, in good faith. There were six people that signed off on an intention to ratify. There were some things we had to work out since the last mediated agreement, especially the slate of officers. And I think we were prepared, and I hope still are prepared to reach agreement. But if we hold – if some hold fast to this, then that is not going to be possible.

THEODORE STEBBINS, JR: I'm persuaded that I was in error, and that I think the attorneys' comments are appropriate and we need an agreement that will stand up under scrutiny.

RON GIDWITZ: Stephanie, I will back off – excuse me, I've got a little food in my mouth. But I will back off my objection, but I will just state for the record that the language that plaintiffs and defendants originally, that the Sidley & Austin attorneys had been moving to change it, I believe –

(End of Side 1)

– distributed version.

STEPHANIE MARSHALL: Okay. Thank you, Ron.

PAUL TUCKER: This is Paul. This is Paul. Am I coming though?

STEPHANIE MARSHALL: Yes you are, Paul. Go ahead.

1, paragraph 4, the last two sentences were eliminated. So in that paragraph, it ended "the Attorney General of the State of Illinois." And then we had also a minor revision on the Consent Agenda, paragraph or number 7, which added, after the 2002 annual meeting, "or until 12-31-02," since the date was not clear. So it was Ted's motion to approve the resolution, and then those two minor changes, one to the resolution and one to the Consent Judgment.

MALE VOICE: Right.

STEPHANIE MARSHALL: So unless there is further discussion, I guess the question is, are we –

DON RATNER: Just a second, Steph. I'm just going over with Mrs. Daley. This is where (inaudible)

ARTHUR HARTMAN: This is Arthur. I'm prepared to vote.

DON RATNER: Stephanie, one second. I'm going over this with Mrs. Daley.

STEPHANIE MARSHALL: Don, and I want to – I left out one part, as Ted was talking. It was "until 12-31-02 or whichever comes first."

DON RATNER: I'm just going over that all with Mrs. Daley. So just want to (inaudible)

STEPHANIE MARSHALL: Okay.

DEAN BUNTROCK: So the only changes are to paragraph 2 and paragraph 7, right?

STEPHANIE MARSHALL: Oh, Judith, I'm sorry. I can't hear you very well. Hello?

MALE VOICE: Just get closer to the phone.

JUDITH TERRA: Can you hear me now? Pardon?

STEPHANIE MARSHALL: Hello?

MALE VOICE: Closer to the phone.

JUDITH TERRA: I can't. I've got it right in my ear. Can you hear now?

STEPHANIE MARSHALL: Yes, we can. Not very well, but we can.

JUDITH TERRA: Okay. I just want to say that I am definitely going to object to any waiver of my legal action, and I think I would like to express a strong objection to the fact that Alan Simpson, Helene Ahrweiler, and Jacques Andréani are not on this – at this meeting. Not on this call.

STEPHANIE MARSHALL: Yeah, we will –

MALE VOICE: I couldn't hear a word of that, Stephanie.

STEPHANIE MARSHALL: She said that she would not agree to anything that waived her rights, and that she is voicing strong objection to the fact that Jacques and Helene and Alan were not on the call. And as Chair, I can just simply duly note that, but they were given every opportunity to be on the call. Don talked with –

ARTHUR HARTMAN: I had no trouble getting in from France.

STEPHANIE MARSHALL: And they said that they would be. So it is absolutely most unfortunate, but we really could not wait. So, Judith, we will note that for the

MARK HEATWALL: So if there was anything else that was required, we would have to come back to the Board and get approval to –

JOHN SABL: I don't think so. I think it would only be if it was something substantive, and, Ron, maybe you want to speak to what your concern was, since I heard this indirectly from Ted. This language was not intended to make – you know, to file, you know substantive changes. And we thought it was helpful from a catch-all. But what – what was your concern, Ron?

STEPHANIE MARSHALL: Ron, are you there?

RON GIDWITZ: I was knocked off somehow. I'm just coming back on.

JOHN SABL: Okay, Ron, the question was asked by – it's John Sabl. The question was asked by Mark Heatwall why we were taking out the catch-all language in the resolution, the one change that Ted made to the resolution that I understood he made at your request. And Mark said, "Isn't that sort of a catch-all if other things need to be filed, and would it be better to leave it in?"

RON GIDWITZ: And that's just the point where I – I heard that, and then I was knocked off the –

JOHN SABL: Okay, and I said that I think this – I thought this language was fine; as we drafted it, it was appropriate and the catch-all was just meant to be if other things needed to be – other things needed to be filed, that it might be better to specifically recognize that. I had understood, or I maybe theorized, that your concern was that language somehow was too broad.

RON GIDWITZ: That is correct.

STEPHANIE MARSHALL: Don, have you – have you been able to clarify for Maggie and Dean exactly where the changes are? And then if so, everyone fully understanding what we – what they will be voting on, then I would then call for a vote on the question.

JUDITH TERRA: Stephanie?

STEPHANIE MARSHALL: Judith?

JUDITH TERRA: Yes. I would like to say a few words before the vote is taken.

STEPHANIE MARSHALL: Yes, please.

JUDITH TERRA: Can you hear me okay?

STEPHANIE MARSHALL: Yes, we can.

JUDITH TERRA: I'm on a different phone. I don't know what's –

DON RATNER: Let me just respond to Stephanie's question. I think Ms. Daley and Mr. Buntrock can respond to that better than I. I think I described it. And they're nodding that they understand all the –

STEPHANIE MARSHALL: Okay, fine. Thank you. Judith, go ahead.

JUDITH TERRA: Well, I just want to say before we take a vote on this motion that the outset, with all due respect to each of my fellow Board members, I think that the mediation result that we are being asked to endorse, and for which we really had high hopes in the beginning, has turned out to be something very different than what we anticipated. For me, it's a process which is distorted the consensual nature of what mediation really should be all about, as reflected in this document. And I think, as Paul Tucker, our Chairman, has already observed, the mediation proposal before us cannot be

think it's – I object strongly to the fact that Helene and Jacques Andréani and Alan Simpson were not on this call. Thank you.

ARTHUR HARTMAN: This is Arthur Hartman. We'll be taking a vote which will indicate what all of our views are. I couldn't disagree more with what Judith has said. I think the good of this Foundation has been found in this mediation, and it will carry on the kinds of things that Dan Terra was interested in. And that is my own personal position. Thank you.

STEPHANIE MARSHALL: I would just like to make a personal comment, too. And I also regret that Jacques and Alan and Helene are not on the call, because I think it would have been important for everyone to have had the opportunity to hear the conversation and to make a statement, if in fact they wished to do so. I sent a letter to David Hilliard dated June 17, where I was responding to the mediated settlement. And in that letter, I raised several concerns which were pretty consistent with concerns I had raised in the past. And then I did say in the letter, having said this, and verbalizing these concerns, that I could live with the substance of the settlement albeit with a heavy heart, and that I was prepared to ratify it at an authorized Board meeting. I also said in that letter that I believe in my heart that it does preserve the most fundamental dimensions of the Foundation's independence in determining the course of its own destiny, which I believe to be stated in the mediated agreement, although I do believe that unprecedented restrictions have been imposed on the Foundation as well. But I believe that a settlement, and not continued litigation, is in fact in the best interests of the Foundation. And I would hope that the 16 Board members for this year, and the 15 Board members in the future

STEPHANIE MARSHALL: Okay.

MARK HEATWALL: But in a general way to everyone, because you do have fiduciary obligations to this institution, which transcend your obligations to other – other things. And each one of you should examine that. I think Judith brought that to the fore. Stephanie, you echoed it. But since the – the allegations have been made, I think it's important to be on the record. And if anyone feels that they can't vote that way, I think they should abstain. So, having said that, if you vote, I assume that means you are not doing so – so freely.

STEPHANIE MARSHALL: Well, I – let me just make a personal comment, just in response to what you just said, Mark. I – I have felt in the past that despite the desire of some Board members over the last year or so to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked my own path, and I have always spoken with my own voice, to represent the integrity of my own convictions. I have done it throughout this arduous process, and I do so now, with full knowledge of my fiduciary responsibilities. It is true that the Attorney General's office has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation. This has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation. Ted, I don't know if you want to make a comment as well.

STEPHANIE MARSHALL: Is there anyone else who has a statement to make? Otherwise, I will – I think it's appropriate that we now call the question.

PAUL TUCKER: I'd like to make a statement, Stephanie.

STEPHANIE MARSHALL: Paul, is that you?

PAUL TUCKER: It's me.

STEPHANIE MARSHALL: Okay.

PAUL TUCKER: It's painful to hear the comments that have been made in many quarters, although I admire the honesty about it all. I think it's very difficult to be able to predict the future in any form or fashion. None of us could have – thought we'd be at this particular juncture when we all joined the Board. Maybe some did, I don't know, but I certainly didn't, and I don't think Ted did, or Stephanie did. And I applaud their effort to try to be able to find the right way to act in these difficult causes. But what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview. The invasion of its independence, its privacy, by a public domain, i.e, the hand of the Attorney General, I find repugnant. I find it detrimental and offensive. I find it also counter to the very foundations on which foundations – and America as a whole – is supposed to be founded, which is why I protested this mediation, and will continue to do so. I also find it disturbing that the resolution calls for the continued presence of the Illinois factions, not that there are not wonderful people in Illinois, certainly more than enough to handle all of this. But I think that that should have been our choice, not somebody else's choice, and that compromise of our independence is something which I think, again, goes right to the heart of the

STEPHANIE MARSHALL: Stephanie, yes. Alan. Ted.

THEODORE STEBBINS, JR: Yes.

STEPHANIE MARSHALL: Judith.

JUDITH TERRA: No.

STEPHANIE MARSHALL: Paul.

PAUL TUCKER: No.

STEPHANIE MARSHALL: Paul?

PAUL TUCKER: No, Steph.

STEPHANIE MARSHALL: Oh, I'm sorry. I didn't hear you, Paul.

PAUL TUCKER: Okay.

STEPHANIE MARSHALL: The motion has been passed by six Board members. We now need a motion for adjourn.

THEODORE STEBBINS, JR: I move to adjourn.

STEPHANIE MARSHALL: Oh, I'm sorry. Is there – the Agenda did say any new business. Is there any new business which needs to come before this Board at this time? Hearing none, we need a motion to adjourn.

THEODORE STEBBINS, JR: So moved.

STEPHANIE MARSHALL: Is that Ted?

ARTHUR HARTMAN: Second.

STEPHANIE MARSHALL: Second, I'm sorry, Dean.

DEAN BUNTROCK: No, that was Arthur.

STEPHANIE MARSHALL: Arthur.

CERTIFICATE OF TRANSCRIPTIONIST

I, Claudia Miller, do hereby certify that the above was transcribed by me from audiotape; that the transcript is a true transcription of the audiotape; that I am neither counsel for, related to, nor employed by any of the parties to which the proceedings were taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Claudia Miller
Perfect Solution, Inc.
1299A Quaker Hill Drive
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703/823-9017

Dated: July 7, 2001

16di-002296

EXHIBIT 27

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

88236v2

[Resolutions Relating to Special Meeting of Board of Directors
of the Terra Foundation of the Arts to be Held on June 29, 2001]

WHEREAS, the Foundation is a defendant in litigation (the "Litigation") entitled Dean L. Buntrock, a Director of the Terra Foundation for the Arts, and Ronald Gidwitz, a Director of the Terra Foundation for the Arts vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts and the Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation in the Circuit Court of Cook County, Illinois, County Department, Chancery Division (No. 00 CH 18359); and

WHEREAS, there has been presented a proposed settlement to the Litigation and this Board of Directors believes that it is in the best interests of the Foundation to accept the proposed settlement and take certain other action related thereto;

NOW, THEREFORE, BE IT RESOLVED THAT the form of Consent Judgment and Order (the "Consent Judgment") presented to this meeting hereby (a copy of which shall be attached to the minutes of this meeting as Exhibit A) is approved, ratified and confirmed and that the officers of the Foundation are, and each of them hereby is, authorized to execute and deliver, in the name and on behalf of the Foundation, the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois) substantially in the form presented to this meeting but with such changes therein as the officer executing the same shall approve (such approval to be conclusively evidenced by his or her execution thereof); and

FURTHER RESOLVED, that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized in the name and on behalf of the Foundation, to file with the Circuit Court of Cook County the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois); and

FURTHER RESOLVED, that Section 2 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the date the Consent Judgment shall be entered by the Circuit Court of Cook County, Illinois (the "Effective Date"), to read as follows:

Section 2. Number, Tenure, and Qualifications.

(a) Number. The number of directors elected by the Board of Directors shall

EXHIBIT A

Class I Directors (Term to Expire at 2002 Annual Meeting)	Class II Directors (Term to Expire at 2005 Annual Meeting)
Helene Ahrweiler	James R. Donnelley
Jacques Andréani	Marshall Field V
Dean L. Buntrock	Dr. Kathleen A. Foster
Margaret Daley	Prof. Robert S. Hamada
Ronald Gidwitz	Frederick A. Krehbiel
Arthur Hartman	
Stephanie Marshall	
Alan Simpson	
Theodore Stebbins, Jr.	
Judith Terra	
Paul Tucker	

FURTHER RESOLVED, that not later than August 1, 2001, this Board of Directors shall meet to (i) elect a new Chairman (who shall be chosen from among the Class II Directors elected pursuant to the preceding resolution), (ii) elect new officers and committee heads, (iii) elect a new Executive Committee composed of the newly elected officers that also are directors, and (iv) elect a new Strategic Planning Committee whose members shall include Mr. Ronald Gidwitz, Dr. Theodore Stebbins, Jr. and one or more Class II Directors; and

FURTHER RESOLVED, that the new Strategic Planning Committee, once elected, shall be authorized and directed to seek to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago, it being understood that the terms of any such partnership shall be subject to the approval of the Board of Directors; and

FURTHER RESOLVED, that the officers of the Corporation are authorized, in the name and on behalf of the Foundation, to execute such additional agreements, certificates or other documents, and to take such further actions (including, without limitation, the payment of expenses or other expenditures of money) as may be necessary or advisable to carry out the preceding resolutions.

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts having moved to dismiss Counts I and II of the Buntrock and Gidwitz Complaint, Paul Tucker having answered the Buntrock and Gidwitz Complaint and having denied its allegations, no other answer having been filed to either complaint and the parties having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. The parties hereto desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts ("the Foundation"), its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the

negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A. No other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE:_____

_____
Judge Dorothy Kirie Kinnaird

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd Perkins
Assistant Attorney General
State of Illinois (Title)

Print Name: FLOYD PERKINS

Date: 7/6/01

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-002303

COPY

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
Ten South Dearborn
Chicago, IL 60603
(312) 853-7000
Firm ID No. 38315

CERTIFICATE OF SERVICE

I, Robert P. O'Keefe, one of the attorneys for defendant The Terra Foundation For The Arts, do hereby certify that I caused a true and correct copy of the attached Notice of Motion to be served upon all counsel of record listed above by facsimile and messenger delivery to those located in Chicago and by facsimile and Federal Express to those located elsewhere before 5:00 p.m. this 6th day of July, 2001.

Robert P. O'Keefe

16di-002306

EXHIBIT 28

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

Case No. 00 CH 13859

ORIGINAL

PROCEEDINGS JULY 2, 2001

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(CAPTION CONTINUED)

THE PEOPLE OF THE STATE OF)
ILLINOIS ex rel., JAMES E. RYAN,)
Attorney General of Illinois,)
Plaintiff-Intervenor,)
vs.)
JUDITH TERRA, a Director of the)
Terra Foundation for the Arts,)
PAUL HAYES TUCKER, a Director of)
the Terra Foundation for the Arts,)
ALAN K. SIMPSON, a Director of)
the Terra Foundation for the Arts,)
and the TERRA FOUNDATION FOR THE)
ARTS, an Illinois Not-for-Profit)
Corporation,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on the 2nd day of July A.D. 2001, at 2:10 p.m.

BEFORE: HONORABLE DOROTHY KIRIE KINNAIRD.

APPEARANCES:

QUINLAN & CRISHAM, LTD.,
(30 North LaSalle Street, Suite 2900,
Chicago, Illinois 60602), by:
MR. WILLIAM R. QUINLAN,
MR. JAMES R. CARROLL and
MR. JOHN F. KENNEDY,
appeared on behalf of the Plaintiffs;

BELLOWS & BELLOWS, P.C.,
(79 West Monroe Street, Suite 800,
Chicago, Illinois 60603), by:
MR. JOEL J. BELLOWS and
MS. LAUREL G. BELLOWS,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

VERNER, LIIPFERT, BERNHARD, McPHERSON &
HAND, CHARTERED,
(901 15th Street, N.W.,
Washington, D.C. 20005), by:
MR. LEONARD GARMENT,
appeared on behalf of the named
Defendants;

APPEARANCES: (Continued)

KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.,
(1615 M Street, N.W., Suite 400,
Washington, D.C. 20036), by:
MR. KENNETH CHRIS TODD,
appeared on behalf of the named
Defendants;

SHEFSKY & FROELICH, LTD.,
(444 North Michigan Avenue, 25th Floor,
Chicago, Illinois 60611), by:
MR. JAMES D. WILSON and
MR. BRIAN L. CROWE,
appeared on behalf of Defendants
Judith Terra, Paul Hayes Tucker, and
Alan K. Simpson;

SIDLEY, AUSTIN, BROWN & WOOD,
(Bank One Plaza,
10 South Dearborn Street,
Chicago, Illinois 60603), by:
MR. STEPHEN C. CARLSON and
MS. SUSAN A. STONE,
appeared on behalf of Defendant
Terra Foundation for the Arts;

APPEARANCES: (Continued)

HONORABLE JAMES E. RYAN,
Attorney General,
(100 West Randolph Street, 3rd Floor,
Chicago, Illinois 60601), by:
MR. FLOYD D. PERKINS, Assistant Attorney
General, Charitable Trusts Bureau, and
MS. THERESE M. HARRIS, Assistant Attorney
General, Charitable Trusts Bureau,
appeared on behalf of the
Plaintiff-Intervenor;

ALSO PRESENT:
MR. HILLIARD.

REPORTED BY: KAY A. LEVINE, M.A., C.S.R., R.P.R.
Certificate No. 84-3654.

The public policy of the state, the public policy of the United States, the public policy of the United States expressed in the Arbitration Act are that these things are to be encouraged, not discouraged. That's exactly what they would have here. If they want to complain about this agreement, and if they want to complain about this process, they can say it was fraud, they can say it was duress. They can say those things, but they need evidence of proof that's clear and convincing.

There is nothing proffered anywhere here that even offers a scintilla of evidence that nobody agreed to this or it wasn't properly agreed to. In fact, the people that they allege that were somehow coerced are not here. They were not in the federal court. They don't file an affidavit. The very people who supposedly were intimidated or hurt not only do not file an affidavit or appear; in fact, they make a statement that their vote has nothing to do with it. That they were not coerced into making this vote. They make their vote because it's a hard question. And we think on a better analysis here,

about.

And if they want to say this was a coerced type of thing, it requires clear and convincing evidence. And that's after they admit there's an agreement; you must have to set it aside. There is no evidence of that at all. At all. All they have is affidavits of third parties, affidavits of an individual, Mr. Tucker, who himself can't testify to what these people feel or don't feel.

He said, I think they were coerced. They just told us they weren't. And in fact the federal court couldn't see any basis to this. Nothing's new. They filed the same things in the federal court. So there's nothing here in front of your Honor to warrant any kind of allowing them to file these matters or to be heard.

These are things that they are just dissatisfied with. Well, they're dissatisfied with a lot of things. Frankly, we're dissatisfied with a lot of things.

THE COURT: Do you believe that it would be different if they came forward with a motion that was seeking to have the Court not approve the

settlement because it was not a settlement, not agreed to, something wrong?

MR. QUINLAN: They showed that it had not been agreed or not settled to, and there was substantial evidence -- that is what the Illinois law requires is substantial evidence. It might require a hearing. But there's no substantial evidence of this. In fact, it's admitted.

THE COURT: What about an argument that perhaps there's something illegal about this settlement? I know there were some statements made about that the other day, but I don't really see that necessarily here in terms of something -- cases that are cited that says that there's some provision of this agreement that is contrary to Illinois law.

MR. QUINLAN: Well, if you notice in their pleading that they have filed -- actually it's a pleading, there's no complaint on file. There's actually nothing in front of your Honor other than a request to file a motion. So that there's no request to file a pleading. There's nothing that brings this case in front of the Court other than their motion.

proposed consent degree?

MR. BELLOWS: 21 days.

THE COURT: 21? I leave on July 27th. And I would like to have a chance to decide whether or not there's going to be any kind of discovery or evidentiary proceeding here because I would expect that you would do that while -- perhaps while I was gone.

This consent decree provides for the new board to take over and for everything to be done by August 1st. And I'm willing to expedite this as much as I need to in order to get this done.

MR. BELLOWS: Are you ordering the Attorney General to submit himself -- or the Assistant Attorney General, Mr. Perkins, to submit himself to interrogation by us.

THE COURT: I am not ordering the Attorney General, based on what I have in front of me, to do anything. But he has indicated to you that he is willing to talk to you, and I think a good starting point is to talk to him first. He is a public official. He will not compromise any ongoing investigation, but I would expect that he

16di-002316

EXHIBIT 29

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	

PLAINTIFFS' MOTION TO APPOINT AN INDEPENDENT LITIGATION COMMITTEE AND INDEPENDENT LITIGATION COUNSEL FOR THE TERRA FOUNDATION, AND/OR RECEIVER

Plaintiffs Dean L. Buntrock and Ronald Gidwitz, Directors of the Terra Foundation for the Arts ("Terra Foundation"), an Illinois not-for-profit corporation, (hereinafter collectively referred to as "Plaintiffs") respectfully move this Court to appoint an independent litigation committee and independent litigation counsel, and/or receiver for the Terra Foundation to represent its interests in this matter. In support of this motion, Plaintiffs state as follows:

INTRODUCTION

The defendants do not take seriously this Court's TRO and the tenor of this Court's ruling. Within 24 hours of the hearing before this Court and entry of the TRO on September 25,

independence will be further assured through the appointment of a provisional receiver to implement the Court's order.

I. FACTUAL BACKGROUND.

Both the plaintiffs and the Illinois Attorney General's office have presented a verified complaint to this Court that the defendants, Paul Tucker, Judith Terra, Alan Simpson and others have caused, and intend to cause, irreparable harm to the Terra Foundation. Rather than safeguarding the Terra Foundation on behalf of the people of the State of Illinois, the defendants have embarked upon a scheme to close the Museum in Chicago and usurp the Art Work and assets of the Terra Foundation (valued in excess of $400 million) for their own purposes, in violation of the charitable trust established by Daniel Terra for the people of the State of Illinois.

A. Tucker, Terra, and Simpson Have Breached Their Fiduciary Duties to the Terra Foundation and Threaten to Destroy the Terra Foundation.

The evidence before this Court established that the Terra Foundation is a public trust, created for the benefit of the people of Illinois by Daniel Terra. The Terra Foundation is comprised of the Terra Museum in Chicago, substantial cash and real estate holdings, a multimillion dollar collection of American art, and a museum in Giverny, France. (See Plaintiffs' Verified Complaint and Illinois Attorney General's Complaint).

The plaintiffs and the Illinois Attorney General have submitted verified allegations that Tucker, Judith Terra, Simpson and others have engaged in serious waste and mismanagement of the Terra Foundation, and threaten imminent harm to the Terra Foundation, including the following:

- Grossly mismanaging the Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons

or Corcoran Gallery of Art in Washington, D.C.; and (4) set up an educational facility in Washington, D.C.

- The Terra Foundation's Board of Directors met on August 24, 2000. At that meeting Tucker pronounced that the Terra Foundation should move to Washington, D.C. and close the Terra Museum in Chicago.

- Tucker is both Chairman and President of the Terra Foundation and is responsible for its safety, yet he has allowed and/or caused the Terra Foundation to be depleted of long term staff, has allowed and/or caused the Terra Foundation's long term security personnel to quit, has allowed and/or caused its executive director to quit, and directed that art belonging to the Terra Foundation be delivered from France to Defendant Judith Terra's home.

Because Tucker, Judith Terra and Alan Simpson have displayed an utter disregard for the best interests of the of the Terra Foundation and its beneficiaries, the people of Illinois, the defendants should ultimately be removed as directors of the Board of Directors of the Terra Foundation.

B. This Court Found That a Fair Question Exists That Tucker, Terra and Simpson Threaten Irreparable Harm to the Terra Foundation.

On September 25, 2000, this Court conducted a hearing on the plaintiffs' and the Illinois Attorney General's Emergency Motion for Temporary Restraining Order. After the hearing, this Court found that Tucker, Judith Terra and Alan Simpson posed a genuine and immediate threat to the Terra Foundation and that an injunction was necessary to protect the Foundation and the public. This Court enjoined Tucker, Judith Terra, Simpson and others from removing plaintiffs from the board of directors and executive committee of the Terra Foundation, closing the Terra Museum, or relocating the Artwork outside of Illinois. A copy of the Order is attached as Exhibit A.[1] The tenor of the Court's ruling was to preserve the status quo and avoid actions by the

[1] The Affidavits of Plaintiffs Gidwitz and Buntrock are attached hereto as Exhibits B and C, respectively.

16di-002319

was obligated under the Rules of Professional Conduct as "corporate" counsel to advise the Foundation of the conflicts and the impropriety of such an arrangement. *See* R.P.C 1.7 and 1.13.

The conflict of interest is obvious and irreconcilable. As this Court found, Tucker's misconduct threatens to cause imminent and irreparable harm to the Terra Foundation. Tucker, therefore, cannot be the director of litigation on behalf of the Terra Foundation involving litigation against himself. *See* R.P.C. 1.7; *Lower v. Lanark Mutual Fire Insurance Co.*, 114 Ill. App.3d 462, 448 N.E.2d 940 (2d Dist. 1983). The best interest of the Terra Foundation is to investigate the allegations against Tucker, Judith Terra and Simpson. Moreover, Tucker has already demonstrated that his self interest is directly adverse to the best interests of the Terra Foundation. Thus, by unilaterally appointing Tucker as litigation director, the defendants have revealed their intention to use Sidley & Austin as their own counsel. No attorney has filed an appearance for any of the individual defendants in this case. Each of the defendants must have their own counsel to represent them in this case and not the Foundation's counsel. R.P.C. 1.7.

Under Illinois law, as well as authority from other jurisdictions, Tucker must be replaced as "litigation director" and an independent litigation committee and/or receiver must be appointed for the Terra Foundation to manage the litigation. Consequently, Sidley & Austin must be replaced and the independent litigation committee and/or receiver needs to select independent litigation counsel for the Terra Foundation to protect the trust established by Daniel Terra.

It is well settled that a special litigation committee must be comprised of disinterested members. The selection of independent and disinterested members of a litigation committee is of paramount importance to ensure that the best interests of the entity, the Foundation, are served. *See* Jerold S. Solovy, Barry Levenstam, & Daniel S. Goldman, *The Role of Special Litigation Committees In Shareholder Derivative Litigation*, Tort & Insurance Law Journal 864, 875. As Mr. Solovy notes, factors that require the disqualification of a board member from service on a special litigation committee include whether it is alleged the director is subject to personal liability and therefore "interested" or whether the director authorized, approved, or benefitted from the transaction underlying the lawsuit. *Id.* at 875-76. Moreover, counsel chosen must be counsel not previously retained by the corporation and truly independent so as to ensure proper legal advice is provided. *Id.* ("Consultation with independent counsel has been considered very significant evidence of the special committee's independence.").

The structural bias inherent in the litigation committee context requires that interested directors be disqualified from serving on a litigation committee. *See* Meg Shevach, *Deciding Who Should Decide To Dismiss Derivative Suits*, 39 Emory L. J. 937, 958 (1990) (The independent litigation committee must be beyond reproach.)

An interested director must be disqualified from serving on a litigation committee, and as many courts have concluded, directors who are defendants in the litigation should also not be permitted to select the litigation committee's members. *See, e.g., Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W.2d 709 (1983) (interested directors should not vote for the selection of the members of the independent litigation committee.) Here, Tucker, as the litigation director is vested with the authority to make decisions that control Terra's role in the litigation. Tucker's

that this Court appoint a receiver and/or order that a special litigation committee be established to retain independent litigation counsel and direct the litigation on behalf of the Terra Foundation. This special litigation committee must be composed of independent and disinterested persons, possibly other members of the board of directors. *See Zapata*, 430 A.2d 788-89 (board of directors can appoint a special litigation committee to oversee litigation, but that committee must be independent); *Auerbach v. Bennett*, 393 N.E.2d at 1001 (directors selected for special litigation committee must be disinterested).

Who selects the independent board members, and how can the court and the parties be assured of true independence? In this case, resolving such an issue can result in costly collateral litigation. To avoid such collateral litigation and to ensure independent representation of the Terra Foundation, this Court should appoint a provisional receiver under the General Not For Profit Corporation Act of 1986 (805 ILCS 105/112.55) and the Court's inherent authority. *See e.g. People ex rel., Fahner v. Community Hospital of Evanston* (1st Dist. 1982). As requested in the verified pleadings of the Illinois Attorney General and plaintiffs, the receiver will be ideally equipped to investigate this matter and recommend to the Court the appropriate independent representation of the Foundation. There is no prejudice to any of the defendants, and the Foundation's best interests will be protected.

II. THE TERRA FOUNDATION MUST BE REPRESENTED BY INDEPENDENT LITIGATION COUNSEL.

It is equally clear that Sidley & Austin cannot represent the Terra Foundation under these circumstances. Tucker, Judith Terra and Simpson have compromised Sidley & Austin, and Sidley & Austin has violated Rule 1.7 of the Rules of Professional Conduct by accepting Tucker

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after disclosure.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after disclosure.

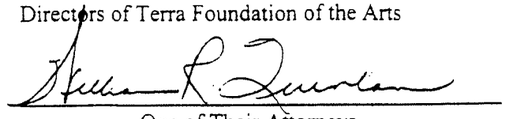
(c) When representation of multiple clients in a single matter is undertaken, the disclosure shall include explanation of the implications of the common representation and the advantages and risks involved.

Ill. R. P.C. 1.7. Here, Sidley & Austin cannot reasonably believe that its representation of the Terra Foundation under these circumstances will not constitute a violation of its responsibilities under Rule 1.7. Even the Terra Foundation's consent to the representation would not permit Sidley & Austin to continue its representation of the Terra Foundation because Sidley & Austin cannot establish that it would be "reasonable" to believe that it could represent the Terra Foundation without any adverse effect from its relationship with Paul Tucker. In addition, Sidley & Austin cannot undo the harm.

Similarly, Winston and Strawn cannot continue to represent the Foundation under Rule 1.7 because they have a direct conflict with a current client, plaintiff Gidwitz, and have not demonstrated the lack of independence necessary to represent the Foundation. When Tucker was appointed litigation director to direct Sidley & Austin, the Terra Foundation's attorney from

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ,
Directors of Terra Foundation of the Arts

By: 
One of Their Attorneys

William R. Quinlan
James R. Carroll
John F. Kennedy
William J. Quinlan
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm I.D. # 33745

16di-002325

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1 of 5

Dean L. Buntrock et al
v. plaintiffs
Judith Terra et al
defendants

NO. 00 CH 13559

ORDER

This matter coming before on Plaintiffs' Emergency Motion for TRO, Plaintiffs' motion to disqualify Sidley & Austin as counsel for Terra Foundation, Plaintiffs' motion to file Corrected Emergency Motion for TRO and Plaintiffs motion for Expedited Discovery, The court being fully advised and counsel for Terra Foundation being present it is hereby ordered:

(1) Plaintiffs' motion to Disqualify Sidley & Austin is denied without prejudice;
(2) Plaintiffs are granted leave to substitute a Corrected Emergency Motion for Temporary Restraining Order

Atty No. 33745
Name Quinlan & Crishan
Attorney for Plaintiffs
Address 30 N LaSalle #2500
City / Zip Chgo. IL 60602
Telephone (312) 263-0500

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

3 of 5

[illegible] Plaintiffs

v.

[illegible] defendants

NO. 00 [illegible]

ORDER

C. Plaintiffs have established that there is no adequate remedy at law if injunctive relief were not granted

D. Plaintiffs and The People of The State of Illinois have raised a fair question as to their likelihood of success on the merits

E. On a balance of hardship, The Court finds that Plaintiffs and The People of Illinois would be harmed if injunctive relief were not granted whereas any harm to defendants by the entry of a TRO is not as great

Atty No. 33745

Name [illegible]

Attorney for [illegible]

Address [illegible]

City / Zip [illegible]

Telephone [illegible]

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-002326

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

-1 of 5

5 of 5

Dian L Buntrock
et al

v.

Judith Terra
et al

NO. 00 CH 13855

Page 5 ORDER

~~Plaintiffs~~

(6) The temporary restraining order shall remain in effect until October 12, 2000 at 5:00 p.m. unless otherwise extended by the Court

(7) Bond is waived for good cause shown because of public interest is involved

(8) The matter is set for October 12, 2000 at 11:00 a.m. for the purpose of continuing the TRO, discussing dates for responses to discovery requests, set date for preliminary injunction hearing and for status on J. Terra's ~~Motion~~ Petition to intervene

(9) This order is entered September 25 2000 at 3:16 P.M. Central Daylight Time

Atty No. 33745
Name Quinlan & Crisham
Attorney for Plaintiffs
Address 30 N. LaSalle #2900
City / Zip Chgo, IL 60602
Telephone (312) 263-0900

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
SEP 25 2000
JUDGE DOROTHY [illegible] #276 Judge's No.
DEPUTY CLERK

ENTER:

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420164)

16di-002327

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF RONALD GIDWITZ

The undersigned, upon oath, depose and state as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I am a member of the board of directors for the Terra Foundation for the Arts ("Terra Foundation").

3. On September 26, 2000, I attended the annual meeting of the board of directors for the Terra Foundation ("Board of Directors") in Giverny, France.

4. Prior to that meeting, I was a member of the Executive Committee, Chairman of the Strategic Planning Committee and a member of the Finance, Investment and Audit Committee of the Terra Foundation's Board of Directors.

5. The September 26, 2000 meeting was attended by the other members of the Terra Foundation's Board of Directors including Judith Terra and Paul Hayes Tucker, defendants in the case captioned *Buntrock, et al. v. Terra, et al.*, currently pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Number 00 CH 13859, the Honorable Judge Dorothy Kinnaird presiding (hereinafter the "action" or "pending litigation"). This meeting was also attended by Mark M. Heatwole, a partner in the law firm of Winston & Strawn, who was present as counsel for the Terra Foundation.

6. During the September 26, 2000 meeting, I was removed as Chairman of the Strategic Planning Committee, and as a member of the Finance, Investment, and Audit

the Code of Civil Procedure, certifies that he has read this Verified Statement and that the statements set forth herein are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Ronald Gidwitz

Doc:158446

** TOTAL PAGE.04 **

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF DEAN L. BUNTROCK

The undersigned, upon oath, depose and state as follows:

1. I am over 18 years of age and have personal knowledge of the facts set forth herein and will testify truthfully thereto if called as a witness to do so.

2. I am a member of the board of directors for the Terra Foundation for the Arts ("Terra Foundation").

3. On September 26, 2000, I attended the annual meeting of the Board of Directors of the Terra Foundation ("Board of Directors") in Giverny, France.

4. Prior to that meeting, I was the Treasurer of the Terra Foundation and Chairman of the Finance, Investment and Audit Committee as well as a member of the Executive Committee of the Terra Foundation's Board of Directors.

5. The September 26, 2000 meeting was attended by the other members of the Terra Foundation's Board of Directors including Judith Terra and Paul Hayes Tucker, defendants in the case captioned ***Buntrock, et al. v. Terra, et al.***, currently pending in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, Number 00 CH 13859, the Honorable Judge Dorothy Kinnaird presiding (hereinafter the "action" or "pending litigation"). This meeting was also attended by Mark M. Heatwole, a partner in the law firm of Winston & Strawn, who was present as counsel for the Terra Foundation.

6. At the September 26, 2000 meeting, I was removed as an officer and Chair of Finance, Investment and Audit Committee as well as prevented from serving on any other

statements set forth herein are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Dean L. Buntrock

Doc: 38445

16di-002332

EXHIBIT 30

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	No. 00 CH 13859
	)	Hon. Dorothy Kirie Kinnaird
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DECLARATION OF PROFESSOR EVELYN BRODY

1. My name is Evelyn Brody. My business address is Chicago-Kent College of Law, Illinois Institute of Technology, 565 West Adams Street, Chicago, Illinois 60661.

2. I am Professor of Law at the Chicago-Kent College of Law at the Illinois Institute of Technology, where I have been a faculty member since 1992. In the Fall semester 2001, I will be a visiting professor at Duke University School of Law. My research interests

16di-002333

6. The settlement agreement would "pack" the Foundation's board with Illinois residents for at least 25 years, and handicap the business judgment of the board with geographic restrictions for the next 50 years, without any support in the existing articles of incorporation or bylaws. The Attorney General cannot, under the law, compel this outcome. Only the courts can preserve the flexibility of this Foundation to operate as originally envisioned.

7. In this Declaration, I will discuss two issues: (I) the significance of the absence of a geographic restriction in the Foundation's organic documents; and (II) the proper role of the State attorney general in the oversight of charities.

I. THE ABSENCE OF A GEOGRAPHIC RESTRICTION IS AN IMPORTANT PART OF THE PURPOSES OF THE FOUNDATION

8. Private philanthropy and the nonprofit sector rest on the fundamental Constitutional guarantees of private property protected by due process, liberty of contract, and freedom of worship and expression. As long as the trust or corporation qualifies as charitable, no legislature, attorney general, or court may mandate a departure from its privately-determined purposes no matter how confident are the parties that a better social use could be made of the funds.

8. The inherent conservative nature of this legal structure has permitted numerous charitable trusts notorious for their founder's idiosyncracies. A donor might dictate a general geographic restriction – such as Buck Trust's limitation of the funds for the benefit of Marin County, California (one of the wealthiest counties in the country). A donor might dictate an even more specific use – such as the prohibition on moving displayed works of art under the trusts establishing the Barnes Foundation (outside Philadelphia), the Isabelle Stuart Gardner Museum (Boston), and the Frick Collection (New York City).

10. Yet just as honored under the law is a purpose clause *unrestricted* as to geographic use. Indeed, a donor or founder might draw upon the lessons of the Buck Trust and the museum foundations just described – that no mortal can predict the future, and the narrower the purpose, the sooner the charity is likely to outlive its usefulness. Thus, an enlightened founder could recognize that tying the hands of the trustees only invites wasteful benign neglect or wasteful resort to the courts for approval of a *cy pres* petition. Nor is there any guarantee of a trustee's success in a *cy pres* proceeding to reform a charitable trust, because relief will be granted only if the original restriction is impossible to carry out. The Buck Trust was prohibited from expending its resources to benefit those in the larger San Francisco area; and a Pennsylvania court recently rejected a thoughtful *cy pres* petition from the Hershey Trust, whose income from Hershey stock far exceeds its ability to spend, as designated, on students at the Hershey School. Even approval takes time and effort: A Pennsylvania court held a 3-day hearing prior to approving a one-time tour of the art collection of the Barnes Foundation, and the badly needed renovation

articles of incorporation impose no geographic restriction. In the case of the Foundation, there has been no failure of its original purpose and so no amendment to the articles of incorporation would be necessary for the board to redeploy assets out of the State of Illinois.

15. State attorneys general have no necessary expertise, much less the resources, to address the myriad concerns of the hundreds of thousands of charities that function in the United States today. In particular, an attorney general is not equipped to set the policies and make the hard decisions required to operate a museum. The museum world of today is a complex web of block-buster tours; collaborations (such as this summer's first-time joint exhibit and marketing campaign in New York by the Whitney and the Museum of Modern Art); and cross-border allliances (the Tate Gallery in London and the Museum of Modern Art, while continuing plans collaborating on painting exhibitions, recently terminated their plans for a joint commercial website). Like the Terra Foundation, the Guggenheim operates or plans to operate museums at more than one location – eight, to be precise (two in New York City and one more on the way, plus Venice, Bilbao, Berlin, and sites planned for Las Vegas and Brazil). Among more traditional concerns, museum boards must worry about such issues as the tax consequences of corporate sponsorship arrangements; the intellectual property value of reproductions; and the price to charge for admission, given the competition for museum-goers' educational and entertainment budget.

16. A State attorney general has the obligation to provide oversight of the charitable sector. To this end, an attorney general is vested with the authority to seek to correct breaches of fiduciary duty that have not otherwise been remedied by the board. However, the attorney general is not a "super" member of the board. Where, as here, suit was brought against the board by a minority of the directors, the attorney general's involvement does not tip the weight of the vote in an area committed to the discretion of a majority of the board. Nor, as described above, does the attorney general have authority to impose changes in the purposes of a charity – in particular, a geographic restriction.

17. A regulator's enforcement activities always have policy implications, even if unintended. For example, when Manhattan District Attorney Robert Morganthau seized paintings loaned by a Viennese collector for an exhibit at the Museum of Modern Art – out of concern that they might have an illegal Nazi provenance – museums throughout New York feared for their ability to put together exhibitions requiring loans from nonresidents. See *In the Matter of the Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897, 901 (N.Y. 1999) (referring to the statute then in effect as intended, in part, "to protect State cultural institutions that depend upon the free flow of art for the benefit of the people of the State of New York").

18. Even charity regulators, understandably, have specific goals and priorities. An elected

fiduciaries as much as of the attorney general. Reform rather than punishment is generally the goal of the charity regulator, and board members as well prefer a chance to improve their behavior while avoiding embarrassment and personal liability. Closing agreements or settlements between the regulator and the charity to end an enforcement action can be quite detailed, often spelling out specific terms dealing with future structure and governance. Under these circumstances, however, the board of a charity is vulnerable to being strong-armed into assenting to an attorney general's demands.

23. Only a court decision stands between the Foundation's purpose and governance structure as they existed prior to the Attorney General's involvement, and a radical alteration of purpose and governance structure as described in the Consent Judgment and Order.

CONCLUSION

24. For all the reasons outlined above, the Attorney General's participation in and procurement of the Proposed Settlement – and anticipated future half-century involvement – are inconsistent with the legal framework for the operation of charitable not-for-profit corporations. The Attorney General's actions create an enormous disincentive for charities to locate or seek incorporation in the state of Illinois.

This concludes my Declaration:

Evelyn Brody
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology
565 West Adams Street
Chicago, Illinois

Dated: July 18, 2001

July 2001

EVELYN BRODY
Professor of Law
Chicago-Kent College of Law
Illinois Institute of Technology
565 West Adams Street
Chicago, IL 60661
312-906-5276
ebrody@kentlaw.edu

PROFESSIONAL EXPERIENCE

ACADEMIC:

Professor of Law, **Chicago-Kent College of Law, Illinois Institute of Technology**. Associate Professor 1998-2001; Assistant Professor 1992-1998.

Courses: Corporate Tax, Partnership Tax, Taxation of Business Enterprises, Personal Income Tax, Taxation of Investments, and Nonprofit Law.

Visiting Professor, **New York University School of Law**, scheduled for Spring semester 2002: will teach Income Taxation and Tax Policy.

Visiting Professor, **Duke University School of Law**, scheduled for Fall semester 2001: will teach Federal Income Taxation and Partnership Taxation.

Visiting Assistant Professor, **University of Pennsylvania Law School**, Spring semester 1998: taught Federal Income Taxation and Partnership Taxation.

Lecturer, **University of Wisconsin Law School**, Spring semesters, 1985 through 1988: taught Taxation of Partnerships and S Corporations.

RESEARCH AFFILIATION:

Associate Scholar, **The Urban Institute, Center on Nonprofits and Philanthropy**, Washington, D.C., from 1998.

GOVERNMENT:

Prepared and taught a week-long program on *Taxation of Financial Products*, Public Finance Training Institute, **Taiwan Ministry of Finance**, July 4-8, 1994.

Staff member, **Clinton-Gore Transition**, Treasury Tax Policy and Internal Revenue Service Transition Team, December 1992.

Attorney/advisor to the Tax Legislative Counsel, in the **Office of Tax Policy, U.S. Treasury Department**, August 1988 - May 1992.

Symposium Issue, 23 J. CORP. L. 585 (1998); reprinted at 22 EXEMPT ORG. TAX REV. 421 (December 1998).

The Limits of Charity Fiduciary Law, 56 MD. L. REV. 1400 (1998). An earlier version is available as Working Paper No. 242, Program on Non-Profit Organizations, Yale University (June 1997), as part of a project on the changing dimensions of trusteeship, directed by historian Peter Dobkin Hall (Hauser Center for Nonprofit Organizations, John F. Kennedy School, Harvard University).

The Tax Treatment of Education After the Taxpayer Relief Act of 1997, 78 TAX NOTES 1514 (Mar. 23, 1998).

Hocking the Halo: Implications of the Charities' Winning Briefs in **Camps Newfound/ Owatonna, Inc.**, *in The Howard Oleck Memorial Nonprofit Symposium Issue,* 27 STETSON L. REV. 433 (1997), reprinted in 20 EXEMPT ORGANIZATION TAX REVIEW 31 (April 1998).

Charitable Endowments and the Democratization of Dynasty, 39 ARIZ. L. REV. 873 (1997).

Institutional Dissonance in the Nonprofit Sector, 41 VILL. L. REV. 433 (1996).

Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms, 40 N.Y. L. SCH. L. REV. 457 (1996), **cited at *Pegram v. Herdrich*, No. 98-1949, 120 S. Ct. 2143, 2157 n. 11 (June 12, 2000)** (HMO case).

Paying Back Your Country Through Income-Contingent Student Loans, 31 SAN DIEGO L. REV. 449 (1994).

EVELYN BRODY, BRUCE K. BENESH & M. KEVIN BRYANT, PARTNERSHIPS: COMPLETE TAX PRACTICE AND PLANNING GUIDE (1989, with annual updates through 1994).

Co-author, **A GUIDE FOR WISCONSIN NONPROFIT ORGANIZATIONS** (State Bar of Wisconsin; 1990, 1992, 1995 & 1998 updates) (chapter on the tax treatment of charities).

In Progress:

Editor and author, PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Urban Institute Press, forthcoming 2001). Having planned the coverage of legal, economic, historic and political issues, I recruited appropriate chapter authors. I am writing the ***Introduction*** and Chapter 6, ***Legal Theories of Property-Tax Exemption: Sovereignty Quasi and Real***; and co-authoring Chapter 9, ***State-Paid PILOTs for Nonprofit Property and Other Hartford, Connecticut Initiatives*** (with Nicholas R. Carbone). A book conference was held June 6-7, 2000 (see below). March 2001 drafts available.

May 2, 2001) (Burton A. Weisbrod, organizer).

The 29th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel of draft chapters from the forthcoming volume THE STATE OF AMERICA'S NONPROFIT SECTOR (New Orleans, Nov. 18, 2000).

Presenter, ***The Legal Framework for Nonprofit Organizations***, at:

The Fall 2000 Nonprofit Sector Doctoral Workshop of the **Hauser Center for Nonprofit Organizations, John F. Kennedy School, Harvard University** (Cambridge, Nov. 29, 2000).

The 29th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel of draft chapters from the forthcoming second edition of THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (New Orleans, Nov. 18, 2000).

The Fall 2000 Seminar Series of the **Program on Non-Profit Organizations and the Institution for Social and Policy Studies, Yale University** (New Haven, Oct. 16, 2000).

Visitor, **Netanya Academic College, Israel**, where I gave a faculty lecture, taught in three classes, and spoke at a conference co-sponsored by the Israeli Center for Third Sector Research, all on topics of nonprofit law and policy (December 28-30, 1999).

Presenter, ***A Taxing Time for the Bishop Estate: What Is the I.R.S. Role in Charity Governance?***, at:

The **University of Illinois College of Law**, Faculty Workshop (Champaign-Urbana, Feb. 25, 2000).

The **Chicago Area Nonprofits Seminar Series**, Northwestern University (Evanston, Nov. 30, 1999) (Burton A. Weisbrod, organizer).

The 28th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Action**, as part of a panel on "Stakeholders and the Flow of Revenues to Nonprofits" (Washington, D.C., Nov. 6, 1999).

Presenter, ***Charities in Tax Reform: Threats to Subsidies Overt and Covert***, at:

The **Nonprofit Forum** (New York City, Dec. 16, 1998).

The 27th Annual Conference of the **Association for Research on Nonprofit Organizations and Voluntary Associations** (Seattle, Washington, Nov. 5-7, 1998), as part of a panel on "Tax and Finance Issues Affecting Nonprofit Organizations."

MAPPING THE BATTLEFIELD, Center on Nonprofits and Philanthropy, The Urban Institute (Washington, D.C., June 6-7, 2000).

Presented **"The Current State of Tax Exemptions"** at the 20th Annual State and Local Taxation Conference, National Conference of State Tax Judges (Boston, Sept. 21, 2000).

Organizer and moderator of a panel on **The Charity Property-Tax Exemption**, National Tax Association Annual Meeting (Santa Fe, Nov. 10, 2000).

2. **Seminar Series on Nonprofit Advocacy and the Policy Process**:

With Professor Frances Hill, University of Miami School of Law, I am helping Center director Elizabeth Boris and staff organize a series of ten seminars in Washington, D.C., from February 2000 to December 2001, on the legal and regulatory framework for the advocacy activities of nonprofit organizations. The Center is commissioning papers for discussion and publication. I have been planning and moderating sessions, drafting and editing seminar summaries for publication and Web posting, and editing papers. In addition, I –

Presented **"The Elements of Advocacy"** at Seminar #1 – Nonprofit Advocacy: Practices and Perspectives (Washington, D.C., February 18, 2000).

Presented **"Accountability: To Whom, For What, and How?"** at Seminar #6 – Representation, Participation and Accountability (Washington, D.C. February 16, 2001).

Writing and will present **"Aggregate or Entity: A Constitutional View of Association and Group Speech"**, at Seminar #9 – Advocacy and Democracy: Rights, Theories and Practices (scheduled for Washington, D.C., September 21, 2001).

3. **Emerging Issues in Philanthropy Series**:

Member, planning group for a semi-annual series on **"Emerging Issues on Philanthropy,"** sponsored jointly by The **Urban Institute Center on Nonprofits and Philanthropy** and the **Harvard University Hauser Center for Nonprofit Organizations** (from 1999). (The other planners are, from the Urban Institute, Center director Elizabeth Boris and economists Eugene Steuerle and Joseph Cordes; and Marion Fremont-Smith, senior fellow at Hauser.) We have held programs on the efficiency of the charitable tax deduction, the unrelated business income tax, election-year issues in philanthropy, and the "related" activities of nonprofits carried out in for-profit form. In addition to helping to organize and moderate panels, I was a panelist for ***Has the Unrelated Business Income Tax Become a Voluntary Tax? Administrative and Design Issues***, at Conference on UBIT: THE DOG THAT DOESN'T BITE, Harvard University Hauser Center for Nonprofit Organizations (Cambridge, Nov. 11, 1999).

PRESENTATIONS TO PRACTITIONERS Recent presentations include –

capital gains rules; the use of equity-based compensation (stock and stock options); the distinction between investors, traders, and dealers; the political party platforms' 2000 tax proposals affecting individuals; and the income-tax consequences of possible gift-and-estate tax repeal.

Co-Chair, *Subcommittee on Policy Issues and Compliance, Exempt Organizations Committee* (from Spring 1997). In March 1999, I wrote a policy memorandum at the request of the ABA Tax Section on the Clinton administration's proposal to tax the investment income of trade associations. Available at 25 EXEMPT ORG. TAX REV. 138 (1999).

Articles Editor, THE TAX LAWYER (American Bar Association), from 1996-1999. Edited Claire E. Toth, *Nonrecourse Debt in Excess of Fair Market Value and Disappearing Basis: The Partnership Paradox*, 50 TAX LAWYER 37 (Fall 1996); Peter C. Canellos, *Reasonable Expectations and the Taxation of Contingencies*, 50 TAX LAWYER 299 (Winter 1997); Daniel S. Goldberg, *Nonrecourse Debt in Excess of Fair Market Value*, 51 TAX LAWYER (Fall 1997); and Jeffrey A. Maine, *Evaluating Subchapter S in a Check-the-Box World*, 51 TAX LAWYER 717 (Summer 1998).

Member, **Great Lakes TE/GE Council** (advisory group to the IRS Tax-Exempt/Government Entities Division) (starting April 2001). Made a presentation on "Lessons from the Bishop Estate Case" at the April 20, 2001 meeting.

Member, **Academic Advisors to the Joint Committee on Taxation in Connection with a Study of the Overall State of the Federal Tax System** (meetings with Joint Committee Staff held Washington, D.C., June 5-6, 2000; January 26, 2001; and February 23, 2001).

Nonprofit Legal Projects:

Participant and commentator, **ALI Law of Nonprofit Organizations** conference (N.Y.U. School of Law, May 1, 2000). Scheduled to attend second meeting in Boston, September 14, 2001.

Task Force Chair, Chapter 8 (Board of Directors), for working group on revision of **The American Bar Association's Revised Model Nonprofit Corporation Act** (from March 2000).

Multidisciplinary Nonprofit Projects:

Council Member, **Nonprofit Sector Research Fund, The Aspen Institute** (from September 2000; previously, member of the Grant Advisory Committee).

Member, **Illinois Nonprofit Study Advisory Committee, Donors Forum of Chicago** (from 1999).

Peer reviewer of manuscripts for the **NONPROFIT AND VOLUNTARY SECTOR QUARTERLY** and for **NONPROFIT MANAGEMENT & LEADERSHIP**.

EXHIBIT 31

Pursuant to the Court Order of July 25, 2001,
Exhibit No. 31 Remains Under Seal.

16di-002345

EXHIBIT 32

Chicago Tribune
Copyright 2001 by the Chicago Tribune

Saturday, April 28, 2001

Metro

Foundation truce a boon for charities

J Linn Allen, Tribune staff reporter

A squabble in a wealthy and philanthropic family ended with a court settlement Friday that will likely mean a generous and speedy windfall for a number of major Chicago cultural institutions, hospitals and other charities.

Cook County Judge Robert Boharic approved the agreement, which provides that $50 million will be distributed this year from the Regenstein Foundation to a number of recipients, including the Lincoln Park Zoo, the Art Institute, the University of Chicago and Rush-Presbyterian-St. Luke's Medical Center.

It also stipulates that 90 percent of all money donated in the future by the $125 million fund will go to charities and institutions in the Chicago area.

The pact ended more than half a year of wrangling among members of the Regenstein clan on how to distribute money from the Chicago-based foundation, one of the city's major benefactors for more than 50 years.

The conflict began late last summer when Betty Regenstein Hartman, daughter of fund founders Joseph and Helen Regenstein, proposed to give away $82 million to various charities in a single year, which would cut foundation funds by two-thirds. Typically the fund gives out only about 5 to 7 percent of its assets a year.

The fund's director, Robert Mecca, blocked the plan, expressing fears that it was a prelude to shutting the fund down. He was supported by Susan Regenstein Frank, a daughter of Hartman's brother, Joseph Regenstein Jr., who ran the fund for many years before his death last year.

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Art on Michigan Avenue from moving out of town.

'I'm glad it's over'

Susan Frank, who lives outside Philadelphia, said she and her brother were happy about the settlement, and added that she had long wanted to be a member of the foundation board. "I'm glad it's over," she said.

Last fall, when the family conflict became public, Frank said closing down the foundation would be contrary to the wishes of her father, Joseph Regenstein Jr., who had long been a fixture in Chicago philanthropic circles as head of the foundation.

Frank also said at the time that Hartman didn't have the "energy, care or education to be bothered" with the foundation.

Among the factors holding up settlement of the case, whose terms had been worked out in principle months ago, were some $750,000 in fees being billed to the foundation by attorneys representing the warring parties. A side letter to the pact said the lawyers would reduce their billings to the foundation by 15 percent.

Lincoln Park Zoo president Kevin Bell said he was glad the foundation would continue to be a major giver in Chicago over the long term.

Bell said that the foundation has pledged $9 million for a project to transform the large mammal house to the Regenstein African Journey, and that funds for the project had been coming in regularly despite the conflict.

Joseph Regenstein, who made his fortune in the paper-making and chemical business, and his wife, Helen, set up the foundation in 1950.

---- INDEX REFERENCES ----

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16di-002348

EXHIBIT 33

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MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL

HENK BRANDS
SEAN A. LEV
EVAN T. LEO
ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

July 12, 2001

By Facsimile and Federal Express

Mr. Thomas Ioppollo
Assistant Attorney General, General Law
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601

Re: Interview of Floyd D. Perkins Regarding Terra Foundation Litigation

Dear Mr. Ioppollo:

Thank you for responding by telephone to our request to interview Mr. Perkins. While the circumstances compel us to accept your limitation of the interview (as you put it, to an informal "chit-chat"), we are disappointed that Mr. Perkins has refused to discuss his role in the Terra case on the record and under oath.

Nevertheless, due to the tight briefing schedule set by the Court, we feel we must proceed with the interview. Of course I am sure you understand that we do so without waiving our right to depose Mr. Perkins or any other discovery rights to which our clients are entitled under well settled law.

We ask that you reconsider, at least, conducting the interview on the record. This will serve all parties' interests in avoiding confusion about the content of the conversation. A transcript will make clear the questions put to Mr. Perkins and his answers without the need to rely on note taking. This is in everyone's interest.

bcc: [redacted]
Neil M. Gorsuch
Leonard Garment
Larry Levinson
Joel Bellows
Laurel Bellows

16di-002351

EXHIBIT 34

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WRITER'S DIRECT NUMBER
(312) 853-7717

WRITER'S E-MAIL ADDRESS
scarlson@sidley.com

July 13, 2001

BY FACSIMILE AND U.S. MAIL

Lawrence E. Levinson, Esq.
Verner, Lipfert, Bernhard, McPherson and
Hand
901 15th Street, N W
Washington, D C 20005-2301

Dear Mr Levinson.

Dr. Stebbins is on vacation He learned yesterday of your desire to interview him "on the record and under oath" on Tuesday, July 17 "concerning [his] involvement in the Terra Foundation litigation "

Dr Stebbins has already stated on the record at the June 29, 2001 Board Meeting the reasons why he joined a majority of the Board in voting in favor of the results of the Court-ordered mediation. We believe you already have a copy of the tape of that meeting. We have prepared a transcript of the meeting of which you could have a copy if you like Dr Stebbins would not say anything to you inconsistent with what he already said on the record at the June 29 Board Meeting.

Yours truly

Stephen C. Carlson

SCC:ljp

EXHIBIT 35

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

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HENK BRANDS
SEAN A. LEV
EVAN T. LEO
ANTONIA M. APPS
MICHAEL J. GUZMAN
AARON M. PANNER
DAVID E. ROSS
SILVIJA A. STRIKIS
RICHARD H. STERN, OF COUNSEL

July 16, 2001

Via Facsimile and FedEx

J. William Roberts, Esq.
Hinshaw & Culbertson
222 North La Salle Street, Suite 300
Chicago, Illinois 60601-1081

Re: *Interview of Dr. Stephanie Marshall*

Dear Mr. Roberts:

I represent Alan Simpson, Judith Terra and Paul Hayes Tucker in the Buntrock v. Terra litigation and am writing to request your assistance in scheduling an interview of Dr. Stephanie Marshall in connection with the upcoming hearing on the proposed settlement of that dispute.

I understand that you represent Dr. Marshall in connection with the Illinois Attorney General's investigation concerning the Illinois Mathematics and Science Academy. We have been seeking to interview Dr. Marshall regarding the settlement of the Buntrock v. Terra litigation. Last week Laurel Bellows, my co-counsel, called Dr. Marshall's office and spoke with her assistant; Ms. Bellows left a message explaining that she would like to interview Dr. Marshall concerning the settlement and requested that Dr. Marshall return her call. Dr. Marshall did not return Ms. Bellows' call.

While I do not understand you to represent Dr. Marshall in connection with this specific dispute, I am requesting your assistance in scheduling the interview given your representation of her in a closely-related matter. We would like to interview Dr. Marshall under oath and have a transcript made of the interview. Due to the schedule set by the Court, we would like to conduct the interview tomorrow or Wednesday, although we also may be able to do it Thursday morning.

I appreciate your assistance in this matter and look forward to hearing from you.

Very truly yours,

David E. Ross

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	Hon. Dorothy Kirie Kinnaird

AFFIDAVIT OF BRIAN L. CROWE IN SUPPORT OF SHEFSKY & FROELICH LTD.'S PETITION FOR FEES AND COSTS

I, Brian L. Crowe, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certify that the statements set forth in this Affidavit are true and correct.

1. I have knowledge of the facts contained in this Affidavit and if called as a witness could testify competently thereto.

2. I am a shareholder in the law firm of Shefsky & Froelich Ltd. ("Shefsky"). I am the attorney who was responsible for supervising the litigation work performed by this law firm during the period it represented the Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson ("Director Defendants") in this matter, October 2000 to June 29, 2001. I have been licensed to practice law in the State of Illinois since 1964 and have overseen and conducted numerous lawsuits.

3. For nearly twelve years, from 1975 to 1987, I served as a Judge of the Circuit Court of Cook County, and in that capacity I had occasion from time to time to review, and rule on, the reasonableness of attorneys fees awarded in various matters in which fees were an appropriate award.

4. From 1997 to 1999, I served as Corporation Counsel for the City of Chicago, and in that capacity I had occasion from time to time to review attorneys fees charged to the City of Chicago by outside counsel.

5. I have also, from time to time, been called and qualified to testify as an expert witness regarding the reasonableness of attorneys fees.

6. Each of the foregoing experiences has provided me with an informed basis to state my opinion that the fees and costs billed by Shefsky for its representation of the Director Defendants are reasonable.

7. Exhibit A to this Affidavit is a detailed explanation of the work performed by members and employees of Shefsky in connection with the above matter and the charges for that work. The

explanation includes the date of the service rendered, the identity of the person rendering the service, a detailed narrative of the service rendered, and the amount of time spent providing that service. For those persons who provided services both before and after November 1, 2000, two hourly rates are given because Shefsky's hourly rates increased on that date.

8. The billing rate for each person is as follows:

Person	*Position*	*Hourly Rate*
Brian L. Crowe (BLC)	Shareholder	335.00 (to October 31, 2000) 355.00 (as of November 1, 2000)
Michael J. Howlett, Jr. (MJH)	Shareholder	355.00
James D. Wilson (JDW)	Shareholder	275.00 (to October 31, 2000) 295.00 (as of November 1, 2000)
Alan T. Slagel (ATS)	Shareholder	295.00
Jack J. Hagerty (JJH)	Shareholder	260.00 (to October 31, 2000) 290.00 (as of November 1, 2000)
Gregory C. Ward (GCW)	Shareholder	210.00 (to October 31, 2000) 250.00 (as of November 1, 2000)
Patricia S. Spratt (PSS)	Shareholder	220.00 (to October 31, 2000) 230.00 (as of November 1, 2000)
Brett Nolan (BXN)	Associate	150.00 (to October 31, 2000) 175.00 (as of November 1, 2000)
Jared M. Wayne (JMW)	Associate	150.00
Ellen M. Avery (EMA)	Associate	155.00
Gary L. Nuzzi (GLN)	Paralegal	95.00
Thomas S. DalCompo (TSD)	Paralegal	90.00
Gabriel Reilly-Bates (GRB)	Paralegal	70.00 (to October 31, 2000) 75.00 (as of November 1, 2000)

Jennie B. Fisher (JBF) Paralegal 70.00

9. As is correctly reported on Exhibit A, the attorneys' fees the Director Defendants incurred in connection with this matter through June 29, 2001 total $450,800.00.

10. In addition, the attached Exhibit A shows the costs incurred and disbursements made by Shefsky on behalf of the Director Defendants in relation to this matter.

11. As is correctly reported on Exhibit A, the costs incurred and disbursements made by Shefsky & Froelich Ltd. in connection with this matter through June 29, 2001, total $17,576.17.

12. The total of these amounts equals $468,376.17.

13. Based upon my experience, the amount charged in this matter for the services rendered and costs disbursed was reasonable and necessary. The charges are equivalent to the usual and customary charges that Shefsky charges its clients for similar work and are comparable to charges by other law firms in this area with similar experience and background for similar services.

Further affiant sayeth not.

Brian L. Crowe

707295.1

16di-002359

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E MAIL sflld@shefskylaw.com
FED ID# 36-2693453

FILE # 025134-00001-BLC
INV. # 14057

JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER JUNE 29, 2001
ATTN: JUDITH TERRA
3263 NORTH STREET, N.W.
WASHINGTON, D.C. 20007

R E M I T T A N C E A D V I C E

PREVIOUS AMOUNT OUTSTANDING.....$	0.00
TOTAL FEES THIS INVOICE.....$	450,800.00
TOTAL COSTS THIS INVOICE.....$	17,576.17
TOTAL AMOUNT THIS INVOICE.....$	468,376.17
TOTAL AMOUNT DUE.....$	468,376.17

PLEASE SHOW THIS NUMBER ON YOUR CHECK: 025134-00001-BLC

EXHIBIT
tabbies
A

16dl-002360

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FILE # 025134-0001-BLC
INV. # 14057

JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER — JUNE 29, 2001
ATTN: JUDITH TERRA
3263 NORTH STREET, N.W.
WASHINGTON, D.C. 20007

INVOICE FOR PERIOD THROUGH 06/29/01

LEGAL SERVICES REGARDING: BUNTROCK V. JUDITH TERRA

10/08/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH CLIENTS' ATTORNEYS FOR FOUNDATION; MEETING WITH CLIENTS AND ATTORNEYS FOR TERRA FOUNDATION AT O'HARE AIRPORT; TIME IN TRAVEL; REVIEW DOCUMENTS POST-MEETING.	6.80
10/08/00	GCW	REVIEW OF MATERIALS RECEIVED FROM SIDLEY & AUSTIN; INTER-OFFICE CONFERENCE WITH BRIAN CROWE REGARDING SAME; ATTEND MEETING TO DISCUSS RETENTION AND CASE RELATED ISSUES AT O'HARE.	5.10
10/09/00	BLC	CONFERENCE WITH STEVE CARLSON REGARDING STATUS AND PROCEDURE; CONFERENCE WITH COUNSEL REGARDING PROCEDURE; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	3.60
10/09/00	BXN	CONFERENCE WITH JAMES D. WILSON AND BRIAN L. CROWE (.10); REVIEW OF PLEADINGS (2.10); CIRCULATE AND MAKE COPIES OF PLEADINGS (.80) CONFERENCE WITH PATRICIA S. SPRATT (.10).	3.10
10/09/00	GCW	MEETING REGARDING STAFFING OF CASE; INTER-OFFICE CONFERENCES WITH JACK HAGERTY, PATRICIA SPRATT AND BRETT NOLAN REGARDING MEETING ON OCTOBER 8, 2000.	1.60

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10/09/00	JDW	CONFERENCE WITH BLC, JJH, BXN, GCW; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BLC; BEGIN REVIEW OF MATERIALS	6.10
10/09/00	PSS	OFFICE CONFERENCE WITH B. CROWE, J. WILSON, J. HAGERTY, G. WARD, AND B. NOLAN RE RESEARCH REGARDING FIDUCIARY DUTIES OF OFFICERS/DIRECTORS OF NOT-FOR-PROFIT CORPORATION, TO WHOM THOSE DUTIES ARE OWED, AND RE APPLICATION OF DEAD MAN'S ACT TO THE FACTS OF THIS CASE; RESEARCH ISSUES; OFFICE CONFERENCE WITH J. WILSON RE PREPARING MOTION TO DISMISS.	3.60
10 9/00	TSD	OBTAIN COPY OF STATE COURT DOCKET IN BUNTROCK SUIT.	.30
10/10/00	BLC	REVIEW DOCUMENTS REGARDING STATUS AND STRATEGY AND PROCEDURE.	2.00
10/10/00	JDW	CONTINUED REVIEW OF DOCUMENTS; CONFERENCE WITH BLC; PHONE CONFERENCE WITH JUDITH TERRA; BEGIN DRAFT OF INDEMNIFICATION REQUESTS	5.20
10/10/00	JJH	REVIEW COMPLAINT AND OTHER DOCUMENTS RELATIVE TO TRO; VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 25, 2000.	3.70
10/10/00	PSS	OFFICE CONFERENCE WITH B.CROWE RE MOTION TO DISMISS; OFFICE CONFERENCE WITH B.NOLAN RE VARIOUS THEORIES/BASES FOR MOTION TO DISMISS.	.70

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10/11/00	BLC	CONFERENCE WITH CLIENT, JUDITH TERRA, IN WASHINGTON, D.C.; REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STATUS, STRATEGY AND PROCEDURE.	12.00
10/11/00	BXN	CONFERENCE WITH PATRICIA S. SPRATT (.20); REVIEW CASES REGARDING FIDUCIARY DUTIES (.90); RESEARCH REGARDING CHARITABLE TRUST ACT (.60); RESEARCH REGARDING NOT-FOR-PROFIT ACT (1.10).	2.80
10/11/00	JDW	TRAVEL TO AND FROM WASHINGTON, D.C.; MEET WITH CLIENT	12.30
10/11/00	JJH	REVIEW MOTION TO APPOINT SPECIAL LITIGATION COUNSEL, JAMES D. TERRA'S EMERGENCY PETITION TO INTERVENE, DEFENDANT TERRA FOUNDATION'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT, AND DEFENDANT TERRA FOUNDATION'S OPPOSITION TO MOTION FOR A SPECIAL LITIGATION COMMITTEE; VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING SAME; TELEPHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION REGARDING DERIVATIVE ACTIONS GENERALLY AND SPECIAL LITIGATION COMMITTEES GENERALLY.	8.90
10/11/00	JMW	CONDUCT RESEARCH REGARDING SPECIAL LITIGATION COMMITTEE	
10/11/00	PSS	CONTINUE RESEARCH REGARDING BASES FOR A MOTION TO DISMISS; REVIEW PLAINTIFF'S MOTION TO APPOINT INDEPENDENT LITIGATION COMMITTEE; OFFICE CONFERENCE WITH J. HAGERTY AND B. NOLAN RE ALL.	7.80
10/12/00	BLC	PREPARE FOR AND APPEAR BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL POST-COURT HEARING.	4.00

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10/12/00	JBF	STARTED PLEADINGS INDEX	2.50
10/12/00	JDW	CONTINUED REVIEW OF FOUNDATION DOCUMENTS; REVIEW NOTICE OF DEPOSITION FOR MME. AHRWEILER; REVIEW PLEADINGS FILED BY PLAINTIFF; REVIEW DRAFT RESPONSE; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH MR. TUCKER	5.80
10/12/00	JJH	PREPARE FOR ORAL ARGUMENT ON VARIOUS MOTIONS; VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN REGARDING SAME; ATTEND HEARING; REVIEW EMERGENCY MOTION TO INTERVENE; PRELIMINARY RESEARCH REGARDING SAME; DRAFT RESPONSE TO MOTION TO INTERVENE.	9.40
10/12/00	PSS	CONTINUE RESEARCH IN PREPARATION FOR DRAFTING MOTION TO DISMISS; UPDATE AND SHEPARDIZE ALL CASES FOUND; REVIEW ADDITIONAL PLEADINGS PROVIDED BY SIDLEY & AUSTIN (MOTIONS, AG'S COMPLAINT, LEGAL MEMORANDA); OFFICE CONFERENCE WITH J. WILSON AND J. HAGERTY RE BACKGROUND FACTS OBTAINED FROM CLIENT INTERVIEWS AND RE COORDINATION OF ALL DISCOVERY MATTERS.	6.70
10/12/00	TSD	FILE APPEARANCE AND NOTICE OF FILING SAME WITH THE CLERK OF THE CIRCUIT COURT; DELIVER SAME TO BRIAN CROWE AT COURT.	.70
10/13/00	BLC	CONFERENCE WITH JOHN ENGLISH AND REVIEW DOCUMENTS AT UNGARETTI & HARRIS OFFICE; CONFERENCE WITH CLIENT, JUDITH TERRA; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	2.50

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10/13/00	BXN	CONFERENCE WITH PATRICIA S. SPRATT (.60); RESEARCH REGARDING FIDUCIARY DUTIES OWED TO STATE (1.90); REVIEW PLEADINGS AND NEW MOTION (.90); RESEARCH REGARDING INDEMNIFICATION UNDER BYLAWS AND ILLINOIS LAW (1.20); DRAFT MOTION TO DISMISS (2.30).	6.90
10/13/00	JBF	COPIED EXHIBITS PULLED CASES OFF OF WEST LAW	2.30
10/13/00	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION; CONFERENCE WITH JJH, BLC, PSS; REVIEW ORDERS; REVIEW PLEADINGS; CONTINUED REVIEW OF FOUNDATION DOCUMENTS; REVIEW PLAINTIFFS' MOTION FOR SPECIAL LITIGATION COMMITTEE; PHONE CONFERENCE WITH CLIENT	5.10
10/13/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN; REVIEW AND REVISE RESPONSE TO EMERGENCY PETITION TO INTERVENE; REVIEW VARIOUS DISCOVERY REQUESTS; MEETING WITH JOHN ENGLISH AND BRIAN CROWE AT UNGARETTI & HARRIS REGARDING ESTATE ISSUES; REVIEW RESPONSE FROM SIDLEY & AUSTIN TO MOTION FOR INDEPENDENT COUNSEL; RESEARCH REGARDING SAME; TELEPHONE CONFERENCE WITH JIM WILSON AND CORPORATE COUNSEL FOR THE FOUNDATION REGARDING SPECIAL LITIGATION COMMITTEES AND DERIVATIVE ACTIONS.	6.70
10/13/00	PSS	CONCLUDE RESEARCH; BEGIN DRAFT OF MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS; REVISE AND EDIT SAME.	8.50
10/14/00	BLC	REVIEW DOCUMENTS REGARDING MEDIA COVERAGE AND INDEMNIFICATION ISSUES; REVIEW PLEADINGS.	1.50

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10/16/00	BLC	CONFERENCE WITH WILLIAM CONLON AND TELEPHONE CONFERENCE WITH ATTORNEY GENERAL'S OFFICE; CONFERENCE WITH COUNSEL AND REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR COURT HEARINGS; REVIEW CASES AND DOCUMENTS REGARDING SPECIAL LITIGATION COMMITTEES; CONFERENCE WITH COUNSEL RELATIVE THERETO.	2.30
10/16/00	BXN	RESEARCH REGARDING SPECIAL LITIGATION COMMITTEES PER JDW (1.70); DRAFT MOTION TO DISMISS (2.00); CONFER WITH JH REGARDING MOTION (.40); CONFERENCES WITH PSS REGARDING MOTION (.40); CONFER WITH JDW REGARDING SPECIAL LITIGATION COMMITTEES (.20)	4.70
10/16/00	JDW	DRAFT RESPONSE TO MOTION FOR SPECIAL LITIGATION COMMITTEE; CONFERENCE WITH JJH; REVIEW CASE LAW AND CONTINUED RESEARCH RE: SPECIAL LITIGATION COMMITTEE	6.50
10/16/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN; REVIEW AND REVISE MEMORANDUM IN SUPPORT OF MOTION TO DISMISS; FURTHER RESEARCH REGARDING INTERVENTION AND SPECIAL LITIGATION COMMITTEES; FURTHER DRAFTING OF MEMORANDUM IN OPPOSITION TO PETITION TO INTERVENE; FILE SAME; TELEPHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION REGARDING SPECIAL LITIGATION COMMITTEES.	8.70
10/16/00	PSS	FURTHER REVISE DRAFT MEMO IN SUPPORT OF MOTION TO DISMISS.	1.80
10/16/00	TSD	FILE RESPONSE IN OPPOSITION TO PETITION TO INTERVENE WITH THE CLERK OF THE CIRCUIT COURT.	.60

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10/17/00	BXN	CONFERENCES WITH PSS (.30); CONFERENCES WITH JH (.30); RESEARCH PER JH REGARDING CHARITABLE TRUSTS AND FIDUCIARY DUTIES OWED (1.50)	2.10
10/17/00	JBF	ORDERED FILE INSERTS ORGANIZED DOCUMENTS FOR THE FILE	2.20
10/17/00	JDW	REVIEW/REVISE OPPOSITION TO SPECIAL LITIGATION COMMITTEE; REVIEW TERRA FOUNDATION'S OPPOSITION TO TRO; CONFERENCE WITH BLC	3.60
10/17/00	JJH	TELEPHONE CONFERENCE WITH JIM WILSON AND STEPHEN CARLSON REGARDING SLC'S GENERALLY; REVIEW REPLY REGARDING INDEPENDENT LITIGATION COMMITTEE; TELEPHONE CONFERENCE WITH STEPHEN CARLSON REGARDING SAME; REVIEW AND REVISE MOTION TO DISMISS FOR INDIVIDUAL DEFENDANTS.	3.20
10/17/00	TSD	FILE RESPONSE IN OPPOSITION TO SPECIAL LITIGATION COMMITTEE WITH THE CLERK OF THE CIRCUIT COURT.	.60
10/18/00	BLC	CONFERENCE WITH SIDLEY & AUSTIN LAWYERS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR HEARING.	2.30
10/18/00	JBF	BEGAN DISCOVERY INDEX, UPDATED PLEADINGS INDEX	1.60
10/18/00	JDW	MEETING WITH BLC AND JJH RE: STRATEGY FOR HEARING; MEETING AT SIDLEY AND CONFERENCE CALL WITH ALL COUNSEL; REVIEW ALL PLEADINGS FOR ARGUMENT RE: SPECIAL LITIGATION COMMITTEE	6.50

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10/18/00	JJH	MEETING WITH BRIAN CROWE AND JIM WILSON REGARDING STRATEGY FOR FRIDAY'S HEARING; DRAFT CORRESPONDENCE TO CLIENTS REGARDING DISCOVERY REQUESTS; CONFERENCE CALL WITH COUNSEL FOR THE FOUNDATION REGARDING VARIOUS MOTIONS FILED BY PLAINTIFFS; REVIEW SAME; FURTHER REVIEW AND REVISIONS TO MOTION TO DISMISS.	4.90
10/18/00	PSS	REVIEW ALL DISCOVERY SERVED BY ALL PLAINTIFFS ON ALL DEFENDANTS; OFFICE CONFERENCE WITH J. HAGERTY RE COORDINATING OUR DISCOVERY RESPONSES; DRAFT LETTER TO CLIENTS FOR J. HAGERTY RE ASSEMBLING RESPONSIVE DOCUMENTS; REVIEW BUNTROCK'S AND GIDWITZ'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY S&A.	1.40
10/18/00	TSD	DELIVERED COURTESY COPIES TO JUDGE KENARD'S CHAMBERS	.50
10/19/00	BLC	CONFERENCE WITH FLOYD PERKINS OF ATTORNEY GENERAL'S OFFICE AT STATE OF ILLINOIS BUILDING; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; CONFERENCE WITH SIDLEY & AUSTIN ATTORNEYS AND REVIEW CASE LAW TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD.	4.50
10/19/00	BXN	DRAFT AND REVISE MOTION TO DISMISS	1.80
10/19/00	JBF	UPDATED PLEADINGS INDEX AND DISCOVERY INDEX AND ORGANIZED DOCUMENTS IN FILE	2.70
10/19/00	JDW	PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH BLC; CONTINUE PREPARATIONS FOR COURT; CONTINUED REVIEW OF RESEARCH; PREPARE FOR AND MEET WITH MR. PERKINS AND BLC; REVIEW PLEADINGS; PREPARE FOR ORAL ARGUMENT	9.10

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10/19/00	PSS	DRAFT ANSWER FOR DR. TUCKER; REVISE AND EDIT SAME; TELEPHONE CONFERENCE WITH DR. TUCKER AND J. WILSON RE SAME; REVIEW ADDITIONAL DISCOVERY SERVED ON US; LETTER TO CLIENTS RE SAME; REVIEW CORRESPONDENCE REGARDING THIRD-PARTY PRODUCTION PURSUANT TO SUBPOENA, REGARDING SUBPOENA SERVED ON MME. AHRWEILER, AND J. TERRA'S INTENTION TO SEEK LEAVE TO FILE AMENDED PETITION TO INTERVENE; OFFICE CONFERENCE WITH J. WILSON RE ALL.	8.90
10/20/00	BLC	PARTICIPATION IN HEARINGS BEFORE JUDGE KINNAIRD AND COURT-ORDERED CONFERENCE WITH JUDGE KINNAIRD.	2.30
10/20/00	JBF	ORGANIZED FILE AND UPDATED INDEXES	2.40
10/20/00	JDW	PHONE CONFERENCE WITH PROFESSOR TUCKER; MEETING WITH COUNSEL; PREPARE FOR HEARING; DRAFT OUTLINE; ATTEND HEARING; PHONE CONFERENCE WITH JUDITH TERRA; REVIEW ANSWER; MEET AND CONFER WITH COUNSEL FOR FOUNDATION	10.30
10/20/00	JJH	CONFERENCES WITH JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN; RESEARCH REGARDING RECEIVERSHIPS GENERALLY; PREPARE FOR HEARING ON EMERGENCY MOTIONS; ATTEND SAME; TELEPHONE CONFERENCE WITH CLIENTS REGARDING SAME.	6.80
10/20/00	PSS	CONCLUDE REVISIONS TO ANSWER/AFFIRMATIVE DEFENSES FOR DR. TUCKER; TELEPHONE CONFERENCE WITH J. ENGLISH RE REVIEWING UNGARETTI & HARRIS RECORDS RE REPRESENTATION OF J. TERRA VS. THE ESTATE; CONCLUDE PREPARATIONS FOR HEARING; ATTEND HEARING.	8.60

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10/22/00	BLC	REVIEW DOCUMENTS TO PREPARE FOR STRATEGY FOR DISCOVERY AND SUGGESTED COURT PROCEDURE.	.80
10/23/00	BLC	CONFERENCE WITH PAUL TUCKER AND JIM WILSON; REVIEW DOCUMENTS; CONFERENCE WITH STEVE CARLSON OF SIDLEY & AUSTIN AND CONFERENCE WITH JUDITH TERRA; CONFERENCE WITH PROF. PAUL TUCKER AND REVIEW DOCUMENTS.	1.30
10/23/00	JBF	ORGANIZED PLEADINGS AND DISCOVERY INDEXES MADE COPIES	3.20
10/23/00	JDW	CONFERENCE WITH JJH; PHONE CONFERENCE WITH STEVE CARLSON; STRATEGY SESSION BETWEEN BLC, JJH, JDW; CONFERENCE CALL WITH CLIENTS; REVIEW ANSWER; REVIEW ISSUES FOR MOTION TO DISMISS FOR SENATOR SIMPSON	3.80
10/23/00	PSS	TELEPHONE CONFERENCE WITH MRS. TERRA RE PREPARATION OF DISCOVERY RESPONSES; PARTICIPATE IN CONFERENCE CALL WITH J. WILSON, B. CROWE, J. TERRA, AND P. TUCKER.	.70
10/24/00	BLC	CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.80
10/24/00	JBF	COPIED PLEADINGS TO SEND TO MRS. TERRA	.80
10/24/00	JDW	FURTHER STRATEGY DISCUSSIONS; PHONE CONFERENCE WITH CLIENT; PHONE CONFERENCE WITH STEVE CARLSON RE: DERIVATIVE ISSUES; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH MR. MICHAELI; PHONE CONFERENCE WITH PROFESSOR TUCKER RE: SLC	5.10

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10/24/00	PSS	RESEARCH ILLINOIS NOT FOR PROFIT CORPORATIONS ACT FOR REFERENCES TO THE MINIMUM NUMBER OF PERSONS WHO MUST BE ON COMMITTEES, AND THE RATIO OF DIRECTORS TO NON-DIRECTORS; ADVISE J. WILSON RE SAME.	.40
10/25/00	BLC	REVIEW AND ANALYZE DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING BOARD MEETING IN BOSTON AND POTENTIAL MOTIONS BEFORE JUDGE KINNAIRD AND GENERAL STRATEGY.	1.50
10/25/00	JBF	UPDATED DISCOVERY INDEX AND ORDERED MORE FILE INSERTS	.80
10 /00	JDW	CONFERENCE WITH BLC RE: STRATEGIES; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENT; REVIEW PROBATE ISSUES; REVIEW CASE LAW RE: DERIVATIVE ISSUES AND CAUSES OF ACTION	4.10
10/25/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW AND REVISE DRAFT ANSWERS.	1.90
10/25/00	PSS	TELEPHONE CONFERENCE WITH DR. TUCKER RE ASSEMBLING DOCUMENTS IN ADVANCE OF PREPARING RESPONSES TO DISCOVERY REQUESTS; DRAFT ANSWER FOR J. TERRA TO BUNTROCK'S AND GIDWITZ'S COMPLAINT; BEGIN TO DRAFT WRITTEN DISCOVERY RESPONSES FROM ATTORNEY GENERAL AND FROM BUNTROCK & GIDWITZ.	6.10
10/26/00	BLC	REVIEW DOCUMENTS REGARDING THEORIES OF DEFENSE AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	1.30
10/26/00	JBF	ORGANIZED CORRESPONDENCE FOLDER AND ORDERED MORE INSERTS	.50

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10/26/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON; REVIEW DRAFT ANSWER; REVIEW DRAFT MOTION TO DISMISS; REVIEW COMPLAINT; PHONE CONFERENCE WITH CLIENT	3.70
10/26/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW PLEADINGS AND THE FOUNDATION'S MOTION TO DISMISS; CONFERENCE WITH BRETT NOLAN REGARDING SAME.	2.10
10/27/00	BLC	CONFERENCE WITH COUNSEL; CONFERENCE WITH SIDLEY & AUSTIN LAWYER AND REVIEW DOCUMENTS REGARDING BOARD OF DIRECTOR MEETINGS AND COURT STRATEGY.	.50
10/27/00	DXN	RESEARCH PER JH REGARDING FIDUCIARY DUTY AND CHARITABLE TRUSTS (.80); REVISE FIDUCIARY SECTION OF MOTION TO DISMISS PER JH (1.10)	1.90
10/27/00	JBF	COPIES	.50
10/27/00	JDW	EXTENDED CONFERENCE WITH BLC; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH JJH; REVIEW MEMO AND ORDERS RE: ISSUES FOR BOARD MEETING	2.80
10/27/00	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	1.60
10/27/00	PSS	OFFICE CONFERENCE WITH J. WILSON RE DOCUMENTS IDENTIFIED AT UNGARETTI & HARRIS; SAME WITH J. HAGERTY; DRAFT ANSWER AND AFFIRMATIVE DEFENSES FOR DR. TUCKER TO ATTORNEY GENERAL'S COMPLAINT; REVISE AND EDIT SAME; BEGIN DRAFT OBJECTIONS AND ANSWERS TO WRITTEN DISCOVERY FROM BUNTROCK & GIDWITZ AND FROM ATTORNEY GENERAL.	7.80
10/28/00	BLC	REVIEW PLEADINGS AND EXHIBITS.	1.00

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10/29/00	JDW	LEGAL RESEARCH RE: BREACH OF FIDUCIARY DUTY AND DERIVATIVE ACTIONS; REVIEW ANSWER TO ATTORNEY GENERAL'S COMPLAINT	2.90
10/30/00	BLC	CONFERENCE WITH CLIENT AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY; BOARD MEETING AND COURT APPEARANCES.	2.00
10/30/00	JBF	UPDATED PLEADINGS INDEX ORDERED INSERTS UPDATED MINUTES INDEX	1.80
10/30/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON RE: BOARD MEETING; PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE WITH PSS; CONFERENCE WITH BLC RE: STRATEGY; CONFERENCE WITH JJH RE: SAME; REVIEW AND EDIT ANSWER	5.80
10/30/00	PSS	CONTINUE DRAFT OBJECTIONS AND RESPONSES TO WRITTEN DISCOVERY AND ANSWERS FOR MRS. TERRA TO BOTH COMPLAINTS.	5.80
10/31/00	BLC	REVIEW DOCUMENTS REGARDING MOTIONS TO PREVENT BOARD OF DIRECTORS MEETING IN BOSTON AND CONFERENCE WITH COUNSEL RELATIVE THERETO; CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY FOR MEETING.	2.00
10/31/00	BXN	REVIEW ATTORNEY GENERAL'S COMPLAINT (.90); RESEARCH REGARDING FACT-PLEADING AND SECTION 2-615 MOTION (1.00); BEGIN DRAFTING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (2.00)	3.90
10/31/00	JBF	UPDATED PLEADINGS AND DISCOVERY INDEXES ORGANIZED CORRESPONDENCE FILE	1.60

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10/31/00	JDW	PHONE CONFERENCE WITH MARK HEAWOLE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCES WITH STEVE CARLSON; REVIEW JOINDER MOTION FROM QUINLAN RECEIVED AT 4:10; REVIEW EMERGENCY MOTION OF ATTORNEY GENERAL RECEIVED AT 3:55; CONFERENCE WITH BLC AND PSS; STRATEGIZE FOR COURT HEARING IN MORNING	5.10
10/31/00	PSS	CONCLUDE DRAFTS OF ALL RESPONSES TO DISCOVERY FOR ALL DEFENDANTS AND ANSWERS TO COMPLAINTS FOR MRS. TERRA; TELEPHONE CONFERENCE WITH MRS. TERRA AND N. MICHAELI RE ALL DRAFTS AND ASSEMBLING RESPONSIVE DOCUMENTS; LETTER TO SAME CONFIRMING; MESSAGE TO DR. TUCKER RE DOCUMENTS; OFFICE CONFERENCE WITH B. CROWE AND J. WILSON RE TWO LATEST "EMERGENCY" MOTIONS RE BOARD MEETING TO ESTABLISH LITIGATION COMMITTEE.	3.20
11/01/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE FOR COURT HEARING; CONFERENCE WITH COUNSEL AND CONFERENCE WITH CLIENTS POST-HEARING.	1.00
11/01/00	BXN	DRAFTING MOTION TO DISMISS SIMPSON (3.40); REVISIONS PER JH (.70)	4.10
11/01/00	JBF	DELIVERED CURTESY COPIES TO THE JUDGE AND FILED DOCUMENTS AT THE DALEY CENTER	.90
11/01/00	JBF	ORGANIZED CORRESPONDENCE FOLDER	1.00

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11/01/00	JDW	PREPARE FOR AND ATTEND COURT HEARING ON EMERGENCY MOTION; DRAFT RESPONSE; PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON	9.90
11/01/00	JJH	CONFERENCE WITH JIM WILSON REGARDING EMERGENCY MOTIONS; ATTEND HEARING ON SAME; VARIOUS TELEPHONE CONFERENCES WITH JOINT DEFENSE COUNSEL; TELEPHONE CONFERENCE WITH CLIENTS REGARDING SAME.	9.10
11/01/00	PSS	COMMENT ON, REVISE, AND EDIT DRAFT RESPONSE TO EMERGENCY MOTION RE BOARD MEETING; REVIEW SIDLEY & AUSTIN'S RESPONSE TO SAME; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE EVENTS IN COURT TODAY; TELEPHONE CONFERENCE WITH J. WILSON, B. CROWE, DR. TUCKER, AND MRS. TERRA RE SAME.	1.80
11/02/00	BLC	STRATEGY SESSION WITH JIM WILSON AND JACK HAGERTY; CONFERENCE WITH WILLIAM CONLON OF SIDLEY & AUSTIN; CONFERENCE WITH SIDLEY & AUSTIN ATTORNEYS AND CONFERENCE WITH QUINLAN & CRISHAM ATTORNEYS; PREPARE FOR HEARING AND ATTENDANCE AND PARTICIPATION IN HEARING BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL POST-HEARING; REVIEW DOCUMENTS.	4.50
11/02/00	BXN	DRAFT MOTION TO DISMISS (SEN. SIMPSON) (3.00); REVIEW EMERGENCY MOTION OF AG (.50)	3.50
11/02/00	GCW	INTER-OFFICE CONFERENCE WITH BRIAN CROWE REGARDING INITIAL CLIENT MEETING AND PARTICIPATION OF THE DILENSCHNEIDER GROUP.	.30

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11/02/00	JBF	UPDATED PLEADINGS INDEX	.30
11/02/00	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE CALL WITH BILL CONLON; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE CALL WITH BRIAN CROWE, STEVE CARLSON AND JIM WILSON; PHONE CALL TO PAUL TUCKER; REVIEW MOTION FOR WINSTON & STRAWN; COURT APPEARANCE	8.50
11/02/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; VARIOUS TELEPHONE CONFERENCES WITH COUNSEL FOR THE FOUNDATION REGARDING SAME.	2.70
11/02/00	PSS	OFFICE CONFERENCES WITH J. WILSON AND B. CROWE RE REGENSTEIN FOUNDATION LITIGATION AND PARALLELS TO THIS CASE; OBTAIN COPY OF DOCKET FOR SAME AND OF COMPLAINT FOR SAME; REVIEW BOTH; OFFICE CONFERENCES WITH J. WILSON AND B. CROWE RE ALL.	2.30
11/02/00	TSD	SEARCH COURT RECORDS FOR REGENSTEIN FOUNDATION SUIT.	.40
11/02/00	TSD	COPY REGENSTEIN COMPLAINT AT THE CIRCUIT COURT.	.60
11/03/00	BLC	CONFERENCE WITH FOUNDATION LAWYERS AND SIDLEY & AUSTIN REGARDING SELECTION OF ATTORNEY FOR SPECIAL LITIGATION COMMITTEE AND REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND SELECTION OF LAWYER FOR SPECIAL LITIGATION COMMITTEE.	3.00
11/03/00	JBF	ORDERED INSERTS ORGANIZED CORRESPONDENCE AND PLEADINGS DELIVERED LETTER TO THE JUDGE AT THE DALEY CENTER	2.30

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11/03/00	JDW	CONFERENCE WITH BRIAN CROWE AND JACK HAGERTY AT SIDLEY & AUSTIN RE: INDEPENDENT COUNSEL ISSUES; DRAFT CORRESPONDENCE TO COURT RE: INDEPENDENT COUNSEL; DRAFT ISSUES MEMO	3.10
11/03/00	JJH	ATTEND MEETING WITH BRIAN CROWE AT SIDLEY & AUSTIN; REVIEW AND REVISE CORRESPONDENCE; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	3.60
11/05/00	BLC	REVIEW DOCUMENTS RELATIVE TO BOARD OF DIRECTORS' MEETING; REVIEW PLEADINGS AND ANALYZE DISCOVERY REQUESTS; DISCOVERY PLAN OF PLAINTIFFS AND RESPONSES AND STRATEGY.	1.30
11/6/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; COURT APPEARANCE BEFORE JUDGE KINNAIRD.	2.00
11/06/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PAUL TUCKER; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON; REVIEW QUINLAN MOTION; COURT APPEARANCE ON APPOINTMENT OF LITIGATION COUNSEL; PREPARE ANSWER	8.60
11/06/00	PSS	ATTENTION TO PLAINTIFFS' BUNTROCK AND GIDWITZ' EMERGENCY MOTION RE CONTRACT WITH PUBLIC RELATIONS FIRM; OFFICE CONFERENCE WITH JDW RE SAME.	.50
11/07/00	JBF	ORGANIZED FILE	1.50

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11/07/00	JDW	CONFERENCE WITH JACK HAGERTY RE: SIDLEY ACTION; REVIEW FAX FROM Q&C; PHONE CONFERENCE WITH MR. KENNEDY; PHONE CONFERENCE WITH PROFESSOR TUCKER; PHONE CONFERENCE WITH MR. CARLSON; DRAFT REVISIONS TO ORDER; DRAFT CORRESPONDENCE RE: REVISIONS TO SAME; REVIEW DRAFT OBJECTIONS TO DISCOVERY	6.50
11/08/00	BLC	CONFERENCE WITH CLIENT, P. TUCKER, AND CONFERENCE WITH D. RATNER; CONFERENCE WITH DILENSCHNEIDER OFFICIALS AND CONFERENCE WITH SIDLEY AUSTIN; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	2.30
11 3/00	BXN	CONFER WITH JDW REGARDING MOTION TO DISMISS	.20
11/08/00	JBF	ORGANIZED CORRESPONDENCE	1.00
11/08/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR MEETING AT QUINLAN & CRISHAM; PREPARE FOR MEETING WITH ARTHUR ANDERSEN; MEETING AT Q&C; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DOCTOR TUCKER; CONFERENCE WITH BRIAN CROWE RE: GREATER CHICAGO CHAMBER OF COMMERCE; PHONE CONFERENCE WITH CHRIS ROBLING; MULTIPLE CONFERENCES PHONE CONFERENCES WITH DR. TUCKER	6.10
11/08/00	PSS	ATTENTION TO CORRESPONDENCE FROM PLAINTIFF'S COUNSEL RE DRAFT ORDER; OFFICE CONFERENCE WITH J. WILSON RE STATUS OF OUR DISCOVERY RESPONSES.	.40
11/09/00	BLC	CONFERENCES WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH PAUL TUCKER AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	2.00

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11/09/00	BXN	REVIEW EMERGENCY MOTION AND RESPONSE BRIEF REGARDING DILENSCHNEIDER CONTRACT	.50
11/09/00	JBF	UPDATING PLEADINGS INDEX TRANSFERRED CORRESPONDENCE INTO BINDERS	1.60
11/09/00	JDW	REVIEW TRANSCRIPT OF COURT PROCEEDINGS; DRAFT CORRESPONDENCE TO JOHN KENNEDY; CONFERENCE WITH JACK HAGERTY; CONFERENCES WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. RATNER; REVIEW AND EDIT DISCOVERY AND EDIT MOTION	9.10
11 ?/00	PSS	ATTENTION TO VARIOUS LETTERS RE SCHEDULING BOARD MEETING TO ELECT SLC.	.30
11/10/00	BXN	COMPILE DISCOVERY SERVED UPON INDIVIDUAL DIRECTORS (1.00); DRAFT DISCOVERY (.70)	1.70
11/10/00	JBF	UPDATED PLEADINGS INDEX FILED NEW CORRESPONDENCE	1.30
11/10/00	JDW	PHONE CONFERENCE WITH JOHN KENNEDY; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; COMPLETE EDITS TO DRAFT ORDER; REVIEW/REVISE MOTION TO DISMISS	1.90
11/10/00	JDW	PHONE CONFERENCE WITH JXG; REVIEW MOTION AND EDIT SAME	.90
11/10/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING INDEPENDENT LITIGATION COMMITTEE AND COMPOSITION OF SAME; REVIEW CORRESPONDENCE BETWEEN SIDLEY & AUSTIN AND QUINLAN & CRISHAM.	1.60

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11/13/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH BOARD ATTORNEYS.	.50
11/13/00	JBF	ORGANIZING TERRA FILE	.50
11/13/00	JDW	CONFERENCE WITH BRIAN CROWE RE: MEETING TUESDAY AT SIDLEY & AUSTIN; REVIEW FAX	3.60
11/14/00	BLC	MEETING WITH WILLIAM CONLON, STEVE CARLSON AND SUSAN STONE AT SIDLEY & AUSTIN; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE AND TELEPHONE CONFERENCE WITH SIDLEY & AUSTIN.	2.00
11/14/00	BLC	TELEPHONE CONFERENCE WITH STEVE CARLSON AND TELEPHONE CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING INDEPENDENT LITIGATION COMMITTEE.	1.00
11/14/00	BXN	REVIEW WEEK'S COMPILATION OF PLEADINGS, MEMORANDA AND OTHER MATERIALS	.40
11/14/00	JBF	UPDATED PLEADINGS INDEX	.20
11/14/00	JDW	MEETING AT SIDLEY & AUSTIN; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; DRAFT MEETING AGENDA; REVIEW ORDER	2.90
11/14/00	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON, BILL CONLON, STEPHEN CARLSON AND SUSAN STONE REGARDING INDEPENDENT LITIGATION COMMITTEE; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	1.70

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11/15/00	BLC	CONFERENCE WITH LEN SCHRAGER, ADVISOR TO INDEPENDENT LITIGATION, AND CONFERENCE WITH STEVE CARLSON OF SIDLEY & AUSTIN; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY FOR BOARD OF DIRECTORS MEETING.	1.50
11/15/00	JDW	CONFERENCE WITH BRIAN CROWE; MEETING WITH PROFESSOR SCHRAGER; PHONE CONFERENCE WITH BRIAN CROWE RE: MEETING AND NEWSPAPER ARTICLES; PHONE CONFERENCE WITH STEVE CARLSON AND JACK HAGERTY; DRAFT OUTLINE FOR CONDUCT OF MEETING; CONFERENCE WITH JACK HAGERTY	4.70
11/15/00	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON AND COUNSEL FOR INDEPENDENT LITIGATION COMMITTEE REGARDING SCHEDULING AND NOTICE TO BOARD OF DIRECTORS; REVIEW AND REVISE DRAFT NOTICE; TELEPHONE CONFERENCE WITH JIM WILSON AND STEPHEN CARLSON REGARDING NOTICE, OUTLINE AND RESOLUTIONS.	2.90
11/16/00	BLC	TELEPHONE CONFERENCE WITH WILLIAM CONLON AND SEARCH FOR POTENTIAL COMMITTEE MEMBER; CONFERENCE WITH COUNSEL REGARDING SPECIAL COUNSEL AND REVIEW TRANSCRIPT.	1.50
11/16/00	JBF	FILED NEW DOCUMENTS	.70
11/16/00	JDW	REVIEW/REVISE OUTLINE; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH PROFESSOR SCHRAGER; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; STRATEGIZE	5.10

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11/17/00	JDW	REVIEW/REVISE OUTLINE; CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE; PHONE CONFERENCE WITH MR. SCHRAGER; REVIEW COMMUNIQUE; EDIT SAME	3.50
11/20/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING BOARD OF DIRECTORS' MEETING, TECHNIQUES OF PLAINTIFFS' ATTORNEYS AND STATUS UPDATE.	.50
11/20/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PROFESSOR SCHRAGER; DRAFT LETTER TO MR. QUINLAN; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH JACK HAGERTY	3.10
11/20/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW AND REVISE DRAFT RESOLUTIONS; REVIEW AND REVISE MEETING OUTLINE; REVIEW CORRESPONDENCE FROM OPPOSING COUNSEL AND COUNSEL FOR THE FOUNDATION; REVIEW AND REVISE RESPONSES TO SAME.	2.90
11/21/00	JBF	UPDATING CORRESPONDENCE FOLDER	.20
11/21/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW JOHN KENNEDY RESPONSE; DRAFT REPLY; CONFERENCE WITH JJH; FURTHER PHONE CONFERENCE WITH MR. CARLSON RE: KENNEDY LETTER	5.10
11/21/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; FURTHER REVIEW AND REVISIONS TO MEETING OUTLINE.	1.20
11/21/00	PSS	OFFICE CONFERENCE WITH J. WILSON RE STATUS OF OUR CLIENT'S PRODUCTION OF DOCUMENTS AND RE COORDINATING TRANSFER OF DOCUMENTS.	.30

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11/22/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; TELEPHONE CALL TO PAUL TUCKER.	1.30
11/22/00	BXN	REVIEW OF RECENT PLEADINGS AND CORRESPONDENCE	.50
11/22/00	JDW	REVIEW/REVISE LETTER TO MR. KENNEDY; CONFERENCE WITH BRIAN CROWE AND JACK HAGERTY; REVIEW TERRA MEMO; PHONE CONFERENCE WITH STEVE CARLSON (X3); PHONE CONFERENCE WITH PROFESSOR SCHRAGER; REVIEW PROPOSED DISCOVERY RESPONSE	6.50
11/22/00	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.70
11/23/00	JDW	REVIEW CORRESPONDENCE AND MEMO FROM S. CARLSON	1.40
11/27/00	JDW	COURT APPEARANCE; DRAFT CORRESPONDENCE TO ALL COUNSEL; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW DRAFT RESOLUTIONS; PHONE CONFERENCE WITH CARLSON; PHONE CONFERENCE WITH PAUL TUCKER	3.10
11/27/00	JJH	FURTHER REVIEW AND REVISIONS TO MEETING OUTLINE; VARIOUS CONFERENCES WITH JIM WILSON REGARDING SAME; REVIEW CORRESPONDENCE FROM OPPOSING COUNSEL; FURTHER REVIEW OF DRAFT RESOLUTIONS.	3.10
11/28/00	JBF	ORGANIZING FILE	.80
11/28/00	JDW	REVIEW AND REVISE RESOLUTIONS; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW PERKINS LETTER; CONFERENCE WITH JACK HAGERTY PHONE CONFERENCE WITH DR. TUCKER	3.30

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11/28/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; FURTHER REVISIONS TO MEETING OUTLINE.	1.80
11/29/00	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROGRESS REGARDING BOARD OF DIRECTORS MEETING.	.30
11/29/00	JBF	UPDATING CORRESPONDENCE BINDER	.30
11/29/00	JDW	REVIEW/REVISE OUTLINE FOR MEETING ; CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MS. STONE; REVIEW PLEADINGS	.80
11/29/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY	1.10
11/30/00	BLC	CONFERENCE WITH COUNSEL REGARDING BOARD OF DIRECTORS MEETING.	.30
11/30/00	JDW	MULTIPLE PHONE CONFERENCES WITH DR. TUCKER; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH SUSAN STONE;	3.40
11/30/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING BOARD MEETING.	.80
12/01/00	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS AND STRATEGY; REVIEW DOCUMENTS RELATIVE THERETO; REVIEW CORRESPONDENCE.	1.00
12/01/00	JDW	REVIEW TAPES OF BOARD MEETING; PHONE CONFERENCE WITH MR. CARLSON; CONFERENCE WITH CLIENT; CONFERENCE WITH MR. RATNER; PHONE CONFERENCE WITH MR. SCHRAGER	5.90

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12/01/00	JJH	CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY; TELEPHONE CONFERENCE WITH S. CARLSON REGARDING INDEPENDENT LITIGATION COMMITTEE MEETING.	1.20
12/03/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SPECIAL LITIGATION COMMITTEE; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.00
12/03/00	JDW	REVIEW MEMOS RE: STAY OF PROCEEDINGS; LEGAL RESEARCH RE: SAME; PROVIDE SAME TO MR. CARLSON; PHONE CONFERENCE WITH MR. CARLSON RE: STRATEGY; PHONE CONFERENCE WITH MS. STONE; REVIEW MESSAGES RE: BOARD MEETING; REVIEW/REVISE MOTION TO STAY; CONFERENCE WITH BRIAN CROWE RE: STATUS AND SPECIAL LITIGATION COMMITTEE	3.90
12/04/00	JBF	ORGANIZED CORRESPONDENCE FOLDER AND UPDATED PLEADING'S INDEX	.40
12/04/00	JDW	DRAFT CORRESPONDENCE TO MR. CARLSON, MR. RATNER AND MS.. STONE; REVIEW BOARD TAPES	4.10
12/04/00	JJH	REVIEW AND REVISE MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING SAME.	3.20
12/05/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	.50
12/05/00	JBF	UPDATED PLEADINGS INDEX	.30
12/05/00	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH DON RATNER; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW/REVISE NEWEST VERSION OF MOTION TO STAY; FURTHER PHONE CONFERENCES WITH CLIENTS	2.10

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12/05/00	JJH	FURTHER REVISIONS TO MEMORANDUM IN SUPPORT OF 2-619.1 MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	1.90
12/06/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; COURT APPEARANCE BEFORE JUDGE KINNAIRD; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL POST-HEARING.	2.80
12/06/00	JDW	REVIEW FAXED MOTION TO CONTINUE STAY; PHONE CONFERENCE WITH QUINLAN'S OFFICE; COURT APPEARANCE	4.50
12 6/00	JJH	FURTHER REVISIONS TO MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING STATUS.	1.40
12/07/00	BXN	REVIEW EMERGENCY TRO AND RELATED MATERIALS; LEGAL RESEARCH PER JACK HAGERTY; REVISIONS TO MOTION TO DISMISS (SIMPSON).	1.60
12/07/00	JBF	ORGANIZING FILE	1.20
12/07/00	JDW	CONFERENCE WITH PAT SPRATT RE: TRO MOTION; CONFERENCE WITH BRIAN CROWE RE: STRATEGY; CONFERENCE CALL; REVIEW TRO MOTION; PHONE CONFERENCE WITH STEVE CARLSON	5.10
12/07/00	PSS	REVIEW PLAINTIFF'S EMERGENCY MOTION RE APPOINTMENT OF RECEIVER AND TO OVERRIDE DECISIONS OF INDEPENDENT LITIGATION COMMITTEE; RESEARCH RE INDEMNIFICATION OF DIRECTORS AS TO ATTORNEYS FEES.	1.10

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12/08/00	BLC	REVIEW DOCUMENTS AND CASE LAW REGARDING S.L.C. AND REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL FOR PENDING HEARING AND CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL.	1.50
12/08/00	JBF	UPDATING PLEADINGS INDEX	.50
12/08/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON; REVIEW TAPES; DRAFT CORRESPONDENCE; LEGAL RESEARCH; BEGIN DRAFT OF RESPONSE TO EMERGENCY MOTION FOR RECEIVER, ETC.; PHONE CONFERENCES WITH CLIENTS; CONFERENCE WITH PAT SPRATT; REVIEW BRIEFS RE: ADVANCES	4.70
12 8/00	PSS	DISTILL FACTUAL ALLEGATIONS AGAINST OUR CLIENTS FROM BOTH COMPLAINTS IN PREPARATION FOR DRAFTING AN ARGUMENT; OFFICE CONFERENCE WITH J. WILSON RE SAME; BEGIN DRAFT OF SAME.	3.40
12/10/00	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. MICHAELI; REDRAFT DOCUMENTS; REVIEW STATUTES AND BY-LAWS; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENTS	5.10
12/11/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND MODIFY PLEADINGS TO BE SUBMITTED TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD.	1.00
12/11/00	BXN	RESEARCH FOR JIM WILSON REGARDING ADVANCEMENT OF FEES AND EXPENSES; CONFER WITH JIM WILSON REGARDING SAME .	2.50
12/11/00	JBF	ORGANIZING FILE	.40

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12/11/00	JDW	PHONE CONFERENCE WITH JUDITH TERRA; DRAFT RESPONSE TO TRO; PHONE CONFERENCE WITH STEVE CARLSON; ADDITIONAL CONFERENCES RE: EDITS TO OUR RESPONSE TO THE TRO; MULTIPLE REVISIONS TO SAME.	8.50
12/11/00	PSS	DRAFT FACT SECTION OF OUR RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR APPOINTMENT OF RECEIVER AND FOR STAY; REVISE AND EDIT SAME; REVIEW COMPLETED RESPONSE AND EDIT/COMMENT ON SAME.	3.20
12/12/00	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; REVIEW CASE LAW.	1.50
12/12/00	BXN	REVIEW SIDLEY & AUSTIN'S MEMORANDUM IN OPPOSITION BRIEF	.50
12/12/00	JBF	UPDATED PLEADINGS INDEX, ORGANIZING FILE.	1.60
12/12/00	JDW	CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH PAT SPRATT; DRAFT CORRESPONDENCE; CONFERENCE WITH JACK HAGERTY; DRAFT CORRESPONDENCE RE DILENSCHNEIDER GROUP; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENTS; PHONE CONFERENCE WITH MR. KENNEDY; REVIEW TRANSCRIPTS OF BOARD MEETING 11/30/00; CONFERENCE WITH BRIAN CROWE	4.90
12/12/00	PSS	REVIEW SIDLEY & AUSTIN'S RESPONSE TO BUNTROCK'S AND GIDWITZ'S MOTION FOR TRO REGARDING CONFLICT OF SIDLEY AND AUSTIN AND RE PAYMENT OF LEGAL FEES AND TERRA FOUNDATION'S MOTION TO STRIKE PROFESSOR BREEN'S AFFIDAVIT.	.50

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12/12/00	TSD	FILE EMERGENCY MOTION TO APPOINT RECEIVER, FOR TEMPORARY RESTRAINING ORDER, AND OBJECTION TO MOTION FOR STAY WITH THE CLERK OF THE CIRCUIT COURT.	.60
12/12/00	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.50
12/13/00	JBF	ORGANIZED FILE	.20
12/13/00	JDW	REVIEW REPLY; PHONE CONFERENCE WITH MR. KENNEDY; CONFERENCE WITH JACK HAGERTY, PAT SPRATT AND BRIAN CROWE; DRAFT OUTLINE FOR ORAL ARGUMENT; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MR. RATNER; CONFERENCE WITH BRIAN CROWE	3.80
12/13/00	PSS	REVIEW PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION REGARDING ILC, ATTORNEYS FEES, AND DILENSCHEIDER CONTRACT; OFFICE CONFERENCE WITH J. WILSON RE SAME; OFFICE CONFERENCE WITH J. WILSON RE PREPARATION OF PRECISE OF ALLEGATIONS MISMANAGEMENT BY INDIVIDUAL DIRECTOR DEFENDANTS.	.50
12/14/00	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD - PREPARE OUTLINE AND REVIEW CASE LAW; HEARING BEFORE JUDGE KINNAIRD.	2.00
12/14/00	JBF	COPYING COMPLAINTS	1.90
12/14/00	JDW	PHONE CONFERENCE WITH MR. CONLON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENT; PHONE CONFERENCE WITH MR. CARLSON; PREPARE FOR AND ATTEND COURT HEARING; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JUDITH TERRA	4.90

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12/14/00	PSS	OFFICE CONFERENCE WITH B. CROWE, J. WILSON, AND J. HAGERTY RE TODAY'S HEARING ON EMERGENCY MOTIONS.	.20
12/15/00	JBF	COPYING PLEADINGS ORGANIZING FILE	.70
12/15/00	JJH	REVIEW EMERGENCY MOTION; DRAFT RESPONSE TO TRO; VARIOUS CONFERENCES WITH JIM WILSON REGARDING SAME.	2.90
12/15/00	PSS	REVIEW BOTH COMPLAINTS AND HIGHLIGHT ALLEGATIONS REGARDING MISMANAGEMENT OF TERRA FOUNDATION OR MUSEUM; MEMO TO J. WILSON RE SAME.	.70
12/18/00	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL; TELEPHONE CALL TO PAUL TUCKER REGARDING ISSUES INVOLVED IN CLAIMS OF WASTE AND MISMANAGEMENT.	1.00
12/19/00	BLC	REVIEW DOCUMENTS PLAN AND STRATEGY FOR PENDING MOTIONS.	1.00
12/19/00	JBF	ORGANIZED FILE	.90
12/20/00	ATS	MEET WITH CLIENT REGARDING EMPLOYMENT ISSUE; CONFER WITH JACK HAGERTY AND BRIAN CROWE REGARDING SAME	.30
12/20/00	BLC	CONFERENCE WITH PAUL TUCKER REGARDING LITIGATION ISSUES; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	2.30
12/20/00	JDW	REVIEW DR. TUCKER FAX; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH CLIENT; REVIEW MOTIONS IN PREPARATION FOR HEARING.	4.10

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12/20/00	JJH	MEETING WITH PAUL TUCKER AND BRIAN CROWE REGARDING JOHN NEFF; CONFERENCE WITH BRIAN CROWE REGARDING SAME.	1.30
12/21/00	BLC	CONFERENCE WITH CLIENT AND CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING PENDING MOTIONS AND STRATEGY.	2.00
12/21/00	BXN	READ AND REVIEW REPLY BRIEFS AND SUR-REPLY BRIEFS	1.20
12/21/00	JDW	CONFERENCE WITH BRIAN CROWE; MEETING WITH DON RATNER; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MR. TUCKER; CONFERENCE WITH MS. TERRA; REVIEW NEW FILINGS BY PLAINTIFF; DRAFT CORRESPONDENCE	8.20
12/21/00	JJH	REVIEW EMERGENCY MOTION FOR TRO; PRELIMINARY RESEARCH REGARDING SAME; CONFERENCE WITH JIM WILSON REGARDING SAME.	1.90
12/22/00	JBF	MADE COPIES OF THE COMPLAINTS	.30
12/22/00	JDW	REVIEW FAX; CONTEMPLATE STRATEGY; CONFERENCE WITH PAT SPRATT RE: SURREPLY; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW TRANSCRIPT OF PROCEEDINGS OF DECEMBER 6, 2000 FOR INACCURACIES FROM BUNTROCK; CONFERENCE CALL WITH BRIAN CROWE AND MR. TUCKER; REVIEW ATTORNEY GENERAL'S MOTION; DRAFT CORRESPONDENCE TO CLIENTS	6.70

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12/22/00	PSS	OFFICE CONFERENCE WITH J. WILSON RE PREPARING A SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION TO ENJOIN PAYMENT AND FOR STAY; DRAFT SAME; REVISE AND EDIT SAME; REVIEW ATTORNEY GENERAL'S PARALLEL MOTION; OFFICE CONFERENCE WITH J. WILSON RE SAME.	4.60
12/23/00	JDW	PHONE CONFERENCE WITH JUDITH TERRA; REVIEW FAXED DOCUMENTS	1.00
12/26/00	BLC	CONFERENCE WITH COUNSEL; REVIEW CORRESPONDENCE AND MEMORANDA; PREPARE FOR HEARING BEFORE JUDGE KINNAIRD.	1.50
12 6/00	JBF	UPDATED PLEADINGS INDEX	1.80
12/26/00	JDW	REVIEW/REVISE SURREPLY; DRAFT MOTION FOR LEAVE TO FILE SURREPLY; DRAFT NOTICE OF MOTION; DRAFT COURTESY COPY LETTER TO COURT; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH BRIAN CROWE	8.30
12/26/00	TSD	FILE EMERGENCY MOTION FOR LEAVE TO FILE SURREPLY AND NOTICE OF EMERGENCY MOTION WITH THE CLERK OF THE CIRCUIT COURT; DELIVER COURTESY COPIES OF SAME TO JUDGE KINNAIRD'S CHAMBERS.	.60
12/27/00	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD AND PARTICIPATION IN HEARING BEFORE JUDGE KINNAIRD.	3.00
12/27/00	JDW	LEGAL RESEARCH; CONFERENCE WITH BRIAN CROWE; REVIEW TRIBUNE ARTICLE; PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR HEARING; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH STEVE CARLSON; FURTHER CONFERENCES WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY	6.40

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12/28/00	BLC	REVIEW DOCUMENTS AND CASE LAW REGARDING PENDING MOTIONS.	1.00
12/28/00	JBF	REVISED PLEADINGS INDEX.	1.60
12/29/00	JDW	PHONE CONFERENCE(S) WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON; REVIEW APPELLATE RULES; REVIEW ARGUMENTS RE: TRO; REVIEW NEW MOTION; EDIT MOTION	4.80
12/29/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING COURT RULINGS ON PENDING MOTIONS.	.50
12/29/00	EMA	RESEARCH RE: MICHAEL A. FICARO AS SPECIAL ASSISTANT ATTORNEY GENERAL AFTER 1992. IN OFFICE CONFERENCES WITH JIM WILSON ON SAME.	.40
12/29/00	JBF	SEARCHED WESTLAW FOR CASES; ADDITIONS TO PLEADINGS INDEX.	2.10
12/29/00	JDW	PREPARE FOR AND PARTICIPATE IN COURT HEARING; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCES WITH COUNSEL; MEETING WITH COUNSEL FOR FOUNDATION; CONFERENCE WITH MR. RATNER	9.10
12/30/00	JDW	PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. RATNER; PHONE CONFERENCE WITH CLIENTS; REVIEW/REVISE LETTER TO COURT	2.60
12/31/00	JDW	PHONE CONFERENCES WITH MRS. TERRA, DR. TUCKER; REVIEW/REVISE LETTER TO JUDGE KINNAIRD; RESEARCH RE: MR. FICARO; PHONE CONFERENCE WITH MR. CROWE; PHONE CONFERENCES WITH MR. CARLSON AND MR. CONLON	5.10

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01/02/01	BLC	PREPARE FOR COURT HEARING BEFORE JUDGE KINNAIRD; APPEARANCE BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS POST-HEARING.	6.00
01/02/01	EMA	RESEARCH AND REVIEW DELAWARE CORPORATE LAW JOURNAL FOR JIM WILSON.	.30
01/02/01	JBF	XEROXED JOURNAL ARTICLE AT THE DALEY CENTER LAW LIBRARY; ORGANIZING FILE; XEROXED COPIES OF THE COMPLAINTS	2.40
01/02/01	JDW	REVIEW AND REVISE CORRESPONDENCE TO COURT; CONFERENCE WITH BRIAN CROWE; DELIVER LETTER TO JUDGE;REVIEW/REVISE DRAFT ORDER FROM 12/29; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH CHRIS ROBLING; PREPARE FOR AND ATTEND COURT HEARING BEFORE JUDGE KINNAIRD; REVIEW DRAFT ORDER; FURTHER CONFERENCES WITH MESSRS. CARLSON AND KENNEDY; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCES WITH PAT SPRATT ON APPEAL ISSUES; CONFERENCE WITH JACK HAGERTY	10.30
01/02/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT REGARDING APPELLATE BRIEF; RESEARCH REGARDING MANDATORY PRELIMINARY INJUNCTIONS; DRAFT APPELLATE BRIEF REGARDING SAME; REVISIONS TO SAME.	11.80
01/02/01	PSS	REVIEW REQUIREMENTS FOR INTERLOCUTORY APPEAL FROM ENTRY OF TRO; OFFICE CONFERENCE WITH J. HAGERTY, B. CROWE, AND J. WILSON RE PREPARATION OF SAME;RESEARCH STANDARD OF REVIEW OF ENTRY OF TRO; PREPARE NOTICE OF APPEAL; PREPARE PETITION	13.80

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		FOR APPEAL; PREPARE MULTIPLE SECTIONS OF MEMORANDUM IN SUPPORT (INTRODUCTION, QUESTIONS PRESENTED, JURISDICTIONAL STATEMENT, RELEVANT FACTS, STANDARD OF REVIEW); IDENTIFY DOCUMENTS TO BE INCLUDED IN SUPPORTING RECORD; DRAFT AFFIDAVIT AUTHENTICATING SAME FOR J. WILSON; REVISE AND EDIT DRAFTED PORTIONS OF MEMORANDUM; REVIEW J. WILSON'S AND J. HAGERTY'S SECTIONS; FURTHER REVISE MEMORANDUM.	
01/03/01	BLC	REVIEW PLEADINGS AND REVIEW COURT ORDERS; CONFERENCE WITH MICHAEL SHAKMAN AND CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL REGARDING SLC.	1.50
01/03/01	JEF	BATES STAMPING; ORGANIZING FILE; MAKING LABELS FOR BINDERS; FILING AT THE APPELLATE COURT AND DELIVERING COPIES TO MR. PERKINS AND MR. KENNEDY.	3.20
01/03/01	JDW	DRAFT AND REVISE APPELLATE BRIEF; CONFERENCES WITH BRIAN CROWE, PAT SPRATT AND JACK HAGERTY; PHONE CONFERENCE WITH MR. MICHAELI; COMPLETE APPELLATE COURT PLEADINGS	11.30
01/03/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT REGARDING APPELLATE BRIEF; FURTHER REVISIONS TO SAME; FILE AND SERVE SAME.	3.90
01/03/01	PSS	CONCLUDE REVISIONS TO ALL PLEADINGS AND APPELLATE BRIEF, AND CONCLUDE ASSEMBLY OF SUPPORTING RECORD; CONFERENCES WITH J. WILSON AND J. HAGERTY RE REVISIONS; FILING DIRECTIONS TO T. DALCOMPO.	6.50

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01/03/01	TSD	FILE INTERLOCUTORY APPEAL AND NOTICE OF FILING SAME WITH THE CLERK OF THE CIRCUIT COURT; FILE PETITION FOR INTERLOCUTORY APPEAL, SUPPORTING MEMORANDUM; SUPPORTING RECORD, AND NOTICES OF FILING SAME WITH THE CLERK OF THE APPELLATE COURT; SERVE COPIES OF SAME ON QUINLAN'S OFFICE AND THE ATTORNEY GENERAL'S OFFICE.	1.00
01/04/01	ATS	PREPARE FOR AND MEET WITH BRIAN CROWE, JIM WILSON AND JACK HAGERTY REGARDING STATUS AND STRATEGY; REVIEW BACKGROUND MATERIALS AND INFORMATION	2.50
01/04/01	BLC	CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW BRIEFS; CONFERENCE WITH COUNSEL REGARDING SLC; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND APPEAL; CONFERENCE WITH WILLIAM CONLON REGARDING AG AND SLC.	1.80
01/04/01	BXN	MEETING WITH BRIAN CROWE, JIM WILSON, JACK HAGERTY, ALLAN SLAGEL AND PAT SPRATT; REVIEW NEW FILINGS; LETTER TO STEVE CARLSON; CONFERENCE WITH JACK HAGERTY REGARDING SIMPSON MOTION TO DISMISS; REVISIONS TO MOTION TO DISMISS.	4.70
01/04/01	JBF	ORGANIZING FILE; COPY DISCOVERY DOCUMENTS.	1.80
01/04/01	JDW	REVIEW PLAINTIFFS' BRIEF; PHONE CONFERENCE WITH ALL COUNSEL; PHONE CONFERENCES WITH MR. CARLSON; REVIEW DRAFT PLEADINGS; REVIEW/REVISE MOTION TO DISMISS; REVIEW DISCOVERY RE: RECEIVER	10.20

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01/04/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, ALLAN SLAGEL, PATRICIA SPRATT, BRETT NOLAN AND ELLEN AVERY REGARDING STATUS AND STRATEGY; REVIEW AND REVISE MOTION TO DISMISS FOR SEN. SIMPSON; REVIEW DISCOVERY FROM PLAINTIFFS.	3.10
01/04/01	PSS	ATTENTION TO EXPEDITED DISCOVERY MATTERS; RESEARCH NOT FOR PROFIT CORP. ACT RE APPOINTMENT OF PROVISIONAL DIRECTOR; CONFERENCES WITH J. WILSON, J. HAGERTY, B. CONLON AND S. CARLSON (X2) RE STRATEGY, APPOINTMENT OF INDEPENDENT THIRD PERSON TO SLC, IDENTIFY OF SAME, AND SETTLEMENT OPTIONS; RESEARCH ISSUE RE RULE 137 AND SIGNATURE OF ATTORNEY ON PLEADINGS V. SOMEONE ELSE SIGNING A PLEADING ON HIS OR HER BEHALF.	5.80
01/04/01	TSD	DELIVER ADDITIONAL COPIES OF SUPPORTING RECORD TO THE ILLINOIS APPELLATE COURT.	.60
01/05/01	ATS	PREPARE FOR AND MEET WITH BRIAN CROWE, JIM WILSON AND JACK HAGERTY REGARDING STATUS AND STRATEGY; REVIEW BACKGROUND MATERIALS AND INFORMATION	2.00
01/05/01	BLC	REVIEW PLEADINGS, BRIEFS AND DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE AND TELEPHONE CONFERENCE WITH QUINLAN & CRISHAM.	2.50
01/05/01	BXN	REVISE SIMPSON MOTION TO DISMISS; RESEARCH REGARDING FIDUCIARY DUTIES OF TRUSTEES/DIRECTORS; CONFERENCE WITH JACK HAGERTY.	2.80

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01/05/01	JBF	CREATED APPELLATE COURT PLEADINGS INDEX COPIED PLEADINGS TO DISTRIBUTE TO TERRA TEAM ORGANIZED FILE	2.60
01/05/01	JDW	CONFERENCE WITH BRIAN CROWE REGARDING WINSTON & STRAWN DOCUMENTS; PHONE CONFERENCE WITH MARK HEATWOLE; CONFERENCE WITH BRIAN CROWE; PAT SPRATT AND JACK HAGERTY; FURTHER CONFERENCE WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCES WITH PAUL TUCKER; REVIEW PLAINTIFFS' BRIEF ON TRO	9.30
01/05/01	JJH	FURTHER REVISIONS TO SEN. SIMPSON'S MOTION TO DISMISS; REVIEW APPELLATE BRIEF FILED BY PLAINTIFFS; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	2.60
01/05/01	PSS	MULTIPLE OFFICE CONFERENCES WITH J. HAGERTY AND J. WILSON RE STRATEGY ON DISCOVERY.	.90
01/05/01	TSD	PICK UP ORDER FROM ILLINOIS APPELLATE COURT.	.70
01/07/01	ATS	REVIEW AND REVISE DISCOVERY; CONFER WITH JIM WILSON REGARDING SAME	.50
01/07/01	JDW	PHONE CONFERENCE WITH CLIENTS; EXCHANGE VOICE MAIL MESSAGES WITH MR. CARLSON; REVIEW DISCOVERY REQUESTS; REVIEW PLAINTIFFS' BRIEF REGARDING THE TRO	2.60
01/08/01	ATS	REVIEW AND REVISE DISCOVERY; CONFER WITH JIM WILSON REGARDING SAME	1.00
01/08/01	BXN	CONFERENCE WITH JACK HAGERTY REGARDING SIMPSON MOTION; RESEARCH REGARDING CHARITABLE TRUST ACT; REVISE SIMPSON MOTION TO DISMISS.	2.80

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01/08/01	JDW	REVIEW QUINLAN BRIEF; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY AND ALLAN SLAGEL; PHONE CONFERENCE WITH MRS. TERRA; CONFERENCE WITH ALLAN SLAGEL RE: DISCOVERY	3.90
01/08/01	JJH	REVIEW PLAINTIFFS' DISCOVERY; FURTHER REVIEW OF APPELLATE FILINGS; CONFERENCE WITH JIM WILSON REGARDING STATUS.	2.20
01/08/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES.	.30
01/08/01	TSD	FILE DEFENDANTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS WITH THE CLERK OF THE CIRCUIT COURT.	.60
01/09/01	ATS	REVIEW MOTION TO DISMISS CLAIMS AGAINST SEN. SIMPSON AND BACKGROUND MATERIALS; CONFER WITH JIM WILSON REGARDING SAME	1.50
01/09/01	BLC	CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL; PREPARE FOR AND ATTEND COURT BEFORE JUDGE KINNAIRD; CONFERENCE WITH CLIENTS POST-COURT HEARING.	6.00
01/09/01	JBF	EXPAND PLEADINGS INDEX; ORGANIZE FILE.	2.10
01/09/01	JDW	CONFERENCE WITH BRIAN CROWE AND PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA AND SENATOR SIMPSON; CONFERENCE CALL ON DISCOVERY; PREPARE FOR AND MAKE COURT APPEARANCE; MEETING WITH CLIENTS; PHONE CONFERENCES WITH CLIENTS	9.40

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01/09/01	PSS	TELEPHONE CONFERENCE WITH ALL COUNSEL RE EXPEDITED DISCOVERY; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE DISCOVERY AND SETTLEMENT STRATEGIES; ATTENTION TO ALL OUTSTANDING DISCOVERY SERVED ON US AND PREPARATION OF RESPONSES THERETO.	6.80
01/09/01	TSD	OBTAIN COPY OF ORDER FROM APPELLATE COURT.	.60
01/10/01	ATS	REVIEW MOTION TO DISMISS CLAIMS AGAINST SEN. SIMPSON	1.00
01/10/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW STATE'S DOCUMENTS AND REVIEW PLEADINGS; CONFERENCE WITH S. STONE AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; CONFERENCE WITH ATTORNEY GENERAL PERKINS AT STATE OF ILLINOIS BUILDING; CONFERENCE WITH COUNSEL WILLIAM CONLON POST-MEETING.	2.30
01/10/01	BXN	REVIEW OF INTRODUCTORY APPEAL BRIEFS.	.70
01/10/01	EMA	RESEARCH RE: BREACH OF A FIDUCIARY DUTY INVOLVING A STATEMENT OR OTHER NON-CONDUCT. ALSO, IN OFFICE CONFERENCES WITH GABE RILEY-BATES AND JIM WILSON ON SAME.	1.10
01/10/01	GRB	RESEARCH DUTY OF LOYALTY, DUTY OF CARE AND A DIRECTOR OF A NONPROFIT CORPORATION'S FIDUCIARY DUTY.	9.00
01/10/01	JDW	CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH CLIENTS	5.10

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01/10/01	PSS	REVISE AND EDIT ALL RESPONSES TO ALL OUTSTANDING DISCOVERY ADDRESSED TO OUR CLIENTS; REVIEW AND COMMENT ON SIDLEY & AUSTIN'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO TERRA FOUNDATION; OFFICE CONFERENCES WITH J. WILSON (X3) RE DISCOVERY ISSUES.	5.20
01/11/01	ATS	CONFER WITH JIM WILSON REGARDING SEN. SIMPSON MOTION TO DISMISS; REVIEW AND REVISE SAME	1.20
01/11/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING PENDING MOTIONS AND STRATEGY AND PROCEDURE.	.80
01 1/01	GCW	RESEARCH AND WORK ON DRAFT OF MOTION TO DISMISS SEN. SIMPSON; INTER-OFFICE CONFERENCE WITH JIM WILSON AND ALLAN SLAGEL REGARDING SAME.	1.50
01/11/01	GLN	REVIEWED, PROOF READ, "CITE-CHECKED" AND "SHEPARDIZED" MEMORANDUM IN SUPPORT OF INTERLOCUTORY APPEAL.	3.60
01/11/01	JBF	MADE COPIES OF MOTIONS, ORGANIZED FILE.	2.20
01/11/01	JDW	REVIEW NEW MOTION; CONFERENCE WITH BRIAN CROWE RE: EXPERT STRATEGIES; CONFERENCE WITH JACK HAGERTY RE: JOINDER ISSUE; REVIEW/REVISE NOTICE OF JOINDER DRAFT; CONFERENCE WITH PAT SPRATT; COMPLETE MOTION TO DISMISS AND JOINDER MOTION	10.30
01/11/01	PSS	DRAFT NOTICE OF JOINDER IN TERRA FOUNDATION'S MOTION FOR JUDGMENT ON THE PLEADINGS; FINAL REVIEW OF MOTION TO DISMISS ON BEHALF OF SEN. SIMPSON; OFFICE CONFERENCE WITH J. WILSON RE COORDINATING DOCUMENT REVIEW AND DOCUMENT PRODUCTION.	3.00

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01/12/01	BLC	REVIEW ART INSTITUTE PROPOSAL; CONFERENCE WITH JIM WILSON REGARDING PLAN FOR COURT HEARING AND SLC MEETING; REVIEW MOTIONS OF QUINLAN & CRISHAM.	1.00
01/12/01	JDW	PREPARE FOR AND ATTEND COURT HEARING ON MOTION TO DISMISS SEN. SIMPSON; CONFERENCE WITH COUNSEL; PHONE CONFERENCE WITH DR. TUCKER (X2); CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH CHRIS ROBLING; PHONE CONFERENCE WITH DR. TUCKER AND DON RATNER; MEETING WITH DR. TUCKER; PREPARE ANSWERS TO INTERROGATORIES	8.90
01/12/01	PSS	FURTHER REVISIONS TO: MRS. TERRA'S RESPONSE TO AG'S FIRST DOCUMENT REQUEST; MRS. TERRA'S RESPONSE TO AG'S FIRST SET OF INTERROGATORIES; MRS. TERRA'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; MRS. TERRA'S RESPONSE TO PLAINTIFFS & AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; MRS. TERRA'S RESPONSE TO PLAINTIFFS & AG'S INTERROGATORIES; DR. TUCKER'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; DR. TUCKER'S RESPONSE TO PLAINTIFFS & AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; DR. TUCKER'S ANSWERS TO PLAINTIFFS AND AG'S INTERROGATORIES; SEN. SIMPSON'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; SEN. SIMPSON'S RESPONSE TO PLAINTIFFS AND AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; AND DR. TUCKER'S ANSWERS TO PLAINTIFFS AND AG'S INTERROGATORIES; OFFICE CONFERENCES (MULTIPLE) WITH J. WILSON RE ALL.	6.30

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01/12/01	TSD	FILED NOTICE OF JOINDER, SIMPSON'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT AND NOTICE OF FILING SAME WITH CLERK OF THE CIRCUIT COURT OF COOK COUNTY	.60
01/14/01	PSS	REVIEW DOCUMENTS PROVIDED BY DR. TUCKER AND IDENTIFY ALL RESPONSIVE TO EXPEDITED REQUESTS TO PRODUCE FROM PLAINTIFFS AND THE ATTORNEY GENERAL SPECIFIC TO TRO RECEIVER HEARING ON FEBRUARY 20 AND FOLLOWING.	7.20
01/15/01	BLC	CONFERENCE WITH COUNSEL REGARDING BOARD OF DIRECTORS MEETING AND DISCOVERY; REVIEW DOCUMENTS REGARDING DISCOVERY ISSUES.	1.00
01/15/01	BXN	REVIEW OF DISCOVERY RESPONSES AND BRIEFS RELATING TO APPEALS.	.70
01/15/01	JGF	ORGANIZED FILE	.80
01/15/01	JDW	REVIEW/REVISE ANSWERS TO INTERROGATORIES; CONFERENCE CALL WITH MESSRS. RATNER AND ROBLING; CONFERENCE WITH BRIAN CROWE; CONFERENCES WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCES WITH CLIENTS; COMPILE ANSWERS TO INTERROGATORIES FOR CLIENTS; REVIEW/REVISE DOCUMENT REQUEST RESPONSES; PHONE CONFERENCE WITH MR. CARLSON	4.70

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01/15/01	PSS	CONCLUDE REVIEW OF DR. TUCKER'S DOCUMENTS; REVISE/EDIT ALL RESPONSES TO TRO DISCOVERY; DRAFT RESPONSES FOR DR. TUCKER, MRS. TERRA, AND SEN. SIMPSON TO PLAINTIFFS AND ATTY GENL'S THIRD DOCUMENT REQUEST; OFFICE CONFERENCE WITH J. WILSON RE DR. TUCKER'S DOCUMENTS, MRS. TERRA'S DOCUMENTS, AND SEN. SIMPSON'S DOCUMENTS; TELEPHONE CONFERENCE WITH MRS. TERRA RE DOCUMENTS.	7.50
01/16/01	BLC	CONFERENCE WITH COUNSEL AND REVIEW DOCUMENTS REGARDING DISCOVERY AND THEORY OF DEFENSE.	.50
01/16/01	JBF	PICKED UP DOCUMENTS FROM THE TERRA MUSEUM ORGANIZED FILE	.80
01/16/01	JDW	REVIEW MATERIALS REGARDING THE ART INSTITUTE; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH LORI ROESER; REVIEW FOUNDATION'S ANSWERS TO DISCOVERY; CONFERENCE WITH PAT SPRATT; CONFERENCES WITH BRIAN CROWE; PHONE CONFERENCE WITH PAUL TUCKER	5.60
01/16/01	PSS	DRAFT ANSWERS TO PLAINTIFFS AND ATTORNEY GENERAL'S RULE 213(F) AND (G) INTERROGATORIES; TELEPHONE CONFERENCES (2) WITH L. ROESER RE ALL DEFENDANTS' DISCOVERY RESPONSES; REVISE SEN. SIMPSON'S AND DR. TUCKER'S INTERROGATORY ANSWERS PER THEIR COMMENTS; TELEPHONE CONFERENCES (2) WITH J. TERRA RE HER DOCUMENTS; OFFICE CONFERENCE WITH J. WILSON RE STRATEGY AT 2/20 HEARING.	3.20
01/17/01	BLC	REVIEW DISCOVERY RESPONSES.	.50
01/17/01	BLC	REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY AND FUTURE COURT HEARINGS.	1.30

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01/17/01	BLC	REVIEW DISCOVERY RESPONSES. REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY AND FUTURE COURT HEARINGS. CONFERENCE WITH COUNSEL RELATIVE THERETO.	.00
01/17/01	BXN	CONFERENCE WITH JDW; RESEARCH RE: BIFURCATION OF DEPOSITIONS; RESEARCH RE:ILLINOIS SUPREME COURT RULE 206(D); DRAFT RESPONSE RE: PLAINTIFF'S MOTION TO BIFURCATE.	6.20
01/17/01	JBF	COPIED AND DISTRIBUTED ARTICLE IN NEWSPAPER AND NEW PLEADINGS UPDATED PLEADINGS INDEX MADE LABELS FOR NEW BINDERS	2.60
01/17/01	JDW	CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON AND PAT SPRATT; PREPARE DOCUMENTS FOR MR. CARLSON; PHONE CONFERENCES WITH COUNSEL RE: DISCOVERY; PHONE CONFERENCES WITH CLIENTS REGARDING DISCOVERY	7.30
01/17/01	PSS	REVIEW DOCUMENTS PROVIDED BY MRS. TERRA AND IDENTIFY THOSE RESPONSIVE TO REQUESTS RELATING TO THE 2/20 HEARING; COPYING AND PRODUCTION INSTRUCTIONS TO IKON; REVIEW PLAINTIFFS AND ATTORNEY GENERAL'S RESPONSES TO TRO DISCOVERY; OFFICE CONFERENCE WITH J. WILSON RE SAME; REVIEW TERRA FOUNDATION'S DISCOVERY RESPONSES; TELEPHONE CONFERENCE WITH J. KENNEDY RE 201(K) CONFERENCE; E-MAIL TO SAME CONFIRMING; RESEARCH RE WHETHER MRS. TERRA CAN BE REQUIRED TO TRAVEL TO FRANCE FOR THE SOLE PURPOSE OF COLLECTING AND PRODUCING HER DOCUMENTS THERE OR WHETHER PLAINTIFFS WILL BE REQUIRED TO TRAVEL THERE TO REVIEW SAME; OFFICE CONFERENCE WITH J. WILSON RE SAME; REVISE/EDIT ALL REMAINING DISCOVERY RESPONSES.	6.10

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01/18/01	BLC	REVIEW DOCUMENTS REGARDING DISCOVERY THEORY OF DEFENSE AND CONFERENCE WITH SUSAN STONE; CONFERENCE WITH STEVE CARLSON AND CONFERENCE WITH ART SULLIVAN; CONFERENCE WITH COUNSEL.	2.00
01/18/01	BXN	DRAFT MOTION FOR FEE APPLICATION; CONFERENCE WITH PSS; CONFERENCE WITH JDW.	3.50
01/18/01	JDW	REVIEW/REVISE RESPONSE TO ATTORNEY GENERAL'S MOTION REGARDING DISCOVERY; PHONE CONFERENCE WITH COUNSEL RE: DISCOVERY	3.90
01/18/01	PSS	RESEARCH RE IRPC RULE 4.2 ISSUE RAISED BY QUINLAN'S ATTEMPTED COMMUNICATIONS OF TERRA DIRECTORS AND EMPLOYEES; SHEPARDIZE AND UPDATE CASES FOUND; OFFICE CONFERENCE WITH J. WILSON RE SAME; TELEPHONE CONFERENCE OF D. STANNER OF QUINLAN AND CRISHAM RE PLAINTIFFS' AND ATTORNEY GENERAL'S OVERDUE DISCOVERY RESPONSES; PREPARE FOR 201(K) CONFERENCE; TELEPHONE CONFERENCE WITH S. CARLSON RE ALL ISSUES TO BE DISCUSSED IN 201(K) CONFERENCE; OFFICE CONFERENCE WITH J. WILSON RE SAME; PARTICIPATE IN 201(K).	6.20
01/19/01	BXN	DRAFT MEMORANDUM IN SUPPORT OF FEE APPLICATION (1.90).	1.90
01/19/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MRS. TERRA RE: FORMER EMPLOYEE LIST; REVIEW/REVISE OPPOSITION TO ATTORNEY GENERAL BIFURCATED DEPOSITION MOTION; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; CONFERENCE WITH PSS	4.10

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01/19/01	PSS	TELEPHONE CONFERENCE WITH MRS. TERRA RE DISCOVERY ISSUES; REVIEW AND COMMENT ON RESPONSE TO AG'S MOTION TO BIFURCATE DEPOSITIONS AND FOR MORE THAN 3 HOURS; E-MAIL D. STANNER RE OVERDUE DISCOVERY; OFFICE CONFERENCE WITH J. WILSON RE ALL.	1.80
01/21/01	BLC	CONFERENCE WITH CLIENT.	.30
01/21/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON	1.00
01/22/01	BLC	COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING PENDING MOTION AND HEARINGS AND SETTLEMENT ISSUES.	2.30
01/22/01	BXN	CONFERENCE WITH PSS; CONFERENCE WITH JDW AND PSS; DRAFT AND RESEARCH MEMORANDUM RE: BIFURCATION.	3.40
01/22/01	JBF	UPDATED PLEADINGS INDEX	.50
01/22/01	JDW	CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH ALAN SIMPSON; PHONE CONFERENCE WITH STEVE CARLSON; COURT APPEARANCE ON ATTORNEY GENERAL'S MOTION FOR BIFURCATED DEPOSITIONS; CONFERENCE WITH JACK HAGERTY ON OUTCOME OF COURT HEARING; STRATEGY; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH STEVE CARLSON	3.90
01/22/01	JJH	CONFERENCE WITH JIM WILSON REGARDING STATUS HEARING; ATTEND SAME.	2.20

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01/22/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES AND RE PREPARATION OF A MOTION TO COMPEL SPECIFIC PERFORMANCE ON CONTRACTUAL UNDERTAKING TO ADVANCE FEES; OFFICE CONFERENCE WITH B. NOLAN RE SAME.	.60
01/23/01	ATS	CONFER WITH JH AND JDW ON STRATEGY REGARDING MOTION FOR BLC REGARDING SAME	.50
01/23/01	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING DISCOVERY AND PENDING MOTIONS; REVIEW DOCUMENTS FROM SIDLEY & AUSTIN AND QUINLAN & CRISHAM REGARDING DISCOVERY AND PENDING HEARING; CONFERENCE WITH SUSAN STONE AND CONFERENCE WITH COUNSEL REGARDING SELECTION OF SLC.	1.00
01/23/01	BXN	DRAFT MOTION FOR APPLICATION OF ATTORNEYS FEES	1.50
01/23/01	JBF	COPIED AND DISTRIBUTED NEW PLEADINGS ORGANIZED PLEADINGS AND CORRESPONDENCE	2.80
01/23/01	JDW	CONFERENCE WITH BRIAN CROWE; REVIEW ATTORNEY GENERAL'S REPLY RE: RECEIVER; CONFERENCE WITH JACK HAGERTY; DRAFT CORRESPONDENCE TO DON RATNER; REVIEW FAX FROM SUSAN STONE; PHONE CONFERENCE WITH JOHN KENNEDY; CONFERENCE WITH JACK HAGERTY AND ALLAN SLAGEL RE: STRATEGIES; CONFERENCE WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCE WITH CHRIS ROBLING; BEGIN REVIEW OF TAPES	6.70
01/23/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES RAISED BY S. CARLSON; ATTENTION TO LETTER FROM J. KENNEDY REGARDING FURTHER 201(K) CONFERENCE ON 1/14.	.50

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01/24/01	BXN	DRAFT MOTION FOR APPLICATION OF FEES	2.60
01/24/01	JDW	CONTINUE REVIEW OR TAPES; PHONE CONFERENCES WITH JOHN KENNEDY; CONFERENCES WITH BRIAN CROWE RE: ATTORNEY NAMES; 201(K) CONFERENCE WITH ALL COUNSEL AND PAT SPRATT; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON	5.90
01/24/01	PSS	PREPARE FOR, AND PARTICIPATE, IN FURTHER 201(K) CONFERENCE; OFFICE CONFERENCE WITH J. WILSON FOLLOWING SAME.	2.40
01/25/01	BXN	DRAFT RESPONSE BRIEF TO MOTION TO BIFURCATE; RESEARCH RE: BIFURCATION AND LENGTH OF DEPOSITIONS.	5.00
01/25/01	GLN	REVIEWED, ASSEMBLED, ORGANIZED AND COPIED VARIOUS ORIGINAL DOCUMENTS TO BE PRODUCED BY SENATOR SIMPSON (PER PPS).	2.60
01/25/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRIAN CROWE; MEETING WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; 201(K) CONFERENCE WITH ALL COUNSEL; REVIEW DOCUMENTS FOR EXCHANGE	7.40
01/25/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE PREPARATION OF ADDITIONAL DOCUMENT REQUESTS AND INTERROGATORIES TO PLAINTIFFS AND TO ATTORNEY GENERAL; DRAFT SAME; REVISE, EDIT SAME; TELEPHONE CONFERENCE WITH P. TUCKER RE RESPONSES TO REMAINING DISCOVERY; OFFICE CONFERENCE WITH B. NOLAN RE DRAFT MOTION REGARDING FEES.	1.50

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01/26/01	BLC	CONFERENCE WITH COUNSEL REGARDING ART INSTITUTE COMMITTEE; CONFERENCE WITH CLIENT AND CONFERENCE WITH COUNSEL REGARDING DOCUMENT ACQUISITION; REVIEW DISCOVERY REQUESTS AND MOTIONS.	1.30
01/26/01	BXN	DRAFT AND REVISE RESPONSE BRIEF; REVISIONS TO SAME PER JDW; CONFERENCES WITH JDW; RESEARCH RE: VERIFICATION OF PLEADINGS.	5.50
01/26/01	JBF	FILE MAINTENANCE	1.60
01/26/01	JDW	CONFERENCE WITH PAT SPRATT; REVIEW DISCOVERY;PHONE CONFERENCE WITH PAUL TUCKER; STRATEGIZE WITH BRIAN CROWE; CONFERENCE WITH BRETT NOLAN; REVIEW/REVISE MOTION FOR ADVANCEMENT; PHONE CONFERENCE WITH STEVE CARLSON; FURTHER PHONE CONFERENCE WITH PAUL TUCKER AND DON RATNER; CONFERENCES WITH PAT SPRATT; FURTHER CONFERENCES WITH BRIAN CROWE	8.50
01/26/01	PSS	CONCLUDE REVIEW SEN. SIMPSON'S DOCUMENTS AND IDENTIFY THOSE RESPONSIVE TO DOCUMENT REQUESTS; CONCLUDE PREPARATION OF SEN. SIMPSON'S RESPONSES TO ALL DOCUMENT REQUESTS; BEGIN REVIEW OF P. TUCKER'S DOCUMENTS FOR THOSE RESPONSIVE TO INITIAL DOCUMENT REQUEST.	4.80
01/26/01	TSD	FILE MOTION FOR ADVANCEMENT OF FEES, MEMORANDUM IN SUPPORT OF MOTION OF ADVANCEMENT OF FEES, AND NOTICE OF MOTION WITH THE CLERK OF THE CIRCUIT COURT; DELIVER COURTESY COPIES OF SAME TO JUDGE KINNAIRD'S CHAMBERS.	.60
01/27/01	JDW	REVIEW PLAINTIFF SUPPLIED DOCUMENTS	6.10

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01/28/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR SAME	1.30
01/28/01	PSS	TRAVEL TO WASHINGTON, D.C., FOR MEETING WITH MRS. TERRA ON 1/29 TO REVIEW DOCUMENTS.	3.50
01/29/01	BLC	CONFERENCE WITH COUNSEL REGARDING STEBENS HEARING PLANS FOR POTENTIAL SETTLEMENT; REVIEW DOCUMENTS; REVIEW PLEADING AND EXHIBITS AND PREPARE FOR HEARINGS BEFORE JUDGE KINNAIRD.	2.50
01/29/01	JBF	COPIED AND DISTRIBUTED MOTION TO COMPEL FEES UPDATED PLEADINGS INDEX AND APPELLATE PLEADINGS INDEX ORDERED INSERTS COPIED DOCUMENTS PRODUCED TO TUCKER AND SIMPSON	1.70
01/29/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE CALL WITH CHRIS ROBLING, DON RATNER AND STEVE CARLSON; PHONE CONFERENCES WITH PAUL TUCKER; REVIEW NEWSPAPER ARTICLE; REVIEW SIDLEY FAX RE: LETTER TO JUDGE KINNAIRD AND LETTER TO ATTORNEY GENERAL AS WELL AS FAX RECEIVED BY TED STEBBINS FROM MRS. DALEY; FURTHER PHONE CONFERENCES WITH STEVE CARLSON; DOCUMENT REVIEW.	6.20
01/29/01	PSS	MEET WITH MRS. TERRA TO REVIEW DOCUMENTS AND DISCUSS LITIGATION ISSUES AND STRATEGY; RETURN TRAVEL TO CHICAGO.	9.20
01/30/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-HEARING.	3.80
01/30/01	JBF	COPIED PLEADINGS RECEIVED ON 01/26/01 FILE MAINTENANCE	1.70

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01/30/01	JDW	CONTINUED REVIEW OF PLAINTIFF DOCUMENTS; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO JOHN KENNEDY; COURT APPEARANCE; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH PAT SPRATT; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA	8.90
01/30/01	PSS	REVIEW DOCUMENTS PRODUCED BY TERRA FOUNDATION; FINALIZE ALL OF MRS. TERRA'S WRITTEN DISCOVERY RESPONSES PER DISCUSSIONS WITH HER; TELEPHONE CONFERENCE WITH W. CONLON, S. CARLSON, J. WILSON AND B. CROWE RE VARIOUS SETTLEMENT IDEAS; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE DISCUSSIONS WITH MRS. TERRA YESTERDAY; OFFICE CONFERENCE WITH J. WILSON RE JUDGE KINNAIRD'S MEDIATION IDEA; BEGIN REVIEW OF DOCUMENTS PRODUCED BY BUNTROCK AND GIDWITZ.	6.20
01/31/01	BLC	PREPARE FOR MEETING WITH SIDLEY & AUSTIN AND CONFERENCE WITH COUNSEL REGARDING SETTLEMENT AND MEDIATOR ISSUES; CONFERENCE AT SIDLEY & AUSTIN WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING MEDIATION AND SETTLEMENT ISSUE AND DISCUSSION AS TO THEORIES OF DEFENSE.	3.00
01/31/01	BXN	REVIEW PETITION TO INTERVENE (.30).	.30
01/31/01	JBF	UPDATED PLEADINGS INDEX AND APPELLATE PLEADINGS INDEX ORDERED INSERTS AND FILE FOLDERS	2.30

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01/31/01	JDW	REVIEW FAX FROM TALI MICHAELI; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH BRIAN CROWE; CONFERENCE WITH BRIAN CROWE AND PAT SPRATT RE: MS. SPRATT'S REVIEW OF JUDITH TERRA'S DC DOCUMENTS AND COMPLAINTS; PHONE CONFERENCE WITH PAUL TUCKER; FURTHER CONFERENCE WITH PAT SPRATT; MEETING BETWEEN MESSRS. CARLSON, CONLON, CROWE AND WILSON; CALL REGARDING MEDIATORS; DRAFT CORRESPONDENCE TO OUR CLIENTS	6.10
01/31/01	PSS	FURTHER OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE 1/29 WITH J. TERRA, HER THEORY OF THE CASE, AND DOCUMENTS PROVIDED BY HER; FINALIZE AND SERVE ALL REMAINING OUTSTANDING DISCOVERY RESPONSES; E-MAIL MESSAGE TO ALL COUNSEL RE SAME AND RE SUPPLEMENTAL PRODUCTION ANTICIPATED NEXT WEEK; REVIEW J. TERRA ADDITIONAL DOCUMENTS AND IDENTIFY THOSE FOR SUPPLEMENTAL PRODUCTION; BEGIN REVIEW OF P. TUCKER DOCUMENTS FOR SAME.	5.50
02/01/01	BLC	REVIEW DOCUMENTS REGARDING DISCOVERY ISSUES AND CONFERENCE WITH COUNSEL RELATIVE THERETO; REVIEW AND ANALYZE PLEADINGS.	.80
02/01/01	JBF	BATES STAMPED DOCUMENTS UPDATED INDEXES AND CORRESPONDENCE FILE ORDERED INSERTS	1.60
02/01/01	JDW	CONFERENCE WITH BLC AND PSS RE: MEDIATION OBJECTIVES; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH COUNSEL; RESEARCH QUALIFICATIONS OF MEDIATIONS.	9.50
02/01/01	MJH	CONFERENCE WITH JIM WILSON AND BRIAN CROWE RE: MEDIATOR OPTIONS	.40

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02/01/01	PSS	CONCLUDE REVIEW OF DOCUMENTS PROVIDED BY PROF. TUCKER FOR SUPPLEMENTAL DOCUMENT PRODUCTION RESPONSE; OFFICE CONFERENCES (X2) WITH B. CROWE AND J. WILSON RE MEDIATION ISSUES, POTENTIAL CONFLICTS BY MEDIATORS PROPOSED BY PLAINTIFFS AND ATTORNEY GENERAL, AND IN PREPARATION FOR CONFERENCE CALL WITH CLIENTS; PARTICIPATE IN CONFERENCE CALL WITH B. CROWE, J. WILSON, MRS. TERRA, PROF. TUCKER, AND SEN. SIMPSON RE ALL ISSUES.	7.20
02/01/01	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.60
02 1/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL REGARDING SELECTION OF MEDIATOR.	.50
02/02/01	BXN	CONFERENCE WITH JDW; CONFERENCE WITH EMA; RESEARCH REGARDING THIRD PARTY BENEFICIARY LAW.	1.90
02/02/01	BXN	REVIEW LATEST PLEADING AND CORRESPONDENCE.	.60
02/02/01	EMA	IN OFFICE CONFERENCE WITH BXN RE: RESEARCH ABILITY TO SUE UNDER AGREEMENT.	.30
02/02/01	JBF	BATES STAMPED DOCUMENTS STAMPED DOCUMENTS CONFIDENTIAL	2.70
02/02/01	JDW	CONFERENCE CALL WITH JACK HAGERTY AND BRIAN CROWE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH JUDITH TERRA; MULTIPLE PHONE CONFERENCES WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO JUDGE; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON REGARDING MEDIATION; RESEARCH REGARDING SAME.	9.10

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02/02/01	MJH	FURTHER DISCUSSIONS WITH JIM WILSON REGARDING MEDIATOR STRATEGIES	.80
02/02/01	PSS	REVIEW PROPOSED PROTECTIVE ORDER RE CONFIDENTIALITY OF STRATEGIC PLANNING DOCUMENTS; IDENTIFY ALL CONFIDENTIAL DOCUMENTS PRODUCED TO DATE BY DIRECTOR DEFENDANTS AND INSTRUCT J. FISHER RE MARKING SAME; LETTER TO ALL COUNSEL RE DIRECTOR DEFENDANTS' SUPPLEMENTAL PRODUCTION; REVIEW ALL CORRESPONDENCE FROM ALL COUNSEL RE PROPOSED MEDIATORS; OFFICE CONFERENCE WITH J. WILSON RE SAME.	4.10
02 2/01	TSD	DELIVERY TO JUDGE KINNAIRD'S CHAMBERS.	.50
02/05/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING MEDIATION AND SELECTION OF MEDIATOR AND CONFERENCE REGARDING STRATEGY AND PROCEDURE; PREPARE FOR HEARING; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-APPEARANCE; REVIEW DISCOVERY AND DISCOVERY RESPONSES.	3.80
02/05/01	BXN	RESEARCH REGARDING THIRD PARTY BENEFICIARY ISSUES.	2.80
02/05/01	JBF	ORGANIZE DISCOVERY DOCUMENTS ORGANIZED PLEADINGS AND CORRESPONDENCE ORDERED INSERTS	2.30

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02/05/01	JDW	PHONE CONFERENCE WITH MRS. TERRA; REVIEW ATTORNEY GENERAL RESPONSE TO SPECIAL INTERROGATORY RE: NEFF; CONFERENCE WITH BRIAN CROWE; ATTEND COURT HEARING ON OUR MOTION TO ADVANCE; PHONE CONFERENCES WITH DR. TUCKER; PHONE CONFERENCES WITH MRS. TERRA; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH CID FROELICH; FURTHER PHONE CONFERENCES WITH DR. TUCKER AND MRS. TERRA; REVIEW ISSUES FOR POSITION STATEMENT; PHONE CONFERENCE WITH STEVE CARLSON	8.20
02/05/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE COURT HEARING TODAY REGARDING MEDIATION AND OUR MOTION FOR FEES; OFFICE CONFERENCE WITH J. WILSON RE PREPARATION OF A MEDIATION POSITION STATEMENT; ATTENTION TO ATTORNEY GENERAL'S RESPONSE TO TERRA FOUNDATION'S MOTION TO COMPEL	.70
02/06/01	JBF	UPDATED PLEADINGS INDEX FILED CORRESPONDENCE BATES STAMPING	1.30
02/06/01	JDW	REVIEW JIM TERRA'S MOTION; ATTEND COURT HEARING; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO CLIENTS; CONFERENCE WITH BRIAN CROWE RE: MR. MICHAELI DOCUMENTS; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; REVIEW MEDIATOR CANDIDATES	7.30
02/06/01	PSS	FURTHER REVIEW OF DOCUMENTS PROVIDED BY UNGARETTI & HARRIS, AND THOSE PRODUCED BY SIDLEY & AUSTIN, IN PREPARATION FOR DRAFTING MEDIATION POSITION STATEMENT; BEGIN DRAFTING SAME.	8.50
02/07/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.30

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02/07/01	JBF	UPDATED PLEADINGS INDEX	.80
02/07/01	JDW	REVIEW TRANSCRIPT; CONTINUED REVIEW OF BELL, BOYD & LLOYD DOCUMENTS; REVIEW JIM COLLINS '89 DOCUMENT WITH BRIAN CROWE; PHONE CALLS RE: MEDIATION SCHEDULING; MEETING WITH DAVID HILLIARD; CONFERENCE WITH JACK HAGERTY RE: COLLINS' STUFF; CONFERENCE WITH PAT SPRATT RE: POSITION	8.50
02/07/01	JJH	VARIOUS CONFERENCES REGARDING MEDIATION STRATEGY; REVIEW PLEADINGS REGARDING ADVANCEMENTS; CONFERENCE WITH BRIAN CROWE REGARDING STATUS AND STRATEGY.	2.70
02 '/01	PSS	CONCLUDE DRAFT OF MEDIATION POSITION STATEMENT, WITH REFERENCE TO ALL DOCUMENTS TO BE USED AS EXHIBITS; REVISE AND EDIT SAME; ATTENTION TO CORRESPONDENCE FROM D. STANNER RE OUR SUPPLEMENTAL PRODUCTION; RESPOND TO SAME; BEGIN REVIEW OF DOCUMENTS PRODUCED BY N. MICHAELI.	8.90
02/08/01	JDW	CONTINUED REVIEW OF DOCUMENTS; BEGIN WORK ON POSITION PAPER CONCEPTS	4.90
02/09/01	BLC	CONFERENCE WITH STEVE CARLSON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT AND STRATEGY AND PROCEDURE.	1.00
02/09/01	JBF	ORDERED INSERTS FILED CORRESPONDENCE	.80
02/09/01	JDW	MEETING WITH CO-COUNSEL; CONTINUED REVIEW OF DISCOVERED DOCUMENTS	8.20
02/12/01	BLC	MEETING AT MEDIATOR DAVID HILLIARD'S OFFICE REGARDING SETTLEMENT AND PREPARE FOR MEDIATION SESSION.	2.00

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02/12/01	JBF	FILE ORGANIZATION.	.30
02/12/01	JDW	CONTINUED REVIEW OF MATERIALS FOR POSITION LETTER TO MEDIATOR; CONFERENCE WITH BRIAN CROWE AND JACK HAGERTY ;PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR AND MEET WITH MEDIATOR; PHONE CONFERENCE WITH DR. TUCKER; DRAFT CORRESPONDENCE TO CLIENT	6.90
02/12/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE MEDIATION.	.30
02/13/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND TECHNIQUES AND REVIEW DOCUMENTS RELATIVE THERETO.	1.00
02/13/01	JBF	LOCATED MINUTES OF THE 10/99 BOARD MEETING ORDERED INSERTS ORGANIZED PLEADINGS, CORRESPONDENCE, AND RESEARCH	.80
02/13/01	JDW	CONTINUED REVIEW OF DOCUMENTS; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW/REVISE POSITION LETTER; REVIEW DOCUMENTS; CONFERENCE WITH BRIAN CROWE; REVIEW ISSUES RE: SIDLEY & AUSTIN'S POSITION PAPER; PHONE CONFERENCE WITH DR. TUCKER	9.50
02/13/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE OUR SUBMISSION TO MEDIATOR AND RE "WHITE PAPER" AUTHORED BY D. BUNTROCK; REVIEW ALL DOCUMENTS TO LOCATE SAME.	.60
02/14/01	JBF	COPIED AND COMPILED EXHIBITS SEARCHED FOR TERRA DOCUMENTS DELIVERED COPY TO 311 S. WACKER	2.60

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02/14/01	JDW	CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH PAT SPRATT; REVIEW DR. TUCKER NOTES; REVIEW BRIAN CROWE NOTES; PHONE CONFERENCE WITH MR. MICHAELI; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH LORI ROESER; CONTINUE REVIEW/REVISIONS TO POSITION PAPER; PHONE CONFERENCES WITH CLIENTS RE: CORRECTIONS	7.80
02/14/01	PSS	ASSIST J. WILSON IN PREPARING FINAL DRAFT OF MEDIATION POSITION STATEMENT AND IDENTIFYING EXHIBITS THERETO.	2.60
02/15/01	BLC	MEETING AT MEDIATOR DAVID HILLIARD'S OFFICE REGARDING MEDIATION; CONFERENCE WITH COUNSEL TO PREPARE FOR MEDIATION SESSION AND REVIEW SUBMISSIONS OF SIDLEY & AUSTIN.	2.00
02/15/01	JDW	PREPARE FOR MEDIATION MEETING; PHONE CONFERENCE WITH DR. TUCKER; MEDIATION; CONFERENCE WITH BRIAN CROWE AND PAT SPRATT RE: MEDIATION; MEDIATOR; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH SENATOR SIMPSON	6.90
02/15/01	PSS	TELEPHONE CONFERENCE WITH L. ROESER RE OUR SUPPLEMENTAL DOCUMENTS; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE TODAY'S SESSION WITH THE MEDIATOR.	.50
02/16/01	BLC	REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES; CONFERENCE WITH COUNSEL REGARDING DEALING WITH ATTORNEY GENERAL ISSUES AND REVIEW DOCUMENTS RELATIVE THERETO.	1.80
02/16/01	JBF	ORGANIZED PLEADINGS; UPDATED TERRA PLEADINGS INDEX; FILED CORRESPONDENCE	1.80

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02/16/01	JDW	PHONE CALL TO SENATOR SIMPSON; CONFERENCE WITH MRS. TERRA; TELEPHONE CALLS WITH DR. TUCKER; TELEPHONE CALLS WITH MR. AUGUST; TELEPHONE CALLS WITH MR. CARLSON; REVIEW PROTECTIVE ORDER; REVIEW DRAFT COMPLAINT.	5.10
02/18/01	BLC	REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH ATTORNEY GENERAL AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	.80
02/19/01	BLC	CONFERENCE WITH ATTORNEY GENERAL FLOYD PERKINS AND T. HARRIS; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.50
02 9/01	JDW	PHONE CALL TO JUDITH TERRA; SPEAK WITH MR. MICHALI; MEETING WITH BRIAN CROWE AND FLOYD PERKINS; MEETING WITH BRIAN CROWE AND JACK HAGERTY; PHONE CONFERENCE WITH JUDITH, PHONE CONFERENCE WITH MEDIATOR OFFICE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH BRETT AUGUST; REVIEW ATTORNEY GENERAL PROPOSED SETTLEMENT.	7.10
02/20/01	JBF	FILED CORRESPONDENCE; UPDATED APPELLATE PLEADINGS INDEX	.90
02/20/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH LAURIE ROSER REGARDING SENATOR ALAN K. SIMPSON; DRAFT CORRESPONDENCE TO MEDIATOR; CONFERENCE WITH BRIAN CROWE REGARDING INTERVIEWS OF OUR CLIENTS WITHOUT US; REVIEW ORDER DENYING QUINLAN'S MOTION FOR RECONSIDERATION; TELEPHONE CALLS WITH CLIENTS.	4.60

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JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER JUNE 29, 2001
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02/21/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; PREPARE CLIENTS FOR SETTLEMENT MEETING; REVIEW AND RESPONSES TO INTERROGATORIES.	3.60
02/22/01	JDW	PHONE CONFERENCE WITH MRS. TERRA (LENGTHY - PREPARE FOR MEETING); TELEPHONE CALL TO BRETT AUGUST; CALL TO THE SENATOR; REVIEW KENNEDY DRAFT AGREED MOTION TO EXTEND TEMPORARY RESTRAINING ORDER; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH BRETT AUGUST; PREPARATION OF MRS. TERRA.	4.60
02/22/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DRAFTING REPLY IN SUPPORT OF ADVANCEMENT OF FEES.	.30
02/23/01	JBF	FILED CORRESPONDENCE	.80
02/23/01	JDW	TELEPHONE CONFERENCES WITH JUDITH, MR. MICHALI, BRETT AUGUST, STEVE CARLSON; LENGTHY CONFERENCE WITH PAUL TUCKER; MEETING WITH JUDITH TERRA; DRAFT CORRESPONDENCE TO LORI ROESER; TELEPHONE CALL WITH MR. AUGUST; PREPARE MRS. TERRA FOR INTERVIEW.	6.80
02/23/01	PSS	BEGIN DRAFT REPLY IN SUPPORT OF OUR MOTION FOR ADVANCEMENT.	1.30
02/25/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND APPELLATE MATTERS.	.50
02/25/01	JDW	TELEPHONE CALL WITH CLIENT; REVIEW NEW DOCUMENTS.	.80
02/26/01	BXN	REVIEW MOTION FOR CONTINUED TRO	.30
02/26/01	JBF	FAXED LETTERS TO MRS. TERRA	.20

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02/26/01	JDW	REVIEW AND FAX MATERIALS TO MRS. TERRA; TELEPHONE CALL WITH LORIE ROSER; REVIEW MOTION; DRAFT COMPLAINT; TELEPHONE CALL WITH STEVE CARLSON.	5.10
02/26/01	PSS	REVIEW ALL CASES CITED BY PLAINTIFFS IN RESPONSE TO OUR MOTION FOR FEES; OFFICE CONFERENCE WITH J. WILSON RE DRAFT REPLY; CONTINUE PREPARATION OF REPLY.	7.90
02/27/01	JDW	REVIEW MOTION REGARDING RESPONSE TO ELLIOTT CORRESPONDENCE; CONFERENCE WITH BRIAN CROWE; COURT APPEARANCE; TELEPHONE CALL WITH STEVE CARLSON; TELEPHONE CALL WITH CLIENT; DRAFT 137 LETTER; REVIEW AND SEND SAME TO CLIENT; TELEPHONE CALL WITH PAUL TUCKER.	4.60
02/27/01	PSS	LIMITED RESEARCH REGARDING AVAILABILITY OF DAMAGES AS PRECLUDING ENTRY OF INJUNCTION; OFFICE CONFERENCE WITH J. WILSON RE SAME; UPDATE AND CITE CHECK ALL CASES FOUND; REVIEW PLAINTIFF'S MOTION TO EXTEND TRO.	1.50
02/28/01	JDW	REVIEW SIMPSON PRODUCED DOCUMENTS, TELEPHONE CALLS (5) WITH STEVE CARLSON; TELEPHONE CALLS (5) WITH MRS. TERRA; PREPARE DR. TUCKER FOR INTERVIEW; REVIEW AND EDIT REPLY MEMO.	6.70
02/28/01	PSS	CONCLUDE DRAFT OF REPLY IN SUPPORT OF MOTION FOR ADVANCEMENT; EDIT AND REVISE SAME.	6.90
03/01/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND LITIGATION MATTERS.	1.30

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03/01/01	JBF	WESTLAW RESEARCH REGARDING CASES CITED IN DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR ADVANCEMENT OF FEES; ADDED NEW PLEADINGS TO THE PLEADINGS INDEX AND APPELLATE PLEADINGS INDEX	2.90
03/01/01	JDW	REVIEW AND EDIT REPLY REGARDING FEES; DRAFT CORRESPONDENCE; CONTINUE DOCUMENT REVIEW	5.90
03/01/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE FURTHER REVISIONS TO REPLY BRIEF; COMPLETE SAME; LETTER TO CLIENTS TRANSMITTING FINAL COPIES OF SAME.	2.10
03/01/01	TSD	FILE REPLY IN SUPPORT OF MOTION FOR ADVANCEMENT OF FEES AND NOTICE OF FILING SAME WITH THE CLERK OF THE CIRCUIT COURT.	.50
03/02/01	BLC	REVIEW DOCUMENTS REGARDING ATTORNEY FEE, INJUNCTION AND SPECIAL LITIGATION COMMITTEE; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING SETTLEMENT PROPOSAL.	1.50
03/02/01	JDW	TELEPHONE CALL WITH STEVE CARLSON; TELEPHONE CALL WITH MS. TERRA; TELEPHONE CALL WITH DR. TUCKER; REVIEW AND ANALYZE PROPOSAL; CONFER WITH CLIENTS REGARDING SAME AND MODIFICATIONS TO SAME; CONFERENCE WITH JACK HAGERTY AND BRIAN L. CROWE REGARDING SAME.	4.10
03/03/01	JDW	TELEPHONE CALL WITH BRETT AUGUST; TELEPHONE CALL WITH MR. CARLSON; TELEPHONE CALLS WITH CLIENT; AND VOICEMAILS TO MR. CARLSON; REVIEW PLEADINGS.	1.60

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03/04/01	JDW	REVIEW MATERIALS IN PREPARATION FOR CLIENT MEETING; TELEPHONE CALL WITH BRETT AUGUST; TELEPHONE CALL WITH MR. CARLSON; TELEPHONE CALL WITH CLIENT; MEETING WITH CLIENTS AND COUNSEL FOR FOUNDATION.	5.50
03/05/01	BLC	REVIEW DOCUMENTS REGARDING FEE ARGUMENT AND CONFERENCE WITH COUNSEL REGARDING STATUS AND PROCEDURE ON MEDIATION.	1.00
03/05/01	JDW	TELEPHONE CALLS WITH MS. STONE; TELEPHONE CALL WITH MR. CARLSON; REVIEW SETTLEMENT OUTLINE; REVIEW OUTLINE OF SETTLEMENT REGARDING SMI; TELEPHONE CALLS WITH CLIENTS; REVIEW AND REVISE OUTLINE FOR NEW OFFER; EXTENDED MEETING WITH CLIENTS.	8.60
03/06/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH STEVE CARLSON AM AND PM; CONFERENCE WITH COUNSEL REGARDING MEDIATION, ATTORNEY GENERAL AND FEE PETITION.	1.30
03/06/01	JDW	EXTENDED CONFERENCE CALL WITH MRS. TERRA; PHONE CONFERENCE WITH STEVE CARLSON, PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH FLOYD PERKINS; PHONE CONFERENCE WITH JOHN KENNEDY; PHONE CONFERENCES WITH COURT CLERK; PHONE CONFERENCE WITH DR. TUCKER; REVIEW CORRESPONDENCE; REVIEW PROPOSAL; REVIEW AND CORRECT SAME	4.90
03/06/01	PSS	PARTICIPATE IN TELEPHONE CONFERENCE WITH B. CONLON, B. CROWE, AND J. WILSON RE PROPOSED SETTLEMENT TERMS ARRIVED AT IN MEDIATION.	.50

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03/07/01	JDW	REVIEW CORRESPONDENCE FROM MR. KENNEDY; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH COURT; DRAFT RESPONSE TO RULE 137 LETTER; DRAFT STATUS CORRESPONDENCE TO CLIENT; REVIEW DOCUMENTS; REVIEW RESPONSE IN PREPARATION FOR MOTION	5.60
03/08/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PREPARE FOR COURT APPEARANCE; COURT APPEARANCE; PHONE CALL TO MR. KENNEDY; EXTENDED CONFERENCE WITH CLIENTS; CONTINUED REVIEW OF DOCUMENTS	4.10
03/09/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES AND COURT PROCEEDINGS.	1.30
03/09/01	JBF	COPIED AND DISTRIBUTED NEW CORRESPONDENCE	.20
03/09/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON; REVIEW MOTION AND RESPONSE IN PREPARATION FOR ARGUMENT ON MOTION	3.60
03/11/01	BLC	REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES AND PENDING MOTIONS.	.50
03/12/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING STATUS AND PROCEDURE; CONFERENCES WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING DETAILS OF SETTLEMENT NEGOTIATION AND FEE DISPUTE.	1.00
03/12/01	JBF	COPIED AND DISTRIBUTED APPELLATE PLEADINGS	.30

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03/12/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE CALL WITH BRIAN CROWE AND BILL CONLON; CONTINUE REVIEW OF DOCUMENTS	2.80
03/13/01	BLC	CONFERENCES WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND STRATEGY.	1.00
03/13/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE	.30
03/13/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS AND STRATEGY; REVIEW CORRESPONDENCE REGARDING MEDIATION.	1.00
03/14/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT DETAILS AND STRATEGY.	1.00
03/14/01	JBF	FILED NEW PLEADINGS AND CORRESPONDENCE	.40
03/14/01	JDW	CONFERENCE CALL WITH BRIAN CROWE, JIM WILSON AND BILL CONLON; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW STATUTE OF LIMITATIONS; FURTHER PHONE CONFERENCE WITH MR. AUGUST; REVIEW NEW SETTLEMENT PROPOSAL; PHONE CONFERENCES WITH CLIENTS REGARDING SAME	4.60
03/15/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH FLOYD PERKINS AND THERESA HAMES; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	1.50

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03/15/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER; REVIEW MEDIATOR LETTER; CONFERENCE CALL WITH BRIAN CROWE AND MR. CONLON; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; PHONE CONFERENCE WITH MRS. TERRA; PREPARE MEDIATION POSITION PAPER; PHONE CONFERENCE WITH MR. PERKINS; PHONE CONFERENCE WITH MR. CONLON	3.90
03/16/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JOHN KENNEDY; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH MR. MICHAELI ; PRINT NOTES REGARDING SAME.	2.80
03/16/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE EXPECTED AMENDED COMPLAINT FROM A.G.'S OFFICE AND PROSPECTS OF SETTLING.	.30
03/16/01	TSD	DELIVER ENVELOPE TO JUDGE KINNAIRD'S CHAMBERS.	.50
03/19/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH JACK HAGERTY; REVIEW SETTLEMENT PROPOSAL; REDRAFT SAME	2.60
03/21/01	JBF	UPDATED PLEADINGS INDEX; CORRESPONDENCE	1.40
03/21/01	JDW	PHONE CONFERENCE WITH CHRIS ROBLING; PHONE CONFERENCE WITH DR. TUCKER; COURT APPEARANCE; CONFERENCE WITH ATTORNEY GENERAL; CONFERENCE WITH MR. CARLSON; DRAFT CORRESPONDENCE TO CLIENTS; DRAFT CORRESPONDENCE TO STEVE CARLSON; LENGTHY PHONE CONFERENCE WITH MRS. TERRA; LENGTHY PHONE CONFERENCE WITH DR. TUCKER	4.10

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03/22/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW ATTORNEY GENERAL'S DRAFT COMPLAINT	.30
03/23/01	JDW	REVIEW PROPOSED SETTLEMENT; CONTINUED REVIEW OF ANSWER; PHONE CONFERENCE WITH MR. MICHAELI; PHONE CONFERENCE WITH CLIENT; CONFERENCE WITH BLC	1.90
03/29/01	BLC	REVIEW DOCUMENTS REGARDING PROGRESS OF MEDIATION AND PENDING MATTERS IN LITIGATION; CONFERENCE WITH WILLIAM CONLON OF SIDLEY AUSTIN.	1.30
03/30/01	JDW	REVIEW FAXES REGARDING MEDIATION	.20
04/01/01	BLC	REVIEW DOCUMENTS REGARDING MATTERS PENDING IN LITIGATION.	.80
04/02/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING ISSUES IN LITIGATION; CONFERENCE WITH COUNSEL REGARDING PROCEEDING BEFORE JUDGE.	1.50
04/02/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW NOTICE OF PETITION FOR LEAVE TO APPEAL; PHONE CONFERENCE WITH CLIENT	1.10
04/03/01	BLC	CONFERENCE WITH PROFESSOR TUCKER AND CONFERENCE WITH COUNSEL TO PREPARE FOR COURT; COURT APPEARANCE BEFORE JUDGE KINNAIRD; CONFERENCE WITH WILLIAM QUINLAN AND FLOYD PERKINS POST-COURT PROCEEDINGS; CONFERENCE WITH COUNSEL.	2.00
04/03/01	JBF	ORGANIZED NEW CORRESPONDENCE AND APPELLATE PLEADINGS.	.80

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04/03/01	JDW	CONFERENCE WITH BRIAN CROWE; COURT APPEARANCE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA; CONFERENCE WITH PSS	3.10
04/05/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH CLIENT	.60
04/06/01	BLC	CONFERENCE WITH COUNSEL REGARDING ATTORNEYS' MEETING TO NEGOTIATE REMAINING ISSUES.	.30
04/06/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW CORRESPONDENCE FROM CLIENT	2.30
04/08/01	BLC	REVIEW PLEADINGS AND DOCUMENTS TO PREPARE FOR LAWYERS' MEETING IN AID OF MEDIATION.	.50
04/09/01	JBF	ORGANIZED NEW CORRESPONDENCE	.80
04/09/01	JDW	REVIEW FILE MATERIALS; PHONE CONFERENCES WITH MR. CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENTS RE: MEDIATION STATUS; REVIEW CORRESPONDENCE	1.80
04/09/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.70
04/10/01	JDW	PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCES WITH CLIENTS	1.70

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04/11/01	JDW	PHONE CONFERENCE WITH CLIENTS; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MR. HILLIARD; REVIEW MARSHALL SETTLEMENT PROPOSAL; PHONE CONFERENCE WITH MR. CARLSON; CONFERENCE CALL WITH CLIENTS; CONFERENCE WITH BRIAN CROWE RE: SAME; PHONE CONFERENCE WITH MR. HILLIARD; SET UP MEETING FOR MONDAY	4.10
04/12/01	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.30
04/12/01	JBF	ORGANIZED NEW PLEADINGS	.60
04 1/01	JDW	CONFERENCE WITH BRIAN CROWE; COORDINATE DRAFTING OF OUTLINE FOR MEETING MONDAY AND TRIAL PLAN FOR CLIENTS; REVIEW DECISION RE: AUDITORIUM THEATER; PHONE CONFERENCE WITH MR. CARLSON; REVIEW DR. MARSHALL PROPOSAL	1.90
04/13/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD	1.80
04/16/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND PLAN.	.50
04/16/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; MEETING WITH STEVE CARLSON; MEETING WITH ALL COUNSEL AND DAVID HILLIARD; PHONE CONFERENCE WITH CLIENTS FOLLOWING SAME	3.70
04/16/01	PSS	READ FIRST APPELLATE DISTRICT'S 3/21 OPINION IN EYECHANER V. GROSS; OFFICE CONFERENCE WITH J. WILSON RE APPLICABILITY OF THAT CASE TO OURS.	2.00
04/17/01	BLC	REVIEW AND REVISE DOCUMENT; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.50

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04/17/01	JDW	PHONE CONFERENCE WITH BILL CONLON; DRAFT CORRESPONDENCE TO CLIENTS; CONFERENCES WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY	2.70
04/18/01	JBF	FILED NEW CORRESPONDENCE	.30
04/18/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; MEETING WITH BRIAN CROWE; PHONE CONFERENCE WITH SUSAN STONE AND BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD	2.30
04/19/01	JDW	REVIEW CONLON FAX; PHONE CALL WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD; REVIEW NEW PROPOSALS; EDIT SAME	1.60
04/23/01	JBF	ORGANIZED NEW CORRESPONDENCE	.20
04/24/01	JBF	FILED NEW CORRESPONDENCE	.30
04/24/01	JDW	PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH DAVID HILLIARD; FURTHER PHONE CONFERENCE WITH MR. HILLIARD	1.60
04/25/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON	.20
04/30/01	JBF	COPIED AND DISTRIBUTED NEWS ARTICLE AND NEW CORRESPONDENCE TO TERRA TEAM	.30
04/30/01	JDW	REVIEW CARLSON FAX OF SETTLEMENT PROPOSAL; PHONE CONFERENCES WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; FAX AFFIDAVIT TO MRS. TERRA	1.60

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05/01/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND MATTERS TO BE CONSIDERED.	.80
05/01/01	JDW	COURT APPEARANCE ON STATUS; PHONE CONFERENCE WITH STEVE CARLSON	1.20
05/02/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; COURT APPEARANCE; PHONE CONFERENCE WITH STEVE CARLSON	1.00
05/02/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS.	.40
05/03/01	JBF	ORGANIZED PLEADINGS; COPIED PLEADINGS REGARDING ADVANCEMENTS.	.60
05/ 4/01	JDW	REVIEW CORRESPONDENCE; DRAFT CORRESPONDENCE; PHONE CONFERENCE WITH MEDIATOR; PREPARE OUTLINE FOR SETTLEMENT	1.30
05/04/01	PSS	BEGIN REVIEW OF ALL BRIEFS RE DIRECTOR DEFENDANTS' LEGAL FEES; BEGIN DRAFT OUTLINE FOR B. CROWE FOR ARGUMENT THEREON.	3.80
05/07/01	GLN	RESEARCH ASSISTANCE RELATING TO DEFENDANTS MOTION FOR ADVANCEMENT OF FEES AND DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR ADVANCEMENT OF FEES; ALSO ASSEMBLED AND COPIED MATERIALS FOR HEARING ON SAME MOTIONS.	2.20
05/08/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MRS. TERRA; PHONE CALL TO MEDIATOR; REVIEW DRAFT SETTLEMENT DOCUMENT.	2.30
05/08/01	PSS	ASSEMBLE APPENDIX OF CASES CITED FOR DELIVERY TO JUDGE KINNAIRD WITH COURTESY COPIES OF MOTION; CONTINUE PREPARATION OF OUTLINE FOR B. CROWE FOR ORAL ARGUMENT.	.80

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05/09/01	JDW	CONFERENCE WITH PSS REGARDING STATUS AND SETTLEMENT.	.60
05/09/01	PSS	CONCLUDE DRAFT OUTLINE FOR ORAL ARGUMENT ON MOTION FOR FEES; OFFICE CONFERENCE WITH J. WILSON RE SAME; RETRIEVE RECENT PENNSYLVANIA DISTRICT COURT CASE ON POINT; FURTHER CONFERENCE WITH J. WILSON RE SAME; REVISE DRAFT OUTLINE.	5.60
05/09/01	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.50
05/10/01	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MR. HILLIARD; REVIEW SETTLEMENT PROPOSAL	.60
05/11/01	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENT; REVIEW AND EDIT OUTLINE FOR ARGUMENT	1.10
05/13/01	BLC	REVIEW AND ANALYZE DOCUMENTS AND CASE LAW TO PREPARE FOR PENDING MOTIONS.	1.50
05/14/01	BLC	REVIEW AND ANALYZE DOCUMENTS AND CASE LAW; CONFERENCE WITH COUNSEL REGARDING PENDING MOTIONS.	.50
05/14/01	JBF	FILED NEW CORRESPONDENCE	.30
05/14/01	JDW	PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH JUDITH TERRA REGARDING TENTATIVE SETTLEMENT AGREEMENT; PHONE CONFERENCE WITH FLOYD PERKINS; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA; CONFERENCE WITH BRIAN CROWE	3.80

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05/14/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS; REVIEW MEDIATED SETTLEMENT AGREEMENT.	.70
05/15/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND CONFERENCE WITH JUDGE KINNAIRD, ATTORNEY GENERAL FLOYD PERKINS AND WILLIAM QUINLAN.	.80
05/15/01	JDW	REVIEW DRAFT MEDIATED SETTLEMENT; PHONE CONFERENCES WITH STEVE CARLSON; CONFERENCE CALL WITH THE COURT AND THE PARTIES; MEETING WITH BRIAN CROWE; PHONE CONFERENCES WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH BILL CONLON; FURTHER PHONE CONFERENCE WITH MR. CARLSON; COURT PREPARATION; PHONE CONFERENCE WITH BRETT AUGUST	5.60
05/16/01	BLC	CONFERENCE WITH SIDLEY & AUSTIN, WILLIAM CONLON, AND CONFERENCE WITH COUNSEL; REVIEW SETTLEMENT TERM SHEETS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.50
05/16/01	JDW	REVIEW ATTORNEY GENERAL'S LETTER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. CONLON; CONFERENCE WITH PSS; PHONE CONFERENCES WITH JUDITH TERRA; COURT APPEARANCE; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH JUDITH TERRA	3.60
05/17/01	JDW	REVIEW ARTICLES; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; REVIEW NEW MEMO TO NON-PARTY BOARD MEMBERS FROM MR. CARLSON; FAX SAME TO CLIENTS	3.10

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05/17/01	JJH	VARIOUS TELEPHONE CONFERENCES WITH STEVE CARLSON REGARDING "INTERESTED" DIRECTORS; RESEARCH REGARDING SAME; CONFERENCE WITH JIM WILSON REGARDING SAME.	2.60
05/18/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.50
05/18/01	JDW	REVIEW ATTORNEY GENERAL CORRESPONDENCE; CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW NEWEST ATTORNEY GENERAL PROPOSAL; FURTHER PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH WALL STREET JOURNAL REPORTER	3.90
05/20/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.30
05/20/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA	.60
05/21/01	BLC	CONFERENCE WITH COUNSEL AND CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON REGARDING STRATEGY AND PROCEDURE FOR COURT HEARING.	.50
05/21/01	JDW	REVIEW NEWSPAPER ARTICLES; PHONE CONFERENCE WITH DR. TUCKER; COURT APPEARANCE; CONFERENCE WITH MR. CARLSON; PHONE CONFERENCES WITH DAVID HILLIARD; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. CARLSON	4.10
05/22/01	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS AND PROCEDURE.	.30
05/23/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	.50

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05/23/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE; UPDATED PLEADINGS INDEX	.90
05/23/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MRS. TERRA; REVIEW CORRESPONDENCE FROM MEDIATOR AND FROM SIDLEY, AUSTIN, BROWN & WOOD	3.10
05/24/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER AND DON RATNER; PHONE CONFERENCE WITH BRIAN CROWE; REVIEW AND EDIT CLIENT PROPOSAL; PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH MR. AUGUST.	2.90
05/26/01	JDW	PHONE CONFERENCES WITH DR. TUCKER; REVIEW SETTLEMENT PROPOSALS; PHONE CONFERENCE WITH MR. CARLSON	1.60
05/26/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.30
05/29/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES, PENDING MOTION AND STRATEGY AND PROCEDURE.	.50
05/29/01	JDW	PHONE CONFERENCE WITH MR. CONLON; REVIEW CORRESPONDENCE FROM MEDIATOR; REVIEW CORRESPONDENCE FROM AMBASSADOR ANDREANI; REVIEW CORRESPONDENCE FROM MRS. AHRWEILER; COMPARE PAST PROPOSALS TO LANGUAGE IN NEW ONE RE: CONSENT	4.90

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05/30/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; MEETING AT SIDLEY & AUSTIN WITH WILLIAM CONLON, SUSAN STONE AND STEVE CARLSON; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE POST-MEETING.	1.50
05/30/01	JBF	COPIED AND DISTRIBUTED CORRESPONDENCE TO THE TERRA TEAM	.30
05/30/01	JDW	PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH BRETT AUGUST; MEETING WITH CARLSON, ET AL. AND BRIAN CROWE; PHONE CONFERENCES WITH PAUL TUCKER	2.10
05/31/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA AND MR. MICHAELI; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; FURTHER PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE CALL WITH BRIAN CROWE AND STEVE CARLSON; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CONLON	2.90
06/01/01	BLC	CONFERENCE WITH COUNSEL REGARDING PLAN FOR FURTHER LITIGATION; REVIEW AND MODIFY CORRESPONDENCE AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	.50
06/01/01	JDW	DRAFT CORRESPONDENCE TO CLIENTS; CONFERENCE WITH BLC; DRAFT MOTION; PHONE CONFERENCE WITH COUNSEL FOR FOUNDATION	1.90
06/04/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE; FINAL EDITS TO LETTER TO CLIENTS; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH PSS; SECOND LETTER TO CLIENTS RE; PROPOSED DIRECTORS	2.30

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06/05/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH STEVE CARLSON	.80
06/05/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS; REVIEW DRAFT SETTLEMENT PROPOSALS.	1.60
06/06/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STATUS AND PROCEDURE.	.50
06/06/01	JDW	PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH BRETT AUGUST; REVIEW FAX FROM JUDITH TERRA; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW EMERGENCY MOTION; PREPARE DEFENSE TO SAME	3.10
06/07/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING TRO AND CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-HEARING.	2.50
06/07/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW FAX; COURT APPEARANCE; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JUDITH TERRA; FURTHER CONFERENCE WITH BRIAN CROWE	3.20
06/08/01	BLC	REVIEW PLEADING AND CONFERENCE WITH COUNSEL RELATIVE THERETO; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.00
06/08/01	GRB	DELIVERED DOCUMENTS TO THE DALEY CENTER.	.70
06/08/01	JBF	HAND-DELIVERED DOCUMENTS TO COURT	1.30

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E MAIL sflld@shefskylaw.com
FED ID# 36-2693453

06/08/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON	.60
06/08/01	JJH	VARIOUS TELEPHONE CONFERENCES WITH JIM WILSON REGARDING TRO; PREPARE FOR SAME; ATTEND COURT HEARING ON TRO; VARIOUS CONFERENCES REGARDING SAME.	5.90
06/10/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND PENDING MOTIONS.	.50
06/11/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE	1.40
06/11/01	JDW	CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO CLIENTS ENCLOSING COURT ORDERS FROM JUNE 8; CONFERENCE CALL WITH BRIAN CROWE AND PAUL TUCKER	1.90
06/11/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.80
06/12/01	BLC	CONFERENCE WITH LEE FREEMAN AND CHRIS GEER REGARDING CASE HISTORY; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; RESPOND TO REQUEST FOR EMERGENCY MOTION; CONFERENCE WITH COUNSEL RELATIVE THERETO.	2.30
06/12/01	JDW	CALL TO SUSAN STONE; PHONE CONFERENCE WITH STEVE CARLSON ; CALLS RE: CONFERENCE CALL TONIGHT; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENTS; PHONE CONFERENCE WITH MR. FREEMAN	1.80

LAW OFFICES
SHEFSKY & FROELICH LTD.

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06/13/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.30
06/13/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA RE: NEWSPAPER ARTICLE; CONFERENCE WITH BRIAN CROWE RE: SAME; CALL TO STEVE CARLSON; PHONE CONFERENCE WITH MR. CARLSON; LENGTHY PHONE CONFERENCE WITH DR. TUCKER RE: SANCTIONS MOTION VIS A VIS AN INVESTIGATION BY THE STATE'S ATTORNEY'S OFFICE; REVIEW MOTION; PHONE CONFERENCE WITH DR. TUCKER; REVIEW ARTICLE	3.80
06/13/01	JJH	REVIEW DRAFT SETTLEMENT AGREEMENT; REVIEW CORRESPONDENCE REGARDING SAME.	1.10
06/14/01	BLC	REVIEW CASE LAW REGARDING FEE ISSUES AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.30
06/14/01	JDW	PREPARE FOR COURT APPEARANCE; COURT APPEARANCE; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH LORI ROSEN; REVIEW NEWEST SETTLEMENT AGREEMENT DRAFT; CONFERENCE WITH BRIAN CROWE; DRAFT MOTION RE: LEAKED FACTS	4.80
06/15/01	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS, STRATEGY AND PROCEDURE	.50

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JUDITH TERRA; ALAN K. SIMPSON & PAUL TUCKER JUNE 29, 2001
FILE # 025134-00001-BLC
INV. # 14057 PAGE 81

06/15/01	JDW	COURT APPEARANCE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CALL TO LORI ROSEN; PREPARE MOTION FOR STATE'S ATTORNEY INVESTIGATION; PHONE CONFERENCE WITH JUDITH TERRA; CALLS TO SENATOR SIMPSON	2.80
06/15/01	JJH	CONFERENCE WITH JDW REGARDING HEARING; REVIEW SETTLEMENT AGREEMENT.	1.10
06/15/01	TSD	OBTAINED COPY OF STATE COURT DOCKET; TELEPHONE CALL TO JUDGE KINNAIRD'S CLERK REGARDING MONDAY'S HEARING.	.50
06/16/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINAIRD.	1.30
06/18/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD ON ISSUE OF ADVANCEMENT OF FEES AND EXPENSES; COURT APPEARANCE BEFORE JUDGE KINNAIRD.	4.80
06/18/01	JBF	FILED THE EMERGENCY PETITION TO EXCUSE DIRECTOR ALAN K. SIMPSON AND PAUL TUCKER FROM PHYSICAL PRESENCE AT MEDIATION SESSIONS; LOCATED AND COPIED NEWS ARTICLE FROM WALL STREET JOURNAL	1.40
06/18/01	JDW	REVIEW/REVISE MOTION FOR INVESTIGATION; PHONE CONFERENCE WITH FLOYD PERKINS; PHONE CONFERENCES MRS. TERRA; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; PAT SPRATT AND JACK HAGERTY; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW/REVISE LETTER; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW PETITION FILED BY THE ATTORNEY GENERAL ON BEHALF OF MRS. DALEY; PHONE CONFERENCE WITH PAUL TUCKER; COURT APPEARANCE; CONFERENCE WITH BRIAN CROWE RE: MOTION FOR AN INVESTIGATION; PHONE CONFERENCE WITH PAUL TUCKER RE: SAME;	3.90

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06/18/01	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT.	.50
06/18/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE STATUS OF MEDIATION AND OUR CLIENTS' POSITIONS RELATIVE TO SAME; CONCLUDE PREPARING B. CROWE FOR ARGUMENT ON FEES MOTION; ATTEND COURT ON SAME.	3.20
06/18/01	TSD	CHECK JUDGE KINNAIRD'S MOTION CALL FOR STATUS.	.40
06/19/01	BLC	REVIEW CORRESPONDENCE AND MEMORANDA; TELEPHONE CALL TO WILLIAM CONLON AND CONFERENCE WITH COUNSEL IN CALIFORNIA; REVIEW DOCUMENTS.	.50
06. ?/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE	2.20
06/19/01	JDW	REVIEW CORRESPONDENCE FROM MRS. TERRA; PHONE CONFERENCE WITH MR. HILLIARD; PHONE CONFERENCE WITH MR. AUGUST; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA	2.30
06/19/01	TSD	FILED MOTION FOR ORDER REFERRING MATTER TO STATE'S ATTORNEY FOR INVESTIGATION AND NOTICE OF MOTION WITH THE CLERK OF THE CIRCUIT COURT.	.50
06/20/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND CONFERENCE WITH WILLIAM CONLON; REVIEW COURT ORDERS.	.80
06/20/01	JDW	REVIEW ORDER; REVIEW FINAL AGREEMENT; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH DAVID HILLIARD	2.90
06/20/01	PSS	REVIEW TERMS OF AGREED SETTLEMENT; OFFICE CONFERENCE WITH J. WILSON RE SAME.	.30

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06/21/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STATUS OF AND PROCEDURE FOR SETTLEMENT DECISION AND COURT PROCEEDINGS.	.50
06/21/01	JDW	CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH STEVE CARLSON	1.80
06/22/01	BLC	CONFERENCE WITH COUNSEL REGARDING BINDING NATURE OF CONSENT DECREE AND PROCEDURE FOR PENDING COURT APPEARANCE AND REMOVAL OF OFFICER'S ANALYSIS.	.50
06/22/01	JDW	CONFERENCE WITH PAT SPRATT REGARDING GAG ORDER; PHONE CONFERENCE WITH MRS. TERRA	.80
06/25/01	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE REGARDING PETITIONS BEFORE JUDGE KINNAIRD.	.30
06/25/01	JDW	REVIEW FAXES FROM DAVID HILLIARD; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD	1.30
06/25/01	PSS	REVIEW ALL BILLING STATEMENTS FOR ANY PRIVILEGED COMMUNICATIONS; OFFICE CONFERENCE WITH J. WILSON RE SAME AND RE SETTLEMENT ISSUES AND RE DRAFTING FEE PETITION; BEGIN TO DRAFT FEE PETITION.	6.80
06/26/01	BLC	CONFERENCE WITH COUNSEL AND REVIEW DOCUMENTS REGARDING STATUS OF AND PROCEDURE FOR RESOLUTION.	.30

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06/26/01	JDW	CONFERENCE CALL WITH STEVE CARLSON; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH MRS. TERRA	2.10
06/27/01	JDW	CONFERENCE WITH PAT SPRATT; REVIEW PROPOSED SETTLEMENT; REVIEW CORRESPONDENCE	1.80
06/27/01	PSS	DRAFT AFFIDAVIT FOR B. CROWE IN SUPPORT OF FEE PETITION; REVISE SAME PER COMMENTS BY J. WILSON; RESEARCH RE REQUIREMENTS FOR SAME; OFFICE CONFERENCE WITH J. WILSON RE SAME.	5.20
06/28/01	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE REGARDING SETTLEMENT AND CONSENT DECREE AND ADDITIONAL LITIGATION.	.50
06/28/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE; UPDATED PLEADINGS INDEX	2.60
06/28/01	JDW	REVIEW FAX FROM PATTISHALL FIRM; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; FAX MATERIALS TO CLIENTS; CONFERENCE WITH BRIAN CROWE RE: NEWS REPORT THAT LAUREL BELLOWS IS FILING AN ACTION TODAY ON BEHALF OF OUR CLIENTS; PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH STEVE CARLSON	1.60
06/29/01	JBF	FILED CORRESPONDENCE	1.30

TOTAL PROFESSIONAL FEES $ 450,800.00

COSTS AND DISBURSEMENTS:

PHOTOCOPIES	5426.61
FAX CHARGES	1637.58
TELEPHONE EXPENSE	407.96
MESSENGER SERVICES	725.54

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COMPUTER RESEARCH	3472.80
PROFESSIONAL CORP. SERVICES	492.20
TRAVEL EXPENSE	2026.88
LUNCH/DINNER MEETINGS	198.65
OVERTIME EXPENSE	1282.50
FILING FEES - CLERK OF THE CIRCUIT COURT	104.00
FILING FEES - CLERK, ILLINOIS APPELLATE	25.00
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	270.60
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	158.60
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	72.20
PROFESSIONAL FEES-OTHER - LAW BULLETIN PUBLISHING CO.	5.77
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	168.20
PROFESSIONAL FEES-OTHER - LAW BULLETIN PUBLISHING CO.	17.32
PROFESSIONAL FEES-OTHER - CASH	52.00
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	366.00
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	239.75
PROFESSIONAL FEES-OTHER - ESQUIRE DEPOSITION SERVICES	134.75
EXPENSES RE: CLIENT AND ATTORNEY MEETING	47.00
EXPENSES RE: CLIENT AND ATTORNEY MEETINGS	128.25
EXPENSES RE: CLIENT AND ATTORNEY MEETINGS	39.07
EXPENSES RE: CLIENT AND ATTORNEY MEETINGS	29.09
EXPENSES RE: CLIENT AND ATTORNEY MEETINGS	46.00
MISCELLANEOUS EXPENSE - CASH	1.85

TOTAL COSTS AND DISBURSEMENTS $17,576.17

BALANCE THIS INVOICE $ 468,376.17

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FED ID# 36-2693453

BALANCE DUE $ 468,376.17

- - - - - TIMEKEEPER SUMMARY - - - - -

ATS	ALLAN T. SLAGEL	10.50	hours at $	295.00	=	3,097.50
BLC	BRIAN CROWE	154.50	hours at $	355.00	=	54,847.50
BLC	BRIAN CROWE	55.20	hours at $	335.00	=	18,492.00
BXN	BRETT NOLAN	63.90	hours at $	175.00	=	11,182.50
XN	BRETT NOLAN	27.20	hours at $	150.00	=	4,080.00
MA	ELLEN AVERY	2.10	hours at $	155.00	=	325.50
GCW	GREGORY C. WARD	1.80	hours at $	250.00	=	450.00
GCW	GREGORY C. WARD	6.70	hours at $	210.00	=	1,407.00
GLN	GARY L. NUZZI	8.40	hours at $	95.00	=	798.00
GRB	GABRIEL REILLY-BATES	0.70	hours at $	75.00	=	52.50
GRB	GABRIEL REILLY-BATES	9.00	hours at $	70.00	=	630.00
JBF	JENNIE B. FISHER	117.10	hours at $	70.00	=	8,197.00
JDW	JAMES D. WILSON	712.90	hours at $	295.00	=	210,305.50
JDW	JAMES D. WILSON	103.80	hours at $	275.00	=	28,545.00
JJH	JACK J. HAGERTY	88.90	hours at $	290.00	=	25,781.00
JJH	JACK J. HAGERTY	57.90	hours at $	260.00	=	15,054.00
JMW	JARED M. WAYNE	1.50	hours at $	150.00	=	225.00
MJH	MICHAEL J. HOWLETT, JR.	1.20	hours at $	355.00	=	426.00
PSS	PATRICIA S. SPRATT	216.50	hours at $	230.00	=	49,795.00
PSS	PATRICIA S. SPRATT	72.00	hours at $	220.00	=	15,840.00
TSD	THOMAS S. DAL COMPO	14.10	hours at $	90.00	=	1,269.00

PLEASE SHOW THIS NUMBER ON YOUR CHECK: 025134-00001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Hon. Dorothy Kirie Kinnaird

SHEFSKY & FROELICH LTD.'S PETITION FOR FEES AND COSTS

Movant, the law firm of Shefsky & Froelich Ltd. ("Shefsky"), by its undersigned counsel, pursuant to the Consent Judgment and Order entered in this matter on July 26, 2001, hereby petitions this Court to enter an order directing the Terra Foundation for the Arts to pay to the attorneys' fees and costs due it in its representation of the Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson ("Director Defendants") in connection with this matter. In support hereof, Shefsky submits the accompanying Affidavit of Brian L. Crowe (the "Crowe Affidavit"), and in further support, states as follows:

1. In October 2000, the Director Defendants, each a Director of the Terra Foundation for the Arts, engaged Shefsky to represent each of their interests in connection with this matter.

2. As this Court is aware, Shefsky accepted that engagement and from October 2000 through to its withdrawal of representation on June 29, 2001, diligently represented each of the Director Defendants in this matter.

3. On July 26, 2001, this Court entered a Consent Judgment and Order ("Order") pursuant to which some of the parties resolved the disputes among them. Under Paragraph 12 of that Order, "[r]easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation."

4. As Foundation Directors who incurred attorneys fees in connection with this lawsuit, the Director Defendants' reasonable attorneys fees, as determined by this Court, "shall be paid by the Foundation."

5. Moreover, under Section 108.75(d) of the Illinois Not For Profit Corporation Act, 805 ILCS 105/108.75(d), the Court may enter an order directing a not for profit corporation to pay a party director's fees and costs.

6. The determination of what are reasonable attorneys fees is within the sound discretion of the trial court. *Anderson v. Anchor Org. for Health Maintenance*, 274 Ill. App. 3d 1001, 1007, 654 N.E.2d 675, 681 (1st Dist. 1995). The factors a Court should consider when exercising that discretion include

> the services performed, the time expended thereon, the attorney's hourly rate, the skill and standing of the attorney, the nature of the case, the difficulty of the issues involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, and the benefit resulting to the client.

Id. at 1008, 654 N.E.2d at 682. In considering each of those factors, the Court is not limited solely to the evidence of reasonableness presented, such as provided in the Crowe Affidavit, but may also apply its own general knowledge of the practice of law, and its specific knowledge of the case at hand, in arriving at the reasonable value of professional services. *Id.*

7. Here, given the regular and lengthy court appearances of all counsel in this case, and the many legal memoranda submitted to the Court by all counsel on a multiplicity of issues, the Court has had an extraordinary opportunity to assess each of the above factors as applicable to each of the attorneys for each of the Foundation's Directors.

8. In addition, as to the Director Defendants, the Court also has the evidence provided in the Crowe Affidavit to determine the reasonableness of Shefsky's fees.

9. As attested by the Crowe Affidavit, supported by a detailed description of each of the services provided, the reasonable value of the services rendered and costs disbursed by Shefsky in its representation of the Director Defendants is $468,376.17.

WHEREFORE, movant Shefsky & Froelich Ltd. respectfully request this Court enter an order directing the Terra Foundation for the Arts to remit to Shefsky & Froelich Ltd. the sum of

$468,376.17, which sum represents the reasonable value of legal services rendered, and costs charged, in its representation in this matter of Judith Terra, Paul Hayes Tucker, and Alan K. Simpson, as Foundation Directors.

Respectfully submitted,
Shefsky & Froelich Ltd., Movant,

By: _____
One of its Attorneys

Brian C. Crowe
James D. Wilson
Patricia S. Spratt
Shefsky & Froelich Ltd.
444 N. Michigan Avenue
Suite 2500
Chicago, IL 60611
(312) 527-4000
Firm ID No. 29143

707512.1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on 9/20, 2001, at the hour of 9:15 a.m., we shall appear before the Honorable Dorothy K. Kinnaird, in the Courtroom 2302, Richard J. Daley Center, Washington at Dearborn Street, Chicago, Illinois, and then and there present **Shefsky & Froelich Ltd.'s Petition for Fees and Costs and Affidavit of Brian L. Crowe in Support,** copies of which accompany this notice and are herby served on you.

Dated: August 6, 2001

SHEFSKY & FROELICH LTD.

By: Patricia S. Spratt
One of its Attorneys

Brian L. Crowe
James D. Wilson
Patricia S. Spratt
SHEFSKY & FROELICH LTD.
444 North Michigan Avenue, Suite 2500
Chicago, Illinois 60611
(312) 527-4000
Firm I.D.# 29143
707512.1

16di-002452

CERTIFICATE OF SERVICE

The undersigned, pursuant to the provisions of 1-109 of the Code of Civil Procedure, certifies and states that true and accurate copies of the foregoing **Notice of Motion, Shefsky & Froelich's Petition for Fees and Costs, and Affidavit of Brian L. Crowe in Support** were served on:

William R. Quinlan
James R. Carroll
John F. Kennedy
William J. Quinlan
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street
29th Floor
Chicago, Illinois 60602

Floyd D. Perkins
Assistant Attorney General &
Bureau Chief of Charitable Trusts
OFFICE OF THE ILLINOIS ATTORNEY GENERAL
100 West Randolph Street
3rd Floor
Chicago, Illinois 60601

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
SIDLEY AUSTIN BROWN & WOOD
Ten South Dearborn
Chicago, Illinois 60603

Naftali Michaeli
3263 North Street, N.W.
Washington, D.C. 20007

Robert P. Cummins
Cummins & Cronin LLC
77 West Wacker Drive
Suite 4800
Chicago, Illimois 60601

by placing same in properly addressed, full first class postage prepaid, envelopes, and depositing same with the United States Postal Service at 444 North Michigan Avenue, Chicago, Illinois, 60611, before the hour of 5:00 p.m. this date, August 6, 2001.

Brenda Rudolph

Kelly

CUMMINS & CRONIN, LLC
ATTORNEYS AND COUNSELORS
77 WEST WACKER DRIVE
SUITE 4800
CHICAGO, ILLINOIS 60601
PHONE: (312) 578-0500
FAX: (312) 578-1234

ROBERT P. CUMMINS
rpc@cumminscronin.com

THOMAS C. CRONIN
tcc@cumminscronin.com

TELECOPIER TRANSMITTAL COVER SHEET

TO:	K. Chris Todd, Esq. Neil M. Gorsuch, Esq. David E. Ross, Esq. John H. Longwell, Esq. Leonard Garment, Esq. Lawrence Levinson, Esq. David Novoselsky, Esq.	**TELECOPIER NO.:**	(202)326-7999 (202) 371-6279 (312)346-9453
FROM:	Robert P. Cummins		
DATE:	August 29, 2001	**TIME:**	12:53 pm
CLIENT/MATTER NO.: 283		**OPERATOR:**	pw
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ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

BUN TRUCK et al
Plaintiff

v.

TERRA FOUNDATION
DEFENDANTS

NO. 00CH 13859
R 1/02

ORDER

THIS CAUSE COMING ON TO BE HEARD ON AN MOTION OF SHERSKY ENDEAVOR FOR ENTRY OF AN ORDER SETTING A DATE FOR SUBMISSIONS AND RULING ON FEE PETITIONS ALL PARTIES HAVING BEEN REPRESENTED BY COUNSEL. THE COURT HAVING HEARD ARGUMENT OF COUNSEL AND BEING FULLY ADVISED IN THE PREMISES:

IT IS ORDERED

Atty No.
Name
Attorney for
Address
City / Zip
Telephone

ENTER:

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1.02

CCG-N002-150M-11/30/00(13480655)

16di-002456

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntruck et al
Plaintiffs

v.

TERRA FOUNDATION
ET AL
DEFENDANTS

NO. 00CH 13859
P 2 of 2

ORDER CONTINUED

ANY & ALL PETITIONS FOR ATTORNEYS FEES AND COSTS THAT REQUIRE A COURT ORDER FOR PAYMENT SHALL BE FILED ON OR BEFORE SEPTEMBER 11, 2001.
A STATUS HEARING FOR SETTING A DATE FOR HEARING ON SAID FEE PETITIONS IS SET FOR SEPTEMBER 14, 2001 AT 1 PM

This order is entered over the objection of Tucker, Terra & Simpson as expressed by their counsel in open court.

Atty No. 29143
Name BRIAN L CROWE
Attorney for SHEES KYNFROELICH
Address 444 N MICHIGAN AVE.
City / Zip CHICAGO, ILL 60611
Telephone (312) 527-4000

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
AUG 29 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

ENTER: _____ **Judge** _____ **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

2 of 2

CCG-N002-150M-11/30/00(13480655)

16di-002457

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,

Defendants.

AUG 20 2001

Case No. 01 L 009112

Hon. Timothy C. Evans

DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD

Defendant the Terra Foundation for the Arts (the "Foundation"), an Illinois Not-For-Profit Corporation, by its attorneys, Sidley Austin Brown & Wood, hereby moves this Court to enter an order transferring this matter to the Circuit Court of Cook County, Illinois, Chancery Division, pursuant to General Orders 1.2 and 1.3 of the Circuit Court of Cook County. In support of this motion, the Foundation states as follows:

1. Having failed in their multiple attempts before the Chancery Court to upset an agreed settlement that they do not personally support, Plaintiffs' current action in Law Division represents nothing more than their attempt to seek out another judge in another division who they think may be more sympathetic to their claims. On three separate occasions over the past month and a half, the Plaintiffs have been given the opportunity to present their arguments to block the settlement and resulting Consent Judgment (which was entered on July 26, 2001 after extensive consideration of the same matters alleged here by Judge Dorothy Kirie Kinnaird on June 29, July 2 and July 24). Yet, on each occasion, Judge Kinnaird, who has presided over the Buntrock v. Terra litigation, Case No. 00 CH 13859 (Circuit Court, Cook County, Illinois), since its inception over 10 months ago, has found that the Plaintiffs' allegations lacked merit. In a blatant attempt to shop for a new judge, Plaintiffs then presented precisely the same allegations that they raised in front of Judge Kinnaird in their current Complaint in the Law Division in the guise of a new case, Case No. 01 L 009112.

2. On August 13, 2001, at a hearing on Plaintiffs' "Emergency Motion for the Entry of a Temporary Restraining Order," Judge Sheldon Gardner, to whom the case had been assigned, sua sponte and upon oral motion of the Foundation transferred the case to the Presiding Judge of the Law Division for consideration of whether this matter should be transferred to the Chancery Court, indicating on the record that he believed that this matter should be before Judge Kinnaird. Given that Plaintiffs seek relief that is most appropriately granted by the Chancery Court, and that Plaintiffs' claims in this Court mirror those already presented to Judge Kinnaird, this Court should transfer Plaintiffs' claims to the Presiding Judge of the Chancery Division for subsequent reassignment to Judge Dorothy Kirie Kinnaird.

I. Plaintiffs' Suit Must be Transferred because it Seeks Remedies Properly Considered by the Chancery Division.

3. Transfer to the Chancery Division is mandated by the remedies Plaintiffs seek and the General Orders of the Circuit Court of Cook County. In seeking to undo the settlement agreement embodied in the Consent Judgment, Plaintiffs ask this Court for declaratory and injunctive relief. Yet, General Order 1.2(2.1)(b)(1) of the Circuit Court of Cook County expressly provides that:

> The General Chancery Section hears actions and proceedings, regardless of the amount of the claim, concerning ... injunctions, temporary restraining orders ... declaratory judgments, ... and all other actions or proceedings formerly cognizable in courts of Chancery not otherwise provided for.

See General Order 1.2(2.1)(b)(1) (emphasis added); see also Baal v. McDonald's Corp., 97 Ill. App. 3d 495, 501, 422 N.E.2d 1166, 1172 (1st Dist. 1981) ("In general, injunctions rest on the authority of *courts of equity* to restrain persons within their limits of jurisdiction from doing inequitable acts to the wrong and injury of others.")(emphasis added); Brooks v. LaSalle National Bank, 11 Ill. App. 3d 791, 801, 298 N.E.2d 262, 269 (1st Dist. 1973) (the granting of injunctive relief "resides in the sound discretion of the *chancellor*.")(emphasis added).

4. Given this mandate of the General Orders regarding the types of cases properly presented to the Chancery Division, it is clear that Plaintiffs have filed this action in the wrong division. Under General Order 1.3(c):

> Any action assigned to a judge that is determined by that judge, whether by the suggestion of the parties or otherwise, to have been filed or to be pending in the wrong department, division, district or section of the Circuit Court of Cook County, shall be transferred to the Presiding Judge of the division or district in which it is pending for the purpose of transferring the action to the Presiding Judge of the proper division or district, or for reassignment to the proper section.

See General Order 1.3(c) (emphasis added). Judge Gardner clearly recognized the requirements

of General Order 1.3(c), and immediately transferred this matter to this Court for consideration of reassignment. Because Plaintiffs' filing of this action in the Law Division completely ignores the mandate of General Order 1.2(2.1)(b)(1), this cause must be transferred to the Chancery Division under the requirements of General Orders 1.2(2.1)(b)(1) and 1.3(c).[1]

II. Transfer of this Case to the Chancery Division would allow for Reassignment of the Matter to Judge Kinnaird, Whose Lengthy Involvement with and Consideration of the Legal and Factual Claims Made by the Plaintiffs Would Foster the Most Efficient Disposition of this Litigation.

Transfer of this matter to the Presiding Judge of the Chancery Division would also allow for subsequent reassignment of this case to Judge Kinnaird in the Chancery Division. In addition to the mandatory transfer rules of General Order 1.3(c), General Order 1.3(d) provides for transfer of matters to other divisions when such an action would further "the more efficient disposition of litigation." See General Order 1.3(d). Here, Judge Kinnaird's extensive involvement with the case giving rise to the Consent Judgment and her exhaustive consideration of the exact claims Plaintiffs now present necessitate transfer of this matter to the Chancery Division for reassignment to Judge Kinnaird.

5. Since Messrs. Buntrock and Gidwitz, two members of the Foundation's Board of Directors, filed a lawsuit against the Foundation, the three Plaintiffs in this case, and an unrelated third party in September 2000, Judge Kinnaird has presided over all aspects of that litigation. Over the past 10 months, Judge Kinnaird has become intimately familiar with both the law and the facts related to this case, having first presided over four months of contentious motion practice followed by five months of mediation sessions aimed at reaching an agreement

[1] Any attempt by Plaintiffs to point to their "jury demand" as a reason for this Court to deny transfer to the Chancery Division is unavailing. The Supreme Court of Illinois has recently noted, "Conferring

that would result in the dismissal of the Buntrock lawsuit. These mediation sessions eventually led to the entry of a Consent Judgment and Order on July 26, 2001.

6. In the process of entering this Consent Judgment, Judge Kinnaird also became intimately familiar with the claims Plaintiffs have made in the lawsuit they now seek to present in the Law Division. Plaintiffs first sought to block the settlement through presentation of a Motion for Temporary Restraining Order on June 29. After hearing argument on this matter at a hearing on the same day, Judge Kinnaird rejected Plaintiffs' motion for TRO and permitted the Foundation to hold its properly noticed and convened Board meeting at which the settlement was approved.

7. Three days later, on July 2, Judge Kinnaird again heard argument from the Plaintiffs that the settlement should be blocked, at which time the Plaintiffs filed a Motion for Leave to File Written Objections and for an Evidentiary Hearing on the Proposed Settlement. However, the Judge again rejected Plaintiffs' attempts to upset the settlement based upon their personal dislike for its terms. In denying Plaintiffs' motion, Judge Kinnaird noted that "You know, you've come into court and you've filed a number of things, and they sound very, very dramatic. But I don't see anything here supported by affidavit. I don't see anything here supportive of any substance." Tr. of Proceedings, 7/2/01, p.85. However, Judge Kinnaird did permit any party to file a written objection supported by affidavits after a motion for entry of the Consent Judgment was formally presented.

8. Plaintiffs then got their third "bite of the apple" in late July after the Foundation filed its Motion for Entry of the Consent Judgment and Order. On July 19th and July

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jurisdiction in chancery is not excluding trial by jury." Martin v. Heinold Commodities, Inc., 163 Ill. 2d

20th, the Plaintiffs filed exhaustive pleadings objecting to the settlement, and seeking not only to state various counterclaims against the individuals they have now sued in this action, but also seeking to conduct limited discovery. After having reviewed all of the pleadings, exhibits, and cases submitted by the Plaintiffs, as well as the responses to these pleadings – a process that required the judge to "devote her whole weekend" to reviewing the literally hundreds of pages of documents – Judge Kinnaird then heard five hours of argument on July 24, 2001 concerning the very matters Plaintiffs now attempt to place before this Court. At the end of that hearing, Judge Kinnaird rejected Plaintiffs' unfounded attacks on the settlement for a third time and entered the Consent Judgment embodying the terms of the settlement.

9. Now, having had their exhaustive arguments repeatedly rejected in the Chancery Court, Plaintiffs seek to present these same claims and arguments in a new division. An examination of the Complaint Plaintiffs filed in the Law Division makes clear that all of the allegations and underlying facts are nothing more than matters that have been previously alleged and argued, and are an integral part of the proceedings before Judge Kinnaird in Chancery. See, e.g., ¶ 1 of Plaintiffs' Complaint (stating that the directors who voted for the settlement had engaged in "a course of action antithetical to the best interests of the Foundation"), ¶ 6 (alleging a "tainted mediation process"), ¶ 43 (attacking the Attorney General's role in the mediation process), ¶ 70 (alleging that each director who voted in favor of the settlement breached their fiduciary duty to the Foundation), ¶ 80 (seeking "a declaration that the settlement is unlawful"), ¶83 (stating that the court "should enjoin" the directors' approval of the settlement as *ultra vires*). Given Judge Kinnaird's extensive knowledge of and dealings with these claims and the facts surrounding them, that the Court-ordered mediation took place in the case pending in front

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33, 71, 643 N.E.2d 734, 752 (1994) (quoting Gage v. Ewing, 107 Ill. 11, 15 (1883)).

16di-002464

of her, and that the Consent Judgment embodying the settlement was entered by her, judicial economy and fundamental fairness require transfer of this case to the Presiding Judge of the Chancery Court for subsequent transfer to Judge Kinnaird under General Order 1.3(d).

CONCLUSION

10. The fact that Plaintiffs are now attempting to present their thoroughly considered and repeatedly rejected claims in another division and to suggest that they are somehow presenting a Law Division case is further proof that their present suit is nothing more than a transparent attempt to shop for a division and a judge that they think might be more amenable to their claims. Having failed in their numerous and exhaustive attempts to present their claims to the judge most intimately involved with the Buntrock litigation and designated under the General Orders of the Circuit Court of Cook County as the proper forum in which to present their claims for equitable relief, Plaintiffs now attempt to breath new life into their tired and groundless arguments in the Law Division. Given the Chancery Division's designation as the proper forum in which to seek injunctive and declaratory relief, Judge Kinnaird's understanding of and experience with the facts and law surrounding Plaintiffs' claims, and the fact that the "claims" are an attack upon the settlement reached in the case in front of her and embodied in an Order entered by her, this case should be immediately transferred to the Chancery Division for reassignment to Judge Kinnaird .

WHEREFORE, defendant Terra Foundation for the Arts respectfully requests that this Court enter an order transferring this cause to the Presiding Judge of the Chancery Division for reassignment to Judge Dorothy Kirie Kinnaird.

Dated: August 17, 2001

Respectfully Submitted,

By: Stephen C. Carlson

One of the Attorneys for Defendant
The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
312/853-7000
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CERTIFICATE OF SERVICE

I, Stephen C. Carlson, one of the attorneys for Defendant Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD to be served upon the following counsel by messenger deliver:

William R. Quinlan
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30 N. La Salle Street
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and by facsimile and Federal Express to:

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on this 17th day of August, 2001.

Stephen C. Carlson

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,

Defendants.

AUG 20 2001

Case No. 01 L 009112

Hon. Timothy C. Evans

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Thursday, September 13, 2001 at 2:00 p.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Timothy C. Evans in Courtroom 2001 at The Daley Center, Randolph and Dearborn Streets, Chicago, Illinois, and then and there present DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD, a copy of which is hereby served upon you.

Dated: August 17, 2001

Respectfully Submitted,

By: _____
One of the Attorneys for Defendant

16di-002468

The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
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CERTIFICATE OF SERVICE

I, Stephen C. Carlson, one of the attorneys for Defendant Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached NOTICE OF MOTION to be served upon the following counsel by messenger deliver:

William R. Quinlan
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Washington, D.C. 20005
fax: (202) 371-6279

on this 17th day of August, 2001.

Stephen C. Carlson

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

BUNTROCK, Plaintiff,	)	
vs.	)	NO. 00 CH 13859
TERRA, Defendant.	)	

REPORT OF PROCEEDINGS had in the above-entitled cause, before the Honorable DOROTHY K. KINNAIRD, one of the Judges of said Division, had on the 29th day of August, 2001.

PRESENT:

MR. ROBERT CUMMINS
MR. DAVID NOVOSELSKY
MS. SUSAN STONE
MR. WILLIAM R. QUINLAN
MR. BRIAN CROWE
MR. JAMES WILSON
MR. WILLIAM SCHUMAN
MR. FLOYD PERKINS
MR. JAMES CARROLL

Ruby L. Prince
Official Court Reporter
69 W. Washington St., Rm 900
Chicago, Illinois 60602

THE CLERK: Buntrock -v- Terra, 00 CH 18359.

MS. STONE: Good morning, your Honor.

THE COURT: Is it? I'm sorry, I don't mean to be facetious. Let's start at the far right with some plaintiffs over here.

MR. CARROLL: Good morning, your Honor. James Carroll on behalf of Buntrock and Biglets.

MR. QUINLAN: Good morning, your Honor. William R. Quinlan on behalf of Mr. Buntrock and Mr. Biglets.

MR. PERKINS: Good morning, your Honor. Floyd Perkins on behalf of the People.

MS. STONE: Good morning, your Honor. Susan Stone on behalf of the Terra Foundation.

MR. SCHUMAN: Good morning, your Honor. William Schuman from McDermott, Will & Emery, on behalf of Dr. Stephens.

THE COURT: Is Dr. Stephens a party in my case?

MR. SCHUMAN: He is not, but what I understand to be up today has to do with fee petitions to be submitted to your Honor. And as I understand, the terms of the settlement agreement that would include Dr. Stephens, we have been counseling him since February.

And so when we saw the papers here provided to us by the Foundation, we thought it was

appropriate to be here.

THE COURT: And that's McDermott, Will & Emery?

MR. SCHUMAN: Yes.

THE COURT: Good morning. I haven't seen you in a long time.

MR. CROWE: Yes, Judge, I'm Brian Crowe on behalf of the fee petition of Shefsky & Froelich.

MR. WILSON: James Wilson on behalf of the fee petitioner.

THE COURT: Mr. Cummins, you're kind of separating yourself from the defendant. What's going on?

MR. CUMMINS: Well, we're not parties to a consent decree, but I do represent Miss Terra, Dr. Tucker and the Senator.

THE COURT: Okay.

MR. CUMMINS: What I suggested to Mr. Wilson, because clearly there was a misunderstanding in his communication with Mr. Cronin, which I thought we had clarified on Friday, that all of this be continued to the 17th of September.

At that time some related issues that are before Judge Evans may clear the air on some of the issues pertinent to this business of fee petitions as well.

So, our position is that, of course, people can file whatever they want to file, but with respect to Mr. Crowe and Mr. Wilson, their clients, my clients, our clients, were not, never have been and are not currently the subject of any aspect of that consent decree.

And, therefore, it is inappropriate and inconsistent in terms of their representation or continued obligation to those folks not to be pursuing fee petitions at this time.

THE COURT: I'm sorry. I didn't understand that last sentence. Does that mean that your clients are not going to be submitting a fee petition or they are going to be submitting --

MR. CUMMINS: Not pursuant to any consent decree, Judge. Whether or not the Foundation is obligated to pay Shefsky & Froelich or Tom, Dick and Harry, is a matter that we will address with the Foundation and should be addressed with the Foundation, but it's not pursuant to this consent decree.

THE COURT: Well, it sounds to me like there's probably the need for me to adjudicate this fee petition here because that's all that was left in my case. And I don't know what's happened since I signed

my order on July 26th, except that I was advised by Judge Gardner that a matter came in and that he sent it to Judge Evans.

MR. CUMMINS: Right.

THE COURT: And I don't know what he did and what was done and I haven't seen any orders, and I did not get -- I had briefed all of the people in our division who were handling my call in my absence about all of my cases that I thought something might come in on, and I did not hear from any of them that the motion to stay had come in. I did not hear anything about a notice of appeal. I don't know what's gone on.

MR. CUMMINS: The case has been appealed, your Honor.

MS. STONE: May I address the Court?

THE COURT: Tell the reporter, your name.

MS. STONE: Susan Stone.

MR. CUMMINS: Judge, I don't want to be rude to Miss Stone, but before she addresses the Court, you should be advised Sidley & Austin is a defendant in a lawsuit. We have indicated that they should not be appearing on behalf of the Terra Foundation. That's a matter that's currently pending before Judge Evans.

So, Miss Stone may speak, but I just want

the record to reflect that she's not speaking on behalf of the Terra Foundation as far as we're concerned.

THE COURT: Okay, but in this case she's counsel and Sidley & Austin is counsel for Terra Foundation. And there have been numerous rulings of this Court and I think a couple of the Appellate Court that have said that Sidley & Austin may represent the Foundation, and I don't know that any other judge has entered an order that says they may not.

So, on behalf of the Terra Foundation, what is it that you would like to say?

MS. STONE: Okay. Your Honor several things, first just to bring your Honor up to date on the history of what's gone on since we are last in front of you and the consent judgment.

Once you entered the consent judgment, by the terms of the consent judgment and the resolution, a new board was formulated. The new directors became directors effective with the entry of the consent judgment.

There has been a meeting of the board, the new officers elected, the committee chairs, the Foundation's business is proceeding.

There were several things that have been

happened judicially. Mrs. Terra, Dr. Tucker and Senator Simpson, have done several things. They have filed a Notice of Appeal in Federal Court of the dismissal of their 1983 suit against the Attorney General.

In addition, they filed an appeal of your Honor's entry of the consent judgment. In addition, they have done really what amounts to a sort of a sideways appeal for forum shopping attempts to file a separate lawsuit in Law Division to again challenge or appeal your Honor's entry of the consent judgment.

That was what was filed originally in front of Judge Gardner. Judge Gardner said I believe the case should be sent back to Judge Kinnaird and you can quote me on that, but what he did was send it, as appropriate under the rules, to Judge Evans as head of Law Division to do the reassignment.

THE COURT: And has Judge Evans done anything yet?

MS. STONE: No. That will be up on the 13th. I believe it's the 13th.

THE COURT: Of September?

MS. STONE: Yes. That is up for the consideration of the reassignment and the consolidation back to you.

Also up at that time, your Honor, is the motion by Attorney Cummins on behalf of Mrs. Terra, Mr.

Tucker and Senator Simpson to challenge Sidley & Austin to strike the pleadings that we filed on behalf of the Foundation.

They have also sought to file an amended complaint. Leave has not yet been granted. That is the complaint that makes reference to Sidley & Austin and Winston in which they, in essence, seek to disqualify us. It is yet another attack on us.

THE COURT: Okay, well let's not attack whatever it is they're doing. I just want to know where it is.

MS. STONE: In terms of what is up today as I understand it, the issue of fee petitions are up in front of your Honor.

THE COURT: Okay, let's just stop one moment. Has there been any emergency motion or anything filed, motions to stay, anything involving my case in the entry of a consent decree?

MR. CUMMINS: Other than the appeal.

THE COURT: Just a notice of appeal. There hasn't been -- a docketing statement hasn't been done, no emergency motions, no relief asked up there and, no relief asked of any of the people in my division, sitting in my stead about that consent decree?

MR. CUMMINS: Well, not quite, but I want to be

careful that I don't mischaracterize something.

What took place contrary to what Miss Stone suggests is that there was an attempted blessing of the socalled new board members.

Unfortunately, they were apparently and providentially advised that somehow, pursuant to your order, they automatically became something. So, we moved for a temporary restraining order before Judge Gardner.

THE COURT: Is that before Judge Gardner? Okay, did he deny that?

MR. CUMMINS: No, ma'am. What he did do was when all of the defendants in the newly initiated litigation said, hey, we're not going to do anything, the board won't take any action, that became moot.

When we appeared before Judge Evans last Friday, Thursday or Friday, it was again agreed that things would remain status quo until Judge Evans had a chance to consider all of these issues on September 13th.

THE COURT: Was there ever an order entered either by Judge Gardner or Judge Evans, preserving the status quo and preventing the Foundation from going ahead and doing its business?

MS. STONE: No.

MR. CUMMINS: Oh, yes. Miss Stone may say, no, but at the hearing, and we've got a transcript, at the hearing everyone said the board will -- they were going to have a meeting, Judge, on -- they proposed to have a meeting on August 14th. The basis for the temporary restraining order was to stop that from taking place.

The meeting was cancelled and it was agreed and understood that no further action would be taken and that's what has been the status since then.

THE COURT: But there was no -- my question was really had there been an order entered? Was there an order that said status quo, everybody's agreed?

MR. CUMMINS: No, there's a transcript that reflects --

MS. STONE: Your Honor, for the record, I need to correct a misimpression that's being left here. I think that's an inaccurate portrayal of what happened. There was an initial board meeting held with the new board.

THE COURT: When was that?

MS. STONE: That was August 1st.

THE COURT: And that's when the new board was elected?

MR. CUMMINS: The new directors --

MS. STONE: Pardon me, if I may respond to the Judge's question because I believe she addressed it to me.

The new directors became directors, became directors automatically upon your entry of the consent judgment on the 26th of July.

A meeting was held with all of the new directors. Mrs. Terra, Dr. Tucker and Senator Simpson opposed the holding of that meeting. The meeting nevertheless progressed.

At that meeting there were election of new officers, new committee chairs. There were discussions of other aspects of Foundation business. There were discussions about future meetings that would be held, et cetera.

Another meeting was then scheduled to take place on August, Tuesday, August 14th. On Monday August 13th, Mrs. Terra, Dr. Tucker and Senator Simpson went in, in front of the Law Division judge, Judge, I believe was it Gardner or Evans, to try to stop that meeting.

Because it is the Foundation's position that this case does not belong in Law Division, this is really just another bite at the apple to try to get

another judge --

THE COURT: Let's not characterize it. Go ahead.

MS. STONE: We believed it was not appropriate for him to exercise jurisdiction. We voluntarily agreed to cancel that meeting.

There was no agreement that the Foundation would come to a grinding halt and would stop conducting business whatsoever.

To the contrary there was actually discussion at that meeting that with proper notice, with five days proper notice, you would be back and any future TROs they wanted to bring would be brought in front of you.

So, there was no agreement to chill everything --

THE COURT: So, there have been no other board meetings since the August 1st board meeting?

MS. STONE: That is correct.

THE COURT: And we have new officers, people are signing things, going along, operating the business, and the Foundation is going under the direction of new officers?

MS. STONE: Correct.

THE COURT: And the staff and the Foundation is

taking its direction from the new officers?

MS. STONE: That is correct.

THE COURT: And there's been no motion or order or anything entered by anyone stopping any of that from happening?

MS. STONE: That is correct.

MR. CUMMINS: Well, Judge, excuse me just one second. You asked a very simple question. At the August 1st meeting, were the new board members elected?

THE COURT: I meant the officers. How about the officers. They were elected, right?

MR. CUMMINS: Judge, excuse me, may I just make this observation, nobody was elected. Nobody was elected at that board meeting.

What they did do at that board meeting was attempt to vest Mr. Marshall Field with some authority, who had not been elected a board member, and that's one of the problems.

But all of this, most respectfully, will get sorted out in the litigation that's currently pending before Judge Evans.

All I'm suggesting, since Judge Evans is going to be ruling on these matters on the 13th of September, he's holding a hearing both with respect to

the Sidley problems that we've addressed and with respect to this transfer motion that is before Judge Evans, which we are vigorously opposing, all I'm suggesting is there's no fire here. Let's wait until September 17th. That's why I suggested you just continue this.

No one has contacted, for example, Miss Bellows about fee petitions, assuming arguendo, that's a more appropriate matter before you, we suggest it isn't, but no one's contacted them. No one conferred with the lawyers in Washington on this subject.

I got word about this, yes, and I said let's hold our horses. There's no rush, no need to rush this given the complicated nature of these proceedings.

THE COURT: Well, some of these lawyers have been involved in this case since it started back in September of 2000 and haven't gotten paid any money yet.

MR. CUMMINS: Well, Judge, none of these lawyers are starving. I mean, you can take judicial notice of that. I mean, my goodness.

THE COURT: How can I take judicial notice that they're not starving?

MR. CROWE: I have been talking about my family eating tuna fish and now it's cat food --

THE COURT: I think he said something about a cloth coat and a whole bunch of other stuff in the cast.

MR. CUMMINS: He may still be. I'm not even sure he's not still on the public dole in some way.

THE COURT: I don't think so. In any event, why is it a really big deal for everybody who wants to get a fee petition on file before the Court to get it on file?

MR. CUMMINS: Can I suggest one.

THE COURT: Yes.

MR. CUMMINS: Let's assume I'm correct that your consent decree has no effect whatsoever with respect to our folk. Let's assume also that's there are other problems with that consent decree.

My position, with respect to my respected colleagues, Mr. Crowe and Mr. Wilson, who I would like to see make as much money as they can, and I'll tell you this when I look around and see how many lawyers are showing up on a routine motion like this, two or three lawyers from law firms, that raises a question to me about who is going to be deciding what fees are reasonable under the circumstances.

THE COURT: Well, I think unfortunately the consent decree says I have to do it, and in order to do it, I have to have the fee petitions.

MR. CUMMINS: If the consent decree affects those -- we are not parties. Their clients are not parties to this consent decree. Your consent decree cannot affect parties that are not parties to that decree. It's a settlement, Judge. It's nothing more.

THE COURT: I don't really understand why Mrs. Terra, Senator Simpson and Dr. Tucker would be objecting to anything that their former attorneys are submitting as far as have the Foundation pay the fees, whether there's a consent decree or whether there is not a consent decree. Their position has been from day one, that the Foundation should pay the fees. Everybody else is now agreeing the Foundation should pay the fees.

And now their attorneys, their former attorneys, maybe not their second attorneys and maybe not their third attorneys, but their original attorneys are saying let us get paid.

MR. CUMMINS: All right, Judge, that's not a problem. Let's address that with the Foundation. We don't address that with your Honor most respectfully.

You -- in our judgment, and I say this with the utmost respect for this Court, you have nothing to say about what Miss Terra, Mr. Tucker or Senator Simpson do vis-a-vis their lawyers or how their lawyers

get paid if they're entitled to get paid by the Foundation. Let's address that to the foundation.

THE COURT: So, you want Mr. Crowe and Mr. Wilson to submit their fee petition to the board of the directors of the Foundation and have the Foundation staff or whatever review it and pay it or not pay it?

MR. CUMMINS: Well, what I suggest that I think makes better sense to do it this way, is that Mr. Crowe and Mr. Wilson and I confer with our clients and discussion the appropriate way to deal with this issue given the complex procedural issues that are currently before Judge Evans and before the Appellate Court. That's what I suggest.

MR. QUINLAN: Your Honor, may I be heard?

THE COURT: Well, I really don't have any problem with anybody being heard. I do have a problem with my whole call being ruin for this morning because I need to kind of be on time here.

I don't have a motion to stay my decision. I don't have anything from the Appellate Court that stays it. I have an order that I entered that was shown as this case is done. The only thing that's left in this case is for the fee petition.

MS. STONE: And you also retained jurisdiction for

the purposes of enforcing the consent judgment. That's important to note. That's Paragraph 13.

MR. QUINLAN: Your Honor, I just want to proffer that I surely have questions about Mr. Cummins standing. He himself, by his own admission here, has nothing to do with this consent decree.

He has filed an objection to it and your Honor has ruled on that and he has appealed that decision. He now stands before your court, I don't know on what basis, and he complains about a fee petition of counsel of which is no longer party to anything he has to do with it and by his own admission.

So, I don't know what he's talking about, about his objection and frankly his suggestion about the board hearing this, et cetera, is contrary to the very order that your Honor has entered that he has objected to that is now a final order, which you have retained jurisdiction to enforce.

As far as Judge Evans, I was at the hearing in front of Judge Gardner and Judge Gardner took no action whatsoever. His only concern was to preserve this for you when you came back so that he would not in any way interfere with your case.

He found this to be the same case, if not

the related case, if not the same case. The only thing he transferred it to Judge Evans for was for reassignment.

They have filed a number of motions, but the only motion that's pending that will be heard on the 13th is the reassignment back here to the Chancery Division and to your Honor. That's what's at issue.

THE COURT: Is this thing before Judge Evans totally argued? I mean are we --

MR. CUMMINS: Here's where that stands --

THE COURT: And he's suppose to give a ruling on the 13th?

MR. QUINLAN: He has asked for briefs to be filed and briefs are being filed and he will then hear argument on the 13th.

THE COURT: What day are the briefs due?

MR. QUINLAN: Our briefs were filed on Monday and their reply is due Friday?

THE COURT: The only reason I'm asking on timing as to whether anything is really going to happen on the 13th, you all know we have a chief judge election the night of the 12th and it has been set over for day two to the 13th, and we're either going to be in the middle of that election, he's either going to be chief judge

that morning or somebody else is going to be, and I'm just wondering are you actually going to have an answer on the 13th. Is that's what's expected?

MR. QUINLAN: The way it would if we got a judge to come in from Peoria. I assume your Honor is correct.

THE COURT: I'm wondering if you think you're really going to get a ruling that day on this whole issue?

MR. CUMMINS: I do. Yes, I do.

THE COURT: Okay.

MR. CUMMINS: Let me suggest something, first of all, Mr. Quinlan has made a number of inaccurate statements. I won't try to clarify all of those, but he's made a couple of inaccurate statements.

Why am I here? I'm here because I represent Mrs. Terra, Dr. Tucker and Senator Simpson. I'm here because their lawyers are, at least indirectly or tacitly giving some credence to this consent decree that's not in the clients interest. That's why I want this continued.

With respect to the briefing schedule before Judge Evans, I'll tell you precisely where that stands. The final reply brief on the motion to transfer was filed yesterday, on Monday. What is today? On

Monday.

And on Friday of this week, Sidley & Austin will respond to our motion to have their pleadings stricken and their appearance stricken.

We will file a reply brief to that a week from Friday, which I guess is the 8th of September.

THE COURT: So, I just want to know if it's set for ruling or argument?

MR. CUMMINS: It's set for ruling on September 13th at 2:00 o'clock. Judge Evans has already had a preliminary hearing on this when he set up this briefing schedule. I expect there's going to be a ruling that day.

THE COURT: Let's me have Mr. Novoselsky introduce himself and then I need to move on with what I've got today.

MR. NOVOSELSKY: Good morning, your Honor. David Novoselsky. I apologize for being late, but my co-counsel has ably argued, I'm sure.

THE COURT: He certainly has and you're not rushing in with any kind of order from the Appellate Court right now, are you? I mean, there's nothing new?

MR. NOVOSELSKY: I wasn't anticipating one, your Honor, but if you want I can go get one.

THE COURT: No, I had to deal with what I have.

MR. CROWE: Judge since it's my motion --

THE COURT: Your motion is to set a deadline for the filing.

MR. CROWE: It's for hearing.

THE COURT: It's for hearing, okay. Well, I anticipate that the fee petitions in this case are going to be in the multiples, hundreds of thousands of dollars, maybe even pass a million.

They are not going to be fee petitions that are going to be quickly reviewed. I need to have the fee petitions of all counsels at the same time to show that I can check and see if one person is charging three hours for a very quick court appearance and somebody else is charging 23 minutes or whatever, and if one person brought over 4 lawyers on a routine matter and another person only brought over one.

And I keep really good notes of who comes to court and who is here and whether I thought that more lawyers came than were necessary to come on a particular day.

And, so, I'm going to be spending a long time going through whatever the fee petitions are in this case.

MR. CUMMINS: I hope you made that note today, Judge.

THE COURT: Yes, I've noted that Mr. Novoselsky has come to and we've one, two current lawyers for at least for -- well no, we only have one for the Foundation.

MS. STONE: We always have one.

MR. NOVOSELSKY: I'm just here to watch and learn, Judge. I wasn't here to bill for it.

THE COURT: I understand. So, I'll be looking at all the bills eventually, but the earliest that this happens -- I mean, my case is done. I haven't stayed anything. The Appellate Court hasn't stayed anything. Nothing else has been consolidated with this case. As far as I'm concerned, my case is over except if my orders are not being followed or a fee petition has to be adjudicated.

And I think it's totally reasonable to require any lawyer who thinks that they are entitled to fees under the consent decree to give them a period of time to get those fee petitions on file.

MR. CROWE: Under it or outside of it? We've got a motion to advance pending before you and you reserved ruling.

THE COURT: And your motion says, Mr. Crowe, that

you want it done by tomorrow, the 31st, Friday.

MR. CROWE: I hope you prioritize ours, Judge, because our petition has been before you for a long, long time.

THE COURT: Let me ask everybody else, when's the Foundation ready to get its on file?

MS. STONE: First of all, the foundation wants the right to respond to the fee petitions presented by the other counsels.

THE COURT: Of course, everybody's going to have a chance to do that.

MS. STONE: Because it is the Foundation ultimately which is responsible for this, and it is the foundation which has agreed to pay reasonable fees and only reasonable fees of the directors who are involved in this lawsuit.

If you read the language carefully, the Foundation did not obligate Sidley & Austin to present its fees, your Honor, for review.

Sidley & Austin has been presenting its fees to the Foundation. Those have been reviewed by the ILC throughout the pendency of this litigation. Those fees have been discussed and resolved. So, we are not coming to you with a fee petition.

THE COURT: So, you're being paid by the Foundation now and you do not intend to submit a fee petition?

MS. STONE: That's correct, your Honor. We're not obligated to do that --

MR. NOVOSELSKY: So, we're clear, your Honor, we intend on behalf of our clients to vigorously object to the sweetheart deal as it sounds like -- you know, our people have hired us. They think our fees are just wonderful coming out of somebody else's pocket, the Foundation. We don't think it's cash cow.

So, we, of course, want to make it clear on the record that we vigorously intend, wherever the forum is, to ask if all fees be reviewed by somebody responsible rather than somebody with an inherent interest in paying or not paying certain --

MS. STONE: Your Honor, I object to the characterization of the sweetheart deal.

THE COURT: I understand --

MS. STONE: If I may just make one statement, the Foundation who has hired counsel, has had to pay for counsel, and has a way to settle this entire dispute and agreed to pay for other peoples legal fees, including people who have sued the Foundation.

THE COURT: Anybody who's not otherwise being paid,

who believes that by virtue of the filing of this lawsuit or by virtue of the consent decree, they are entitled to fees, which are not being paid and otherwise are not going to be paid, unless a court order comes ordering them to be paid, has until September 11th to get those fee petitions on file.

And I will set this matter for status right after the 13th, like maybe the 15th. Let me look at calendar to make sure there aren't any holidays I'm interfering with or anything, and set it for right after that so that anybody who, any fee petition that's filed, gets sent to all counsel of records in this case.

And anybody who feels they're in a petition, definitely the Foundation, but anybody else where they're going to want to say something about them, I don't know that the consent decree provides objections to each other fee petitions, but I don't think it does, but I think I'm going set this for a period of time for the Foundation to read these and tell me how long you really need to respond. I'm not adjudicating these fee petitions. I'm not setting the hearing date right now, but I think that it's reasonable to say, get them on file by the 10th.

Anybody who thinks they're entitled to be

paid, and I'm going to set this in the afternoon at 1:00 on the 14th, which is the day after -- is that the day something is suppose to happen?

MR. CUMMINS: Would you mind doing that on Monday the 17th? I'm going to be tied up in court in DuPage all day on 14th.

THE COURT: I won't do it. Rosh Hashana begins at sundown the 17th. If I do it at 1:00 o'clock, is that going to affect anybody going off early? Just want to make sure.

MR. NOVOSELSKY: I believe Mr. Crowe will be leaving earlier so he can go to the synagogue.

THE COURT: I just want to make sure. Maybe somebody from Sidley, maybe somebody from McDermott. I just want to make sure.

MS. STONE: Is there any way we can do it earlier that day?

THE COURT: Well, I just want to make sure. I'm fully booked in the morning. In fact, I'm fully booked in the afternoon. I was giving you the lunch hour.

MS. STONE: You anticipate this to be a long hearing with argument or merely a short status hearing to see where we stand?

THE COURT: Why don't I do it at 10:00 o'clock in

the morning?

MR. CUMMINS: Judge, I'm in a hearing before Judge Shader in Federal Court on the morning of the 17th. That's why I suggested the afternoon. If you want to push it later in the week, that's fine with me. I don't care.

THE COURT: The next two days, some people take two days for the holiday. I want to make sure I'm not doing anything that's interfering with anybody's holiday.

MR. CUMMINS: How about the 20th?

UNIDENTIFIED SPEAKER: Judge, the 20th I'm in Baltimore.

MR. CROWE: Should we take your noon hour, Judge --

THE COURT: What was the problem with the 14th? Why don't we just have some people come in on the 14th?

MR. CUMMINS: Because I'm in hearing before Judge Duncan in DuPage County.

THE COURT: And what time is that hearing?

MR. CUMMINS: It's probably going to last most of day because it's the cross-examination of a witness.

THE COURT: Can Mr. Novoselsky come in and tell what the position of --

MR. NOVOSELSKY: If it's just a status, your Honor.

THE COURT: It's just a status to see what the response time is going to be for the fee petition and somebody to tell me what happened the day before.

MR. CUMMINS: Right. Just a minor footnote, your Honor, I was --

THE COURT: A quick minor footnote. I really destroyed my call.

MR. CUMMINS: I was otherwise engaged at the time of the proceedings before Judge Gardner, but Mr. Novoselsky presented the temporary restraining order, and there have been a couple representations to the Court this morning that there was no agreement, that there would be a, essentially a status quo and that no action would be taken by the Foundation's board without appropriate notice to everybody.

And to the extent that anybody wants to persist in that position, I think Mr. Novoselsky can set the record straight on that.

THE COURT: I don't really need to have it set straight. I have nothing in front of me. My question was a very simple one; was a court order entered that memorialized the keeping of the status quo, and the answer was no court order was entered. So, that's all I wanted to know.

MS. STONE: 1:00 o'clock, your Honor?

THE COURT: 1:00 o'clock on September 14th. You have until the close of business September 10th. Any attorneys who believe that by virtue of the filing of this case and/or the entry of the consent decree, they're entitled to payment, which payment must be approved by a court order, needs to file a fee petition by the close of business that day.

MR. CROWE: And all objections to those petitions will be filed by the 14th.

MS. STONE: No.

THE COURT: No. On the 14th, we will set the schedule for -- because we'll see what we have.

MS. STONE: The Foundation is entitled -- pardon me I want to clarify because I hear colloquy between counsels.

The Foundation does have the right at the appropriate time to file written objections to any of the fee petitions, we just haven't set the date for it.

THE COURT: I'm not putting that in an order. I'm going to take a look at the consent decree. I assumed that the Foundation --

MR. QUINLAN: Paragraph 12, your Honor --

THE COURT: would be filing objections, but that's

wrong?

MR. QUINLAN: That is not correct. May I speak? Your Honor, it provides in Paragraph 12, reasonable attorney fees incurred by the Foundation's directors in connection with this lawsuit as determined by the Court shall be paid by the Foundation.

The very reason it was not to go to the Foundation is that they were part of the litigation, and there was an adversarial position by everybody.

THE COURT: Well, the Foundation does know -- the Foundation right now doesn't know what it's position is, okay?

Miss Stone is not going to be able say right now what the position is until she has the fee petitions. Let's her get the fees petitions --

MR. QUINLAN: That may all be true, your Honor, but the Court's order specifically so provides. There's another issue about protocol and the filing of any documents relating -- of the fee.

This is an ongoing case, as your Honor obviously can see here. There is a very great concerned about revealing documents and information that involve attorney/client privilege, work product, strategies and that kind of thing.

There has to be some protected order and, frankly, it should be presented solely to the Court for the Court's consideration.

The amount of the fees may be disclosed. The affidavit supporting it maybe disclosed, but any other information seems to be most appropriate under these circumstances that they should be submitted to your Honor for your Honor's consideration, and it's not an objection process here. No objection process is provided for. Second of all, we have an ongoing case --

THE COURT: Are you suggesting that anybody who has a fee petition that wants to submit it, should be doing it under seal?

MR. QUINLAN: Insofar as any of the backup document is concern, which involves discussions with clients, which discovers strategy, which discovers all those types of things, those have to be protected.

THE COURT: Do you put those in your bills?

MR. QUINLAN: Of course, those are concomitants, you're meeting with people, you're discussing things.

MR. NOVOSELSKY: We're not bound by the consent decree. We didn't agree to it. For them to say now we can't object because they agreed to conceal --

MR. QUINLAN: They are bound by the consent decree

--

MR. NOVOSELSKY: You are we --

THE COURT: I'm going to ask you all to sit down. I'm going to finish my call. You might get recalled around 12:00 o'clock at the rate things are going or later, except that I have a meeting at the offices of the Supreme Court at 12:00 and I'm going to be there. So, I don't know when you're going to get recalled.

If you all persist in talking at the same time, it's just going to be a really long day here. I don't know how many times I can say and say it over again, and I don't know if I have a communication problem and you're not hearing me well, but you're going to come back on a status. And the status is going to be on Friday the 14th of September at 1:00 o'clock.

By that time these fee petitions will be filed. I'm not going to order that anything be filed under seal in this case, and I trust that if there is highly confidential information in bills, that everybody will have the good sense not to file that with the Clerk of the Court, and there may be a procedure where you file something and then you say, you come in on a motion and you say, I'm going to file a more full copy with the Court or whatever and this is the reason.

But your fee petitions, if anybody wants to file them, they're due the 10th. I will see you on the 14th, and that will be for scheduling the hearing date on the fee petition.

And at that time, at 1:00 o'clock on the 14th, we will find out if any party in this case feels that they are in a position or they have a right to object to any fee petition and why and how that objection shall be done.

MS. STONE: But they should be served on counsel, is that correct?

THE COURT: Yes. Anything you're going to file, anything you file with the Clerk of the Court and with me, obviously gets served on everybody else.

MR. CROWE: I hear you, your Honor. We understand.

THE COURT: Draw me up an order.

MR. CUMMINS: One final point, do I understand that we will receive the bills that Sidley & Austin has submitted to the Foundation? My clients, as board members, would like to see those.

THE COURT: Well, your clients as board members can exercise their rights as boards members with the board to receive whatever, but you don't need to do that request in front of the Court. Thank you.

MR. CUMMINS: I hope you have a nice holiday.

MS. STONE: Your Honor, I got to let you go because you've got a big call. I just want to make certain that people will be filing fee petitions in enough detail that we will have the opportunity to make any intelligent objections --

THE COURT: If you don't believe that there's sufficient detail, you can certainly raise that issue when I see you again.

MR. NOVOSELSKY: And we will object to Sidley's fees if they're not submitted at the same time as everyone else, your Honor.

THE COURT: Would you please call the next matter?

(WHICH WERE ALL THE PROCEEDINGS HAD.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

I, RUBY L. PRINCE, an Official Court Reporter for the Circuit Court of Cook County, County Department, Chancery Division, do hereby certify that I reported in stenotype the proceedings had at the hearing of the aforementioned cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable Dorothy K. Kinnaird, Judge of said court.

Ruby L. Prince
Official Court Reporter
084-001925

Dated this 4th day
of September, 2001.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

I, the Honorable DOROTHY K. KINNAIRD, Judge of the Circuit Court of Cook County, presiding Judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings, had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise fully appear of record, the attorney for the _____ tenders this Report of Proceedings and prays that the same may be sealed by the judge of this court pursuant to the statute in such case made and provided.

WHICH IS ACCORDINGLY DONE this _____ day of _____, 19____.

_____
JUDGE
Circuit Court of Cook County,
Illinois

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED
01 SEP -6 PM 2:27
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
CLERK DOROTHY BROWN

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

NOTICE OF EMERGENCY MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Friday, September 7, 2001 at 9:15 a.m., we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2302, Richard J. Daley Center, Chicago, Illinois, and then and there present Defendants' Agreed Emergency Motion for Extension of Time, a copy of which is attached hereto and hereby served upon you.

Dated: September 6, 2001

One of the Attorneys for Defendants

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

FILED
01 SEP -6 PM 2:27
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
CLERK BROWN

No. 00 CH 10859
Hon. Dorothy Kirie Kinnaird

DEFENDANTS' AGREED EMERGENCY MOTION
FOR EXTENSION OF TIME

Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson move this Honorable Court for an extension of time to and including Monday, September 17, 2001, within which to address this Court's order of August 29, 2001.

* * * *

Because defendants Terra, Tucker and Simpson are not parties to the consent judgment/settlement which is the subject of this Court's order of July 26, 2001, these parties and their counsel must yet address the presentation of billing statements to the Foundation for prompt payment pursuant to the indemnification provisions of the Foundation's by-laws.

Inasmuch as the Foundation is a party to the settlement/consent judgment, the Foundation may deem it necessary to submit the Terra/Tucker/Simpson reimbursement demands and related bills to this Court for approval pursuant to the July 26, 2001 order.

The movants, on the other hand, have sought appellate review of the July 26, 2001 order and have initiated independent proceedings (i.e., Civil Action 01 L 009112) seeking to resolve, *inter alia*, important public policy issues. Such appellate review and movants' other independent causes of action create a circumstance such that Terra, Tucker and Simpson require an additional several days to implement a demand for payment without compromising their position or claims as asserted or to be asserted in such other proceedings.

While the matter of payment of attorneys' fees is of critical importance to Terra, Tucker and Simpson who have already invested substantial sums in defending themselves, they and their counsel require the additional time to prudently and appropriately pursue their reimbursement remedies.

The undersigned has consulted with Mr. Perkins, Mr. Carlson of the Sidley firm, Mr. Carroll of the Quinlan firm, and Mr. Schuman of the McDermott firm, and they have agreed to our request.

Wherefore, defendants Terra, Tucker and Simpson respectfully request they be granted to and including September 17, 2001 within which to address this Court's order of August 29, 2001.

Respectfully submitted,

JUDITH TERRA, PAUL HAYES TUCKER
and ALAN K. SIMPSON

9/6/01

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CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of of Emergency Motion and Defendants' Agreed Motion for Extension of Time to be served on the parties listed on the attached Service List via facsimile on the 6th day of September, 2001.

Robert P. Cummins

DEAN L. BUNTROCK, ET AL.
V.
JUDITH TERRA, ET AL.
00 CH 13859

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444 North Michigan Avenue
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	
	)	**No. 00 CH 13859**
	)	**Hon. Dorothy Kirie Kinnaird**
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,	)	
	)	
Plaintiff-Intervenor,	)	
v.	)	
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	

AGREED ORDER

THIS CAUSE COMING ON TO BE HEARD on Defendants' Agreed Emergency Motion For Extension of Time:

IT IS HEREBY ORDERED by agreement that defendants' motion is granted and defendants have to and including September 17, 2001 to respond to this Court's order of August 29, 2001.

DATED: _____ ENTERED:

_____
Judge

CUMMINS & CRONIN, LLC
ATTORNEYS AND COUNSELORS
77 WEST WACKER DRIVE
SUITE 4800
CHICAGO, ILLINOIS 60601
PHONE: (312) 578-0500
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TELECOPIER TRANSMITTAL COVER SHEET

TO:	K. Chris Todd, Esq. Leonard Garment, Esq. Lawrence Levinson, Esq. David Novoselsky, Esq.	**TELECOPIER NO.:**	202-326-7999 202-371-6279 312-346-9453
FROM:	Robert P. Cummins		
DATE:	September 6, 2001	**TIME:**	3:25 pm
CLIENT/MATTER NO.: 283		**OPERATOR:**	pw
TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE:			9

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September 6, 2001

VIA FACSIMILE

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Chicago, Illinois 60611

Re: Buntrock v. Terra

Dear Colleagues:

Judge Kinnaird will enter our agreed order tomorrow at 9:15 a.m. at which time I will appear. No one else need to be in attendance and I obviously will not address any substantive aspects of the case.

Very truly yours,

Robert P. Cummins

RPC/pw
Enclosure

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al., Defendants.	)	

MOTION FOR ENTRY OF PROTECTIVE ORDER

Plaintiffs, Dean L. Buntrock and Ronald Gidwitz, by and through their attorneys, Quinlan & Carroll, Ltd., hereby move this Honorable Court for the entry of a protective order protecting the confidentiality of attorney invoices being submitted in this case. In further support of their motion, plaintiffs state as follows:

1. On July 26, 2001, this Court entered a Consent Judgment and Order ("Consent Order") settling this matter. That Consent Order provides *inter alia* for the reimbursement of reasonable attorneys fees and costs incurred by the Plaintiffs as determined by the Court. (Consent Order, ¶ 12.)

2. On August 29, 2001, this Court ordered the petitions for fees and costs to be submitted pursuant to the Consent Order and filed with the Court by September 11, 2001.

16di-002521

Subsequently on September 7, 2001, this Court modified its order allowing parties additional time to file any petitions.

3. Concurrently with this motion, Plaintiffs are submitting to the Court a petition for attorneys fees and costs pursuant to the Consent Order entered July 26, 2001.

4. The specific provisions of the Consent Order provides that the reasonableness of the fees and costs claimed will be determined by this Court. The Court has already recognized that highly confidential information should not be filed with the Clerk of the Court and that the parties could file a motion with the Court to protect such information. *See* Transcript of Proceedings from August 29, 2001, p. 33 attached as Exhibit B.

5. The information communicated to a client in an attorney invoice is highly confidential and protected by the attorney-client and work product privileges. Indeed, this confidentiality is incorporated into the federal rules governing the submission of fee petitions. *See,* Local Rule, Northern District of Illinois, 54.3(d)(1) ("These records may be redacted to prevent disclosure of material protected by the attorney-client privilege or work product doctrine.").

6. This litigation is ongoing, despite the settlement, as is evidenced by the director defendants' several collateral attacks on the consent judgment and order. Indeed, a notice of appeal has been filed in this matter challenging the Consent Order. Additionally, defendants Tucker, Terra and Simpson have filed an action in the Law Division, *Tucker et al. v. Buntrock, et al.*, 01 L 009112, which challenges this Court's entry of Consent Order. Several motions to transfer and/or consolidate the Law Division action have been filed. Those motions to transfer are fully briefed and are scheduled to be heard on September 17, 2001 by Judge Evans. If the motions are successful, the Law Division action may be consolidated with this case.

7. For these and other reasons, it is clear that this matter is ongoing and Tucker, Terra and Simpson intend to continue to attack the entry and terms of the Consent Order.

8. The sensitive attorney client, work product and confidential information contained in the attorney invoices submitted by the Plaintiffs must be protected. *See, e.g., People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201, 689 N.E.2d 319, 325 (1st Dist. 1997) (recognizing that attorney billing records may be privileged). Protection of the confidentiality of these invoices would be appropriate under any circumstances, however, considering the ongoing nature of this dispute, it is all the more imperative that a protective order be entered by this Court.

WHEREFORE, Plaintiffs Dean L. Buntrock and Ronald Gidwitz respectfully request that this Court enter a protective order protecting the confidentiality of the attorney invoices submitted by the Plaintiffs in connection with their petition for fees and costs, and for such other and further relief that this Court deems just.

DATED: September 14, 2001

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
QUINLAN & CARROLL, LTD.
30 North LaSalle Street–Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm I.D.: 33745

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

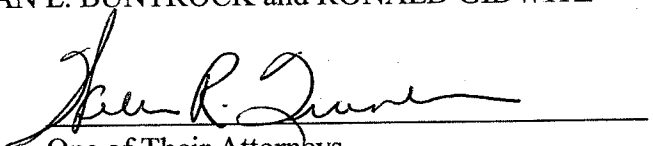
NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on **September 20, 2001** at **11:00 a.m.**, or as soon thereafter as counsel may be heard, we shall appear before the Honorable Dorothy J. Kinnaird, or any judge sitting in her stead, in the courtroom usually occupied by her in Room 2302 of the Richard J. Daley Center, and shall then and there present the attached **Motion for Entry of Protective Order**, a copy of which is attached and hereby served upon you.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: 
One of Their Attorneys

William R. Quinlan
James R. Carroll
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30 North LaSalle Street, 29th Floor
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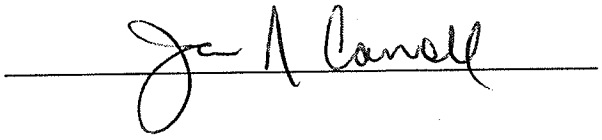
(312) 263-0900
Firm ID # 33745

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and correct copies of the attached **Notice of Motion** and **Motion for Entry of Protective Order,** to be served on **September 20, 2001**, as indicated on the attached service list.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

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3263 N Street N.W.
Washington, D.C. 20007
(Via U.S. Mail)

--

MR. NOVOSELSKY: You are we --

THE COURT: I'm going to ask you all to sit down. I'm going to finish my call. You might get recalled around 12:00 o'clock at the rate things are going or later, except that I have a meeting at the offices of the Supreme Court at 12:00 and I'm going to be there. So, I don't know when you're going to get recalled.

If you all persist in talking at the same time, it's just going to be a really long day here. I don't know how many times I can say and say it over again, and I don't know if I have a communication problem and you're not hearing me well, but you're going to come back on a status. And the status is going to be on Friday the 14th of September at 1:00 o'clock.

By that time these fee petitions will be filed. I'm not going to order that anything be filed under seal in this case, and I trust that if there is highly confidential information in bills, that everybody will have the good sense not to file that with the Clerk of the Court, and there may be a procedure where you file something and then you say, you come in on a motion and you say, I'm going to file a more full copy with the Court or whatever and this is the reason.

16di-002528

Extra

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

Defendants Alan Simpson, Judith Terra, and Paul Hayes Tucker (collectively, "Defendants") respectfully move the Court for an order directing the Terra Foundation for the Arts ("Terra Foundation") to pay their attorneys' fees and costs pursuant to the Restated Bylaws

of Terra Foundation for the Arts ("Bylaws") and the Court's order of August 29, 2001.[1] In support hereof, Defendants submit the Declaration of Leonard Garment. Defendants further incorporate by reference all pleadings, files and records in this action; material that may be judicially noticed by this Court; the presentations and arguments of counsel, if any; and other such matters that the Court may properly consider, and in further support state as follows:[2]

1. Since May 18, 2001, Verner, Liipfert, Bernhard, McPherson & Hand ("Verner Liipfert"), has represented the Defendants – each of whom is a director of the Terra Foundation – individually in the above-captioned matter.

2. Verner Liipfert is a full service national law firm with a trial court and administrative law practice consisting of general litigation as well as specialized litigation in the fields of corporate transactional, international trade, white collar crime, energy, environmental and employment law. Over half the attorneys at Verner Liipfert are currently practicing before regulatory agencies and State and Federal trial and appellate courts across the country. In addition, the firm's corporate law group advises major U.S. companies and foundations on litigation and related corporate governance issues. The Terra matter at Verner Liipfert is under the supervision of two senior members of the firm - - Leonard Garment and Lawrence Levinson.

---

[1] Defendants' substantive and procedural objections to the Consent Judgment and Order of July 26, 2001 ("Consent Judgment and Order") are well-documented. During the August 29, 2001 hearing, however, the Court invited all parties to file petitions for attorneys fees if they are entitled to payment either (1) "by virtue of the consent decree" or (2) by "the filing of this lawsuit." Aug. 29, 2001 Tr. at 26. Defendants are entitled to payment of their attorneys fees by "the filing of this lawsuit," see generally Terra Bylaws Art. X § a, and thus are submitting this petition pursuant to that instruction, without prejudice to their objections regarding the substantive and procedural propriety of the Consent Judgment and Order."

[2] The fees sought in this Motion do not include fees and expenses for performed but as-yet unbilled work. It also does not include fees and expenses associated with future work on post-trial motions or any appeal. Accordingly, Defendants anticipate filing a supplemental motion for additional fees and costs at a later date.

3. Leonard Garment is an experienced trial lawyer who has been long active in complex litigation in Federal and State courts. A graduate of Brooklyn Law School (1949), Mr. Garment was Chairman of the Litigation Department for more than a decade at the New York law firm of Mudge, Rose, Guthrie and Alexander. Mr. Garment served as an Assistant and Counsel to President Richard Nixon (1969 – 1974), Assistant to President Gerald Ford (1975), Counselor to Ambassador and Senator Daniel P. Moynihan and to U.N. Ambassador and Pennsylvania Governor William Scranton. He was Counselor to the United Nations Delegation (1975 – 1976) and U.S. representative to the U.N. Human Rights Commission (1975-76). He served as Chairman, Commission on the Federal Judiciary of Senator Moynihan (1976 – 1988), Vice Chairman of the Second Circuit Nominating Commission (1979 – 1980), and was a member of the Committee on the Judiciary of the Judicial Conference of the United States. Before joining Verner Liipfert in 1998, Mr. Garment was a partner at Dechert, Price and Rhoads and at Dickstein, Shapiro & Morin, where he specialized in all aspects of Federal and State litigation.

4. Lawrence Levinson received his LLB from Harvard Law School and upon graduation served in the U.S. Army's Judge Advocate's Division. From 1957 to 1965, Mr. Levinson was Special Counsel at the Pentagon where he dealt with various national security litigation issues affecting the Defense Department. From 1965 to 1969, Mr. Levinson was the Deputy Special Counsel to President Lyndon Johnson and prepared various legislative proposals involving the operations of the U.S. Department of Justice and the Securities and Exchange Commission. After leaving Washington in 1969, Mr. Levinson became a senior executive at Paramount Communications where his duties included supervising the company's legal department and focusing on issues involving the corporation's charitable foundation and pension funds. During this period, Mr. Levinson also served on the Board of Directors of the predecessor company to

Paramount (Gulf & Western) where he was responsible for Management Information Systems and Government Affairs. In 1995 Mr. Levinson joined Verner Liipfert where he has been active in a variety of litigation matters before various federal and appellate courts in the District of Columbia.

5. Harry McPherson, a graduate of Suwanee College and The University of Texas Law School, served as Counsel to President Lyndon Johnson and in his 30 years of private practice has counseled a number of major U.S. corporations and non-profit organizations and foundations on a variety of matters, including issues of corporate governance. Currently, he is a member of the Board of Directors and Chairman of the Independent Audit Committee of a corporation listed on the NASDAQ.

6. The Bylaws of the Terra Foundation provide that the Foundation "shall indemnify any and all of its directors...against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties...by reason of being or having been" a director, unless that person is found "liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicated on the existence of such liability." Bylaws Art.X § a. None of the Defendants was found liable for any misconduct in his or her service as a director, and the matter was not settled "by agreement predicated on the existence of such liability." Instead, plaintiffs dismissed their claims against Defendants.

7. Consistent with the Bylaws and the Court's order of August 29, 2001, "[r]easonable attorneys fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." (*See introduction on p. 1 and ftn. 1 on p. 2 supra.*)

8. During this period, Mrs. Judith Terra and Naftali Michael (a non-director defendant and long-time friend of Mrs. Terra) advanced $105,000 from their own funds to defray on-going legal expenses and have pledged to supply additional funds. We believe that no other party to this litigation has taken similar action.

9. Attached as Exhibit A is the affidavit of Leonard Garment which explains that the rates for each attorney and support personnel working on the case are based on Verner Liipfert's standard hourly billing charges and expenses. These rates were established by the firm's management committee as the customary and appropriate prevailing market rates taking into account experience, skill levels and educational background of those working in the Terra litigation. Once a sealing order is entered, Defendants will submit detailed billing statements evidencing the actual time expended by individuals working on the case each day, the identity of the individuals performing the work, the legal tasks performed, and the applicable hourly rate.

10. These billing records reflect the scope, intensity and depth of the legal work performed by Verner Liipfert. Since the firm's involvement in the case on behalf of Mrs. Judith Terra, Dr. Paul Tucker and Senator Alan Simpson, it has acted as coordinating counsel to Kellogg Huber, Cummins & Cronin, and to Bellows & Bellows, as well as advising its clients on a day-to-day basis concerning the strategic and legal issues at issue in the various matters pending before the Illinois courts. In so doing, the firm helped to develop, research and prepare emergency motions and supporting legal memoranda, and appeared and argued cases before this court and the Federal District Court for the Northern District of Illinois.

11. In addition to the services performed, the time expended, the attorney involved, and the hourly rate, the reasonableness of a petition for attorneys fees under Illinois law depends upon "the skill and standing of the attorney involved, the difficulty of the work, the novelty or

difficulty of the issues, the importance of the matter, the benefit obtained by the client, and the usual and customary charge for such services." *Cabrera v. First National Bank of Wheaton*, No. 2-00-0781, 2001 WL 845979 *12 (Ill. App. July 28, 2001). All of these factors further support the award of attorneys fees sought by this Motion.

12. With respect to the "skill and standing of the attorney[s] involved," each lawyer involved in this case is qualified with respect to a matter of this complexity. Mr. Garment brought over three decades of complex litigation experience to the case. He is supported by other lawyers with exceptional educational background and significant litigation and corporate experience. *See ¶ 3,4 and 5 supra.*

13. This heavily contested case continues to present major procedural and substantive challenges. Because of the rapid sequence of unfolding events, emergency petitions and temporary restraining orders had to be prepared under severe time pressures. Verner Liipfert did not become fully engaged in the matter until June 2001 when it was asked by its clients to commit fully its resources to the defense of the litigation, to design a comprehensive strategy to vindicate the rights of its three client Board members and to protect the long-term interests of the Terra Foundation in upholding Mr. Terra's intent and the Foundation's right of self-governance. Given these circumstances the firm was required, in the exercise of its professional responsibilities, to become familiar with the course of this complex litigation which began in late September 2000. During the initial period, the firm reviewed the extensive record of the case and its procedural and factual background. In addition, the firm was required to contend with two law firms on the other side of the case - - Sidley & Austin and Quinlan & Crisham - - as well as the Illinois Attorney General. Each of these firms and the Illinois Attorney General continued to file extensive pleadings which required timely and effective responses. As an example, Verner

Liipfert and Kellogg Huber were required to respond in less than 24 hours to three separate briefs totaling over 80 pages in opposition to the Defendants' objections to the proposed settlement.

14. Beyond the complex array of procedural issues, the case to date presents novel substantive legal issues. These include the scope of fiduciary duties of independent not-for-profit foundation directors including their duties of care, disinterestedness, loyalty and obedience, and the relationship of these duties to the intent of the founder of a not-for-profit foundation. At stake are complex issues relating to the legal significance of Foundation directors who "opted-out" of a mediation arrangement and their independent legal rights to assert counterclaims and appeals. The litigation also involves serious questions relating to constitutional rights of the firm's clients including the protection of art as speech under the 1st Amendment and the taking or diminution of property rights by state action without due process of law. Moreover, the case raises significant legal issues relating to the role of the Illinois State Attorney General in this litigation and its effect on not-for-profit Foundation governance. The novelty and uniqueness of the issues required in-depth research into the relevant case law on decisions which have a direct bearing on the case as well as those decisions which contain analogous factual patterns to assist the court's understanding of the unusual legal issues involved. For these reasons alone, the "difficulty of the work" and the "novelty [and] difficulty of the issues" favor awarding the attorney's fees sought by this motion.

15. Finally, this matter raises significant public interest issues bearing directly on the status, duties and obligations of directors of not-for-profit foundations in Illinois and elsewhere. It also undertakes to illuminate the role of State Attorneys General with regard to the scope of their authority over independent not-for-profit institutions. Not surprisingly, given the magnitude and importance of the litigation, the case has generated extensive commentary in the nation's

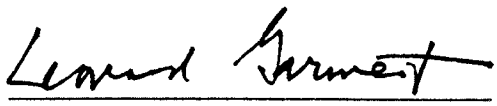
press further attesting to the public importance of the case[3] (see, for example, Wall Street Journal, July 26, 2001 @ p. B-5). It has also attracted the views of recognized experts on Foundation law and governance (see the declaration of Professor Evelyn Brody).

For all of the reasons set forth herein, as well as in the accompanying affidavit, Defendants respectfully request that the Court direct the Foundation to pay Verner Liipfert $178,793.49, which represents the reasonable value of the services rendered and costs disbursed by Verner Liipfert through August 2001 in its representation of the Defendants.

A proposed order is attached.

Respectfully submitted,

ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER



Leonard Garment, Esq.
Lawrence Levinson, Esq.
Verner, Liipfert, Bernhard, McPherson & Hand, Chartered
901 15th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 371-6000
Fax: (202) 371-6270

Attorneys for Defendants

September 14, 2001

[3] Neither "the benefit obtained by the client" nor "the usual and customary charge for such services" is applicable here. As to the former, fee petitions are often filed after a case is completed. Nevertheless, while defendants' efforts to date have not always resulted in favorable rulings, those adverse decisions are being appealed and new actions have been initiated. "[T]he benefit obtained by the client" will not be capable of final determination until those various issues are resolved. As to the latter, given the unique nature of the proceedings in this case and the time in which Verner Liipfert became involved, it is not possible to determine a "usual and customary charge." Nonetheless, Verner Liipfert charged its standard rates and handled the case as it would in any litigation matter of this pace and complexity. (*See generally* Affidavit of Leonard Garment (September 14, 2001).

16di-002537

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

ORDER GRANTING THE MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

The Court having considered the Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker, all papers and materials filed in opposition thereto, the arguments of counsel, the entire record herein, and being duly advised in the premises:

IT IS HEREBY ORDERED THAT Defendants' motion be, and hereby is, GRANTED.

IT IS FURTHER ORDERED THAT within ten days of entry of this order, the Foundation shall send to Verner, Liipfert, Bernhard, McPherson & Hand, a check in the amount

of $178,793.49, payable to "Verner, Liipfert, Bernhard, McPherson & Hand", for fees and expenses related to the representation of Alan K. Simpson, Judith Terra, and Paul Hayes Tucker.

_____

Dorothy Kirie Kinnaird
Circuit Court Judge

Dated: _____, 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

DECLARATION OF LEONARD GARMENT

I, Leonard Garment, declare as follows in support of the Motion for Attorneys' Fees and Costs of Defendant Verner, Liipfert, Bernhard, McPherson & Hand ("Verner Liipfert"):

1. I am a member of the firm Verner, Liipfert, Bernhard, McPherson & Hand, Chartered. I received my law degree from Brooklyn Law School, *summa cum laude*, and my bachelor's degree from Brooklyn College. I have held various positions in both the private and public

sectors. My work in the public sector include the following: Counsel and Assistant to President Richard Nixon (1969-1974), Assistant to President Gerald Ford (1974), Vice Chairman, Administrative Conference of the United States (1973-1974), U.S. Representative to the Commission on Human Rights of the United Nations Economic and Social Council, (1975-1977), Counselor to Ambassador Daniel P. Moynihan and William Scranton, and the U.S. Delegation to the United Nations (1975-1977), Chairman, Commission on the Federal Judiciary of the Senator Daniel P. Moynihan (1976-1988), Vice Chairman, Second Circuit Nominating Commission (1979-1980), and Member of the Committee on the Judiciary of the Judicial Conference of the United States. Prior to becoming Counsel to Verner Liipfert, I was a partner in the law firms of Mudge, Rose, Guthrie & Alexander (1955-1968; 1993-1996), Dickstein, Shapiro & Morin,(1980-1993); and Dechert, Price & Rhoads (1996-1998).

2. I have been lead or co-counsel in a wide range of matters in federal and state courts, including complex civil and criminal cases.

3. I am a member of the bars of the District of Columbia and the State of New York.

4. I am responsible for supervising the work performed by Verner Liipfert during its representation of Judith Terra, Alan Simpson, and Paul Hayes Tucker in this matter. The following attorneys at my firm, among others, also represented Ms. Terra, Senator Simpson, and Dr. Tucker in this matter: Lawrence Levinson, partner and Harry C. McPherson, partner.

5. The aforementioned Verner, Liipfert, Bernhard, McPherson & Hand attorneys, including myself, among other attorneys and legal assistants, spent a total of 514.9 hours representing Ms. Terra, Senator Simpson and Dr. Tucker in this matter.

6. My firm typically bills clients for time spent on their matters at hourly rates. Our hourly partner rates – during this engagement – ranged from $400 to $465; hourly legal assistant

16di-002541

rates ranged from $85 to $160. These rates are comparable to, if not significantly below, the rates charged by other firms in analogous cases, and were established by the firm's Management Committee as the market rates for individuals based upon their skills and education. Mr. Levinson's hourly rate is $465 as is Mr. McPherson's. My hourly rate is $400.

7. At the firm's standard rates, multiplied by the hours expended by each of the professionals who worked on the matter, plus expenses actually incurred and the total fee request for Verner, Liipfert, Bernhard, McPherson & Hand to date is $178,793.49. I regularly reviewed the time and expense records for this matter, which were provided to the client on a monthly basis, and attest that the hours of service provided were reasonable and necessary in support of the claims of Ms. Terra, Senator Simpson, and Dr. Tucker.

8. Once a sealing order is entered, Defendants will submit detailed statements of the services rendered and out-of-pocket expenses incurred by Verner, Liipfert, Bernhard, McPherson & Hand on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker since May 18, 2001.

9. The statements to be submitted once a sealing order is entered include the date of service rendered, the person rendering the service, a detailed statement of the service rendered, and the amount of time spent providing the service.

10. During this period, Mrs. Judith Terra and Naftali Michael (a non-director defendant and long-time friend of Mrs. Terra) advanced $105,000 from their own funds to defray on-going legal expenses and have pledged to supply additional funds. We believe that no other party to this litigation has taken similar action.

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11. I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: September 14, 2001

Leonard Garment

Leonard Garment

16di-002543

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	Hon. Dorothy Kirie Kinnaird
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker (collectively, "Defendants") respectfully move the Court for an order directing the Terra Foundation for the Arts ("Terra") to pay their attorneys' fees and costs pursuant to the Restated Bylaws of Terra Foundation for the Arts ("Bylaws") and this Court's order of August 29, 2001.[1] In support

[1]To be clear, Defendants again assert their substantive and procedural objections to the Consent Judgment and Order of July 26, 2001 ("Consent Judgment and Order"). During the August 29, 2001 hearing, however, the Court invited all parties to file petitions for attorneys fees if they are entitled to payment by virtue of either (1) "the filing of this lawsuit" or (2) "the consent decree." Aug. 29, 2001 Tr. at 26. Defendants petition the Court for their fees by virtue

hereof, Defendants submit the Declaration of K. Chris Todd. Defendants further incorporate by reference all pleadings, files, and records in this action; material that may be judicially noticed by this Court; the presentations and arguments of counsel, if any; and other such matters that the Court may properly consider, and in further support state as follows:[2]

1. Since June 22, 2001, Kellogg Huber, Hansen, Todd & Evans, P.L.L.C. ("Kellogg Huber"), has represented the Defendants — each of whom is a director of the Foundation — in the above-captioned matter.

2. Kellogg Huber is a law firm with extensive litigation and telecommunications practices. Eighteen of its attorneys are engaged in an active litigation practice in both state and federal trial and appellate courts across the country. This case was handled at Kellogg Huber primarily by Chris Todd, Neil Gorsuch, David Ross, and John Longwell.

3. Chris Todd has substantial public and private sector litigation experience. For over a decade he served as a federal prosecutor in the United States Attorney's Office for the Southern District of New York, and as an Associate Counsel to the Office of Independent Counsel for the Iran/Contra matter. For the last ten years, Mr. Todd's practice has concentrated

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of "the filing of this lawsuit," not pursuant to the Consent Judgment and Order. Moreover, the Foundation's Bylaws require the Foundation to indemnify directors for "expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they . . . are made parties . . . by reason of being" directors. Terra Bylaws Art. X § a. Defendants thus are submitting this petition on that basis, without prejudice to their objections regarding the substantive and procedural propriety of the Consent Judgment and Order.

[2]The fees sought in this Motion do not include fees and expenses for performed but as-yet unbilled work. It also does not include fees and expenses associated with future work on post-trial motions or any appeal. Accordingly, Defendants anticipate filing a supplemental motion for additional fees and costs at a later date.

on litigation matters in state and federal courts. Before joining Kellogg Huber, Mr. Todd was head of the litigation section of the Washington office of Johnson & Gibbs, which was a three-hundred person law firm. Neil Gorsuch, a Marshall Scholar and Truman Scholar, received his *juris doctor cum laude* from Harvard University Law School in 1991, and clerked for the Honorable David Sentelle (United States Court of Appeals for the District of Columbia Circuit) and for Justice Byron R. White (United States Supreme Court). David Ross graduated from the Columbia University School of Law in 1995. John Longwell graduated *magna cum laude* from the University of Georgia School of Law in 1999, where he was Order of the Coif and an editor of the University of Georgia Law Review. Before entering private practice, Mr. Longwell clerked for the Honorable Vaughn R. Walker (United States District Court for the Northern District of California).

4. The Bylaws provide that the Foundation "shall indemnify any and all of its directors . . . against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties . . . by reason of being or having been" a director, unless that person is found "liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicated on the existence of such liability." Bylaws Art. X § a. None of the Defendants was found liable for any misconduct in his or her service as a director, and the matter was not settled "by agreement predicated on the existence of such liability." Instead, plaintiffs voluntarily dismissed their claims against Defendants.

5. Attached hereto as Exhibit A is the Declaration of K. Chris Todd, which explains that the rates for each individual that worked on the case are Kellogg Huber's standard hourly

billing rates, which were established as the market rates for individuals based upon their skills and education. Concurrent herewith, Defendants have filed a Motion for Leave to Submit Fee Statements Under Seal for *In Camera* Review; once a sealing order is entered, Defendants will submit detailed billing statements evidencing the actual time expended by individuals working on the case each day, the identity of the individuals performing the work, the legal tasks performed, and the applicable hourly rate.

6. The detailed billing statements that will be submitted to the Court reflect that Kellogg Huber performed a large number of significant tasks since becoming involved in the case. In addition to several court appearances, Kellogg Huber has prepared numerous pleadings. Kellogg Huber also handled several related projects, including interviewing Assistant Attorney General Perkins, meeting with clients, interviewing potential witnesses, and learning the extensive file and background information regarding this case.

7. In addition to the services performed, the time expended, the attorneys involved, and the hourly rate, the reasonableness of a petition for attorneys fees depends upon "the skill and standing of the attorney involved, the difficulty of the work, the novelty or difficulty of the issues, the importance of the matter, the benefit obtained by the client, and the usual and customary charge for such services." *Cabrera v. First National Bank of Wheaton*, No. 2-00-0781, 2001 WL 845979 *12 (Ill. App. July 18, 2001) (affirming award of $70,000 for securing dismissal of complaint). These factors further support the award of attorneys fees sought by this Motion.

8. With respect to the "skill and standing of the attorney[s] involved," each lawyer involved in this case is highly qualified to have worked on a matter of this complexity. Mr. Todd

brought over two decades of complex litigation experience to this matter, and he was supported by lawyers with exceptional educations and significant litigation experience. *See* ¶ 3, *supra*.

9. This case also presented significant procedural and substantive difficulties. Most significantly from a procedural prospective, Kellogg Huber did not become involved in the case until June 22, 2001. This required Kellogg Huber to familiarize itself quickly with the history of the Foundation and the case. Moreover, Kellogg Huber was required to deal with three opposing counsel — Sidley Austin Brown & Wood, Quinlan & Crisham, and the Illinois Attorney General — each of whom generally prepared its own papers in response to filings by Kellogg Huber. For example, Kellogg Huber was required to respond in less than one day to three briefs totaling over 80 pages in opposition to the Defendants' objections to the proposed settlement.

10. Substantively, this case has presented complex novel legal issues, including the fiduciary duties of not-for-profit foundation directors, the proper role of Attorneys General in such cases, and the proper role for the courts in settlements of such cases. This required counsel to expend significant time and resources researching these areas of law, and searching decisions from across the country for analogous cases. For this reason alone, both the "the difficulty of the work" and the "novelty [and] difficulty of the issues" favor awarding the attorneys fees sought by this motion.

11. Finally, this matter is one of significant public interest. The Attorney General intervened in the case purportedly "to protect the interests of the People of Illinois." *See* Attorney General's Complaint for Declaratory Judgment, Injunction, Breach of Fiduciary Duty, Removal, Accounting, Receiver and Appointment of New Directors ¶ 1 (Sept. 25, 2000). And

the efforts of Kellogg Huber have generated significant public interest. See Exhibit B (collecting examples of such materials).[3]

For all of the reasons set forth herein, as well as in the accompanying declaration, Defendants respectfully request that the Court direct the Foundation to pay Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., $392,106.06, which represents the reasonable value of the services rendered and costs disbursed by Kellogg Huber to date in its representation of Defendants.

A proposed order is attached.

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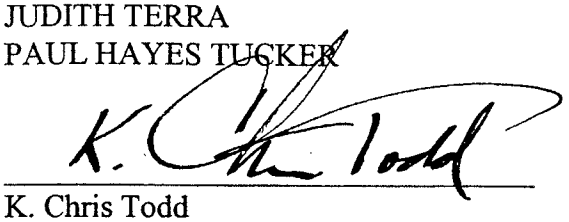
[3]Neither the "the benefit obtained by the client" nor "the usual and customary charge for such services" is applicable here. As to the former, fee petitions are often filed after a case is completed. Nevertheless, while Defendants' efforts to date have not always resulted in favorable rulings, those adverse decisions are being appealed; "[t]he benefit obtained by the client" will not be capable of complete determination until those appeals are resolved. As to the latter, given the unique nature of the proceedings in this case and the time at which Kellogg Huber became involved, it is not possible to determine a "usual and customary charge." Significantly, however, Kellogg Huber charged its standard rates and handled the case as it would any other dispute of this nature. *See generally* Declaration of K. Chris Todd (September 14, 2001).

Respectfully submitted,

ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER



K. Chris Todd
Neil M. Gorsuch
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Attorneys for Defendants

September 14, 2001

16di-002550

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

ORDER GRANTING THE MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

The Court having considered the Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker, all papers and materials filed in opposition thereto, the arguments of counsel, the entire record herein, and being duly advised in the premises:

IT IS HEREBY ORDERED THAT Defendants' motion be, and hereby is, GRANTED.

IT IS FURTHER ORDERED THAT within ten days of entry of this order, the Foundation shall send to Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., a check in the

amount of $392,106.06, payable to "Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.", for fees and expenses related to the representation of Alan K. Simpson, Judith Terra, and Paul Hayes Tucker.

_____

Dorothy Kirie Kinnaird
Circuit Court Judge

Dated: _____, 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

DECLARATION OF K. CHRIS TODD

I, K. Chris Todd, declare as follows in support of the Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker:

1. I am a member of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. I am also a member in good standing of the bars of New York, Texas, and the District of Columbia. I served as a law clerk for the Honorable William M. Taylor, Jr., United States District Court, Northern District of Texas (1972-73), as a trial attorney in the United States Department of Justice, Tax Division, Criminal Section (1975-78), and as an Assistant United States Attorney for

the Southern District of New York (1978-87). I also served as Associate Counsel in the Office of Independent Counsel for the Iran/Contra Matter, as head of the White House/National Security Council group (1987-89).

2. I have been lead or co-lead counsel in numerous matters in federal and state courts, including complex antitrust, commercial, RICO, securities, contract and tort cases. I served as head of the litigation section of the Washington office of Johnson & Gibbs, which was a three-hundred person law firm.

3. I am responsible for supervising the work performed by Kellogg, Huber, Hansen, Todd & Evans during its representation of Judith Terra, Alan K. Simpson, and Paul Hayes Tucker in this matter. The following attorneys at my firm, among others, also represented Ms. Terra, Senator Simpson, and Dr. Tucker in this matter: Neil M. Gorsuch, partner, David E. Ross, partner, and John H. Longwell, associate.

4. The aforementioned Kellogg, Huber, Hansen, Todd & Evans attorneys, among other attorneys and legal assistants, spent a total of 1,241.5 hours representing Ms. Terra, Senator Simpson and Dr. Tucker in this matter.

5. My firm typically bills clients for time spent on their matters at hourly rates. Our partner rates — during this engagement — ranged from $325 to $450; associate rates ranged from $235 to $285; and legal assistant rates ranged from $75 to $145. These rates are comparable to, if not significantly below, the rates charged by other firms in analogous cases, and were established as the market rates for individuals based upon their skills and education.

6. At the firm's standard rates, multiplied by the hours expended by each of the professionals who worked on the matter, the total fee request for the services provided by

Kellogg, Huber, Hansen, Todd & Evans to date is $355,282.50. I regularly reviewed the time records for this matter, which were provided to the client on a monthly basis, and attest that the hours of service provided were reasonable and necessary in support of the work on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker.

7. In addition, Kellogg, Huber, Hansen, Todd & Evans incurred expenses in the amount of $36,823.56. I reviewed these expenses and attest that the expenses incurred were reasonable and necessary in support of the work on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker.

8. The total request for fees and related expenses for Kellogg, Huber, Hansen, Todd & Evans on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker in this matter is $392,106.06.

9. Once Defendants' Motion for Leave to Submit Fee Statements Under Seal for *In Camera* Review is entered, Defendants will submit detailed billing statements of the services rendered and out-of-pocket expenses incurred by Kellogg, Huber, Hansen, Todd & Evans on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker since June 22, 2001.

10. The statements to be submitted once a sealing order is entered include the date of service rendered, the person rendering the service, a detailed statement of the service rendered, and the amount of time spent providing the service.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Date: September 14, 2001

K. Chris Todd

16di-002556

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

PETITION FOR ATTORNEYS FEES AND COSTS PURSUANT TO CONSENT JUDGMENT AND ORDER ENTERED JULY 26, 2001

Plaintiffs, Dean L. Buntrock and Ronald Gidwitz, by and through their attorneys, Quinlan & Carroll, Ltd., respectfully petition this Court for an award of attorneys fees and costs pursuant to the terms of the July 26, 2001 Consent Judgment and Order submitted by the parties and entered by this Court. In support of their petition, Plaintiffs state as follows:

1. In September 2000, the plaintiffs Dean L. Buntrock and Ronald Gidwitz filed the original complaint in this matter in the Circuit Court of Cook County, Chancery Division. The Attorney General of the State of Illinois intervened immediately as a party plaintiff to protect the interests of the people of the State of Illinois as the beneficiaries of the charitable trust established

by Daniel J. Terra in 1978.

2. Throughout the pendency of this case, from September 2000 to almost August 2001, an extraordinary number of substantive motions were filed, responded to and decided in this matter. This Court heard no less than 30 motions, including 10 motions for injunctive relief.

3. The volatility of this case and complexity of the issues motivated the parties to agree to participate in what was a lengthy and difficult, yet successful mediation process.

4. On June 29, 2001, the Terra Foundation for the Arts ("Foundation"), by resolution (the "Resolution"), voted to approve and adopt a Consent Judgment and Order ("Consent Order") settling this matter. A copy of the June 29, 2001 Resolution is attached hereto as Exhibit A.

5. Pursuant to the terms of the Resolution, the Consent Order was submitted to the Court and, on July 26, 2001, this Court approved and entered that Consent Order. A copy of the July 26, 2001 Order is attached hereto as Exhibit B.

6. One of the terms of the Consent Order, as agreed to by the parties, provides: "[R]easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." Ex. B., ¶12. The determination of what are reasonable attorneys fees is, of course, within the sound discretion of the trial court. *Anderson v. Anchor Organization for Health Maintenance*, 274 Ill. App. 3d 1001, 1007-08, 654 N.E.2d 675, 681-82 (1st Dist. 1995). The factors, however, to be considered by the court in mkaing it's determination are:

> the services performed, the time expended thereon, the attorney's hourly rate, the skill and standing of the attorney, the nature of the case, the difficulty of the issues involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, and the benefit resulting to the client.

Anderson, 274 Ill. App. 3d at 1007, 654 N.E.2d at 682.

7. On August 29, 2001, this Court ordered that all petitions for attorneys fees and costs sought pursuant to the Consent Order were to be submitted to the Court by September 11, 2001. A copy of the August 29, 2001 Order is attached hereto as Exhibit C. The court later entered an agreed order providing additional time for submission of petitions. *See* Order of September 7, 2001, attached as Exhibit D.

8. Pursuant to the July 26, 2001 Consent Order and pursuant to this Court's orders of August 29, 2001, and September 7, 2001, the Plaintiffs hereby petition this Court for approval of attorneys fees and costs incurred in connection with this matter as reasonable.

9. The total amount of attorneys fees and costs incurred by Plaintiffs is $ 1,852,400.18. In further support of their petition, Plaintiffs submit the affidavit of William R. Quinlan, attached as Exhibit E.

10. The attorneys fees and costs are fair and reasonable considering the number of hours worked, the hourly rates charged by the attorneys, and particularly in light of the complexity of the issues presented and the benefit received by the clients.

11. The Plaintiffs also contemporaneously seek a protective order from this Court. Upon entry of that protective order, copies of redacted invoices will be submitted to the parties. The invoice entries include narrative descriptions of the services performed by each attorney. These narrative descriptions will be redacted in order to protect the attorney-client and work product privilege. To the extent that this Court would seek additional narrative explanation for any entry, those descriptions would be presented *in camera* to the Court.

WHERFORE, Plaintiffs ask that this Court order the Terra Foundation for the Arts to

reimburse Plaintiffs for attorneys fees in the amount of $ 1,852,400.18 and grant any further relief this Court deems fair and just.

DATED: September 14, 2001

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Jasmine de la Torre
QUINLAN & CARROLL, LTD.
30 North LaSalle Street–Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm I.D.: 33745

16di-002563

Exhibit A

[Resolutions Relating to Special Meeting of Board of Directors
of the Terra Foundation of the Arts to be Held on June 29, 2001]

WHEREAS, the Foundation is a defendant in litigation (the "Litigation") entitled Dean L. Buntrock, a Director of the Terra Foundation for the Arts, and Ronald Gidwitz, a Director of the Terra Foundation for the Arts vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts, Naftali Michaeli and the Terra Foundation for the Arts and the People of the State of Illinois *ex rel.* James E. Ryan, Attorney General of Illinois vs. Judith Terra, a Director of the Terra Foundation for the Arts, Paul Hayes Tucker, a Director of the Terra Foundation for the Arts, Alan K. Simpson, a Director of the Terra Foundation for the Arts and the Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation in the Circuit Court of Cook County, Illinois, County Department, Chancery Division (No. 00 CH 18359); and

WHEREAS, there has been presented a proposed settlement to the Litigation and this Board of Directors believes that it is in the best interests of the Foundation to accept the proposed settlement and take certain other action related thereto;

NOW, THEREFORE, BE IT RESOLVED THAT the form of Consent Judgment and Order (the "Consent Judgment") presented to this meeting hereby (a copy of which shall be attached to the minutes of this meeting as Exhibit A) is approved, ratified and confirmed and that the officers of the Foundation are, and each of them hereby is, authorized to execute and deliver, in the name and on behalf of the Foundation, the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois) substantially in the form presented to this meeting but with such changes therein as the officer executing the same shall approve (such approval to be conclusively evidenced by his or her execution thereof); and

FURTHER RESOLVED, that Sidley Austin Brown & Wood, the attorneys for the Foundation, are authorized in the name and on behalf of the Foundation, to file with the Circuit Court of Cook County the Consent Judgment (if and when it has been executed by or on behalf of Messrs. Buntrock and Gidwitz and the Attorney General of the State of Illinois); and

FURTHER RESOLVED, that Section 2 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the date the Consent Judgment shall be entered by the Circuit Court of Cook County, Illinois (the "Effective Date"), to read as follows:

Section 2. Number, Tenure, and Qualifications.

(a) Number. The number of directors elected by the Board of Directors shall

be sixteen until the 2002 Annual Meeting of the Board of Directors (the "2002 Annual Meeting") and initially be fifteen thereafter

(b) Board Classification. The Board of Directors shall be divided into two classes until the 2002 Annual Meeting, consisting of (I) eleven Class I Directors, who shall be elected for a term to expire at the 2002 Annual Meeting and (II) five Class II Directors who shall initially be elected for a term to expire at the 2005 Annual Meeting of Directors. At the 2002 Annual Meeting the Board of Directors shall be divided into four classes, consisting of (i) three Class I Directors, who shall initially be elected for a term to expire at the 2003 Annual Meeting of Directors, (ii) five Class II Directors (i.e., the Class II Directors elected as contemplated in clause (II) of the preceding sentence) whose term shall expire at the 2005 Annual Meeting of Directors, (iii) three Class III Directors, who shall initially be elected for a term to expire at the 2004 Annual Meeting of Directors, and (iv) four Class IV Directors, who shall initially be elected for a term to expire at the 2006 Annual Meeting of Directors. Thereafter each class of directors shall be elected for four-year terms.

(c) Tenure. No person shall serve as a member of the Board of Directors for a total of more than eight years following the date in June or July 2001 on which this Section 2(c) shall have first become effective (the "Effective Date"), and none of the persons elected as Class I Directors prior to the 2002 Annual Meeting as contemplated by clause (b)(I) of this Section 2 shall serve past the 2002 Annual Meeting or be eligible to stand for election to the Board of Directors at any time thereafter. Each elected director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.

(d) Residency. Prior to the 2002 Annual Meeting at least one-half of the elected directors shall be residents of the State of Illinois. Thereafter until at least 25 years after the Effective Date have elapsed, at least a majority of the elected directors shall be residents of the State of Illinois.

FURTHER RESOLVED, that Section 8 of Article III of the Bylaws of the Foundation shall be amended and restated in its entirety, effective as of the Effective Date, to read as follows:

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of such director's predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors at which the class of directors to which such new director has been designated pursuant to Section 2 of this Article III shall be standing for election.

FURTHER RESOLVED, that effective as of the Effective Date, the following persons shall be elected as the respective class of director indicated below to serve until their respective successors are elected and qualified or until their earlier resignation or removal.

Class I Directors (Term to Expire at 2002 Annual Meeting)	Class II Directors (Term to Expire at 2005 Annual Meeting)
Helene Ahrweiler	James R. Donnelley
Jacques Andréani	Marshall Field V
Dean L. Buntrock	Dr. Kathleen A. Foster
Margaret Daley	Prof. Robert S. Hamada
Ronald Gidwitz	Frederick A. Krehbiel
Arthur Hartman	
Stephanie Marshall	
Alan Simpson	
Theodore Stebbins, Jr.	
Judith Terra	
Paul Tucker	

FURTHER RESOLVED, that not later than August 1, 2001, this Board of Directors shall meet to (i) elect a new Chairman (who shall be chosen from among the Class II Directors elected pursuant to the preceding resolution), (ii) elect new officers and committee heads, (iii) elect a new Executive Committee composed of the newly elected officers that also are directors, and (iv) elect a new Strategic Planning Committee whose members shall include Mr. Ronald Gidwitz, Dr. Theodore Stebbins, Jr. and one or more Class II Directors; and

FURTHER RESOLVED, that the new Strategic Planning Committee, once elected, shall be authorized and directed to seek to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago, it being understood that the terms of any such partnership shall be subject to the approval of the Board of Directors; and

FURTHER RESOLVED, that the officers of the Corporation are authorized, in the name and on behalf of the Foundation, to execute such additional agreements, certificates or other documents, and to take such further actions (including, without limitation, the payment of expenses or other expenditures of money) as may be necessary or advisable to carry out the preceding resolutions.

16di-002567

Exhibit B

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3 For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kinie Kinnaird 9:35 A.M.

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date:_____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By:_____

Its_____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd D. Perkins
Assistant Attorney General
State of Illinois (Title)

Print Name: Floyd Perkins

Date: 7/6/01

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-002576

Exhibit C

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

BUN TROY et al
Plaintiffs

v.

TERRA FOUNDATION
DEFENDANTS

NO. 00CH 13859

R 192

ORDER

THIS CAUSE COMING ON TO BE HEARD ON AN MOTION OF SHERSKI/EMELICH FOR ENTRY OF AN ORDER SETTING A DATE FOR SUBMISSIONS AND RULING ON FEE PETITIONS

~~ALL~~ PARTIES HAVING BEEN REPRESENTED BY COUNSEL. THE COURT HAVING HEARD ARGUMENT OF COUNSEL AND BEING FULLY ADVISED IN THE PREMISES;

IT IS ORDERED

Atty No.
Name
Attorney for
Address
City / Zip
Telephone

_____, _____

ENTER:

_____
Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1 of 2

CCG-N002-150M-11/30/00(13480655)

16di-002577

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Bunt Rock et al
Plaintiffs

v.

TERRA FOUNDATION
ET AL
DEFENDANTS

NO. 00 CH 13859
P 2 of 2

ORDER CONTINUED

ANY AND ALL PETITIONS FOR ATTORNEYS FEES AND COSTS THAT REQUIRE A COURT ORDER FOR PAYMENT SHALL BE FILED ON OR BEFORE SEPTEMBER 11, 2001.
A STATUS HEARING FOR SETTING A DATE FOR HEARING ON SAID FEE PETITIONS IS SET FOR SEPTEMBER 14, 2001 AT 1 PM
This ORDER is ENTERED over the objection of TUCKER, TERRA & SIMPSON as EXPRESSED by their COUNSEL in open Court.

Atty No. 29143
Name BRIAN. J. CROWE
Attorney for SHEFSKY & FROELICH
Address 444 N MICHIGAN AVE
City / Zip CHICAGO, IL 60611
Telephone (312) 527-4000

ENTER: ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
AUG 29 2001
JUDGE DOROTHY KINNAIRD - 2176
DEPUTY CLERK

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

2 of 2

CCG-N002-150M-11/30/00(13480655)

16di-002578

16di-002579

Exhibit D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

AGREED ORDER

THIS CAUSE coming on to be heard by agreement of the parties and the Court being advised in the premises, the parties being in agreement as to the content of this Order, it is hereby ORDERED THAT:

1. The Plaintiffs Buntrock and Gidwitz are hereby granted through and including September 14, 2001 by which to file a petition for award of attorneys fees and costs in this matter;

2. This cause is set for further status on SEPTEMBER 20, 2001 at 11:00 AM; and

3. The September 14, 2001 status hearing set by order of this Court dated August 29,

16di-002580

2001, is hereby stricken.

Dated: September 7, 2001

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
SEP 07 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Judge

Prepared by:
James R. Carroll
Quinlan & Carroll, Ltd.
30 North LaSalle, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm # 33745

16di-002582

Exhibit E

AFFIDAVIT OF WILLIAM R. QUINLAN

I, William R. Quinlan, on oath, depose and state as follows:

1. I am an attorney at law and a partner of the law firm of Quinlan & Carroll, Ltd. (formerly Quinlan & Crisham, Ltd.), 30 North LaSalle Street, Suite 2900, Chicago, Illinois 60602. I attest that this affidavit is submitted in connection with the petition for attorneys fees pursuant to the Consent Judgment and Order entered July 26, 2001 in the case captioned *Dean L. Buntrock et al. v. Judith Terra et al.*, No. 00 CH 13859 (Circuit Court of Cook County). I am the attorney responsible for supervising the legal work performed by this firm on behalf of the plaintiffs Dean L. Buntrock and Ronald Gidwitz, directors of the Terra Foundation for the Arts. I make this affidavit on personal knowledge and if called as a witness I could competently testify to the following matters.

2. I have been licensed to practice law in the State of Illinois since 1964 after graduation from the Loyola School of Law. I received a Master of Laws degree from the University of Virginia School of Law in May 1988.

3. I have also been admitted as a member of the bar of the United States Supreme Court, the United States Court of Military Appeals, the United States Court of Claims, the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois.

4. From 1985 to 1989, I served as a Justice of the Illinois Appellate Court, First District. From 1980 to 1985, I served as a Judge of the Circuit Court of Cook County, Illinois. My legal experience includes serving as General Counsel, Chicago Urban Transportation District and General Counsel for the Chicago Building Commission. From 1975 to 1980, I also served as Corporation

Counsel for the City of Chicago.

5. During my service as a Circuit Court Judge, I presided over numerous jury trials and matters in complex commercial and class-action lawsuits, including the asbestos litigation in Cook County, the Jewel salmonella litigation, and the Union Oil explosion. I have drafted rules on behalf of the Illinois Supreme Court Rules Committee, many regarding complex commercial litigation. I have taught complex litigation at the National Judicial College and DePaul Law School. In addition, I am an Adviser to the Illinois Supreme Court's Study on Complex Litigation after having served previously on this committee for numerous years, including a period as vice-chair of the Committee.

6. I have been in private practice since 1989, when I retired as a Justice of the Illinois Appellate Court. I then became a member of the Chicago law firm Phelan, Pope & John, Ltd., later Phelan, Cahill & Quinlan, Ltd. In February 1996, I started my own firm, which is currently named Quinlan & Carroll, Ltd. Since entering private practice in 1989, I have represented many clients in complex contractual, commercial, and corporate disputes in the trial-level and appellate-level courts of the State of Illinois, and the United States federal courts.

7. From time to time, I have also served as an expert witness for other counsel regarding the reasonableness of attorneys fees and costs.

8. In September 2000, we were retained by Dean L. Buntrock and Ronald Gidwitz to represent them as members of the Board of Directors of the Terra Foundation with regard to the litigation matters before this Court. The highly contested nature of the litigation resulted in extensive and complicated negotiations as part of a mediated settlement, which was approved by this Court in the Consent Judgment and Order of July 26, 2001.

9. I attest that as of July 31, 2001, the plaintiffs have incurred attorneys fees and costs in the total amount of $1,852,400.18, including $1,596,789.50 in fees and $255,610.68 in costs. I further attest that this amount accurately represents the fees and costs incurred by Dean L. Buntrock and Ronald Gidwitz.

10. In determining whether the attorneys fees are reasonable in this matter, I considered a number of factors, including the services performed, time expended, the hourly rate, skill and standing of the attorney, the nature of the case, the difficulty of the issues, the usual and customary charges for comparable services and the benefit to the client. *See Anderson v. Anchor Org. for Health Maintenance*, 274 Ill.App.3d 1001, 1007 , 654 N.E.2d 675, 681 (1st Dist. 1995).

11. I have reviewed all invoices and in light of my experience considered all the relevant factors involved in this litigation. Under the circumstances of this case, considering the experience and standing of the attorneys involved, the complexity of the issues and the benefit achieved for the clients, I believe that the number of hours worked and the hourly rates ranging from $100.00 to $495.00 per hour are fair and reasonable. These charges are also consistent with the usual and customary rates charged by this firm to its clients for similar representation. Further, the attorneys fees and costs are commensurate with and comparable to charges by other law firms with similar experience and background in this kind of matter.

FURTHER, affiant sayeth not.

Dated: September 14, 2001

William R. Quinlan

SUBSCRIBED AND SWORN to before me this 14th day of September, 2001.

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Mary Butler
Notary Public

Doc:182658

16di-002586

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs,	)	
vs.	)	No. 00 CH 13859
TERRA, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor,	)	
vs.	)	
TERRA, et al. Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on September 14, 2001, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **Petition For Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001**, a copy of which is attached and hereby served upon you.

Respectfully submitted,

DEAN BUNTROCK and
RONALD GIDWITZ

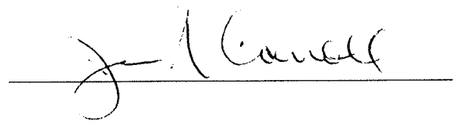
By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 33745

CERTIFICATE OF SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that true and correct copies of the **Notice of Filing** and **Petition For Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001**, were served upon all parties on September 14, 2001 as indicated on the attached Service List.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

SERVICE LIST

Floyd D. Perkins
Therese Harris
Barry Goldberg
Assistant Attorney General & Bureau Chief
of Charitable Trusts
100 W. Randolph Street
3rd Floor
Chicago, Illinois 60601
(Via Messenger Delivery)

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Sidley & Austin
Ten South Dearborn
Chicago, Illinois 60603
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Donald G. Mulack
McBride Baker & Coles
500 W. Madison Street
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K. Chris Todd
Neil M. Gorsuch
John H. Longwell
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W. Suite 400
Washington, D.C. 20036
(Via U.S. Mail)

Leonard Garment
Lawrence Levinson
Verner, Liipfert, Bernhard, McPherson & Hand
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William Schuman
Debra Tucker
McDermott Will & Emery
227 W. Monroe Street, 55th Floor
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David A. Novoselsky
Novoselsky Law Offices
120 North LaSalle
Suite 1400
Chicago, Illinois 60602
(Via Messenger Delivery)

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007
(Via U.S. Mail)

Doc:182686

QUINLAN & CARROLL, LTD.
ATTORNEYS AT LAW

30 NORTH LASALLE STREET • SUITE 2900
CHICAGO, ILLINOIS 60602
TELEPHONE 312.263.0900
FACSIMILE 312.263.5013

WRITER'S DIRECT DIAL NO.

312/917-8450

AFFILIATES:
EDWARD D. HEFFERNAN
WASHINGTON, D.C.

HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

September 14, 2001

VIA MESSENGER
The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Buntrock and Gidwitz v. Terra, Tucker, Simpson, Michaeli, and the Terra Foundation for the Arts*, No. 00 CH 13859**

Dear Judge Kinnaird:

Enclosed please find courtesy copies of Plaintiffs' Petition for Attorneys Fees and Costs Pursuant to Consent Judgment and Order entered July 26, 2001 and Motion for Entry of Protective Order filed with the court today. We will present the Motion for Entry of Protective Order at the hearing scheduled before you on September 20, 2001 at 11:00a.m.

Very truly yours,

William R. Quinlan

cc: Service List Attached

Doc:182807

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

SERVICE LIST

Floyd D. Perkins
Therese Harris
Barry Goldberg
Assistant Attorney General & Bureau Chief
of Charitable Trusts
100 W. Randolph Street
3rd Floor
Chicago, Illinois 60601
(Via Messenger Delivery)

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Stephen C. Carlson
Susan A. Stone
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Neil M. Gorsuch
John H. Longwell
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W. Suite 400
Washington, D.C. 20036
(Via U.S. Mail)

Leonard Garment
Lawrence Levinson
Verner, Liipfert, Bernhard, McPherson & Hand
901 15th Street, N.W. Suite 700
Washington, D.C. 20005
(Via U.S. Mail)

Robert P. Cummins
Cummins & Cronin LLC
77 W. Wacker Drive
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(Via Messenger Delivery)

William Schuman
Debra Tucker
McDermott Will & Emery
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Novoselsky Law Offices
120 North LaSalle
Suite 1400
Chicago, Illinois 60602
(Via Messenger Delivery)

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007
(Via U.S. Mail)

SEP 2 1 2001

No. 1-01-3152

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BUNTROCK and GIDWITZ, Plaintiffs, v. TERRA, et al., Defendants.	)	Appeal from the Circuit Court of Cook County Chancery Division No. 00 CH 13859 The Honorable Dorothy Kinnaird Judge Presiding
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on September 18, 2001, we filed with the Clerk of the Appellate Court of Illinois, First Judicial District, the attached **Appearance**, a copy of which is hereby served upon you.

DEAN BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Quinlan & Carroll, Ltd.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm I.D. No. 38600

Doc:182911

16di-002592

PROOF OF SERVICE

The undersigned, a non-attorney, deposes and states that she served a true and correct copy of the foregoing **Notice of Filing** and **Appearance** to the attorneys on the attached service list via U.S. Mail before the hour of 5:00 p.m. on the 18th day of September, 2001 with proper first class postage affixed thereon.

[X] Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth herein are true and correct.

Doc:182911

16di-002593

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
Appellate Court No.: 1-01-3152

SERVICE LIST

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Therese Harris
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Assistant Attorney General & Bureau Chief
of Charitable Trusts
100 W. Randolph Street
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Chicago, Illinois 60601

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Stephen C. Carlson
Susan A. Stone
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Ten South Dearborn
Chicago, Illinois 60603

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500 W. Madison Street
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Kellogg, Huber, Hansen, Todd & Evans,
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Debra Tucker
McDermott Will & Emery
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Chicago, IL 60606

David A. Novoselsky
Novoselsky Law Offices
120 North LaSalle
Suite 1400
Chicago, Illinois 60602

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007

16di-002594

No. 1-01-3152

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BUNTROCK and GIDWITZ,	)	Appeal from the
	)	Circuit Court of Cook County
Plaintiffs,	)	Chancery Division
v.	)	
	)	
TERRA, et al.,	)	No. 00 CH 13859
Defendants.	)	The Honorable Dorothy Kinnaird
	)	Judge Presiding
	)	
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Intervenor,	)	
vs.	)	
	)	
TERRA, et al.	)	
Defendants.	)	

APPEARANCE

Plaintiffs-Appellees, Dean L. Buntrock and Ronald Gidwitz, by and through their attorneys, QUINLAN & CARROLL, LTD., William R. Quinlan, and James R. Carroll hereby enter their Appearance before this Court.

Respectfully submitted,

DEAN BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

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Doc:182913

16di-002595

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Case No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

TERRA FOUNDATION FOR THE ARTS' OPPOSITION TO VARIOUS PARTIES' MOTIONS AND ATTEMPTS TO FILE DOCUMENTATION SUPPORTING THEIR ATTORNEYS' FEE PETITIONS *IN CAMERA*

Defendant the Terra Foundation for the Arts (the "Foundation"), an Illinois not for-profit corporation, by its attorneys, Sidley Austin Brown & Wood, hereby presents its Opposition to Various Parties' Motions and Attempts to File Documentation Supporting Their Fee Petitions *In Camera*.

1. On September 22, 2000, plaintiffs Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), two members of the Foundation's Board of Directors, filed a lawsuit against the Foundation and three other members of the Board, Judith Terra, Dr. Paul Hayes Tucker and Senator Alan K. Simpson (collectively the "individual defendants") and another unrelated third party, Naftali Michaeli. After over four months of contentious motion

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practice, on February 5, 2001, the Court ordered the parties to submit to mediation and stayed all further proceedings. (See 2/5/01 Order).

2. Over almost a five month period, the parties engaged in mediation sessions in order to attempt to reach an agreement which would result in the dismissal of this lawsuit. On June 29, 2001, the Foundation's Board of Directors passed certain Resolutions authorizing the Foundation to enter into a Consent Judgment and Order which would settle this litigation. On July 26, 2001, the Court entered the Consent Judgement and Order.

3. As one of the conditions of the Consent Judgment, the Foundation agreed that "Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." (See 7/26/01 Consent Judgment and Order, ¶ 12).

4. On August 29, 2001, the Court ordered that "any and all petitions for attorneys' fees and costs that require a court order for payment shall be filed on or before September 11, 2001." (See 8/29/01 Order). That deadline was later extended to September 14, 2001 for plaintiffs Buntrock and Gidwitz and September 17, 2001 for the individual defendants. (See 9/7/01 Order).

5. Since that time, various attorneys representing individual Directors have filed a variety of motions, on behalf of their clients, all of which in essence would prohibit the Foundation from reviewing the actual fee statements which are sought to be paid by the Foundation. Specifically, plaintiffs Buntrock and Gidwitz, filed their Petition for Attorneys Fees and Costs along with a Motion for Entry of a Protective Order in which they agree only to provide the Foundation with "redacted" descriptions of their attorneys' time spent supposedly incurring $1,852,400.18 in legal fees and expenses. Similarly, Bellows & Bellows, who

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represented the individual defendant Directors for only approximately one month are seeking $70,321.74 in attorneys fees and costs. Yet, they too apparently refuse to allow the Foundation to review their bills, and without first seeking leave of Court, Bellows & Bellows filed their Petition for Fees and Costs under seal and the "detail supporting that Petition" *in camera*. Additionally, three other law firms[1] on behalf of the individual defendant Directors have filed fee petitions. These filings are highly ironic given these very lawyers have consistently and emphatically argued that the individual defendant Directors are not bound by the Consent Judgment, yet they are apparently more than willing to accept payment pursuant to the terms of that Consent Judgment. The individual defendant Directors too have requested that the Court permit them to file their fee statements (totaling $679,664.70) under seal for *in camera* review. Although strangely, contrary to their own motion, the Cummins & Cronin law firm did, in fact, attach its bills to its fee petition, the individual defendant Directors' two other law firms refused to do so. (McDermott, Will & Emery, attorneys for Directors Marshall and Stebbins, and Shefsky & Froelich, Ltd., the individual defendant Directors' former attorneys, also filed their fee petitions attaching detailed descriptions of their fees and costs incurred for review by the Court as well as the Foundation. Presumably, these two well respected law firms did not find there to be any breach of client confidences by doing so.)

6. As this Court stated in response to the Foundation's insistence that it be given an opportunity to respond to the fee petitions presented by the various counsel, "Of course, everybody's going to have a chance to do that." (8/29/01 Transcript of Proceedings, p. 24, attached hereto as Exhibit A). The Court further recognized the need for the Foundation to have

[1] The following law firms currently represent the individual defendant Directions: Cummins & Cronin, LLC; Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.; and Verner, Liipfert, Bernhard, McPherson & Hand.

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adequate information upon which to assess and determine whether it believes the fees are reasonable, "Miss Stone is not going to be able to say right now what the [Foundation's] position is until she has the fee petitions. Let's [let] her get the fee petitions." (Id. at p. 31).

7. The Foundation is a not-for-profit corporation whose funds are to be used to support its purpose of promulgating American art and "expand[ing] the artistic horizons of a growing art public." The only thing the Foundation agreed to pay under the Consent Judgment was "reasonable attorneys' fees" – not all attorneys' fees. Directors who seek to use the assets of the Foundation to cover some or all of the attorneys' fees they have incurred bear the burden of proving that their fee requests are reasonable. The Foundation, whose resources are being sought to cover these attorneys' fees, which already amount to over $2 million, certainly has the right to review the fee requests and provide the Court with its comments.

8. Nowhere in the Consent Judgment did the Foundation give up its right to review any fee claims presented by individual directors and to address the reasonableness of the requests. While both the plaintiffs and the individual defendant Directors would rather that this Court review the fee petitions without giving the Foundation any real opportunity to provide any substantive or meaningful response, this is clearly inappropriate. None of the fee-seeking Directors can direct the Court to any authority for denying the Foundation the right to review and comment meaningfully on these proposed expenditures of its funds.

9. No vendor who seeks to have the Foundation pay for his services has any right to simply submit blanket claims not subject to the Foundation's detailed review. If plaintiffs and the individual defendant Directors seek to have their counsel paid by the Foundation, they too should be required to make such a submission to the corporation that will ultimately be paying their bills. To force a not-for-profit corporation to pay these attorneys' fee

16di-002600

claims without even being given the opportunity to review the bills is not only unheard of, but simply unjust.

Respectfully submitted,

TERRA FOUNDATION FOR THE ARTS

By: Lori L. Roeser
One of its Attorneys

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16di-002601

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

BUNTROCK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 00 CH 13859
	)	
TERRA,	)	
	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had in the above-entitled cause, before the Honorable DOROTHY K. KINNAIRD, one of the Judges of said Division, had on the 29th day of August, 2001.

PRESENT:

MR. ROBERT CUMMINS
MR. DAVID NOVOSELSKY
MS. SUSAN STONE
MR. WILLIAM R. QUINLAN
MR. BRIAN CROWE
MR. JAMES WILSON
MR. WILLIAM SCHUMAN
MR. FLOYD PERKINS
MR. JAMES CARROLL

Ruby L. Prince
Official Court Reporter
69 W. Washington St., Rm 900
Chicago, Illinois 60602

16di-002602

you want it done by tomorrow, the 31st, Friday.

MR. CROWE: I hope you prioritize ours, Judge, because our petition has been before you for a long, long time.

THE COURT: Let me ask everybody else, when's the Foundation ready to get its on file?

MS. STONE: First of all, the foundation wants the right to respond to the fee petitions presented by the other counsels.

THE COURT: Of course, everybody's going to have a chance to do that.

MS. STONE: Because it is the Foundation ultimately which is responsible for this, and it is the foundation which has agreed to pay reasonable fees and only reasonable fees of the directors who are involved in this lawsuit.

If you read the language carefully, the Foundation did not obligate Sidley & Austin to present its fees, your Honor, for review.

Sidley & Austin has been presenting its fees to the Foundation. Those have been reviewed by the ILC throughout the pendency of this litigation. Those fees have been discussed and resolved. So, we are not coming to you with a fee petition.

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wrong?

MR. QUINLAN: That is not correct. May I speak? Your Honor, it provides in Paragraph 12, reasonable attorney fees incurred by the Foundation's directors in connection with this lawsuit as determined by the Court shall be paid by the Foundation.

The very reason it was not to go to the Foundation is that they were part of the litigation, and there was an adversarial position by everybody.

THE COURT: Well, the Foundation does know -- the Foundation right now doesn't know what it's position is, okay?

Miss Stone is not going to be able say right now what the position is until she has the fee petitions. Let's her get the fees petitions --

MR. QUINLAN: That may all be true, your Honor, but the Court's order specifically so provides. There's another issue about protocol and the filing of any documents relating -- of the fee.

This is an ongoing case, as your Honor obviously can see here. There is a very great concerned about revealing documents and information that involve attorney/client privilege, work product, strategies and that kind of thing.

16di-002604

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on September 20, 2001 by hand delivery upon the following Chicago counsel and by United States mail upon the following out of state counsel:

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16di-002605

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September 20, 2001

By Hand

SEP 24 2001

The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: Buntrock et al. v. Terra et al., No. 00 CH 13859; Tucker et al. v. Buntrock et al., No. 01 L 009112

Dear Judge Kinnaird:

Please find enclosed courtesy copies of the *Terra Foundation for the Arts' Opposition to Various Parties Motions and Attempts to File Documentation Supporting their Attorneys' Fee Petitions In Camera* and *Terra Foundation for the Arts' Opposition to Mrs. Terra's Motion for Substitution of Judge*.

Sincerely,

Lori L. Roeser

Lori L. Roeser

cc: Counsel of Record

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,
Plaintiffs,

-vs-

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,

-vs-

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

Record of proceedings before the Honorable DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County, Illinois, commencing at 11:40 o'clock a.m. on the 20th day of September, A.D. 2001.

16di-002608

A P P E A R A N C E S :

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16di-002609

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BELLOWS AND BELLOWS by
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on behalf of the Petitioner Bellows and Bellows;

16di-002610

SHEFSKY & FROELICH by
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(312) 527-4000

on behalf of the Petitioner Shefsky & Froelich.

* * * * *

(Whereupon, the following proceedings were held in court.)

THE COURT: Would you please call both cases? I need this back. The 00 first, please.

THE CLERK: 00 CH 13859, Buntrock versus Terra.

And 01 L 9112.

THE COURT: Good morning. I'm sorry to keep you waiting. I wanted to glance at the thing that was delivered this morning, the document. And I also received a call from another judge during this break who needed some help, and I had to take that call.

If you could please identify yourselves for the record.

MR. CUMMINS: Robert Cummins for Terra, Tucker, and Simpson, Your Honor.

MR. NOVOSELSKY: David Novoselsky, here to assist Mr. Cummins.

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MR. CARROLL: Good morning, Your Honor. James Carroll and Cheryl Niro on behalf of Plaintiffs Buntrock and Gidwitz.

MR. PERKINS: Floyd Perkins and Therese Harris on behalf of the People.

MR. IOPPOLO: Thomas Ioppolo. I'm representing Mr. Perkins and Attorney General Ryan in the Law Division case.

MS. STONE: Susan Stone. Sidley, Austin, Brown & Wood on behalf of the Foundation.

MR. BELLOWS: Joel Bellows for a petitioner here, Bellows and Bellows.

MR. SCHUMAN: William Schumann on behalf of Dr. Stebbins and Dr. Marshall.

MR. CROWE: Brian Crowe with my partner, Jim Wilson. We're here on the petition of Shefsky & Froelich.

MR. NOVOSELSKY: As a housekeeping matter, you just announced that the 01 was here. I looked at the order. It says the matter was transferred to Judge Foreman for further reassignment to you. I haven't seen an order from Judge Foreman. I don't know if the Court has received it. Technically, if you haven't received the order, I don't know if we're

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properly here.

THE COURT: I don't know if you're properly here. I received a Notice of Motion from you all --

MR. CUMMINS: Yes.

THE COURT: -- about a Motion for Substitution. And that's why I gave you the courtesy of having it called. I would assume you wouldn't motion up a case in front of me that isn't on my call.

MR. NOVOSELSKY: Well, the reason we did that, Your Honor, Judge Foreman wasn't initially, nor was I, here on Tuesday because of the religious holiday. I checked with his clerk, and the clerk wasn't aware of whether the order had or hadn't been entered.

THE COURT: Well, let me just find out from my clerk. Do you have anything on 01 having been assigned and sent over here by Judge Foreman yet?

MR. CUMMINS: Our motion actually read, Judge, that it was in anticipation that the reassignment would be effective. But I don't know that it has.

THE CLERK: Not under Chancery.

THE COURT: See if it's under Law.

MR. NOVOSELSKY: It would have been in the Law case.

MR. CARROLL: It would have been transferred to

16di-002613

Chancery in the Law case.

THE CLERK: The last order entered in the Law Division was on September 17. Order case transferred for trial to Chancery Division.

THE COURT: Okay. So he probably hasn't signed the order yet.

MR. CUMMINS: Right.

THE COURT: So I'm going to still tell you all everything that I've received and looked at in these cases because a lot of papers have come in.

As you know, you were here the last time in front of me -- the last time of some substance in front of me when -- I believe it was September -- I'm sorry, August 29.

MR. CARROLL: Yes, Your Honor.

THE COURT: When the parties came in and said that it's now time to deal with the attorneys' fees issue in my case, which is 00 CH 13859. And I gave the parties time to file their fee petitions, and that time was extended. I believe it was an order of September 7 that extended that time.

Since the last time, I've received the following documents. And they are the following, in the order that I received them. On September 14,

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filed under seal, Bellows and Bellows' Petition for Attorneys' Fees and an Affidavit of Mrs. Bellows in Support.

September 14, the Plaintiffs' Petition for Attorneys' Fees and the Motion for an Entry of a Protective Order.

On September 17, a Motion for Leave to Submit Fee Statements In Camera filed by Defendants Simpson, Terra, and Tucker and -- the actual motion itself and a petition for fees and costs of three different lawfirms there. You've all received that? Those were the Verner, V-e-r-n-e-r, lawfirm, the Kellogg lawfirm, and Cummins & Cronin lawfirms. You've received those?

MR. NOVOSELSKY: Ours was filed -- excuse me, Your Honor, our firm filed one. Although I was told this morning it went in the mail. I don't know if everybody got it. I'd have to check.

THE COURT: I don't have anything from you, Mr. Novoselsky.

MR. CARROLL: We haven't received it.

MS. STONE: We haven't received it.

THE COURT: That's why I'm just going through. I'm letting you know what I have.

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MR. NOVOSELSKY: I saw it stamp filed in the office. We had a little -- we're a small office, and part of us were out for the holiday. So I assume it went out. I'll have to check.

THE COURT: And then I received in Case Number 01 L 9112 a motion that was to be motioned up today at 11:00 for Substitution of Judge in the L case. And I assume it meant only the L case.

And Dr. Stebbins -- and then I got -- I'm just doing this in order of receipt. Then on the 19th I got Dr. Stebbins' and Dr. Marshall's Petition for Reimbursement of Fees and Costs. Also on the 19th I got from the plaintiff their Opposition to the Motion for Substitution together with all of their cases.

And then this morning I've received the Terra Foundation's Opposition on the Motion for Substitution.

Now I'm going to take all this substitution stuff and put it aside and only deal with the case that I have because that's what I have. And --

MS. STONE: Your Honor, you should have also received this morning as well the Terra Foundation's Opposition to the Motions to File the Fee Petitions

16di-002616

In Camera. It may be clipped to the other document that was sent over.

THE COURT: It's not referenced in the cover letter, so let me just -- you know, is, as a matter of fact. Things came in pretty fast. You're right. The Terra Foundation's Opposition to File Certain Documents In Camera.

MR. NOVOSELSKY: Judge, if I may make one inquiry, and it will be very brief, and I think it will resolve at least a portion of what we're doing today.

It's, my understanding, because I don't want to have any claim made of waiver, that the Court today only has before it the Chancery lawsuit. Anything it's doing today is only in the Chancery action. Nothing you plan on doing today would impact on --

THE COURT: Well, I guess I don't have the other lawsuit in front of me.

MR. NOVOSELSKY: That would be our position, Your Honor.

MR. CUMMINS: Right.

MR. NOVOSELSKY: I don't want anyone to say that we stood here and acquiesced anything in the Law

16di-002617

Division case.

THE COURT: That's why I'm setting aside all this stuff about the substitution because it's not in front of me right now.

MR. WILSON: Your Honor, if I may. In August -- I think we were really the ones who started this back in August when we filed our petition. And there was a courtesy copy sent at the time that the petition was filed in August. If Your Honor does not have that, we would be happy to supply another copy of it. But, in fact, there was a petition filed and I believe everybody has received it some time ago based upon our August filing.

THE COURT: Okay. This is a good time to take a short recess. And I have a reason that I need to do that with the court reporter but outside the presence of the court.

Do I have a conference room available on this floor? Is Judge Gardner in session?

THE DEPUTY: I think he may be, but I'll look.

THE COURT: Could you just again for one moment, please?

I don't want to take everyone out, so I want you to just simply designate one counsel for each

16di-002618

party, please. And in that regard, I realize that we have multiple counsels here on the fee petition issues. And since we have multiple attorneys here for the defendant, so if I could either get Mr. Cummins or Mr. Novoselsky and either Mr. Wilson or Mr. Crow. And Mr. Bellows, you're more than welcome to join us. And I need one person from the Foundation. Why don't we just go with Mr. Perkins, if that's okay. No offense. And -- even though he's a party, I guess, in the other case. And I may or may not have the other case now. I have to go with the case that I have in front of me.

Do I have a place?

THE DEPUTY: Yes. Judge Dooling's Conference Room is open.

THE COURT: Okay. Is the Court in session?

THE DEPUTY: It's not. They're in chambers.

THE COURT: We just need to step out and bring the court reporter.

MR. CUMMINS: Judge?

THE COURT: Yes.

MR. CUMMINS: One matter. And I just want this for the record. We continue our objection that Sidley & Austin attempts to represent the Terra

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Foundation in any further -- in any proceedings, including the Chancery case.

But I just want to have that on the record.

THE COURT: Okay.

(Whereupon, a discussion was held in a Conference Room between Judge Dorothy Kirie Kinnaird and the following counsel: Ms. Susan A. Stone; Mr. Joel J. Bellows; Mr. William P. Schuman; Mr. James D. Wilson; Mr. James R. Carroll; Mr. Floyd D. Perkins; and Mr. Robert P. Cummins. Said discussion was reported but not transcribed at this time.)

(Whereupon, the following proceedings were held in court.)

THE COURT: Let's pick up, if we can, where we left off.

Mr. Wilson, you're going to be sending me your fee petition. Has there been anything filed in response? I assume not, right?

MR. WILSON: There has not, Your Honor.

THE COURT: Okay. I need to deal with the fee petitions that I have. Does anybody believe -- and we're only talking 00 CH, the chancery case. Does

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anybody want to address another issue before we talk about the response times on those?

MR. CUMMINS: Yes, Your Honor. Some lawyers involved in the case, obviously we don't -- having looked at our billing statements -- believe that it applies to our billing statements. Some lawyers involved in the case believe that the narrative portions of their billing statements reflect or embody material that is arguably privileged or immune from discovery as constituting attorney work product.

With respect to those matters, and while it is probably generally true that billing statements are not sacrosanct from discovery, it is -- there is a motion, or at least two motions before you, to allow the billing statements, one, to be filed in the first instance, subject to further order of Court, under seal, to be considered by the Court in camera under seal. Secondly, to allow certain lawyers who believe and respect the fact that they may be dealing with confidential or privileged information that certain of those billing records, to the extent that they are part of the file, be redacted, although copies would be provided in some way so that the Court would be fully advised of all of the matters

16di-002621

for which fees are sought.

So those -- I may not have properly characterized my colleagues' motions. But the essence of it is that, and stated simply, folks want to be able to submit these to you in camera for your at least preliminary review, subject to further order of Court, have you review them in that context, and allow whatever has to be filed ultimately to be filed in a way that doesn't compromise anybody's interest.

I make that point, too, because we must recognize that this isn't the end of the road for this litigation. Before the Appellate Court, and heaven knows where that's going to go, there also is an independent action in which the parties who are submitting fee petitions, or lawyers who are representing parties who are submitting fee petitions, are adverse to one another. And to the extent that any of the billing statements that are being submitted would, perhaps, reflect strategy, that would be pertinent to ongoing disputes between the parties. And there may be more litigation coming. Gosh only knows.

Anyway, that's the other issue. And I understand that --

16di-002622

THE COURT: Are you coming in with a recommendation? Are you asking for something?

MR. CUMMINS: I think -- here's what I -- however the motions are articulated, I would hope that you would enter an order today allowing those lawfirms who, in good faith, consistent with their obligations to the Court, believe that their billing statements contain privileged information or information immune as work product, to file with you complete billing statements, without redaction, for your approval or review, as necessary. Remembering, of course, that we object to all of this, but -- and then allow, after you've made that determination, other documents to be filed as you deem appropriate, having considered these things on that basis.

THE COURT: Now, is there any party in this case that believes that certain parts of these should not be filed sealed?

MS. STONE: Your Honor, on behalf of the Foundation, we are not concerned, necessarily, as to whether or not they're filed under seal and therefore shielded from the public at large.

What we are concerned about, as we made clear to you last time, and as I thought Your Honor

16di-002623

had indicated last time that you agreed with our position, the Foundation cannot be put in a position of being asked to write a blank check. It is clear that under the Consent Judgment, Your Honor is the one who is going to determine what is reasonable. Not the Foundation. We understand that. We respect that.

Nevertheless, the Foundation would like to be heard on this matter, just as it likes to be heard on any motion that's brought in front of Your Honor. In order to be heard, we have to have the opportunity to make an intelligent objection or even recommendation that certain fees, indeed, are reasonable. And it's the Foundation's judgment that the Court should pay those -- or should order that those be paid. But in order --

THE COURT: So your suggestion is what?

MS. STONE: In order for us to make that sort of reasonable showing or statement in front of Your Honor, we need to have access to the fees. As it currently stands, Your Honor, we have not seen the fees, the actual underlying fees, that people are submitting to Your Honor for approval.

THE COURT: I haven't gotten the underlying

16di-002624

either, yet.

MR. CARROLL: That's correct.

MS. STONE: Well, from some -- I believe from -- well, from Shefsky & Froelich you did, Your Honor. And I believe that also from McDermott you have seen fees. And I believe even Mr. Cummins has submitted some detailed fees.

THE COURT: Right. I'm talking about plaintiff.

MS. STONE: Okay. Your Honor, currently before you you have fee requests in the amount of $3 million, roughly, if my calculation is correct. The Foundation cannot be muzzled, cannot be silenced. We have to have an opportunity to weigh in as to whether or not we believe some, all, or some other portion of these fees are appropriate or inappropriate.

And so what we are requesting, Your Honor, or what we are suggesting, is that if Your Honor wants these filed under seal, that is fine. But whatever is shown to Your Honor should be shown to us.

Now, if there is some limited circumstance where people believe that there's a particular detailed time entry that somehow gives away an

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attorney-client privileged communication. For example, if there would be a narrative about a phone call, discussion with Mr. Buntrock about X, Y, Z. If they feel the Re: line is somehow giving away work product or attorney-client privilege, that Re: line could be redacted. But the detailed time narratives have to be presented both to Your Honor and to us in order for us to have any opportunity to submit a meaningful statement to Your Honor.

THE COURT: Let me give an example. And maybe Mr. Carroll can respond to this one.

MR. CARROLL: Thank you.

THE COURT: There have been very few court appearances in this case where we haven't had multiple attorneys come in.

MR. CARROLL: That's correct.

THE COURT: For the simplest of issues involving things like, you know, putting it over. Setting the schedule. Some emergency motion which wasn't going to be heard at 9:15, and everybody knew it wasn't going to be heard at 9:15 because we had another hearing the next day or later that day, that we had a large crowd show up.

Now, it may -- I don't know what the

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Sidley & Austin bills were in this case. And I presume that it is the position of the Foundation that I should never see those bills or know what they've charged and what the Foundation has already paid Sidley. But it's going to be difficult, without having that, for this Court to even make a comparison. There are going to be days when I'm looking at an entry and hopefully I will remember or recollect from taking a look at the orders in the Court file what exactly happened on that day and whether or not I really needed to have, you know, 15 attorneys standing in front of me.

Would it not be helpful for them to be able to say something about, look, the Quinlan firm sent five people. They billed for three of them. And they said that that court appearance took two and a half hours. What we did, Judge, is we sent one person and we billed for one hour. Now, we don't have to necessarily -- you don't necessarily have to give them anything more than, court appearance, such and such a date, who was there.

Are you saying they're not entitled to that?

MR. CARROLL: Your Honor, first of all, I believe there -- and I think that it's borne out by the

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history of this case, that there isn't and hasn't been an easy motion in anything that we've done in this case. That every court appearance has involved lengthy court appearances and difficult issues where there have been a possibility of a number of other issues that could have been raised and that were being raised during it. So first I'd like to make that observation.

Secondly, I'd like to agree with this Court's position that in order for this Court to determine what is reasonable in terms of attorneys' fees, it is very relevant for both parties, the plaintiffs, and for the Court to see what Sidley's bills are to see what is reasonable under the circumstances and how they responded and what they did in terms of how many lawyers they had in Court, et cetera, Your Honor.

And in that vein, they filed an objection, and we would like to respond to that objection. So I don't think we're quite at Ms. Stone's position yet.

MS. STONE: Call me Sharon.

THE COURT: No. I'm not that informal.

MR. CARROLL: In order to respond and in order to have a ruling because we would like to file a

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response and we believe she is inaccurate and, in fact, contrary to what the agreement calls for and certainly contrary to what was negotiated during the Settlement Decree.

MR. CUMMINS: Could I --

THE COURT: Do you believe that it was negotiated in the settlement that nobody was going to have an opportunity to object to anybody else's fees?

MR. CARROLL: We believe it was part of the negotiating settlement, Your Honor, that the bills would be submitted to the Court for determination of reasonableness. In fact, we bargained for that with the mediator.

THE COURT: Okay.

MR. CARROLL: And that was specifically discussed. And that's the way the agreement was written. So that's exactly right, Your Honor. It was the Court's -- going to be the Court's determination. Especially under the circumstances, Your Honor. God forbid this case went up on appeal and it was reversed for whatever reason. We would be back down in front of this Court on a Consent Decree that's now been vacated with Sidley facing us as our opposition again and have all the history of

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everything that we put forth in this case.

In that vein, Your Honor, it was our intent to do very similarly to what you've been talking about when, in fact, if we, in fact, do submit redacted bills to other parties.

If you'll see, we followed the Court's procedure, I think of the August 29 date, that "if there's highly confidential information in the bills that everybody will have the good sense not to file it with the Court and there may be a procedure where you will file something."

In fact, we did that, Your Honor. We filed a protective order. And in our Motion for Protective Order, we indicated to the Court that we would provide the parties with our redacted bills. And the procedure that we had intended to file was very similar to what we're talking about today. But I guess what's good for the goose is good for the gander. If we're going to determine what's reasonable, everybody has to know what all the bills are.

MS. STONE: Your Honor, may I --

MR. CUMMINS: Judge --

THE COURT: I need to have the plaintiff's

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position clarified. You are not objecting to filing, for everyone to see, redacted bills?

MR. CARROLL: That is correct, Your Honor.

THE COURT: Okay.

MS. STONE: And, Your Honor, there's actually not that much disagreement. If, indeed, these are good faith redactions where people are really taking out the precise legal issue that they researched, that may be appropriate.

Nevertheless, if people are off on a frolic and detour. If they are, for example, raising a disqualification motion of Sidley & Austin for the sixth time to the Illinois Supreme Court, after it's been rejected by you on numerous occasions and by the Appellate Court, the Foundation may take the position that the Foundation doesn't believe that was a reasonable expenditure of fees. You have to --

MR. CARROLL: Your Honor --

MS. STONE: Pardon me. Pardon me.

THE COURT: That's not going to be redacted. That's going to be in there.

MS. STONE: Well, I'm not sure what he means by redacted. And unfortunately, we may just be buying ourselves a fight for the future. What we do need

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are detailed time entries. We need an opportunity to see it. The Foundation agreed to pay reasonable attorneys' fees. Not all attorneys' fees. Not any attorneys' fees that could be submitted. But reasonable fees, and only reasonable fees. And we agreed to do it only in connection with this lawsuit.

So, for example, time that might have been spent by the Bellows firm -- and I'm sorry to pick you out in particular -- but that may have been spent in preparation for a Federal lawsuit, a wholly separate Federal lawsuit against the Attorney General, would not be fees that the Foundation ever agreed to pay in connection with this lawsuit. That's why we need to see the detailed time entries.

I'm not saying no redactions ever, Your Honor. I understand that we have to be pragmatic and reasonable here. But the Foundation, being confronted with about $3 million in fee requests, has to understand what those fee requests are comprised of. How many attorneys?

THE COURT: That's $3 million not including you.

MS. STONE: Correct.

MR. CUMMINS: Judge, let me make a comment. If I may.

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MS. STONE: It's an awesome amount.

MR. CUMMINS: I think there's a very practical approach to this. And if I may most respectfully suggest the following: That all the folks who are going to submit billing statements for your review do so completely, unredacted. Afford you an appropriate period of time within which to review those. And having done that, then set the matter for another status hearing at which time you, having had the benefit of an opportunity to look at these things, can pass on the issue of whether and to what extent the next step goes forward. In other words, what's going to be filed.

And let me suggest something with respect to not only the bills of Sidley & Austin, but also the bills of Winston & Strawn. Those have to be before you if there's going to be any fair play here. And let me explain why. For someone to suggest that the alpha and omega of the fees that ought to be paid to -- or the scope of the indemnification for fees, to which these Directors are entitled, including my clients, is governed by an agreement to which we were not a party, that's folly.

Moreover, there are Bylaws of this

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Foundation that mandate indemnification of Directors. And this statement in this Consent Judgment to which we are not a party is not consistent, necessarily, with the Foundation's obligation.

That's precisely why I said on previous occasions that what I intended to do, and I was persuaded to do it the other way because people thought we might get into a procedural trap -- I don't believe that this Court would allow that to happen, but some folks said we better do it that way -- our bills are going to go to the Foundation. And the Foundation ought to see them. But the Foundation is going to see them with lawyers counseling them who are going to be unaffected and untainted by conflicts of interest which have not been resolved, never raised before in this case, in the nature that currently exists.

Now I'm not going to get into that now because that's not before you. But here's what -- in order to avoid that fistfight at this time, what I'd like to suggest you do is accept and receive all of the billing statements relating to this controversy beginning in September of 2000, have bills submitted by Sidley and Winston as well, to the extent that

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those billing statements relate to their participation, allegedly on behalf of the Foundation, so you have those for what comparative analysis purpose you may need. And then, after you've had a chance to review and digest those matters, have another status hearing and then talk about the procedural steps that should then follow.

Everybody's interest is protected. You'll have the whole story in front of you. And people can then deal with the issue with all the cards on the table.

MS. STONE: Everyone's interests will not be protected. What the Foundation agreed to do, as part of a settlement, was to pay not just its own attorneys -- which it was doing in the ordinary course -- but to pay the attorneys for people that had sued it. People that had dragged its name through the mud. People that had caused it to incur a great deal of expense this past year. It agreed to do that as a way to settle this very drawn out, hard fought litigation.

THE COURT: Including defendants. Individual defendants.

MS. STONE: Exactly.

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THE COURT: We're talking paragraph 12.

MS. STONE: Exactly. The Foundation's Directors.

THE COURT: The Foundation's Directors.

MS. STONE: Not even the named individual defendants. That's why you see Dr. Stebbins and Dr. Marshall coming in with a fee petition. It was all Directors in connection with this lawsuit. Not ancillary litigation in Federal Court, but this lawsuit.

THE COURT: Okay.

MS. STONE: But reasonable fees, Your Honor.

MR. CARROLL: Again, Your Honor, that is subject to the Court's determination. And we specifically bargained for that language in the agreement.

MS. STONE: And we're not arguing that.

MR. CARROLL: And I would suggest that before we even get to this issue, that we make a determination of whose fees, and respond to the pleadings and make a determination of whose bills are even going to be submitted to the Court.

MR. SZALA: Your Honor, may I --

THE COURT: One moment. Does anybody believe that this Consent Decree requires the Foundation's bills to be approved by the Court?

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MR. CUMMINS: Absolutely. Absolutely. It has to.

THE COURT: Does anybody who entered into the Consent Decree believe that this Consent Decree requires that the Foundation's bills be approved by the Court?

MR. CARROLL: Your Honor, the language is silent as to that. But I would suggest that in order to make a determination of what are reasonable fees, under the circumstances, and given the lengthy nature of this litigation, that in order for this Court to make that determination, that it would have to -- it doesn't necessarily have to approve, but it would certainly have to make the determination of what those fees are to make a determination of whether the other fees are reasonable.

MR. CUMMINS: Right.

THE COURT: All right. Mr. Szala, do you want to say something here?

MR. SZALA: Yes, Your Honor. On behalf of Winston & Strawn and being a bystander here --

THE COURT: Were you ever a party in this case?

MR. SZALA: We initially represented the Foundation.

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THE COURT: Like the first day? And then you went away.

MR. SZALA: We went away, Your Honor. We're the general counsel for the Foundation itself. We're also a proposed defendant in the Law Division action, but leave has not been granted to add us.

But in light of what has been said here by Mr. Cummins, we would respectfully submit that we don't think that the agreement requires a disclosure of Winston & Strawn's legal fees. We don't think that was part of the agreement. The omission there that is silent, we believe that that was the intention of the parties involved not to go over those particular issues.

MR. CUMMINS: Well, let me tell you why, if I may. Let me tell you why --

MS. STONE: Please.

MR. CUMMINS: -- those fees ought to be considered by Your Honor. First of all, it is correct. And I've labored in this vineyard a little bit. It is correct that it's appropriate for a judicial officer to consider the other parties' fee statements in making a comparative analysis of reasonableness. And we can cite the authority to

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support that.

Secondly, for example, incident to this Consent Judgment, incident to the resolution of issues by way of this Consent Judgment, a settlement of this case, we have minutes of meetings. There are documents, that have already been made part of the public record, where Sidley & Austin and Winston & Strawn were commenting and taking positions with respect to what were the implications of this settlement to other parties who were not parties to the settlement? For example, whether or not in any way, shape, or form they could bind Ms. Terra, Mr. Tucker, or Senator Simpson. And the answer, of course, was no, that that could not take place. So while Winston may have been in the background, Winston was concurrently representing the Terra Foundation and Buntrock and Gidwitz, clients of Winston.

THE COURT: They were never representing --

MR. CUMMINS: Excuse me.

THE COURT: -- the individuals.

MR. CUMMINS: Your Honor, there was concurrent adverse representation. It was never resolved by Your Honor because you said Winston stepped out of

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the case now. And to the extent that they're conflicted, that's something that somebody can whistle over to the ARDC, but they're not before me as counsel in this case and so I'm not going to rule on any disqualification. That all took place before I got into this case.

My only point is, and Mr. Szala may be quite correct that they didn't have a significant part in the litigation, but they had some part in the litigation, albeit they didn't have an appearance on file, or withdrew their appearance, and it's only appropriate and necessary for this Court to consider all of these billing statements to determine any level of reasonableness under either this Consent Decree or any other test you want to apply.

But let me say this. You cannot, I don't think, most respectfully, ignore the mandate of the Bylaws. I think you have to consider the Bylaws when you implement this provision.

And for somebody like Sidley & Austin, who we believe shouldn't be speaking for the Foundation, to stand up and say, we'll be the arbiters. This is the way it ought to be. And we're not going to -- we're not going to show you our cards, that's dead

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wrong.

MS. STONE: Your Honor, may I be heard on three specific points?

THE COURT: Please.

MS. STONE: Number one, you asked the ILC to retain counsel and to deal with all matters relating to the Foundation during the litigation. The ILC did that.

As part of the ILC's job, the ILC, on a monthly basis, received, reviewed, questioned, and authorized payment of Sidley & Austin's legal fees. Sidley & Austin was the only litigation counsel. Winston & Strawn was not litigation counsel. So our fees have been reviewed and have been vetoed and have been approved by the ILC. That has gone on up to the present point in time.

What is happening here is not the creation of some sort of joint fund where all of the settling parties are agreeing to pay all of the attorneys' fees. If that was happening, if Mr. Buntrock and Mr. Gidwitz were actually going to be paying part of this, it would indeed be appropriate for them to see and review Sidley's fees. That's not what's happening here. The Foundation is paying its own

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attorneys, and has done so. And in addition, has agreed, as part of settlement, to pay reasonable fees of other parties, the parties that sued it. Now, we --

MR. BELLOWS: In connection with this case.

MR. CARROLL: As determined by the Court. But what the --

MS. STONE: But pardon me. Pardon me. Pardon me. There is no quarrel here. I do not quarrel with Mr. Carroll. I even do not quarrel with Mr. Cummins, as surprising as that is. I certainly do not quarrel with Your Honor. You are the determiner, the arbitrator, of what is reasonable.

THE COURT: Excuse me. Gentlemen, I'm having some trouble hearing Ms. Stone. I don't remember her talking when you all were talking.

Go ahead.

MS. STONE: We do not quarrel with the fact that you will decide what is reasonable. Not the Foundation. We agreed as part of settlement to make you the decision maker on that. But we never agreed to sit by idly and not even put in a response or not even to be heard on this. You can take our papers for what they're worth. You can say, yes, Sidley &

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Austin is right when it points out that at a particular hearing it had one lawyer and Quinlan & Crisham brought five. Or you can discount that and say, you know, maybe Quinlan was right to staff up that much. It was a complicated hearing and, you know, Ms. Stone, you alone were not up to the task and you shouldn't have come over by yourself. You should have brought over, you know, five other people. You can make that determination. We merely want to be heard. In order to be heard, we have to have the raw material with which to make intelligent observations. We may, in fact, agree with a great deal of the fees that are presented to you. We don't know yet because we don't have the raw goods.

THE COURT: Anybody who wants to give me their complete billing statements, may do so. Anybody in good faith who wants to give me redacted billing statements, redacted because of attorney-client privilege or some other kind of strategy privilege or whatever that you think is an important privilege that gives rise to a reason why it shouldn't be disclosed, may give me redacted bills. I'm only going to adjudicate reasonable attorneys' fees incurred by the Foundation's Directors in connection

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with the lawsuit. The Directors being Buntrock. Gidwitz. To the extent that they desire to have me do it, Terra, Tucker, and Simpson. And any other Directors who incurred attorneys' fees privately. And I will certainly be glad to do that. In connection with this litigation. This court, in here, this courtroom, and this Court only.

In order to make an intelligent decision in that regard, we do need to have a protective order so that all of these billing statements, the ones that are unredacted or whatever, if you all believe -- and I don't know if there's a request that they all be filed under seal? Does anybody have any problem with their billing and their statements just being simply filed with the Court with no seal?

MR. SCHUMAN: Your Honor, we already did that without.

MR. WILSON: As well as we did, Your Honor.

THE COURT: Anybody else?

MR. CARROLL: As long as there's a protective order, Your Honor, we agree.

MR. CUMMINS: I don't understand. Were you suggesting that they would be covered by a protective order?

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MR. CARROLL: As long as they're protected by a protective order, Judge, consistent with your wishes, we're not looking for it to be filed under seal.

THE COURT: What does that mean?

MR. CARROLL: The protective order as to who can see the files.

THE COURT: Well then that means filed under seal. That's the same thing. Okay? So I take it you all -- and by that I mean Mr. Wilson and Mr. Crow and your firm, Shefsky & Froelich, they -- you're just going to file it. Anybody can see it who wants to see it the whole time?

MR. WILSON: It's been filed for the last two months.

THE COURT: And your motion is the same?

MR. SCHUMAN: It's the same for McDermott, Will & Emery.

THE COURT: Bellows and Bellows, what do you want?

MR. BELLOWS: We have filed, Your Honor, under seal. And of course --

THE COURT: If you want to make it public, you're welcome to. If you don't want to, redact the portions that you think are confidential just like

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everybody else is going to do.

MR. BELLOWS: Fair enough.

THE COURT: So I'm just going to hold these and you're going to have to advise me with copies to everybody what you're doing.

MR. CUMMINS: I'll look at ours. But may I ask --

THE COURT: One moment. And I do not need to see anything from Winston & Strawn.

I can't adjudicate the attorneys' fees in this case without seeing the bills of Sidley & Austin. They will be seen by me and me only.

MS. STONE: That's fine, Judge.

THE COURT: And I need to take a look at those and I need to make some comparisons and they need to definitely be filed under seal. And I will look at those, I'll compare what everybody else was doing on those days, and I'll determine what the Consent Decree says I'm supposed to do, the fees of the individual Directors.

MR. CUMMINS: Judge, two things. You made the comment to the extent that Buntrock -- excuse me, to the extent that Terra, Tucker, and Simpson wish to have you look at those. Now, do I understand by

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saying that that you recognize that it may simply be appropriate, without prejudice to any position they may take before the Foundation, that it's simply something that they --

THE COURT: Excuse me one moment.

(Colloquy between the Court and deputy.)

THE COURT: I'm sorry, go ahead.

MR. CUMMINS: Sure. That we could simply have the Foundation pass on those as normally would be the case in a circumstance of indemnification?

THE COURT: Well, let me put it this way. I am certain that Shefsky & Froelich wants the Court to do this under the Consent Decree. Is that correct?

MR. CROWE: No, Your Honor. We argued this and I argued this very hard before Your Honor under the indemnification statute. I think the Court should have paid us under the indemnification statute. The Court can do whatever it wants. The Court certainly has a lot of arguments before it under the indemnification statute, but I think that requires a review also.

MR. BELLOWS: We're going to be responding, Your Honor. We're going to be responding with additional -- if I may say so, with additional

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litigation. We believe that we are entitled, vis-a-vis the Federal lawsuit, to bring an action in a different court in aid of this litigation and in aid of the rights of the parties that are involved in this litigation. And we believe that we're entitled not only under the indemnification statute, but also under the Charter, to have the Foundation reimburse our clients for those fees.

Now, if the Court just says, well, I think that this should be just this matter in this courtroom just before me, then we'd like to address that. Or to have the Court consider the possibility that fees spent in connection with this suit that was brought the day before we filed a motion here in which we filed many of the same papers, should be within the purview of your review. Notwithstanding the fact that it was brought five blocks away.

MS. STONE: Your Honor, the indemnification provision people are talking to was never intended to be a blank check from the Foundation to have people sue the Foundation. To the contrary.

THE COURT: If somebody wants to submit bills to the Foundation under indemnification, they can do so.

MS. STONE: Right.

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THE COURT: There is apparently an indemnification provision. And apparently if the Foundation isn't doing what they're supposed to do in that regard, fight it out with the Foundation.

MS. STONE: Right.

THE COURT: I've got to deal with the fees in this case. And "this case" means everything up until the time this case was over. And if you've got fees in this case, you think you're entitled to them under the indemnification.

MR. CROWE: I do. But you --

THE COURT: But you're also entitled to them under here.

MR. CROWE: Right.

THE COURT: If you submit them under here, great. I'll deal with it. (Indicating.) If you submit them under here, great. I'll deal with it. (Indicating.) But I'm not dealing with them under indemnification. I'm dealing with it under the Consent Decree.

MR. CUMMINS: Well, given the way you -- you might parse our bills, because some of it related to what we considered to be protecting our clients' interests, but might not have been directly involved, you know, when the case -- after the case

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was over, as you put it. So I may have to parse those bills and resubmit them to you, that's all. I just don't want you looking at stuff and then having to reject it. Because I've heard what you said today, and I can take that stuff out. So what I may want to do by next Monday is give you a new set of bills, that's all.

MS. STONE: Your Honor, clarification?

MR. CROWE: Your Honor, all I'm saying is Your Honor has to pass on reasonableness of our bills. Your Honor has already ruled on the fact that Terra, Simpson, and Tucker have their fees paid under the Consent Decree that it does not in any way affect their rights to contest a Consent Decree. And so if Your Honor wants that vehicle to pay the Shefsky & Froelich fees, fine.

You also have taken under reservation the arguments that Mr. Kennedy and I made against each other for a long time, for an hour, about the ability to be paid under the indemnification section. So Your Honor has a lot of roads to get to paying Shefsky & Froelich's fees, but all of them dictate that you decide the reasonableness of our fees.

THE COURT: And I'm going to.

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MR. CROWE: Okay.

THE COURT: And I'm going to decide yours under the Consent Decree. And if they want me to decide theirs under the Consent Decree, the Consent Decree says I'm supposed to do all the Directors. Their Directors are the same ones as you, but they're the Directors, and I'll look at theirs.

MR. CUMMINS: There's one other point, Judge, and then I'll try to shut up.

My clients have demanded to see billing statements submitted to the Foundation. They're Directors. They're entitled to see those billing statements.

THE COURT: Bring it up with the Foundation at a Foundation Board meeting.

MR. CUMMINS: Well, I've done that, I've done that, and Sidley & Austin, apparently, has directed people at the Foundation not to turn over those bills.

THE COURT: I don't know what Sidley is doing. I don't know who's representing the Foundation. I don't know what the Foundation is doing. But I assume they're running a couple of art museums right now.

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MR. CUMMINS: Well, I know this. I know our clients --

MS. STONE: Your Honor, I have a point of clarification.

MR. CUMMINS: -- I know our clients aren't getting those billing statements. They're entitled to them, and I raise it with you. Maybe you can give somebody some guidance on that to avoid another lawsuit, but maybe that's what it takes.

THE COURT: I don't think courts are supposed to give guidance to avoid lawsuits. I think courts are supposed to deal with what they have in front of them. And what I have in front of me is a requirement that I'm supposed to adjudicate attorneys' fees in this lawsuit.

Now, Counsel, unfortunately we need to recess because I'm supposed to be, at 12:00, over at the Administrative Office for a meeting and I am now going to be 45 minutes late for it, and I need to recess.

If you want to continue to argue, I can see you back here at 2:15. Otherwise, I can give you a schedule for doing these fees. What do you want?

MR. BELLOWS: Can you give us a schedule?

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MS. STONE: Can I ask a clarification question?

THE COURT: What's your clarification?

MS. STONE: When you said that other firms may submit their petitions under seal, does that mean and not serve Sidley & Austin? Is that what you're saying? And not share those with us? Just with the Court? I didn't understand.

THE COURT: Anybody that wants to redact anything, you have to give the redacted version to everybody. I mean, you -- anything you're filing, if you're filing it totally under seal because you think the -- I can't imagine anybody's filing anything totally under seal.

MS. STONE: They are.

THE COURT: The only one who should be filing anything totally under seal is Sidley because I'm not adjudicating your fees in this case.

MR. BELLOWS: How long will you give us to resubmit our petition?

THE COURT: The rest are going to be either all redacted or all public. And anything that's redacted has to be given to everybody else. Anything that's public, has to be given to everybody else.

MR. CUMMINS: Okay.

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THE COURT: Can you all put this together in a week?

MR. BELLOWS: A week is fine, Judge.

THE COURT: A week?

MR. WILSON: No problem, Your Honor.

THE COURT: Why don't I see you in about a week and we will know at that time whether I have one case or two cases to deal with.

MR. SZALA: Your Honor, may I --

MS. STONE: May we have time to respond, though, Your Honor? We'd like to file some things in response to the fee petitions.

THE COURT: I want to make sure I have the fee petition.

MS. STONE: That's fine.

THE COURT: I want to make sure I have everything that I'm supposed to have.

MS. STONE: That's fine.

THE COURT: And that you all have copies of everything and that we have a protective order.

MS. STONE: Fine.

THE COURT: And you're going to have to negotiate the protective order. You haven't done that, right?

MR. CUMMINS: No.

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MR. CARROLL: No, Your Honor.

MR. SZALA: Your Honor, just one thing, if I could.

Winston & Strawn takes offense to Mr. Cummins' statement previously where he linked the ARDC to Winston & Strawn.

THE COURT: I understand. Anybody would. And your silence should not be read in any way as agreeing that Winston & Strawn has done anything that should lead anybody to do anything with the ARDC.

MR. CUMMINS: Nor did Mr. Cummins. I just repeated what was on the record stated by the Court.

THE COURT: Okay. Today is the 20th, and there is a holiday next week. I'm not going to require anybody to file anything on the 27th. Rather than going ahead and filing it and maybe perhaps to make it cleaner, do you want to all just bring your filings to Court on a certain day at a certain time?

MS. STONE: Sure.

MR. NOVOSELSKY: Sounds salubrious, Your Honor.

THE COURT: Why don't we do this on the 28th, which is a week from tomorrow, at 11:00. Would that work? And present your petitions on that day. Make sure that you give copies to the other side in

16di-002655

advance.

MR. CARROLL: Do you want us to refile the petitions in addition to the detail, Your Honor? Is that what you're suggesting? We have filed a petition, but we haven't filed --

THE COURT: No, you don't have to refile anything. If you're leaving what you have the same, you don't need to refile. And I've read off today what I have. I need to leave. Leave me an order. Thank you.

(Which were all of the proceedings had in this cause at this time.)

* * * * *

16di-002656

STATE OF ILLINOIS)
) ss:
COUNTY OF DuPAGE)

LAURA L. KOOY, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County;

That she reported in shorthand and thereafter transcribed the foregoing proceedings;

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause before the Honorable DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County.

Witness my official signature and seal as Notary Public in and for DuPage County, Illinois, on this 21st day of September, A.D. 2001.

Laura L. Kooy

LAURA L. KOOY, CSR, RDR, CRR
Notary Public
CSR No. 084-002467
200 North Dearborn Street
Suite 2903
Chicago, Illinois 60601
(312) 782-KOOY (5669)

OFFICIAL SEAL
LAURA L. KOOY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-2-2003

16di-002657

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 00 CH 13859
	)	
TERRA, et al.,	)	
	)	
Defendants.	)	
	)	
THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Intervenor,	)	
	)	
vs.	)	
	)	
TERRA, et al.	)	
	)	
Defendants.	)	

SUPPLEMENTAL PETITION FOR ATTORNEYS FEES AND COSTS
PURSUANT TO CONSENT JUDGMENT AND ORDER ENTERED JULY 26, 2001

Plaintiffs, Dean L. Buntrock and Ronald Gidwitz, by and through their attorneys, Quinlan & Carroll, Ltd., respectfully submit this supplemental petition for an award of attorneys fees and costs pursuant to the terms of the July 26, 2001 Consent Judgment and Order ("Consent Decree") previously submitted to this Court. In support of their petition, Plaintiffs state as follows:

1. On September 14, 2001, the plaintiffs Dean L. Buntrock and Ronald Gidwitz submitted a petition for an award of attorneys fees and costs pursuant to the terms of the July 26, 2001 Consent Decree entered in this matter. That petition is hereby incorporated by reference.

16di-002659

2. Since the submission of that petition to this Court, plaintiffs Dean L. Buntrock and Ronald Gidwitz have incurred additional attorneys fees in connection with the original lawsuit. Accordingly, this amended petition is being submitted in order to incorporate those additional fees and costs incurred by the plaintiffs during the month of August, 2001.

3. Pursuant to this Court's order of September 20, 2001, the plaintiffs will submit redacted copies of the attorneys invoices in support of the amounts claimed in this amended petition for fees and costs.

4. Pursuant to the July 26, 2001 Consent Decree and this Court's orders of August 29, 2001, September 7, 2001 and September 20, 2001, the plaintiffs hereby petition that in addition to the amount claimed in the September 14, 2001 petition for fees and costs submitted by plaintiffs, this Court also approval these additional attorneys fees and costs incurred in connection with this matter as reasonable.

5. The total additional amount of attorneys fees and costs incurred by Plaintiffs is $21,419.12.

6. For the reasons in their petition for award of attorneys fees and costs, the total attorneys fees and costs are fair and reasonable considering the number of hours worked, the hourly rates charged by the attorneys, and particularly in light of the complexity of the issues presented and the benefit received by the clients.

7. As noted in the original petition for fees and costs and in plaintiffs' motion for entry of a protective order, the Plaintiffs have sought entry of a protective order from this Court. (See Draft Protective Order attached as Exhibit A.) Upon entry of that protective order, copies of redacted invoices will be submitted to the parties. Of course, to the extent that this Court may need

16di-002660

additional narrative explanation for any entry, those descriptions would be presented *in camera* to the Court.

WHEREFORE, Plaintiffs ask that this Court order the Terra Foundation for the Arts to reimburse Plaintiffs for attorneys fees as sought in the original petition for fees and costs and pursuant to this supplemental petition, and grant any further relief this Court deems fair and just.

DATED: September 28, 2001

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Jasmine de la Torre
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm I.D.: 38600

16di-002661

A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

AGREED PROTECTIVE ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the Attorney General, the Terra Foundation for the Arts ("Foundation") and Plaintiffs Dean L. Buntrock and Ronald Gidwitz ("Plaintiffs") as follows:

1. In connection with the entry of the Consent Judgment and Order in this case ("Consent Decree"), Plaintiffs have filed with the Court redacted copies of attorneys invoices ("Invoices") with a copy of said redacted Invoices to the Attorney General and counsel for the Foundation.

2. The Invoices produced in this case in their current form shall be marked with the legend "Confidential" and shall be treated as such.

16di-002663

3. The Attorney General, the Foundation and the Plaintiffs' and their attorneys, agents or assignees agree that the Invoices produced in this case and information contained in said Invoices shall not be disclosed or used for any other purpose or used in any other litigation absent the written agreement of the producing parties or order of the Court.

4. Upon the final conclusion of this lawsuit, including any appeals, upon 30 days written notice from the producing parties, all Invoices, all notes that contain or identify Confidential information from such Confidential documents and all copies thereof shall be destroyed or surrendered to the party that submitted said Invoice. If such Confidential documents are destroyed, counsel shall certify compliance with this paragraph to the party that submitted said Invoices.

5. The parties to this agreement may seek modification of this Order at any time, first by seeking the producing parties' consent, and absent consent, by application to the Court.

Dated: ENTER:

_____

Judge

Prepared by:
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm ID 38600

Doc:183229

16di-002664

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AFFILIATES:
EDWARD D. HEFFERNAN
WASHINGTON, D.C.

HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

OCT - 2 2001

OCT - 2 2001

September 28, 2001

VIA MESSENGER DELIVERY
The Honorable Dorothy K. Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Dean L. Buntrock and Ronald Gidwitz v. Judith Terra, Paul Hayes Tucker, et al.***
No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed is a courtesy copy of the **Supplemental Petition for Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001**, which was filed today.

Very truly yours,

William R. Quinlan

WRQ/mb
Enclosure

cc: All Counsel of Record

Doc:183262

16di-002665

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs,	)	
vs.	)	No. 00 CH 13859
TERRA, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor,	)	
vs.	)	
TERRA, et al. Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on September 28, 2001, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **Supplemental Petition For Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001**, a copy of which is attached and hereby served upon you.

Respectfully submitted,

DEAN BUNTROCK and
RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 33745

Doc:183218

16di-002666

CERTIFICATE OF SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies that true and correct copies of the **Notice of Filing** and **Amended Petition For Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001**, were served upon all parties on September 28, 2001 as indicated on the attached Service List.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Mary Butler

Doc:183218

16di-002667

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

SERVICE LIST

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Doc:183218

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(Via Hand Delivery)

Naftali Michaeli
3263 N Street N.W.
Washington, D.C. 20007
(Via U.S. Mail)

16di-002668

OCT - 2 2001

September 28, 2001

Re: Buntrock, et al. v. Terra, et al.

To All Counsel:

Enclosed is the order I presented to the Court after the Hearing today. If anyone has a problem with it, let me know.

In any event, would the person who presents the agreed-upon protective order kindly send me a copy.

Very truly yours,

BELLOWS AND BELLOWS
By:

Joel J. Bellows

JJB:ps
Enclosure

16di-002670

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

OCT - 2 2001

BUNTROCK, et al.

v.

TERRA, et al.

NO. 00 CH 13859

ORDER

THIS MATTER COMMING ON TO BE HEARD ON THE COURT'S CALL, COUNSEL FOR THE PARTIES PRESENT. WITH REGARD TO BELLOWS AND BELLOWS' AMENDED PETITION FOR FEES AND COSTS, THE COURT ORDERS:

LEAVE IS GIVEN BELLOWS AND BELLOWS TO FILE ITS AMENDED PETITION FOR FEES AND COSTS, SUBJECT TO THE PROTECTIVE ORDER TO BE ENTERED BY THE COURT DEALING WITH FEE PETITIONS. EXHIBIT 1 TO THE AFFIDAVIT of JOEL J. BELLOWS IN SUPPORT of BELLOWS AND BELLOWS' AMENDED PETITION IS A RESTATED DESCRIPTION of THE ACTIVITIES PERFORMED BY BELLOWS AND BELLOWS. CONSEQUENTLY, THE FOUNDATION AND ATTORNEY GENERAL'S OFFICE SHALL REVIEW THE SAME ACTIVITY DESCRIPTION AS THE COURT, SHOULD EITHER DESIRE TO DO SO.

Atty No. 01000

Name JOEL BELLOWS

Attorney for BELLOWS AND BELLOWS

Address 79 W. MONROE, #800

City / Zip CHICAGO 60603

Telephone (312) 332-3340

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
SEP 28 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

ENTER:

Judge **Judge's No.**

[redacted] **CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

16di-002671

ORDER

CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock

v.

Terra

OCT - 2 2001

NO. 00 CH 13859

ORDER

This cause coming before the Court on various parties' petitions for attorneys' fees. It is hereby ordered that the Billing Statements Submitted to the Terra Foundation for the Arts by Sidley Austin ~~Brown~~ & Wood shall be maintained by the Clerk of the Court UNDER SEAL.

Atty No. 38315
Name Lori Doerer / Sidley Austin ~~Brown~~ & Wood
Attorney for Defendant Terra Foundation
Address 10 S. Dearborn
City / Zip Chicago / 60603
Telephone (312) 853-7000

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN

ENTER: SEP 28 2001

JUDGE DOROTHY KINNAIRD - 2780
DEPUTY CLERK

Judge **Judge's No.**

[redacted] **CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**

CCG-N002-150M-12/29/99(03420164)

60[redacted]002673

OCT - 2 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

NOTICE OF FILING DOCUMENTS UNDER SEAL

The following document contained herein, is submitted for filing under seal on September 28, 2001, pursuant to the instructions of the Honorable Dorothy Kirie Kinnaird at the hearing of this matter on September 20, 2001:

Billing Statements Submitted to the Terra Foundation for the Arts by Sidley Austin Brown & Wood

16di-002674

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing **Notice of Filing Documents Under Seal** to be served on September 28, 2001 by United States mail upon the following counsel:

William R. Quinlan
James R. Carroll
Quinlan & Crisham, Ltd.
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Chicago, IL 60602

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Assistant Attorney General
Charitable Trusts
100 W. Randolph Street
Chicago, IL 60601

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Thomas C. Cronin
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Lawrence Levinson
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Debra Tucker
McDermott Will & Emery
227 W. Monroe Street
Chicago, IL 60606

Lori L. Roeser

CH1 2274062v1

16di-002675

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

ORDER

This matter coming before the Court on status of various petitions for payment of attorneys' fees and costs, all parties being represented, it is hereby ORDERED THAT:

1. Any party seeking payment of attorneys' fees and costs shall submit an unredacted copy of their bills to the Court, under seal if the party desires, by October 3, 2001;

2. Any party seeking payment of attorneys' fees and costs shall also serve a copy of their bills redacted for attorney client and work product privileged matters on the Attorney General and counsel for the Foundation. Defendants Tucker, Terra and Simpson object to any review of bills by counsel for the Foundation.

16di-002677

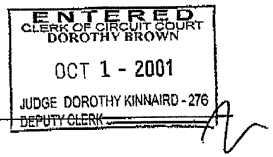
3. The Attorney General and counsel for the Foundation shall file a response, if any, to the petitions for payment of attorney fees and costs, under seal, by November 5, 2001, and serve a copy of the pertinent portions of their response on the appropriate interested party;

4. The appropriate interested party shall file a reply, if any, to the Attorney Generals' and Foundations' response by November 19, 2001.

5. This matter is set for hearing on December 19 at 11:00 a.m. without further notice.

Dated: October 1, 2001

ENTER:



Judge

Prepared by:
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm ID 38600

QUINLAN & CARROLL, LTD.
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WRITER'S DIRECT DIAL NO.

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jcarroll@qclaw.com

AFFILIATES:
EDWARD D. HEFFERNAN
WASHINGTON, D.C.

HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

October 2, 2001

Via Facsimile Transmission

To: All Counsel of Record

Re: ***Buntrock, et al. v. Terra, et al.***
00 CH 13859

Dear Counsel:

Attached is a copy of the Order signed by Judge Kinnaird relative to the hearing on September 28, 2001.

Very truly yours,

James R. Carroll

JRC/mb
Enclosure

Doc:183326

16di-002679

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859

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Debra Tucker
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16di-002680

QUINLAN & CARROLL, LTD.
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FACSIMILE
(312) 263-5013

THE INFORMATION CONTAINED IN THIS COMMUNICATION MAY BE CONFIDENTIAL OR PRIVILEGED UNDER THE LAW. DUPLICATION OR DISCLOSURE OF THE INFORMATION CONTAINED HEREIN IS STRICTLY PROHIBITED AND MAY BE UNLAWFUL WITHOUT THE SPECIFIC AUTHORIZATION OF THE ADDRESSEE. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT), AND RETURN ANY HARD COPY YOU HAVE PRODUCED VIA THE POSTAL SERVICE.

FAX TRANSMITTAL INFORMATION

TO:	**K. Chris Todd Neil M. Gorsuch**	**FROM:**	**James R. Carroll**
TELEPHONE:	**(202) 326-7900**	**TELEPHONE:**	**(312) 917-8466**
FAX:	**(202) 326-7999**	**FAX:**	**(312) 263-5013**
DATE:	**October 2, 2001**	**NUMBER OF PAGES TO FOLLOW:**	4
RE:	**040412/2074**	**NOTES:**	

If you do not receive the entire amount of pages, please contact our office at (312) 263-0900. Thank you.

Doc:177130

16di-002681

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED

01 OCT 31 PM 2:47
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
CLERK DOROTHY BROWN

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

EMERGENCY MOTION FOR RECONSIDERATION

Defendants Terra, Tucker and Buntrock move this Honorable Court for the entry of an order modifying this Court's earlier ruling that fee petitions in this litigation were to be reviewed by Sidley Austin Brown & Wood acting as counsel for the Terra Foundation. Movants respectfully request that that ruling be vacated and that Sidley Austin Brown & Wood be barred from any participation in this Court's consideration of fees for which reimbursement is being sought.

* * * *

1. In support of the foregoing, on October 10, 2001 in Civil Action No. 01 L 009112, Terra, Tucker and Simpson filed their motion to disqualify Sidley Austin Brown & Wood. A copy of that motion along with the affidavit of Judith Terra is attached hereto as Exhibit A.

16di-002683

2. Incident to proceedings before Judge Nowicki in connection with the Tucker, et al. motion to disqualify, a motion was made to examine Sidley attorneys Stone and Carlson (see attached Exhibit B). The basis for that motion was the conflicting affidavit testimony of Terra, Stone & Carlson.

3. In response to a briefing schedule established by Judge Nowicki, Sidley Austin Brown & Wood determined that it would withdraw from any further representation of the Terra Foundation in the proceeding before Judge Nowicki. A copy of Sidley's filing is attached hereto as Exhibit C.

4. In light of the sworn allegations of conflict coupled with the disparate affidavit testimony of Terra, Stone and Carlson, we believe Sidley's withdrawal was effected in recognition of its conflicted status.

5. In view of the foregoing, we ask the Court to reconsider its earlier ruling that Sidley Austin Brown & Wood act in any capacity with respect to the pending fee petitions.

Respectfully submitted,

JUDITH TERRA, ALAN K. SIMPSON and PAUL HAYES TUCKER

By: _____
One of their Attorneys

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Telephone: (312)578-0500
Fax: (312)578-1234

16di-002684

CUMMINS & CRONIN, LLC
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ROBERT P. CUMMINS
rpc@cumminscronin.com

THOMAS C. CRONIN
tcc@cumminscronin.com

TELECOPIER TRANSMITTAL COVER SHEET

TO:	K. Chris Todd, Esq. Lawrence Levinson, Esq. David Novoselsky, Esq.	**TELECOPIER NO.:**	(202)326-7999 (202) 371-6279 (312)346-9453
FROM:	Robert P. Cummins		
DATE:	October 31, 2001	**TIME:**	4:06 pm
CLIENT/MATTER NO.:	283	**OPERATOR:**	pw
TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE:			7

Message:

If you did not receive all pages, or if you have any questions, please call (312)578-0500.

THE INFORMATION CONTAINED IN THIS TELECOPIED MESSAGE, INCLUDING ANY ENCLOSURES, IS ATTORNEY PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE AS ADDRESSEE. THE REVIEW, DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION BY OR TO ANYONE OTHER THAN THE INTENDED ADDRESSEE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U. S. POSTAL SERVICE. THANK YOU.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED
01 OCT 31 PM 2:47
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CHANCERY DIV.
CLERK
DOROTHY BROWN

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

NOTICE OF EMERGENCY MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on November 5, 2001 at 9:15 AM, we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2302, Richard J. Daley Center, Chicago, Illinois, and then and there present Plaintiffs' Emergency Motion for Reconsideration, a copy of which is attached hereto and hereby served upon you.

Dated: October 31, 2001

One of the Attorneys for Defendants

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
Firm ID No. 37288
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Telephone: (312)578-0500
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16di-002686

A

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock et al

v.

Terra et al

No. 00CH13859

ORDER

This matter coming on to be heard on Defendants' EMERGENCY Motion for Reconsideration, It is hereby ordered that:

The motion for reconsideration is granted in part and Sidley shall not file any responses to the ~~[illegible]~~ pending fee petitions on behalf of the Foundation ~~[illegible]~~, although the Court makes no finding as to any alleged conflict; the Attorney General is hereby granted until November 19, 2001 to respond to said fee petitions, and this matter is set for status at 10:30 a.m. on Friday, December 7, 2001; and any replies to the Attorney General's response to the fee petitions shall be filed by December 3, 2001.

Atty. No.:

Name: Cummins & Cronin

Atty. for: Defendants

Address: 77 W. Wacker Dr.

City/State/Zip: Chgo Ill

Telephone: (312) 578-0500

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
NOV 05 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

16di-002689

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock et al

v.

Terra et al

No. 00CH 13859

ORDER

This matter coming on to be heard on Defendants' EMERGENCY Motion for Reconsideration, It is hereby ordered that:

The motion for reconsideration is granted in part and Sidley shall not ~~[illegible]~~ file any response to the ~~[illegible]~~ pending fee petitions on behalf of the Fund ~~[illegible]~~, although the Court makes no finding as to any alleged conflict; the Attorney General is hereby granted until November 19, 2001 to respond to said fee petitions, and this matter is set for status at 10:30 a.m. on Friday, December 7, 2001; and any replies to the Attorney General's response to the fee petitions shall be filed by December 3, 2001.

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Telephone: 312/578-0500

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CLERK OF CIRCUIT COURT
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DEPUTY CLERK

Judge — Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

16di-002690

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TELECOPIER TRANSMITTAL COVER SHEET

TO:	K. Chris Todd, Esq. Lawrence Levinson, Esq.	**TELECOPIER NO.:**	(202)326-7999 (202)371-6279
FROM:	Robert P. Cummins		
DATE:	November 7, 2001	**TIME:**	11:25 am
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TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE:			3

Message:

If you did not receive all pages, or if you have any questions, please call (312)578-0500.

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16di-002691

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*,	)	
	)	
Plaintiffs,	)	NOV 0 6 2001
	)	
v.	)	No. 00 CH 13859
	)	
JUDITH TERRA, *et al.*,	)	
	)	
Defendants.	)	
	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff- Intervenor,	)	
v.	)	
JUDITH TERRA, *et al.*,	)	
Defendants.	)	

ATTORNEY GENERAL'S MOTION FOR ADDITIONAL TIME TO FILE HIS RESPONSE TO PETITIONS FOR ATTORNEY'S FEES

Plaintiff-Intervenors, the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JAMES E. RYAN, moves this Honorable Court for additional time to file his response to the multiple Fee Petitions filed in this matter.

1. As the Court is aware substantial multiple fee petitions have been filed seeking millions of dollars from the Foundation for attorney fees.

2. The staff of the Attorney General has made significant effort to review these petitions. The Attorney General's staff have made several charts for comparison and have undertaken to examine and list the various activities it was aware of outside of

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the court case so as to supply such to the court for review. In addition a comprehensive list of pleadings and other court filings has been assembled, a copy of which is attached as Exhibit "A" which lists the filings made.

3. Unfortunately, the Attorney General's staff members Floyd Perkins and Therese Harris assigned to this fee matter have been required to devote significant time to a dozen or more other matters since the end of September 2001 and have not been able to complete the review of all of the fee petitions at issue and/or complete and file a response on or before November 5, 2001.

WHEREFORE the Attorney General prays for an additional 14 days to complete and file responses to the several attorney fee petitions pending before this court.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General of Illinois

_____
BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Bureau of Charitable Trusts and Solicitations
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

16di-002694

Terra Museum Chancery

1 9-22-00 Quinlan's Verified Comp. for Declaratory, Injunctive

2 9-22-00 Quinlan's Emg Mot for TRO

3 9-22-00 Quinlan's Memo of Law in Support of PLs' Mot for TRO

4 9-22-00 Quinlan's Emg Mot for Expedited Disc and Notice

5 9-25-00 Sidley's Opposition to Emg Mot for TRO

6 Sidley's Appearance and Jury Demand for Terra Foundation and Correspondence

7 9-25-00 AG's Comp for Dec. Jdgmt, Inj, etc.

8 9-25-00 AG's Appearance

9 9-25-00 AG's Emg Mot for TRO and Pre. Inj.

10 9-25-00 PL's Memo in Support of Emg for TRO and Pre. Inj.

11 9-25-00 AG's Mot to Intervene

12 9-25-00 Order

13 9-25-00 Quinlan's Reply in Support of Emg Mot for TRO

14 9-25-00 Quinlan's Pl's Mot to Disqualify Counsel

15 9-25-00 McBride's Terra's Emg Pet to Intervene

16 9-25-00 Order

17 9-25-00 Order

18 9-27-00 Mot to Appoint Spec Process Server

19 9-28-00 Order

20 9-28-00 Order

21 10-12-00 Sidley's Def Foundation Cons. Memo in Support of its Mots to Dismiss Complaints

22 10-12-00 Sidley's Def Foundation Mot to Dismiss AG's Comp.

23 10-12-00 Sidley's Opposition to Terra's Emg Pet to Intervene

24 10-12-00 Sidley's Def Foundation Mot to Dismiss Pl's Comp

25 10-12-00 Sidley's Opposition by Def Foundation to Pl's Mot to Appoint a Spec Lit Committee

26 10-12-00 Shefsky's Appearance for Terra, Tucker & Simpson

27 10-12-00 Orders (5)

28 10-13-00 Sidley's Notice of Filing of Corrected Page 2 of Mot to App. Spec.

Group Exhibit A

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29 10-16-00 Shefsky's Opposition to Terra's Emg Pet to Intervene

30 Quinlan's Pl's Reply in Further Support of Mot to Appoint an Ind. Lit. Com.

31 10-17-00 Sidley's Opposition by Def Foundation to Pl's Mot to Enforce TRO

32 10-17-00 Shefsky's Opposition to Pl's Mot to App. Ind. Lit. Com. and Ind. Lit. Counsel

33 10-19-00 AG's Response in Sup. of Pl's Mot to Appoint Ind. Lit. Committee

34 10-20-00 Quinlan's Pl's Mot for Lve to File Reply in Sup. of Mot to Enforce the TRO

35 10-20-00 Quinlan's Pl's Mot for Lve to Supplement Pl's Mot to Appt. Ind. Lit. Com.

36 10-20-00 Quinlan's Notices of Motion

37 10-20-00 Order

38 10-20-00 Order

39 10-20-00 Shefsky's Verified Ans and Aff Def of Tucker and Notice

40 10-31-00 Notice of AG's Emg Mot to Object Bd. Meeting

41 10-31-00 Quinlan's Pl's Joinder in AG's Emg Mot to Object Terra Bd. Meeting

42 10-31-00 AG Correspondence Ltr

43 11-01-00 Sidley's Terra Fndtn's Opposition to AG's Mot to Object Bd. Meeting

44 11-01-00 Shefsky's Ind. Def's Response to AG's Emg Mot to Object Bd. Meeting

45 11-01-00 Order

46 11-02-00 Winston's Emg Mot of W&S to Amd Ord entered 11-1-00

47 Quinlan's Pls' Response to Emg Mot of W&S

48 11-02-00 AG's Response to W&S Emg Mot to Amd Order

49 11-02-00 Order

50 11-02-00 Order

51 11-06-00 Quinlan's Pls' Emg Mot to Produce & Quash Ultra Vires

52 11-08-00 Sidley's Fndtn's Opposition to PL's Emg Mot to produce & Quash

53 11-13-00 Order

54 11-13-00 Quinlans' Pls Response to Def Tucker's Aff. Def.

55 11-27-00 Order

56 12-05-00 Sidley's Fndtn's Mot to Cont Stay of Proceedings Pending Ind Lit

57 12-06-00 Quinlan's Emg Mot for a TRO to Enjoin

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58 Quinlan's Emg Mot to Appoint Receiver and for TRO and Obj Mot for Stay

59 Quinlan's Pls' Response to Mot to Stay Proceedings

60 12-06-2000 Order

61 12-11-00 Shefsky's Resp of Tucker, etc. Emg Mot to Appoint Receiver

62 Affidavit of Ralph E. Lerner

63 Affidavit of Lawrence C. Marshall

64 Sidley's Terra Fndtn's Mot to Strike Affidavits of Prof. Breen

65 12-11-00 Sidley's Not of Motion of Mot to Strike Affidavit

66 12-13-00 Quinlan's Reply in Sup. of Pls' Emg Mot Appt. Receiver for TRO

67 12-14-00 Order

68 12-20-00 Sidley's Fndtn's Sur-Reply to Pl's Emg Mot to Appt a Receiver

69 12-20-00 Quinlan's Reply in Support of TRO Enjoining Advancement of Atty Fees

70 12-22-00 AG's Mot to Enjoin Terra Fndtn's use of Spec. Lit,. Com.

71 12-26-00 Shefsky's Emg Mot for Lve to File Surreply

72 12-26-00 Quinlan's Pl's Join and Adopt the AG's Mot to Enjoin

73 12-27-00 Quinlan's Pl's Emg Mot in Limine to Exclue Affidavits

74 12-29-00 AG's Memo in Support of his Mot to Ejjoin the Fndtn's use of Spec. Lit.

75 1-02-01 Quinlan's Notice of Interlocutory Appeal

76 1-02-01 AG's Emg Mot to Compel Certain Disc and for Appt. of Rec.

77 1-02-01 Quinlan's Emg Mot for Stay Pursuant to Supreme Ct Rule

78 1-02-01 Quinlan's Notice of Interlocutory Appeal

79 1-02-01 Order

80 1-05-01 Sidley's Amended Appearance for Terra Foundation

81 1-8-01 Sidley's Fndtn's Opposition to AG's Mot to Enjoin Spec. Lit.

82 1-09-01 Order

83 1-10-01 Sidley's Def Fndtn Mot for Jdgmt on Pleadings

84 1-10-01 Sidleys Def Fndtn's Memo in Support of Mot for Jdgmt

85 1-08-01 Michaeli's Verified Ans and Aff Def of Michaeli to Comp of Buntrock & Gidwitz

86 1-12-01 Order

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87 1-12-01 Order

88 1-10-01 Sidley's Fndtn's Mot for Jdgmt on Pleadings

89 1-10-01 Sidley's Def Fndtn's Memo in Support of Mot for Jdgmt on Pleadings

90 1-10-01 Sidley's Fndtn's Mot for Clarification of 1-2-01 Order

91 Quinlan's Pls' Opposition to Mot for Clarification

92 1-11-01 Sidley's Original Signature Page of Lerner's Affidavit

93 1-12-01 Order

94 1-12-01 Order

95 1-12-01 Shefsky's Def Simpson's Mot to Dismiss

96 1-12-01 Shefsky's Def Simpson Memo of Law in Sup of his Mot to Dismiss

97 1-12-01 Shefsky's Def Tucker's Not of Joinder

98 1-16-01 AG's Mot to Allow Bifurcated Deps

99 1-17-01 Quinlan's Pls' Join and Addopt the AG's Mot to Allow Bifurcated Deps

100 1-19-01 Shefsky's Def Terra, etc., Memo in Oppositin of AG's Mot to allow Bifurcated Deps

101 1-19-01 Sidley's Fndtn's Opposition to Pls' and AG's Mot allow Bifurcated Deps

102 1-19-01 Quinlan's Pls' Reply in Support of Mot to Enjoin

103 1-22-01 AG's Reply in Support of Mot to Enjoin

104 1-22-01 Order

105 1-26-01 Sidley's Fndtn's Mot to Vacate TRO of 1-2-01

106 1-26-01 Sidley's Fndtn's Mot to Compel AG to Ans Int. #1

107 1-26-01 Sidley's Fndtn's Mot to Deny AG's Mot to Enjoin

108 1-30-01 Quinlan's Pls' Emg Mot to Strike Fndtn's Mot to Vacte TRO

109 1-30-01 Order

110 1-31-01 AG's Response To Fndtn's Mot to Compel AG to Ans. Interrogatory #1

111 2-03-01 Order

112 2-05-01 Order

113 2-06-01 Order

114 1-26-01 Shefsky's Def Terra, etc. Mot for Advancement of Fees

115 1-26-01 Shefsky's Terra, etc. Memo in Support of Def Mot for Adv. Fees

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116 2-26-01 Quinlan's & AG's Emg Mot for Ext of TRO

117 2-27-01 Order

118 2-21-01 Quinlans' Pls' Response to Def Terra, etc. Memo in Support of Def Mot Adv. Fees

119 1-30-01 McBride's Petition of the Estate of Daniel Terra and James Terra to Intervene

120 3-01-01 Shefsky's Defs, Terra, etc. Reply in Support of Mot for Adv. Fees

121 3-08-01 Agreed Protective Order

122 3-08-01 Order

123 3-21-01 Order

124 4-03-01 Order

125 4-08-01 Order

126 5-16-01 Order

127 5-18-01 Order

128 9-07-01 Orders

129 Quinlan's & AG's Joint Emg Mot and Memo of Law (Docs filed under Seal)

130 06-06-01 Quinlan's Mot for Lve to File Under Seal Emg Mot and Memo

131 6-08-01 Sidley's Fndtn's Opposition to Pls' & AG's Mot for TRO (Docs filed under Seal)

132 6-07-01 Order

133 6-08-01 Order

134 6-08-01 Order

135 6-14-01 Sidley's Emg Petition to Excuse Dir. Ahrweiler's Presence at Mediation

136 6-18-01 Shefsky's Emg Petition to Excuse Dir. Simpson, Tucker Presence at Mediation

137 06-15-01 Order

138 6-18-01 AG's Emg Petition to Excuse Dir.'s Daley & Ambassador Hartman's Presence at Mediation

139 6-19-01 AG's Corrected Caption Emg Petition to Excuse Dir's Daley & Ambassador Hartman's Presence at Mediation

140 6-18-01 Orders (3)

141 6-18-01 Shefsky's Mot for Ord Referring Matter to St.'s Atty of Cook Cty

142 6-29-01 Order

143 6-29-01 Additional Appearance

144 7-02-01 Bellows & Bellows Defs' Mot for Lve to File Written Obj. and Evd. Hrg.

16gi-002699

145 7-02-01 Orders (2)

146 6-29-01 Shefsky's Emg Mot to Wdrw

147 7-02-01 Order

148 7-06-01 Sidley's Mot for Entry of Consent Jdgmt & Order

149 6-29-01 Bellows & Bellows Defs' Mot for TRO to Prevent Changes

150 7-19-01 Cummins' Defs' Mot for Sub of Atty

151 7-19-01 Cummins' Correspondence Re Sub of Atty Mot

152 7-19-01 Cummins' Objs of Def Terra, etc to Proposed Settlement (Docs Filed Under Seal)

153 7-20-01 Cummins' Mot for Lve to File Responsive Pldgs & to Join Additional Parties

154 7-20-01 Cummins' Memo in Support of Mot for Lve to File Responsive Pleadings

155 7-20-01 Cummins' Mot for Lve to Conduct Ltd. Focused Disc

156 7-23-01 Sidley's Fndtn's Reply to Ind Def Dirs' Objs to Proposed Sett.

157 7-23-01 Quinlan's Pls' Response to Dir Defs Objs to Sett

158 7-23-01 Quinlan's & AG's Mot for Lve to File a Brief in Excess of 15 Pages

159 7-26-01 Order

160 7-26-01 Consent Jdgmt and Order

161 8-06-01 Shefsky's Petition for Fees and Costs

162 Affidavit of Brian Crowe in Sup. of Shefsky's Petition for Fees and Costs

163 8-22-01 Cummins' Notice of Appeal

164 8-29-01 Order

165 9-06-01 Cummins' Defs' Agreed Emg Mot for Ext of Time

166 9-07-01 Agreed Order

167 9-07-01 Order

168 9-14-01 Quinlan's Mot for Entry of Protective Order

169 9-14-01 Quinlan's Pet for Atty's Fees and Costs Pursuant to Cons. Jdgmt & Order

170 9-12-01 McDermott's Dr. Stebbins' & Dr. Marshall's Pet for Reimbursement of Fees & Costs

171 9-14-01 Bellows' Petition for Fees and Costs (Under Seal)

172 9-17-01 Cummins' Mot for Lve to Submit Fee Stmts Under Seal

173 Cummins' Petition for Fees and Expenses (Under Seal)

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174 9-14-01 Verner's Mot for Attys' Fees and Costs of Defs' Simpson, etc.

175 9-14-01 Kellogs' Mot for Attys' Fees and Costs of Defs, Simpson, etc.

176 9-20-01 Sidley's Fndtn's Opposition to Various Parties' Motions

177 9-20-01 Order

178 Kellogg's 8-31-01 Invoice

179 Kellogg's 7-31-01 Invoice

180 Kellogg's 6-30-01 Invoice

181 Kellogg's Mot for Attys' Fees and Costs of Defs, Simpson, etc.

182 Verner, Liipfert, etc. 9-06-01 Invoice

183 Verner, Liipfert, etc. 9-06-01 Invoice

184 Verner, Liipfert, etc. 7-26-01 Invoice

185 Verner, Liipfert, etc. 7-26-01 Invoice

186 Verner, Liipfert, etc. 9-06-01 Invoice

187 9-14-01 Verner's Mot for Attys' Fees and Costs of Def, Simpson, etc.

188 9-17-01 Affidavit of David Novoselsky

189 Cummins' 09-17-01 Petition for Fees and Expenses (Under Seal)

190 9-28-01 Quinlan's Supplemental Petition For Attys' Fees and Costs

191 9-27-01 Cummins Correspondence

192 06-29-01 Order

193 10-01-01 Agreed Order

194 9-28-01 Bellows' Amd Petition for Fees and Costs

195 10-2-01 Notice of Filing Documents Under Seal

196 10-01-01 Order

197 10-31-00 AG's Emg Mot to Object to Bd Meetng Sched. 11-02-00 in Boston

198 10-1-01 Agreed Protective Order.pdf

16di-002701

BUNTROCK AND GIDWITZ
VS.
TERRA, ET AL.
NO. 00 CH 13859

PLEADINGS

1. Plaintiffs Buntrock & Gidwitz's Verified Complaint
2. PlaintiffsBuntrock & Gidwitz's Motion for Expedited Discovery
3. Plaintiffs Buntrock & Gidwitz's Emergency Motion for TRO
4. Plaintiffs Buntrock & Gidwitz's Memorandum of Law in Support of their Motion for TRO
5. AG's Motion to Intervene
6. AG's Emergency Motion for TRO
7. AG's Memorandum in Support of Motion for TRO
8. AG's Complaint
9. Sidley's Appearance for Terra Foundation
10. Sidley's Brief in Opposition to Emergency Motion for TRO
11. Plaintiff Buntrock & Gidwitz's Reply in Support of Motion for TRO
12. Plaintiff Buntrock & Gidwitz's Motion to Disqualify Sidley
13. James Terra's Emergency Petition to intervene
14. 9/25/00 Court Order granting AG leave to intervene
15. 9/25/00 Court Order granting Buntrock & Gidwitz & AG's TRO
16. 9/25/00 Court Order continuing petition to intervene to 10/12/00
17. Plaintiffs Buntrock & Gidwitz & AG's Motion to appoint special process server
18. 9/28/00 Court Order appointing special process server

16di-002702

19. Def. Foundation's Motion to Dismiss AG's Complaint

20. Def. Foundation's Motion to Dismiss Buntrock & Gidwitz's Complaint

21. Def. Foundation's Memorandum in Support of its Motions to Dismiss

22. Def. Foundation's Brief in Opposition to James Terra's Petition to Intervene

23. Def. Foundation's Brief in Opposition to Plaintiffs Motion to Appoint Special Litigation Counsel and/or Receiver

24. Attorney Crowe's Appearance on behalf of Defs. Judith Terra, Tucker & Simpson

25. 10/12/00 Court Order extending TRO

26. 10/12/00 Court Order setting brief schedule for petition to intervene

27. Corrected Page 2 to Def.'s Brief in Opposition to Motion to Appoint Special Litigation Counsel and/or Receiver

28. Defs. Judith Terra, Tucker, Simpson Brief in Opposition to James Terra's Petition to Intervene

29. Def. Foundation's Brief in Opposition to Plaintiffs Motion to Enforce TRO and Enjoin Retaliation

30. Plaintiff's Reply in Support of Motion to Appoint Special Litigation Counsel and/or Receiver

31. Defs. Judith Terra, Tucker & Simpson's Brief in Opposition to Motion to Appoint Special Litigation Counsel and/or Receiver

32. AG's Response in Support of Plaintiffs Buntrock & Gidwitz's Motion to Appoint Independent Litigation Committee & Notice of Filing

33. Plaintiffs' Motion for Leave to File Reply in Support of Their Motion to Enforce the TRO and Enjoin Retaliation

34. 10/20/00 Court Order extending TRO, granting in part Plaintiffs' Motion to Appoint Litigation Council, and denying Foundation's Motion to Dismiss Plaintiff's and AG's Complaints

35. 10/20/00 Court Order granting James Terra until 11/2/00 to file Petition to Intervene

36. Defendant Tucker's Verified Answer and Affirmative Defenses

16di-002703

37. AG's Emergency Motion to Object to Foundation Board Meeting scheduled for 11/2/00 in Boston, MA

38. Plaintiffs Buntrock & Gidwitz's Joinder in AG's Emergency Motion to Object to Foundation Board Meeting scheduled for 11/2/00 in Boston, MA

39. Foundation's Opposition Brief to AG's Motion to Object to Foundation Board Meeting scheduled for 11/2/00 in Boston, MA

40. Defs Judith Terra, Tucker & Simpson's Response to AG's Emergency Motion to Object to Foundation Board Meeting scheduled for 11/2/00 in Boston, MA and Compel Compliance with Court Order

41. 11/1/00 Court Order cancelling 11/2/00 Foundation Board Meeting and extending TRO to 11/20/00

42. Winston & Strawn's Emergency Motion to Amend Court Order Entered 11/1/00

43. AG's Response to Winston & Strawn's Emergency Motion to Amend Court Order Entered 11/1/00

44. Plaintiff's Buntrock & Gidwitz Response to Winston & Strawn's Emergency Motion to Amend Court Order Entered 11/1/00

45. 11/2/00 Court Order setting status hearing and deadline to submit names of candidates for Foundation counsel

46. Pltffs Buntrock & Gidwitz's Emergency Motion to Produce & Quash the as Ultra Vires Dilenschneider Contract

47. Foundation's Opposition Brief to Pltffs Emergency Motion to Produce and Quash as Ultra Vires the Dilenscheider Contract

48. 11/13/00 Court Order Amending Order of 11/1/00

49. Pltffs Buntrock & Gidwitz's Response to Def. Tucker's Affirmative Defenses

50. Def. Foundation's Motion to Continue Stay of Proceedings Pending Independent Litigation Committee Investigation

51. Pltffs Buntrock & Gidwitz's Emergency Motion for a TRO to Enjoin Further Implementation of the Dilenschneider Contract

52. Pltffs Buntrock & Gidwitz's Emergency Motion to Appoint Receiver and for a TRO and Objection to Motion for Stay

16di-002704

53. Pltffs Buntrock & Gidwitz's Response to Motion to Stay

54. Defendant Terra, Tucker & Simpson's Response to Buntrock & Gidwitz's Emergency Motion to Appoint Receiver

55. Defendant Terra Foundation's Response to Buntrock & Gidwitz's Emergency Motion to Approve Receiver

56. Plaintiffs' Buntrock & Gidwitz's Reply in Support of Plaintiffs' Emergency Motion to Appoint Receiver and for a TRO and Objection to Motion for Stay

57. 12/14/00 Court Order setting hearing for 12/27/00

58. Terra Foundation's Sur-Reply to Plaintiffs' Emergency Motion to Appoint a Receiver and for a TRO

59. Pltffs Buntrock & Gidwitz's Reply in Support of TRO Enjoining Advancement of Attorneys Fees

60. AG's Motion to Enjoin Foundation's Use of Current Special Litigation Committee and for Appointment of a Receiver to Conduct Independent Investigation

61. Surreply of Defendants Tucker, Terra & Simpson to Pltffs Buntrock & Gidwitz's Emergency Motion to Appoint Receiver, for TRO and for Objection to Motion for Stay

62. Pltffs Buntrock & Gidwitz Join and Adopt AG's Motion to Enjoin Foundation's Use of Current Special Litigation Committee and for Appointment of a Receiver to Conduct the Independent Investigation

63. Pltffs Buntrock & Gidwitz's Emergency Motion In Limine to Exclude Affidavits of Larry Marshall, Theodore Stebbins & Ralph Lerner, Instanter

64. AG's Memorandum in Support of His Motion to Enjoin Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver to Conduct the Independent Investigation

65. AG's Emergency Motion to Compel Certain Discovery and for Appointment of a Receiver

66. Pltffs Buntrock & Gidwitz's Notice of Interlocutory Appeal

67. Pltffs Buntrock& Gidwitz's Emergency Motion for Stay Pursuant to Supreme Court Rule 305(B)

68. January 2, 2001 Court Order

16di-002705

69. Defendant Foundation's Opposition to AG's Motion to Enjoin Use of the Special Litigation Committee and for Appointment of a Receiver

70. Amended Appearance of Sidley & Austin filed 1/8/01

71. January 9, 2001 Court Order

72. Defendant Foundation's Motion for Judgment on the Pleadings

73. Defendant Foundation's Memorandum in Support of its Motion for Judgment on the Pleadings

74. Verified Answer and Affirmative Defenses of Defendant Michaeli

75. Def. Foundation's Motion for Clarification of 1/2/01 Court Order

76. Pltffs. Buntrock & Gidwitz's Opposition Brief to Motion for Clarification

77. 1/12/01 Court Order setting schedule for filing briefs

78. 1/12/01 Court Order granting Def. Simpson leave to file Sec. 2-615 Motion to Dismiss

79. Defendant Tucker's Notice of Joinder in Defendant Foundation Motion for Judgment on the Pleadings on Counts I and II of Plaintiff's Buntrock & Gidwitz's Complaint

80. Defendant Simpson's Motion to Dismiss

81. Defendant Simpson's Memorandum of Law in Support of his Section 2-615 Motion to Dismiss

82. Plaintiffs Buntrock & Gidwitz Join and Adopt the AG's Motion to Allow Bifurcated Depositions and Depositions in Excess of Three Hours Under Rule 206

83. Defendant Foundation's Motion to Deny A.G.'s Motion to Enjoin Use of the Current Special Litigation Committee and to Strike the hearing on that Motion for Feb. 20 to 22, 2001

84. Defendant Foundation's Motion to Vacate the TRO Entered on Jan. 2, 2001

85. Defendant Foundation's Motion to Compel the A.G. to Fully Answer Interrogatory No. 1

86. Defendants Judith Terra's, Tucker's, and Simpson's Memorandum in Support of the Director Defendants' Motion for Advancement of Fees

87. Defendants Judith Terra's, Tucker's and Simpson's Motion for Advancement of Fees Petition of the Estate of Daniel Terra and James D. Terra to Intervene

16di-002706

88. AG's Response to Foundation's Motion to Compel AG to Answer Interrogatory No. 1

89. Plaintiff's Buntrock and Gidwitz Motion to Strike Foundation's Motion to Vacate TRO of Jan. 2, 2001 and Motion for Payment of Attorney Fees

90. January 30, 2001 Order

91. Feb. 5, 2001 Attorney Fee Motion Order

92. Feb. 5, 2001 Mediation Order

93. Feb. 6, 2001 Order

94. Plaintiffs' Response to Defendants Judith Terra's, Tucker's, and Simpson's Memorandum in Support of the Director Defendants' Motion for Advancement of Fees

95. Defendants Terra's, Tucker's, and Simpson's Reply in Support of their Motion for Advancement of Fees

96. Pltffs' and AG's Emergency Motion for Extension of TRO

97. Feb. 27, 2001 Order

98. March 8, 2001 Agreed Protective Order

99. March 8, 2001 Order

100. March 21, 2001 TRO Order

101. April 3, 2001 TRO Order

102. April 3, 2001 Scheduling Order

103. Joint Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order to Enjoin Board Meeting Scheduled for June 8-9, 2001

104. Motion for Leave to File Under Seal Emergency Motion and Memorandum of Law in Support of Temporary Restraining Order To Enjoin Board Meeting Scheduled for June 8-9, 2001

105. Terra Foundation's Opposition to Plaintiffs' and Attorney General's Motion for Temporary Restraining Order to Enjoin Board Meeting Scheduled for June 8-9, 2001

16di-002707

106. 06/07/01 Order granting Plaintiffs' Motion for Leave to File Emergency Motion, Defendant's response to Emergency Motion due 7/8/01, Hearing on Emergency Motion 07/02/01, Foundation must provide documents to partiers and Attorney General

107. 06/08/01 Mediation Order

108. 06/08/01 Temporary Restraining Order

109. Emergency Petition to Excuse Director Helene Ahrweiler's Physical Presence from Mediation Session

110. 06/15/01 Order granting Ahrweiler's presence to be excused from mediation

111. Emergency Petition to Excuse Director Alan K. Simpson and Paul Tucker from Physical Presence at Mediation Sessions

112. Emergency Petition to Excuse Directors Margaret Daley and Ambassador Arthur Hartman's Physical Presence from Mediation Session

113. 06/18/01 Order Excusing Senator Simpson and Dr. Tucker from physical presence at the Mediation Session on 06/20/01

114. 06/18/01 Order Excusing Margaret Daley and Ambassador Hartman from physical presence at the Mediation Session on 06/20/01

115. 06/18/01 Order Taking Motion of Director Defendants for Advancement of Attorneys Fees under Advisement and continued to 7/02/01

116. Motion for Order Referring Matter to State's Attorney of Cook County for Investigation

117. Defendant's Motion for Temporary Restraining Order to Prevent Irrevocable Changes to the Terra Foundation

118. 06/29/01 Order Denying Defendant's Motion for Temporary Restraining Order to Prevent Irrevocable Changes to the Terra Foundation and setting status for 07/02/01 at 2:00 p.m.

119. Additional Appearance of Judith Terra, Paul Hayes Tucker and Alan K. Simpson

120. Defendant's Motion for Leave to File Written Objections and For an Evidentiary Hearing on the Proposed Settlement (Note: Leave to File was Denied)

121. 07/02/01 Order continuing temporary restraining order of 09/25/00 to 7/24/01 at 5:00 p.m., it is further ordered that the letter of the mediator dated 7/02/01 be filed with the Clerk of the Circuit Court and the Defendant's Motion for Leave to File Written

Objections and For an Evidentiary Hearing on the Proposed Settlement is denied for reasons set forth on the reward

122. 07/02/01 Mediation Letter filed

123. Shefsky & Froelich, Ltd.'s Emergency Motion to Withdraw

124. 07/02/01 Order granting Shefsky & Froelich, Ltd. leave to withdraw and also giving Shefsky & Forelich, Ltd. leave to file its petition for fees

125. 07/02/01 Order granting Motion to Admit Counsel Pro Hac Vice

126. Terra Foundation's Motion For Entry of Consent Judgment and Order

127. Defendants' Motion for Substitution of Attorney

128. Objections of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson to the Proposed Settlement

129. Motion for Leave to File Responsive Pleadings and to Join Additional Parties

130. Motion for Leave to Conduct Limited, Focused Discovery Critical to a Resolution of Proposed Settlement

131. Terra Foundation's Reply to Individual Defendant Directors' Objections to Proposed Settlement

132. Plaintiffs' (Buntrock & Gidwitz) Response to Director Defendants' Objections to Settlement

133. Attorney General's Reply (Missing)

134. Motion for Leave to File a Brief in Excess of 15 Pages, Instanter

135. 07/26/01 Order denying Mot for "Ltd" discovery and granting Mot for Leave to file answers and Mot to File Counterclaims is denied

136. 07/26/01 Consent Judgment and Order

137. Shefsky & Froelich Ltd.'s Petition for Fees and Costs

138. Affidavit of Brian L. Crowe in Support of Shefsky & Froelich Ltd.'s Petition for Fees and Costs

139. Cummins and Cronin Notice of Appeal

16di-002709

140. 08/29/01 Order setting a hearing on fee petitions for 09/14/01 at 1:00 p.m.

141. Def's Agreed Emg Mot for Extension of Time filed by Cummins & Cronin

142. 09/07/01 Agreed Order for Plaintiff's Buntrock and Gidwitz for file a petition for award of attorneys fees and costs and a status set for 09/20/01

143. 09/07/01 Agreed Order granting Def's Emg Mot for Extension of Time

144. Quinlan & Carroll, Ltd.'s Mot for Entry of Protective Order

145. Quinlan & Carroll, Ltd.'s Petition for Atty's Fees and Costs Pursuant to Consent Judgment and Order Entered 07/26/01

146. McDermott, Will & Emery's Dr. Stebbins' and Dr. Marshall's Petition for Reimbursement of Fees and Costs

147. Bellows and Bellows' Petition for Fees and Costs (Under Seal)

148. Cummins & Cronin's Mot for Leave to Submit Fee Statements Under Seal for In Camera Review of Defendants Simpson, Terra and Tucker

149. Cummins and Cronin's Petition for Fees

150. Garment's Mot for Attorneys' Fees

151. Chris Todd's Mot for Attorneys' Fees

152. Foundation's Opposition to Various Parties' Motions and Attempts to File Doc Supporting Their Attys' Fee Petitions in Camera

153. 09/20/01 Order regarding various petitions for payment of atty's fees and costs and other motions

154. Simpson, Terra and Tucker's Mot for Attorneys' Fees and Costs with redacted billing statements of Chris Todd of Kellogg, Huber, Hansen, Todd & Evans

155. Simpson, Terra and Tucker's Mot for Attorneys' Fees and Costs with billing statements of Lenard Garment of Verner, Lipfert, Bernhard, McPherson & Hand

156. Cummins and Cronin's Petition for Fees and Expenses with Affidavits of Cummins and Novoselsky

157. Bellows and Bellows Amended Petition For Fees and Costs

158. Notice of Filing Documents Under Seal

16di-002710

159. 10/01/01 Order regarding attorneys' fees and hearing set for Dec. 19 at 11:00 a.m.

160. 10/01/01 Agreed Protective Order

161. 10/31/01 Cummins' Emg Mot for Reconsideration

16di-002711

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*,

Plaintiffs,

v.

JUDITH TERRA, *et al.*,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff- Intervenor,

v.

JUDITH TERRA, *et al.*,

Defendants.

NOV 0 6 2001

No. 00 CH 13859

NOTICE OF MOTION

TO: **SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that on Nov. 30, 2001 at 9:15 a.m. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Dorothy Kinnaird in Room 2302, in the Circuit Court of Cook County, State of Illinois, and present the ATTORNEY GENERAL'S MOTION FOR ADDITIONAL TIME TO FILE HIS RESPONSE TO PETITIONS FOR ATTORNEY'S FEES, a copy of which is hereby served upon you.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
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Telephone: (312) 814-2533

16di-002712

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*, Plaintiffs, v. JUDITH TERRA, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, v. JUDITH TERRA, *et al.*, Defendants.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I served a copy of the foregoing Notice and the Attorney General's Motion For Additional Time To File His Response To Petitions For Attorney's Fees upon the parties listed on the attached Service List by fax and regular mail by depositing a stamped copy of same addressed to each of the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 2nd day of November 2001, before 5:00 p.m.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
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Telephone: (312) 814-2533

16di-002713

SERVICE LIST

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Quinlan & Crisham, Ltd.
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Chicago, IL 60602

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77 W. Wacker Drive
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Chicago, IL 60601

Stephen C. Carlson
Susan A. Stone
Sidley, Austin, Brown & Wood
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603

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Bellows & Bellows, P.C.
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Chicago, IL 60603

K. Chris Todd
Neil M. Gorsuch
David E. Ross
John H. Longwell
Jibe O. Nzelibe
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W. Suite 400
Washington, DC 20036

Leonard Garment
Lawrence Levinson
Verner, Lupfert, Bernhard, McPherson & Hand
901 - 15th Street, N.W. Suite 700
Washington, DC 20005

16di-002714

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	No. 00 CH 13859 Judge D.K. Kinnaird

TERRA FOUNDATION'S MOTION
FOR LEAVE TO FILE APPEARANCE OF ADDITIONAL COUNSEL

Now comes defendant TERRA FOUNDATION FOR THE ARTS, by its attorneys and moves this Court for leave to file the appearance of additional counsel on

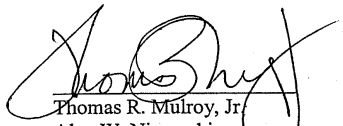
16di-002716

its behalf. Specifically, the Foundation seeks leave for the firm of MULROY, SCANDAGLIA, MARRINSON, RYAN ("MSMR") to file an additional appearance on the Foundation's behalf to protect its interests in paying only those fees provided for in the July 24, 2001 Consent Judgment and Order. A copy of the proposed appearance is attached as Exhibit A hereto.

WHEREFORE, defendant TERRA FOUNDATION FOR THE ARTS respectfully requests that this Court enter an Order granting it leave to file the appearance of the law firm Mulroy, Scandaglia, Marrinson, Ryan as additional counsel on its behalf.

Respectfully Submitted,

TERRA FOUNDATION FOR THE ARTS



Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
Atty. # 38050
55 East Monroe Street, Suite 3930
Chicago, IL 60603
(312) 580-2020

16di-002717

EXHIBIT A

16di-002718

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00CH 13859

Judge D.K. Kinnnaird

APPEARANCE

The undersigned as attorney, enters their appearance, as additional counsel on behalf of Defendant The Terra Foundation for the Arts, an Illinois Not For Profit Corporation.

Respectfully Submitted,

Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
55 East Monroe Street, Suite 3930
Chicago, IL 60603
(312) 580-2020 Atty. # 38050

I certify that a copy of the above instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Attorney for the Terra Foundation for the Arts

16di-002719

NOV 19 2001

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

FILED-1
01 NOV 16 AM 10: 31
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
DOROTHY BROWN CLERK

No. 00CH 13859

Judge D.K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Notice of Motion

To: See Attached Service List

On 11-21-01, at 9:15 AM, in courtroom 2302 of the Richard J. Daley Center, 50 West Washington Street Chicago, Illinois, defendant, Terra Foundation for the Arts, through its attorneys, Mulroy Scandaglia Marrinson Ryan, will present its **Motion for Leave to File Appearance of Additional Counsel**, a copy of which is hereby served upon you.

Alan Nigorski

Mulroy Scandaglia Marrinson & Ryan
55 East Monroe Street, 39th Floor
Chicago, Illinois 60603
(312) 580-2020
Counsel for Terra Foundation for the Arts

16di-002720

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that a copy of the above document(s) was served on the parties above via messenger or via federal express, by 5 p.m. on November 16, 2001.

Alan Niccolai

Attorney for Terra Foundation for the Arts

16di-002721

Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/16/01)

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Chicago, IL 60601

16di-002722

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

Judge D.K. Kinnaird

FILED-1
01 NOV 16 AM 10: 31
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY BROWN
CLERK

TERRA FOUNDATION'S MOTION TO REJECT ANY FEE PETITIONS SEEKING ATTORNEYS' FEES NOT INCURRED IN CONNECTION WITH THIS LAWSUIT

Now comes defendant TERRA FOUNDATION FOR THE ARTS, by its attorneys, MULROY, SCANDAGLIA, MARRINSON, RYAN, and moves this Court to

16di-002724

reject any fee petition or portion thereof seeking attorneys' fees not incurred in connection with this lawsuit (00 CH 13859) as beyond the jurisdiction of this Court under the July 24, 2001 Consent Judgment and Order. In support thereof, defendant states as follows:

1. On July 24, 2001, this Court entered a Consent Judgment and Order resolving the above-captioned litigation, which is attached hereto as Exhibit A. The Court's Order was the result of a settlement agreement between plaintiffs Mr. Dean Buntrock, Mr. Ronald Gidwitz, defendant Terra Foundation for the Arts ("the Foundation") and the Illinois Attorney General, which was reached pursuant to the Mediation ordered by this Court.

2. As part of the Consent Judgment, the parties agreed and the Court ordered that "[r]easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." (Ex. A ¶ 12.) Thus, the Directors are entitled to seek reimbursement from the Foundation ***only*** for reasonable attorneys' fees incurred in connection with ***this*** lawsuit: *Buntrock, et al. v. Terra, et al.*, No. 00 CH 13859.

3. Prior to and since the Court's entry of the Consent Judgment, defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson have mounted various collateral attacks against the settlement agreement and the Court's order, including but not limited to a now-dismissed action filed in federal court ("the Second Lawsuit") and an action originally filed on July 31, 2001 in the Law Division of this Court, *Tucker, et al. v. Buntrock et al.*, No. 01 L 009112 ("the Third Lawsuit"). The Third Lawsuit is now pending before Judge Nowicki.

16di-002725

4. Attorneys for several of the Foundation's Directors have now submitted fee petitions pursuant to paragraph 12 of the Consent Judgment. Currently, there are at least eight such fee petitions before the Court. However, upon information and belief, several of the fee petitions seek reimbursement for attorneys' fees not incurred "in connection with this lawsuit" but incurred in connection with the Second and Third Lawsuits or other collateral attacks on the Consent Judgment.

5. The Consent Judgment -- ***the sole basis under which the Directors seek fees*** -- states that the Foundation shall pay ***only*** those attorneys' fees incurred by its Directors "in connection with ***this*** lawsuit." (Ex. A ¶ 12.) "A consent judgment is generally regarded as one entered by the court reciting a settlement agreement reached by the parties . . . ." *People ex. rel. Fahner v. Colorado City Lot Owners and Taxpayers Ass'n,* 108 Ill. App. 3d 266, 276 (1st Dist. 1982). Thus, "like any other agreement, the law of contract controls its interpretation and its meaning should be determined by the language chosen by the parties." *Id. See also In re Marriage of Hilliard*,178 Ill. App. 3d 620, 623 (3rd Dist. 1989) ("The rules regarding settlement agreements are the same as those which apply to contracts generally, and the primary objective is to give the agreement its plain and ordinary meaning according to the intent of the parties.")

6. Here, the Consent Judgment does not authorize the Court to award – nor require the Foundation to pay – attorneys' fees incurred by the Directors in different – albeit collateral – lawsuits. Accordingly, because the Consent Judgment provides the sole basis under which petitioners' seek fees, any petition for fees incurred

16di-002726

not in connection with this lawsuit (OO CH 13859) is beyond the jurisdiction of this Court and must be rejected.

7. Moreover, if the Court grants petitioners fees not incurred in connection with this lawsuit, certain Directors undoubtedly will continue in serial litigation involving the Foundation and will return to this Court for reimbursement of their attorneys' fees thereby involving this Court and the Foundation in a morass of continuing litigation with no end in sight. Such a result would deprive the Court and the Foundation of one of the significant benefits of the settlement agreement and Consent Order – an end to this lawsuit.

16di-002727

WHEREFORE, defendant TERRA FOUNDATION FOR THE ARTS respectfully requests that this Court enter an Order:

(1) rejecting any fee petition or portion thereof seeking attorneys' fees not incurred in connection with this lawsuit (No. 00 CH 13859) as beyond the jurisdiction of this Court under the July 24, 2001 Consent Judgment and Order;

(2) ordering any of the parties' with fee petitions currently before the Court to withdraw or to amend their petitions to the extent they seek fees not incurred in connection with this lawsuit (No. 00 CH 13859); and

(3) granting the Foundation leave to file an objection to those fee petitions seeking fees not incurred in connection with this lawsuit (No. 00 CH 13859).

Respectfully Submitted,

TERRA FOUNDATION FOR THE ARTS

Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
Atty. # 38050
55 East Monroe Street, Suite 3930
Chicago, IL 60603
(312) 580-2020

16di-002728

EXHIBIT A

16di-002729

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

16di-002730

88236v2

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-002731

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

16di-002732

11. As soon as practicable after the new Directors have taken office, new officers and nmittee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:35 A.M.

16di-002733

NOV 19 2001

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

FILED-1
01 NOV 16 AM 10:31
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY A. BROWN
CLERK

No. 00CH 13859

Judge D.K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Notice of Motion

To: See Attached Service List

On 11-21-01, at 9:15 AM, in courtroom 2302 of the Richard J. Daley Center, 50 West Washington Street Chicago, Illinois, defendant, Terra Foundation for the Arts, through its attorneys, Mulroy Scandaglia Marrinson Ryan, will present its **Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit**, a copy of which is hereby served upon you.

Alan Nicgorski

Mulroy Scandaglia Marrinson & Ryan
55 East Monroe Street, 39th Floor
Chicago, Illinois 60603
(312) 580-2020
Counsel for Terra Foundation for the Arts

16di-002734

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that a copy of the above document(s) was served on the parties above via messenger or via federal express, by 5 p.m. on November 16, 2001.

Alan Niccorski

Attorney for Terra Foundation for the Arts

16di-002735

Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/16/01)

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Winston & Strawn
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Chicago, IL 60601

16di-002736

NOV 26 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 00 CH 13859
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	
	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
	)	
Plaintiff- Intervenor,	)	
v.	)	
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	

ATTORNEY GENERAL'S MOTION TO FILE BRIEFS IN EXCESS OF 15 PAGES IN RESPONSE TO THE SEVERAL FEE PETITIONS

Plaintiff-Intervenors, the PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* JAMES E. RYAN, moves this Honorable Court for leave to file briefs in excess of 15 pages in response to the several fee petitions and states :

1. As the Court is aware substantial and multiple fee petitions have been filed seeking millions of dollars from the Foundation for attorney fees.

2. The staff of the Attorney General has made significant effort to review these petitions. The Attorney General's staff have made several charts for comparison and have undertaken to examine and list the various activities of which they were aware, which occurred outside of the court matters so as to supply such to the court for review.

16di-002738

3. These efforts were made so as to set forth in writing the recollections of the Attorney General's staff of some, but clearly not all, matters that were brought before this court as well as the many other activities that were undertaken in the furtherance of this litigation. Unfortunately, this effort required more than 15 pages to complete.

WHEREFORE, the Attorney General prays for leave to file in excess of 15 pages in response to the several fee petitions.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Bureau of Charitable Trusts and Solicitations
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

16di-002739

NOV 26 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

NOTICE OF FILING

TO: **SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that on November 20, 2001, I caused the attached **Attorney General's Response To The Fee Petition Submitted By Attorneys For Ronald Gidwitz And Dean Buntrock (Filed Under Seal Pursuant To Court Order)** to be filed with the Clerk of the Circuit Court Cook County, Illinois, Chancery Division.

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I served a copy of the foregoing Notice and the foregoing document upon the parties listed below by depositing a copy of same addressed to the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 19th day of November, 2001 before 5:00 p.m.

Therese Harris

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
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Washington, DC 20005

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

FILED
NOV 27 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

EMERGENCY MOTION TO ADVANCE HEARING

NOW COMES Shefsky & Froelich Ltd., former attorneys for JUDITH TERRA, PAUL

HAYES TUCKER and ALAN K. SIMPSON, and respectfully requests this Honorable Court advance the date for hearing Shefsky & Froelich Ltd.'s petition for fees. In support thereof, petitioner states:

1. On or about October 8, 2000 Shefsky & Froelich Ltd. was retained to provide representation to Judith Terra, Alan K. Simpson and Paul Hayes Tucker as directors of the Terra Foundation for the Arts (the "Foundation").

2. Pursuant to the by-laws of the Foundation, the Illinois Not-for-Profit Corporation Act and the Indemnification Agreements between the defendants and the Foundation, advancements and indemnification for the costs and fees expended in this litigation were to have been paid by the Foundation.

3. On or about January 26, 2001, defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson moved to compel the advancement of fees for their defense in this matter ("January Fee Motion"). From time to time, including on March 21, 2001, April 3, 2001, May 16, 2001 and May 18, 2001, this Court continued the ruling on the January Fee Motion because of a concern that a ruling might impact the progress of mediation. On each of these occasions, the Court assured counsel that it would promptly rule on the January Fee Motion once the mediation was complete.

4. In June, 2001, the mediation was completed. As part of the mediated agreement, provisions were made for the fees of counsel to be paid by the Foundation.

5. On or about July 2, 2001, Shefsky & Froelich Ltd. was allowed to withdraw from the representation of the director defendants without prejudice to its right to pursue the January Fee Motion or to file an additional petition pursuant to the mediated settlement agreement.

6. On July 26, 2001, a Consent Decree and Judgment was entered by this Court.

7. On or about August 6, 2001, Shefsky & Froelich Ltd. filed a renewed petition for fees and costs ("Renewed Petition") with the supporting affidavit of Brian L. Crowe attesting to the reasonableness of such fees. Attached thereto were copies of the daily time entries for each lawyer assigned to this matter for the period between October 8, 2000 and the Shefsky & Froelich Ltd.'s withdrawal in July, 2001.

8. From time to time since August 6, 2001, the Renewed Petition has been continued while the Foundation, through its lawyers Sidley, Austin, Brown & Wood and Mulroy, Scandaglia, Marrinson, Ryan, the plaintiffs, through their lawyers, Quinlan & Carroll, the Attorney General of the State of Illinois and this Court have had an opportunity to review and comment upon the fee requests.

9. The Attorney General and the Foundation have now both filed responses to Shefsky & Froelich Ltd.'s petition. Significantly, neither the Foundation nor the Attorney General has made any objection whatsoever to either the fees or costs incurred or the request for reimbursement in the Renewed Petition.

10. It has now been almost fourteen months since Shefsky & Froelich Ltd. began representing the Foundation's directors. A review of the various petitions and responses reveals that Shefsky & Froelich Ltd. is the only firm that has represented any party since the beginning of this litigation that has not been paid. Similarly, Shefsky & Froelich Ltd. has not been paid for any of the out of pocket expenses incurred in this matter for a period of almost 14 months. On numerous occasions since January 26, 2001, Shefsky & Froelich Ltd.'s right to timely payment has been made

16di-002747

subordinated to this Court's and the parties' desires to resolve this case through the mediation process. Shefsky & Froelich Ltd.'s fiscal year closes on December 31, 2001. Given these circumstances: (i) petitions for fees have been pending for almost 10 months; (ii) detailed time records have been on file and available for review for almost four months; (iii) strict review by the plaintiffs, the Foundation and the Attorney General has not produced a single objection to Shefsky & Froelich Ltd.'s petition; and (iv) Shefsky & Froelich Ltd. is the only firm that has not been paid for almost 14 months, it is reasonable for this Court to exercise its equitable power and rule on Shefsky & Froelich Ltd.'s Renewed Petition on or before December 19, 2001.

WHEREFORE, Shefsky & Froelich Ltd. respectfully prays that this Court exercise its equitable power and rule on Shefsky & Froelich Ltd.'s Renewed Petition on or before December 19, 2001.

Respectfully submitted,

SHEFSKY & FROELICH LTD.

By: One of its attorneys

Brian L. Crowe
James D. Wilson
Patricia S. Spratt
SHEFSKY & FROELICH LTD.
Suite 2500
444 North Michigan Avenue
Chicago, IL 60611
(312) 527-4000
No. 29143

725074.1

16di-002748

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

FILED
NOV 27 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

NOTICE OF EMERGENCY MOTION

TO: (See Certificate of Service)

PLEASE TAKE NOTICE THAT on December 4, 2001 at 9:15 m. we shall appear before the Honorable Dorothy K. Kinnaird, Judge of the Circuit Court, Room 2302 of the Richard J. Daley Center, Chicago, Illinois, and then and there present ***Emergency Motion To Advance Hearing***, a copy of which is hereby served upon each of you.

DATED: November 27, 2001

SHEFSKY & FROELICH LTD.

By: One of its attorneys

Brian L. Crowe
James D. Wilson
Patricia S. Spratt
SHEFSKY & FROELICH LTD.
444 North Michigan Avenue, 25th Floor
Chicago, IL 60611
(312) 527-4000

CERTIFICATE OF SERVICE

The Undersigned, pursuant to the provisions of 1-109 of the Code of Civil Procedure, certifies and affirms that on November 27, 2001, she served a true and correct copy of the foregoing ***Notice of Motion*** and ***Emergency Motion To Advance Hearing*** upon

William R. Quinlan
James R. Carroll
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Stephen C. Carlson
SIDLEY AUSTIN BROWN & WOOD
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Chicago, IL 60602

Scott J. Szala
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601

Floyd D. Perkins
Assistant Attorney General &
Bureau Chief of Charitable Trusts
OFFICE OF THE ILLINOIS ATTORNEY GENERAL
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William P. Schuman
MCDERMOTT WILL & EMERY
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1615 M Street, N.W.
Suite 400
Washington, D. C. 20036

Eric D. Brandfonbrener
GRIPPO & ELDEN
227 West Monroe Street
Suite 3600
Chicago, IL 60606

by depositing a true and accurate copy of same in a properly addressed, postage prepaid envelope in the U.S. Mail at 444 N. Michigan Avenue, Chicago, Illinois before the hour of 5:00 p.m.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

FILED
NOV 27 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

EMERGENCY MOTION TO ADVANCE HEARING

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2. Pursuant to the by-laws of the Foundation, the Illinois Not-for-Profit Corporation Act and the Indemnification Agreements between the defendants and the Foundation, advancements and indemnification for the costs and fees expended in this litigation were to have been paid by the Foundation.

3. On or about January 26, 2001, defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson moved to compel the advancement of fees for their defense in this matter ("January Fee Motion"). From time to time, including on March 21, 2001, April 3, 2001, May 16, 2001 and May 18, 2001, this Court continued the ruling on the January Fee Motion because of a concern that a ruling might impact the progress of mediation. On each of these occasions, the Court assured counsel that it would promptly rule on the January Fee Motion once the mediation was complete.

4. In June, 2001, the mediation was completed. As part of the mediated agreement, provisions were made for the fees of counsel to be paid by the Foundation.

5. On or about July 2, 2001, Shefsky & Froelich Ltd. was allowed to withdraw from the representation of the director defendants without prejudice to its right to pursue the January Fee Motion or to file an additional petition pursuant to the mediated settlement agreement.

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10. It has now been almost fourteen months since Shefsky & Froelich Ltd. began representing the Foundation's directors. A review of the various petitions and responses reveals that Shefsky & Froelich Ltd. is the only firm that has represented any party since the beginning of this litigation that has not been paid. Similarly, Shefsky & Froelich Ltd. has not been paid for any of the out of pocket expenses incurred in this matter for a period of almost 14 months. On numerous occasions since January 26, 2001, Shefsky & Froelich Ltd.'s right to timely payment has been made

16di-002754

subordinated to this Court's and the parties' desires to resolve this case through the mediation process. Shefsky & Froelich Ltd.'s fiscal year closes on December 31, 2001. Given these circumstances: (i) petitions for fees have been pending for almost 10 months; (ii) detailed time records have been on file and available for review for almost four months; (iii) strict review by the plaintiffs, the Foundation and the Attorney General has not produced a single objection to Shefsky & Froelich Ltd.'s petition; and (iv) Shefsky & Froelich Ltd. is the only firm that has not been paid for almost 14 months, it is reasonable for this Court to exercise its equitable power and rule on Shefsky & Froelich Ltd.'s Renewed Petition on or before December 19, 2001.

WHEREFORE, Shefsky & Froelich Ltd. respectfully prays that this Court exercise its equitable power and rule on Shefsky & Froelich Ltd.'s Renewed Petition on or before December 19, 2001.

Respectfully submitted,

SHEFSKY & FROELICH LTD.

By: One of its attorneys

Brian L. Crowe
James D. Wilson
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SHEFSKY & FROELICH LTD.
Suite 2500
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16di-002755

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,

Defendants.

FILED
NOV 27 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

NOTICE OF EMERGENCY MOTION

TO: (See Certificate of Service)

PLEASE TAKE NOTICE THAT on December 4, 2001 at 9:15 m. we shall appear before the Honorable Dorothy K. Kinnaird, Judge of the Circuit Court, Room 2302 of the Richard J. Daley Center, Chicago, Illinois, and then and there present ***Emergency Motion To Advance Hearing***, a copy of which is hereby served upon each of you.

DATED: November 27, 2001

SHEFSKY & FROELICH LTD.

By: One of its attorneys

Brian L. Crowe
James D. Wilson
Patricia S. Spratt
SHEFSKY & FROELICH LTD.
444 North Michigan Avenue, 25th Floor
Chicago, IL 60611
(312) 527-4000

CERTIFICATE OF SERVICE

The Undersigned, pursuant to the provisions of 1-109 of the Code of Civil Procedure, certifies and affirms that on November 27, 2001, she served a true and correct copy of the foregoing ***Notice of Motion*** and ***Emergency Motion To Advance Hearing*** upon

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Assistant Attorney General &
Bureau Chief of Charitable Trusts
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1615 M Street, N.W.
Suite 400
Washington, D. C. 20036

Eric D. Brandfonbrener
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Chicago, IL 60606

by depositing a true and accurate copy of same in a properly addressed, postage prepaid envelope in the U.S. Mail at 444 N. Michigan Avenue, Chicago, Illinois before the hour of 5:00 p.m.

_____

16di-002758

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock

v.

Tchra

No. 00CH 13459

ORDER

This cause coming before the court on the motion of Shefsky & Froelich Ltd to advance hearing on its petition for fees and all parties having represented that they have no objection to the payment of Shefsky & Froelich's fees in accordance with the petition and no objection to the motion to advance and the court being fully advised in the premises it is hereby ordered:

(1) A hearing on Shefsky & Froelich's petition for fees is set for December 14, 2001 at 11:00am if necessary.

(2) Shefsky & Froelich shall present a form order to the court with copies served on all parties

Atty. No.: 29143

Name: Wilson J.

Atty. for: Shefsky & Froelich Ltd

Address: 444 N. Michigan Ave

City/State/Zip: Chicago 60611

Telephone: (312) 836-4052

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
DEC 04 2001
JUDGE DOROTHY KINNAIRD-276
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

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JAMES D. WILSON
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DIRECT FAX: (312) 527-1007

IN REFERENCE TO:
25134-01

December 4, 2001

VIA MESSENGER

The Honorable Dorothy Kirie Kinnaird
Judge, Circuit Court of Cook County
2302 Daley Center
Chicago, IL 60602

Re: ***Buntrock, et al. v. Judith Terra, et al.***
Case No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed please find an original and five copies of a draft order submitted to this Court pursuant to today's order. I have also included a disk containing a WordPerfect version of the same.

Very truly yours,

SHEFSKY & FROELICH LTD.

James D. Wilson

JDW:kmm
726270.1
Enclosures

cc: All counsel of record

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

ORDER

THIS CAUSE coming before the Court on Shefsky & Froelich Ltd.'s Petition for Fees and Costs filed with this Court on August 6, 2001 and such petition and supporting affidavit having been

reviewed by counsel for the Terra Foundation for the Arts and the Attorney General for the State of Illinois, and all parties having represented to the Court that they have no objection to the payment of Shefsky & Froelich Ltd.'s fees in accordance with the petition and the Court otherwise being fully advised in the premises:

IT IS HEREBY ORDERED that Shefsky & Froelich Ltd. is awarded fees in the amount of _____to be paid forthwith by the Terra Foundation for the Arts.

DATED:

ENTERED:

_____
Dorothy Kirie Kinnaird, Judge Presiding

Brian L. Crowe
James D. Wilson
Patricia S. Spratt
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Suite 2500
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16di-002761

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DEC - 7 2001

IN REFERENCE TO:
25134-01

December 4, 2001

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Washington, D. C. 20036

Eric D. Brandfonbrener
GRIPPO & ELDEN
227 West Monroe Street
Suite 3600
Chicago, IL 60606

Re: ***Buntrock, et al. v. Terra, et al.***

Dear Counsel:

Enclosed please find a copy of the Order entered today and the draft Order Judge Kinnaird

requested.

Very truly yours,

SHEFSKY & FROELICH LTD.

James D. Wilson

JDW:kmm
Enclosures

726220.1

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock

v.

Terra

No. 00CH 13459

ORDER

This cause coming before the court on the motion of Shefsky & Froelich Ltd to advance hearing on its petition for fees and all parties having represented that they have no objection to the payment of Shefsky & Froelich's fees in accordance with the petition and no objection to the motion to advance and the court being fully advised in the premises it is hereby ordered:

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CLERK OF CIRCUIT COURT
DOROTHY BROWN
DEC 04 2001
JUDGE DOROTHY KINNAIRD-276
DEPUTY CLERK

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(1)

16dr002764

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IN REFERENCE TO:
25134-01

December 4, 2001

VIA MESSENGER

The Honorable Dorothy Kirie Kinnaird
Judge, Circuit Court of Cook County
2302 Daley Center
Chicago, IL 60602

Re: ***Buntrock, et al. v. Judith Terra, et al.***
Case No. 00 CH 13859

Dear Judge Kinnaird:

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Very truly yours,

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James D. Wilson

JDW:kmm
726270.1
Enclosures

cc: All counsel of record

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	Hon. Dorothy Kirie Kinnaird

ORDER

THIS CAUSE coming before the Court on Shefsky & Froelich Ltd.'s Petition for Fees and Costs filed with this Court on August 6, 2001 and such petition and supporting affidavit having been

reviewed by counsel for the Terra Foundation for the Arts and the Attorney General for the State of Illinois, and all parties having represented to the Court that they have no objection to the payment of Shefsky & Froelich Ltd.'s fees in accordance with the petition and the Court otherwise being fully advised in the premises:

IT IS HEREBY ORDERED that Shefsky & Froelich Ltd. is awarded fees in the amount of _____ to be paid forthwith by the Terra Foundation for the Arts.

DATED:

ENTERED:

_____
Dorothy Kirie Kinnaird, Judge Presiding

Brian L. Crowe
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16di-002767

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DEC - 7 2001

IN REFERENCE TO:
25134-01

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December 4, 2001

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Re: ***Buntrock, et al. v. Terra, et al.***

Dear Counsel:

Enclosed please find a copy of the Order entered today and the draft Order Judge Kinnaird

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Very truly yours,

SHEFSKY & FROELICH LTD.

James D. Wilson

JDW:kmm
Enclosures

726220.1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts et al.,	)	
Plaintiffs,	)	No. 00 CH 13859
v.	)	Hon. Dorothy Kirie Kinnaird
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

FILED
DEC 10 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

BELLOWS AND BELLOWS' REPLY IN FURTHER SUPPORT OF ITS AMENDED PETITION FOR FEES AND COSTS

Bellows and Bellows, P.C., by its undersigned attorney, hereby submits its Reply in Further Support of its Amended Petition for Fees and Costs. For the reasons stated below and in Bellows and Bellows' Petition for Fees and Costs, its Amended Petition for Fees and Costs and their supporting Affidavits and the exhibits thereto, the Amended Petition should be granted and the Terra Foundation should be ordered to pay the fee and cost items incurred by Directors Judith Terra ("Terra"), Paul Hayes Tucker ("Tucker") and Alan Simpson ("Simpson") as set forth in the Amended Petition.

Should this Court grant some of the fees incurred as being "in connection with" this litigation and reject others (other than for reasonableness), this Court would commit error. Respectfully, it is not for this Court to decide that fees it may now disallow may be recovered at another time in a different action. Were that the case, all fees in connection with this litigation should be decided elsewhere. Petitioner must be allowed to have its fees measured against the fees of all other participants.

I.

THE FOUNDATION'S OBJECTIONS CANNOT APPLY TO ANY PORTION OF BELLOWS AND BELLOWS' WORK PRODUCT

On July 26, 2001, this Court entered an Order ("the Order") stating in part that "Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." In the Amended Petition, Bellows and Bellows submitted billings for $67,012.75 in fees and $5,305.65 in costs. Of these totals, at most, costs of $400.00 and fees of $5,972.50 would not have been incurred if the case Terra Foundation for the Arts et al. v. Floyd Perkins, No. 01 C 4976 ("the Federal Action") had not been filed.

After the Federal Action was dismissed, Bellows and Bellows' previous work product was replicated in filings before this Court seeking injunctive relief. The fee and cost items for such work product relate equally to the instant matter and the Federal Action. Those fee and cost items undoubtedly were incurred in connection with this lawsuit. Therefore, those fee and cost items fall within the right of Directors Terra, Tucker and Simpson to be indemnified pursuant to the Foundation's bylaws and the Not for Profit Corporations Act.

Indeed, it would be an abuse of discretion for this Court to find otherwise. To draw a

16di-002772

distinction between work performed in preparing a request for relief (regardless of where it was **initially** presented) and the work in presenting that request subsequently would be arbitrary and unwarranted.

The Terra Foundation for the Arts' ("Foundation's") objection, stated in its Motion dated November 16, 2001 must be limited to $5,972.50 in fees and $400.00 in costs in the Amended Petition. Even then, the Foundation's objections should be disregarded with respect to such items.[1]

II.

THE ATTORNEY GENERAL OVERLOOKS THE RELEVANT PORTIONS OF THE NOT FOR PROFIT CORPORATIONS ACT

The numerous objections of the People of the State of Illinois ex rel. James E. Ryan, Attorney General of Illinois ("Attorney General"), to the Amended Petition are without merit. In its Response to the fee petitions, the Attorney General omits to consider the relevant portions of the Illinois Not for Profit Corporations Act and of the Foundation's bylaws.

805 ILCS 105/108.75(a) states that any director of a not-for-profit corporation may be indemnified in connection with "*any* threatened, pending or completed action, suit or proceeding" (emphasis supplied) for attorneys fees "actually and reasonably incurred ... if such person acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation...." Section 108.75(a) extends to *any* suit so long as the directors believe themselves to be acting in the best interests of the corporation. This statutory provision is not limited to cases in which the directors are named as defendants. If directors believe the best interests of the corporation require them to take affirmative action and file suit, Section 108.75(a) provides a

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[1]The objections to the less than $64,000 in remaining fee and cost items are without merit for the reasons stated at page 6, footnote 3 hereinafter.

16di-002773

statutory basis for their indemnification, regardless of whether the directors take an offensive or defensive litigation posture. The Attorney General's suggestion, that Section 108.75(c)[2] of the Not for Profit Corporations Act is the only statutory basis on which this Court can enter an Order awarding fees, is incorrect.

In the case at bar, Directors Terra, Tucker and Simpson did not agree to the Consent Judgment that preceded the Order. Instead, these Directors believed that their duty to the Foundation required them to take action in the best interests of the Foundation. They reasonably believed that the Attorney General's advocacy in alliance with the faction of Directors opposed to the vision of the Foundation's founder, Daniel Terra, arguably led some Directors to change their positions because of concern over actions that could have been taken against them by interests that wanted the Foundation's museum to remain in the City of Chicago. Setting forth facts tending to show that: Daniel Terra had a vision to alleviate the Foundation's precarious financial position by joining it with another cultural institution in Washington D.C. or through relocation of the Foundation's art collection to Washington; that a majority of directors had been supportive of Daniel Terra's vision; that certain elected public officials in Chicago were opposed to that vision; that the Attorney General intervened in the instant dispute for such reasons apart from the best interests of the Foundation; that certain of the Foundation's Directors changed their position to abandon the vision of Daniel Terra; that those same Directors were vulnerable to personal attack by the Attorney General; and that the ultra vires action of persons in the Attorney General's office caused such Directors to change their positions in such manner, Directors Terra, Tucker and Simpson filed the Federal Action, and then

---

[2]Section 108.75(c) provides that a director shall be indemnified to the extent he or she has been successful in the defense of any action.

filed a request for injunctive belief before this Court based on the same factual allegations.

It matters not that this Court disagreed with Directors Terra, Tucker and Simpson in ruling that the relatively high burden of proof for obtaining preliminary injunctive relief had not been met. All that matters is that these Directors were acting in furtherance of what they reasonably believed was in the Foundations' best interests.

The mere fact of the Consent Judgment did *not* relieve the Directors of all exposure to future claims. Although the Attorney General intervened in this suit, that is not to say that members of the public could not have attempted to intervene in their own capacities in the future. Members of the public also could have attempted to bring separate actions against Directors Terra, Tucker and Simpson, accusing them of dereliction in their duties by failing to take all possible steps to protect the Foundation. Therefore, the Attorney General's settlement of its claim did not relieve Directors Terra, Tucker and Simpson of all potential liability they may have had. The Attorney General's arguments to the contrary are without merit and proceed under the false premise that every citizen of the State of Illinois would be motivated by the same set of concerns that drove the Attorney General to action here.

III.

THE ATTORNEY GENERAL OVERLOOKS THE RELEVANT PORTIONS OF THE FOUNDATION'S BYLAWS

Article X, section (a) of the Foundation's bylaws states that the Foundation "shall indemnify any and all of its directors ... against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding ..." The operation of the bylaw is mandatory; the Foundation "*shall*" indemnify. The only relevant criterion under the bylaw

16di-002775

is whether the actions taken by Directors Terra, Tucker and Simpson were "in connection with" the Consent Judgment that the Attorney General was able to convince a majority of the Foundation's Directors to accept.

Without question, the request for preliminary injunctive relief to postpone the Foundation's formal vote on the Consent Judgment until the disinterested status of all Directors could be determined and the claim that the Foundation's federal civil rights were violated by ultra vires actions taken by persons in the Attorney General's office in obtaining that Consent Judgment are a request and claim "in connection with" that Consent Judgment. And, the Consent Judgment is the embodiment of the settlement of Plaintiffs' and the Attorney General's claims in this suit. Therefore, the claims filed by Bellows and Bellows, initially in federal court and then before this Court, are "in connection with" the settlement of Plaintiffs' and the Attorney General's claims. Directors Terra, Tucker and Simpson therefore have a clear and unequivocal right to be indemnified for the cost and expense of those claims, pursuant to the Foundation's bylaws, even if this Court determines that there should be no indemnification pursuant to the Not for Profit Corporations Act.[3]

The Attorney General's reference to the bylaw as applying only to the "defense of an action," Attorney General's Response at 7, misquotes the bylaw and should be disregarded. Moreover, the Attorney General's reliance on International Insurance Co. v. Rollprint Packaging Products, Inc., 312

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[3]This clear legal right to be indemnified gives the Circuit Court of Cook County, as a court of general jurisdiction, the legal power (and indeed the legal *duty*) to grant indemnification to Directors Terra, Tucker and Simpson for all of the fees and costs in Bellows and Bellows' Amended Petition incurred on their behalf, including time spent appearing before the United States District Court in the Federal Action. Therefore, the objections to fees and costs incurred in the Federal Action are without merit, even as to those minor fee and cost items of Bellows and Bellows that were incurred solely in furtherance of the Federal Action. The Federal Action was clearly brought "in connection with" the Consent Judgment and therefore "in connection with" the settlement of the Attorney General's claims and the Plaintiffs' claims in the instant action.

Ill.App.3d 998, 1014-15 (1st Dist. 2000), is misplaced because International Insurance dealt with construction of an insurance contract, not a corporate bylaw, and by the Attorney General's own acknowledgment, dealt with an obligation to "defend," not an obligation to indemnify.

IV.

THE ATTORNEY GENERAL'S REMAINING OBJECTIONS ARE WITHOUT MERIT

No objections are stated as to the reasonableness of the hourly rates charged by Bellows and Bellows which are comparable to, if not lower than, the hourly rates of other firms involved in this matter. Instead, the Attorney General objects only to the amount of time spent and therefore the amount of fees and costs generated by Bellows and Bellows.

However, Bellows and Bellows and its co-counsel were working against the combined forces of Quinlan & Carroll and the Attorney General's office. Bellows and Bellows and its co-counsel, predecessor counsel and successor counsel submitted petitions for fees totalling $1,224,554. Quinlan & Carroll alone submitted a fee petition of over $1,800,000, to which the Attorney General has stated *no* objection[4]. However, since the Attorney General concedes that a key factor in the reasonableness of a fee petition are the fees charged by opposing counsel, it cannot avoid the conclusion that the fees of Quinlan & Carroll are proof of the reasonableness of the fees submitted by counsel for Terra, Tucker and Simpson.[5]

---

[4]Arguably, some of those fees included time spent in monitoring the Federal Action. If so, the Attorney General's lack of consistency brings into question its good faith in attacking those items of Petitioner's fees.

[5]That counsel for Terra, Tucker and Simpson may have been busier during certain specific time periods than counsel for Plaintiffs is testament only to the ebb and flow of litigation. Indeed, when one party is in the process of preparing a request for injunctive relief, that party, other things being equal, will understandably be busier than its opponent. And, there are no time records for the

16di-002777

This comparison, though, does not even factor in the enormous resources of the Attorney General's office, against which counsel for Terra, Tucker and Simpson also had to contend. Of course, the Attorney General has not shared the amount of time *its* attorneys spent on this matter, for which taxpayers must foot the bill. By failing to provide time records concerning what Bellows and Bellows was litigating against, the Attorney General cannot be heard to complain that Bellows and Bellows and other counsel fought too long or too hard.

Nor does the Attorney General provide any *evidence* to support its conclusory arguments that the fees of Bellows and Bellows are unreasonable. By contrast, Bellows and Bellows supported its Amended Petition with the Affidavits of Joel J. Bellows and Laurel G. Bellows, stating facts to show that the fees set forth in the Amended Petition were actually incurred by Terra, Tucker and Simpson as well as their reasonableness. *The Attorney General submits no evidence to contradict any part of the Affidavits of Joel J. Bellows or Laurel G. Bellows.* And, the Attorney General offers no authority for its argument that Defendants themselves must aver the actual and reasonable nature of the fees, nor does it explain how or why Defendants themselves would be competent to make averments about matters of trust and confidence such as the details of the legal services a law firm provides on behalf of its clients. Since the *evidence* of the actual and reasonable nature of Bellows and Bellows' fees is *unrebutted*, the Amended Petition should be granted.

Bellows and Bellows' act of conferring with its lead counsel regarding the claims to be filed on behalf of their shared clients was not only reasonable; it was necessary. Bellows and Bellows was

---

Attorney General, against whom counsel for Terra, Tucker and Simpson were also litigating. Moreover, the quickness with which a court dispatches an argument is no indication of the time or care reasonably spent in crafting that argument. The Attorney General's arguments to the contrary are without merit.

retained to assert claims that, as this Court is aware, were not asserted by its predecessor counsel. Therefore, no reason exists why this Court should limit Bellows and Bellows to what law and facts Shefsky & Froelich had learned. Moreover, Bellows and Bellows' independent assessment of factual and legal matters was crucial to its ability to provide representation to its clients. A successor counsel cannot willfully limit its knowledge of the case to whatever summary of facts or law is provided by its predecessor counsel without risk of running afoul of its own ethical obligations. Such a course of action would clearly be unreasonable. Since successor counsel's act of obtaining its own appraisal of the governing law and facts must then be reasonable, the fees and costs reflecting such an effort must likewise be reasonably incurred and therefore within the clients' right to be indemnified.

Next, it is immaterial whether the Attorney General, the Plaintiffs and the Directors turned by the Attorney General contemplated the actions taken by Terra, Tucker and Simpson after the Consent Judgment was agreed upon. Terra, Tucker and Simpson are not parties to that Consent Judgment. And, the Order reserves to the Court, not the Attorney General, the power to determine the reasonableness of fees incurred. Reasonableness can only be determined by the standard already employed by the Not for Profit Corporations Act, which is whether the director acted in good faith and in a manner he or she reasonably believed to be in the best interests of the Foundation. 805 ILCS 105/108.75(a). Moreover, although the Attorney General learned about the filing of the Federal Action soon after entering into the Consent Judgment, it failed to obtain any modification of the language it drafted before the Court entered the Order.

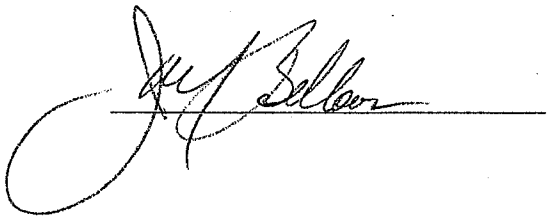
Finally, the Attorney General argues, in entirely conclusory fashion and without any legal support, that the fees must be denied because Bellows and Bellows failed to obtain the preliminary injunctive relief it sought and therefore failed to provide "worthwhile legal product." Attorney

General's Response, at 19. This argument is unsound because it presumes incorrectly that success is a precondition to the right of indemnification. As set forth above, Section 108.75(c) of the Not for Profit Corporation Act is not the only legal basis under which indemnification can be granted. Rather, Section 108.75(a) and the Foundation's bylaws provide additional bases for indemnification which do not require success on the merits. This Court cannot and should not lay a requirement of success on the merits on top of the statute and the bylaws, when the Illinois State Legislature and the Foundation's Directors made the conscious choice not to impose such a requirement.

V.

CONCLUSION

For the reasons stated above, the objections to the Amended Petition are without merit and should be overruled, and Bellows and Bellows' Amended Petition for Fees and Costs should be granted.



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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEC 13 2001

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	Hon. Dorothy Kirie Kinnaird

FILED
DEC 10 2001
CLERK OF CIRCUIT COURT

NOTICE OF FILING

TO: See attached Service List.

TAKE NOTICE that on Monday, December 10, 2001, we caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, Bellows and Bellows' Reply in Further Support of Its Amended Petition for Fees and Costs.

Dated at Chicago, Illinois this 10th day of December, 2001.

Christopher L. Gallinari

Joel J. Bellows, Esq.
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CERTIFICATE OF SERVICE

TO: See attached Service List

I, Elizabeth A. Steinhauser, a non-attorney, being first duly sworn upon oath, do hereby certify that copies of the attached Notice of Filing and Bellows and Bellows' Reply in Further Support of Its Amended Petition for Fees and Costs were served upon each party listed upon the attached Service List by depositing such copies into the U.S. mailbox, located at 79 W. Monroe Street, Suite 800, Chicago, Illinois 60603, postage prepaid, at or before 5:00 p.m. on the 10th day of December, 2001.

Elizabeth A. Steinhauser

SUBSCRIBED AND SWORN TO
before me this 10th day of December, 2001.

NOTARY PUBLIC

"OFFICIAL SEAL"
JULI C. MACDONALD
Notary Public, State of Illinois
My Commission Expires 10/25/03

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

ORDER

THIS CAUSE coming before the Court on Shefsky & Froelich Ltd.'s Petition for Fees and Costs filed with this Court on August 6, 2001 and such petition and supporting affidavit having been

reviewed by counsel for the Terra Foundation for the Arts and the Attorney General for the State of Illinois, and all parties having represented to the Court that they have no objection to the payment of Shefsky & Froelich Ltd.'s fees in accordance with the petition and the Court otherwise being fully advised in the premises:

IT IS HEREBY ORDERED that Shefsky & Froelich Ltd. is awarded fees in the amount of $468,376.17 to be paid forthwith by the Terra Foundation for the Arts.

DATED:

ENTERED:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
DEC 14 2001
DEPUTY CLERK

Dorothy Kirie Kilbaird, Judge Presiding

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James D. Wilson
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16di-002786

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IN REFERENCE TO:
25134-01

December 14, 2001

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Re: ***Buntrock, et al. v. Terra, et al.***

Dear Counsel:

Enclosed please find a copy of the Order entered today by Judge Kinnaird.

Very truly yours,

SHEFSKY & FROELICH LTD.

James D. Wilson

JDW:kmm
Enclosure

727677.1

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00CH 13859 Judge D.K. Kinnaird

THE TERRA FOUNDATION'S MOTION FOR LEAVE TO FILE ITS REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO REJECT ANY FEE PETITIONS SEEKING ATTORNEYS' FEES NOT INCURRED IN CONNECTION WITH THIS LAWSUIT

The Terra Foundation for the Arts ("the Foundation") hereby moves this Court for leave to file the attached five-page reply memorandum in support of its motion to reject any fee petitions seeking attorneys' fees not incurred in connection with this

lawsuit, which was filed on November 16, 2001. In support thereof, the Foundation states as follows:

1. In this proceeding, the Foundation has raised only one concern regarding the several fee petitions before this Court: that no director be awarded attorneys' fees in this proceeding for work done in connection with different – albeit related – lawsuits. For the most part, the directors with fee petitions before the Court have not opposed the Foundation's request that this Court – consistent with the plain meaning and intent of the Consent Judgment Order – reject any fee petitions seeking attorneys' fees not incurred "in connection with this lawsuit."

2. However, in their response to the Foundation's motion, counsel for defendants Judith Terra, Paul Hayes Tucker and Alan Simpson ("the dissenting directors") admit that their fee petitions in this lawsuit seek reimbursement for fees incurred in connection with different lawsuits, but nonetheless assert that they are entitled to such fees under the Consent Judgment and Order. In support of this contention, the dissenting directors rely on certain arguments and authorities for the first time.

3. The Foundation therefore seeks leave to file a five-page reply brief in support of its motion to answer the contentions raised in the dissenting directors' response brief. The Foundation believes its reply brief will assist the Court in determining the appropriate award of fees in this action.

16di-002792

WHEREFORE, the Foundation respectfully requests this Court grant its motion for leave to file its reply brief in support of its motion to reject any fee petition (or portion thereof) seeking attorneys' fees not incurred in connection with this lawsuit.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: _____

Thomas R. Mulroy, Jr., No. 1988492
Alan W. Nicgorski, No. 6243574
Eric J. Muñoz, No. 6275565
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16di-002793

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00CH 13859 Judge D.K. Kinnaird

THE TERRA FOUNDATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO REJECT ANY FEE PETITIONS SEEKING ATTORNEYS' FEES NOT INCURRED IN CONNECTION WITH THIS LAWSUIT

The Terra Foundation for the Arts ("the Foundation") has raised only one concern regarding the several fee petitions before this Court: that no director be awarded attorneys' fees in this proceeding for work done in connection with different – albeit related – lawsuits. For the most part, the directors with fee petitions before the Court

have not opposed the Foundation's request that this Court – consistent with the plain meaning and intent of the Consent Judgment and Order entered by this Court on July 26, 2001 – reject any fee petitions seeking attorneys' fees not incurred "in connection with this lawsuit." However, counsel for defendants Judith Terra, Paul Hayes Tucker and Alan Simpson ("the dissenting directors") admit that their fee petitions in this lawsuit seek reimbursement for fees incurred in connection with different lawsuits, but nonetheless assert that they are entitled to such fees under the Consent Judgment and Order. The dissenting directors are wrong for three reasons.

First, the Consent Judgment and Order – read to effectuate the parties' intent – clearly allows for reimbursement of only attorneys' fee incurred in connection with this lawsuit and does not require the Foundation to reimburse the directors for fees incurred in connection with different lawsuits. Nonetheless, relying on inapposite case law, the dissenting directors focus narrowly on the phrase "in connection with" and stretch that phrase to encompass fees incurred in different lawsuits that "touch on matters" raised in this case.[1] That broad, ambiguous standard is simply not consistent with the purpose and plain meaning of the Consent Judgment and Order. Indeed, by focusing narrowly on the "in connection with" language, the dissenting directors ignore the next two words in that clause: "this lawsuit." The Consent Judgment does not provide for reimbursement of all fees incurred "in connection with this dispute" or "in connection with the facts raised in plaintiffs' complaint." Instead, the Consent Judgment

[1] Specifically, the defendants ignore the obvious intent of the parties to this agreement and rely on plainly inapposite case-law discussing "in connection with" as that term is used in (1) the United States Sentencing Guidelines; (2) arbitration clauses governed by the Federal Arbitration Act; (3) the United States Bankruptcy Code; and (4) insurance policies. (*See* Dissenting Directors Br. at 4.) Far from venturing into these divergent and irrelevant areas of the law, the Court need go no further than the four-corners of the Consent Judgment and Order to determine the proper scope and meaning of "in connection with this lawsuit" as that phrase used in this case.

16di-002795

and Order expressly limits fees by reference to this lawsuit (00 CH 13859). Fees incurred in connection with other lawsuits – with different docket numbers and before different judges – were not incurred in connection with this lawsuit and thus are not reimbursable under the Consent Judgment and Order.[2]

Moreover, the plain meaning of the Consent Judgment and Order is bolstered here by the well-established maxim that "[c]ourts construe contracts so as to avoid absurd results." *Rubin v. Laser*, 301 Ill. App. 3d 60, 68 (1st Dist. 1998); *Foxfield Realty, Inc. v. Kubala*, 287 Ill. App. 3d 519, 524 (2d Dist. 1997) (same) (citation omitted). Indeed, under the dissenting directors' interpretation, the Foundation would be forever required to bankroll any lawsuit brought by its directors so long as it merely "touches on" matters raised in this lawsuit. Given that one of the primary benefits of the Consent Judgment and Order was to put an end to litigation concerning the Foundation's future and, as this Court eloquently stated, to allow the Foundation to return to the business of art as opposed to the business of litigation, it is simply absurd to suggest an interpretation of the Order that would allow feuding directors to continuously re-litigate the matters resolved by the Consent Judgment so long as there is money left to pay their attorneys. Yet, that is precisely the interpretation offered by the dissenting directors here. For this reason too, this Court should reject all fee petitions for work done in connection with different lawsuits.

Second, even if the words "in connection with this lawsuit" can be stretched to cover fees incurred in different lawsuits, the Consent Judgment and Order

[2] The dissenting directors suggest that the Foundation's reading of the Consent Judgment and Order renders the words "in connection with" meaningless surplusage. This is not so. Indeed, the use of the phrase "in connection with this lawsuit" allows for non-party Directors, such as Directors Marshall and Stebbins – to seek reimbursement of the fees they necessarily incurred as a result of certain matters raised in this lawsuit.

provides only for the reimbursement of "reasonable" attorneys' fees. Here, the dissenting directors' request for fees incurred while launching collateral attacks on this Court's Consent Judgment and Order is downright "unreasonable." The dissenting directors had the opportunity to argue and to vote against the proposed settlement of this litigation at the Board Meeting on June 29, 2001; they did so and lost. They also had the opportunity to raise their objections before this Court (on the Foundation's dime); again, they did so and lost. To now raise those same objections in different lawsuits is anything but reasonable. On this ground too, the dissenting directors' request for fees incurred in different lawsuit should be rejected.

Third, public policy weighs heavily against requiring the Foundation -- a not-for-profit corporation -- to cannibalize its finite resources by funding repeated attempts by feuding directors to re-litigate the matters determined by this Court's Consent Judgment and Order. Yet, that is exactly what the dissenting directors ask this Court to do. The Foundation exists to promote American art, not to fund litigation. Public policy therefore supports the Foundation's efforts to preserve its resources for the promotion of American art by limiting reimbursement of attorneys' fees in this proceeding to only those fees actually incurred in connection with this lawsuit. For this reason as well, this Court should reject all fee petitions seeking reimbursement of fees incurred in connection with different lawsuits.

CONCLUSION

For the foregoing reasons, and as originally set forth in the Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit, filed November 16, 2001, the Foundation respectfully requests that this Court reject any fee petition or portion thereof seeking attorneys' fees not incurred in connection with this lawsuit: *Buntrock et al. v. Terra et al.*, No. 00 CH 13859.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: Alan Nicgorski

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16di-002798

JAN 14 2002

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00CH 13859

Judge D.K. Kinnaird

Notice of Motion

To: See Attached Service List

On January 15, 2002 at 2:00 p.m., in courtroom 2302 of the Richard J. Daley Center, 50 West Washington Street Chicago, Illinois, defendant, Terra Foundation for the Arts, through its attorneys, Mulroy Scandaglia Marrinson Ryan, will present its **Motion For Leave To File Its Reply Memorandum in Support of Its Motion To Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit**, a copy of which is hereby served upon you.

Mulroy Scandaglia Marrinson & Ryan
55 East Monroe Street, 39th Floor
Chicago, Illinois 60603
(312) 580-2020
Counsel for Terra Foundation for the Arts

16di-002799

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that a copy of the above document(s) was served on the parties above via messenger or via federal express, by 5 p.m. on January 11, 2002.

Attorney for Terra Foundation for the Arts

Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/28/01)

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16di-002802

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JAN 14 2002

January 11, 2002

VIA MESSENGER
The Honorable Dorothy Kirie Kinnaird
Richard J. Daley Center
Courtroom 2302
50 West Washington Street
Chicago, Illinois 60603

Re: Buntrock et al. v. Terra et al., 00 CH 13859

Dear Judge Kinnaird:

Please find enclosed a courtesy copy of the Terra Foundation's Motion For Leave To File Its Reply Memorandum In Support of its Motion To Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this lawsuit. A copy of the proposed reply memorandum is attached to the motion. The matter of attorneys' fees in the above-referenced lawsuit is scheduled for a hearing before you Honor on January 15, 2002, at 2:00 p.m.

We have also included copies of the cases cited in the proposed reply memorandum.

Very truly yours,

Alan Nicgorski

Alan W. Nicgorski

AWN:cr

Enclosures

cc: All Attorneys of Record
See attached Service List

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Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/28/01)

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Defendant named in 00 CH 13859
Nafti Michaeli
3263 N. Street N.W.
Washington, D.C. 20007

Joel J. Bellows
Bellows & Bellows
79 West Monroe Street
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Chicago, IL 60603
(312) 332-3340
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16di-002805

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

JAN 23 2002

Dean L. Buntrock et al.

v.

Judith Terra et al.

No. 00 CH 13859

ORDER

This cause coming before the Court upon various Directors petitions for attorneys' fees, the Court being fully advised of the premises hereby orders that:

(1) The Directors seeking attorneys' fees and the Attorney General shall present draft orders to the Court on or before January 29, 2002; and

(2) The Court shall rule on the petitions at 11:00 a.m. on February 13, 2002.

Atty. No.: 38050

Name: Alan W. Niccorski

Atty. for: Terra Foundation

Address: 55 E. Monroe, Suite 3930

City/State/Zip: Chicago, IL 60603

Telephone: 312-580-2035

ENTERED

ENTER: JAN 15 2002
DOROTHY KINNAIRD
DOROTHY BROWN
CLERK OF CIRCUIT COURT

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01

16di 002807

JAN 2 3 2002

Form 10

APPEARANCE

STATE OF ILLINOIS
APPELLATE COURT
FIRST DISTRICT } SS.

January 16, A.D. 2002

Dean L. Buntrock, et al.,
Plaintiffs-Appellees,

Gen. No. 01-3152 vs.
Judith Terra, et al.,
Defendants-Appellants

APPEAL FROM CIRCUIT COURT OF COOK COUNTY, Chancery Division
No. 00-CH-13859

Sidley Austin Brown & Wood
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
Telephone: 312/853-7000
FIRM NO.: 38315

We hereby enter the appearance of Defendant - Appellee the Terra Foundation for the Arts and Sidley Austin Brown & Wood's appearance as attorneys for said Defendant - Appellee in the above entitled cause.

Sidley Austin Brown & Wood / by Stephen C. Carlso

Attorneys for Defendant-Appellee
The Terra Foundation for the Arts

16di-002809

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing **Appearance** to be served on January 16, 2002 by United States mail upon the following:

William R. Quinlan
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Lori L. Roeser

N.M.B

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

January 24, 2002

Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County, Chancery Division
Richard J. Daley Center
50 West Washington Street, Room 2403
Chicago, Illinois 60602

Re: Buntrock, et al. v. Terra, et al.
Case No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed are the cases I cited and referred to in the argument regarding attorney's fees in the Terra matter on January 15, 2002. The cases enclosed are as follows:

- *Blue v. People of The State of Illinois* 223 Ill. App. 3d 594 (2nd Dist 1992).
- *Fruin v. Northwestern Medical Faculty* 194 Ill. App. 3d 1061 (1st Dist 1990).
- *Lozoff v. Shore Heights, Ltd.* 35 Ill. App. 3d 697 (2nd Dist 1976).
- *Lozoff v. Shore Heights Ltd.* 66 Ill. 2nd 398 (1977).
- *Ratcliff v. Apantaku* 318 Ill. App. 3d 621 (1st Dist 2000).

Sincerely,

Floyd Perkins,
Chief
Charitable Trusts and Solicitations Bureau
(312) 814-2533

cc: w/enclosures
all counsel on attached service list

16di-002812

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EMANUEL S. LOZOFF, Plaintiff-Appellee, v. SHORE HEIGHTS, LTD., et al., Defendants-Appellants

No. 74-18

Appellate Court of Illinois, Second District, First Division

35 Ill. App. 3d 697; 342 N.E.2d 475; 1976 Ill. App. LEXIS 1914

February 6, 1976, Filed

PRIOR HISTORY:
[*1]**

APPEAL from the Circuit Court of Kane County; the Hon. PAUL W. SCHNAKE, Judge, presiding.

DISPOSITION:
Reversed.

COUNSEL:
David P. Peskind and Gail L. Erschen, both of Tyler, Peskind & Solomon, of Aurora, for appellants.

Albert Brooks Friedman, of Chicago, for appellee.

JUDGES:
Mr. Justice Guild delivered the opinion of the court. Seidenfeld, P.J., and HALLETT, J., concur.

OPINIONBY:
GUILD

OPINION:

[*698] **[**477]** In 1971 the defendant corporation, Shore Heights, Ltd., (Shore Heights), was the beneficiary of a land trust holding title to 209 lots in Kendall County. Flintlock Investments of Aurora, Illinois (Flintlock) was negotiating with Shore Heights for the purchase of these lots and was also negotiating with Aldridge Construction Company (Aldridge) for the sale of the same lots. Plaintiff, Emanuel S. Lozoff, was employed by Flintlock at this time. Plaintiff was licensed to practice law in Wisconsin but was not licensed to practice law in Illinois until March 2, 1972, almost three months after the complaint herein was filed.

A contract was entered into between Shore Heights and Flintlock but the sale was not consummated. Thereafter, plaintiff discussed with Aldridge's attorneys the possibility **[***2]** of their negotiating directly with Shore Heights. Plaintiff also proposed to Shore Heights' attorney, Norman Lawrence, that plaintiff be employed by Shore Heights to put together a sale of the lots to Aldridge.

On July 20, 1971, a meeting was held between Shore Heights' attorney, plaintiff and the defendant Charles Greene, who was general manager of Shore Heights. At this meeting a letter agreement was dictated by plaintiff and later signed by the defendant, Delores Greene, president of Shore Heights, for Shore Heights. In pertinent part, this agreement provided as follows:
"Dear Mr. Lozoff:

This is to serve as a memorandum of our agreement in which you will be paid the sum of $ 65,000 *as attorney's fees for the legal services rendered by you* in the Aldridge Construction Company -- Shore Heights land agreement for properties located in Kendall County, Illinois." (Emphasis added.)

On August 6, 1971, a contract was entered into between Shore Heights and Aldridge but later Aldridge served notice on Shore Heights that they were not going to proceed with the contract.

On December 9, 1971, plaintiff, represented by counsel, filed the instant complaint alleging that he was **[***3]** due S 65,000 from defendants for having rendered legal services to them as described in the July 20, 1971, letter agreement. The complaint also alleged that plaintiff dealt with the defendants Charles and Delores Greene individually as well as on **[*699]** behalf of the defendant Shore Heights and that the Shore Heights-Aldridge contract was not consummated due to defendants' "refusal, failure or inability" to comply therewith. The jury returned a verdict in favor of the plaintiff and against the individual and corporate defendants in the amount of $ 65,000, and answered in the affirmative the special interrogatory, "Did the Plaintiff perform all of the services, which were required by him by the contract?" Following entry of judgment based upon the jury's verdict and the denial of relief prayed for in their post-trial motion, defendants appeal.

The sole question presented in this case is whether an attorney who is licensed to practice law in Wisconsin but not in Illinois may recover attorney's fees for legal services rendered in Illinois.

Although defendants raise several allegations of error, we find that we need only consider the question of whether an attorney who is not **[***4]** licensed to practice law in Illinois can recover on a contract to perform legal services in Illinois. Prior to a discussion of that issue, we note plaintiff's argument that defendants have not properly preserved this issue for review **[**478]** due to their failure to raise it in their post-trial motion. We find, however, that in their post-trial motion defendants specifically asserted that the court erred in denying their motion for judgment on the pleadings and motion in limine, both of which were based exclusively upon plaintiff's lack of an Illinois license to practice law. Such a specification of error satisfies the specificity requirement of section 68.1(2) of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, par. 68.1(2)) by indicating the grounds upon which the defendants rely "*** with sufficient particularity to afford the trial court identity of the error relied upon." *Osborne v. Leonard (1968), 99 Ill. App. 2d 391, 396, 240 N.E.2d 769, 771.*

We turn, then, to a consideration of the effect of plaintiff's not being licensed to practice law in the State of Illinois. Section 1 of the Attorneys and Counselors Act (Ill. Rev. Stat. 1973, ch. 13, par. 1) in part **[***5]** states:

"No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State.

No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney."

Plaintiff argues that the plain meaning of this statute has no application to the instant case because: (1) he acted merely as a "finder" and not as a lawyer, or (2) Supreme Court Rule 707 (Ill. Rev. Stat. 1973, ch. 110A, par. 707) controls the instant case.

[*700] As to plaintiff's first argument, we find that the fact that the Lozoff-Shore Heights contract, which was drafted by plaintiff, provided that plaintiff was to be paid $ 65,000 "as attorney's fees for *** legal services" and the fact that the complaint sought recovery for legal services precludes plaintiff from now contending that he merely acted as a broker or "finder." As to plaintiff's second contention, we find Supreme Court Rule 707 inapplicable to the case at bar. That Rule provides:

"Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law **[***6]** from any other jurisdiction in the United States, or foreign country, may in the discretion of any court of this State be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed."

This Rule, in the discretion of the court, allows a foreign attorney "to *participate before the court* in the trial or argument of any particular cause in which, for the time being, he is employed." Plaintiff herein is attempting to recover for legal services performed outside of the courts of this State. Rule 707, therefore, has no application to the instant case.

The courts of the State of Illinois have the sole and exclusive power to determine who may practice law in the State. (*Chicago Bar Association v. Kellogg (1949), 338 Ill. App. 618, 88 N.E.2d 519.)* The practice of law is not limited to court appearances, (*People ex rel. Illinois State Bar Association v. Schafer (1949), 404 Ill. 45, 87 N.E.2d 773),* but includes the giving of advice or the rendition of any service requiring the use of any degree of legal knowledge or skill. *People ex rel. Chicago Bar Association v. Barasch (1950), 406 Ill. 253, 94* **[***7]** *N.E.2d 148.*

In *City of East St. Louis v. Freels (1885), 17 Ill. App. 339, 343,* in considering the claim of a nonlawyer for legal services the court stated the following with reference to a predecessor of the statute involved in the instant case:

"From this statute it would seem that the policy of the law is, that no person without being duly licensed as an attorney **[**479]** at law can recover for services performed as such in a court of record."

In *Sellers v. Phillips (1890), 37 Ill. App. 74,* an attorney who was licensed to practice law in Michigan but not in Illinois sued to recover on a contract for attorney's fees for prosecuting an appeal in the Illinois Supreme Court. The appellate court noted first that the contract,

"*** is in conflict with Sec. 1, Chap. 13, R.S., which prohibits any person from practicing as an attorney or counselor at **[*701]** law, or conducting any action or suit in which he is not a party concerned in any court of record in this State without having previously obtained a license for that purpose * * *." *(37 Ill. App. 74, 75.)*

The court then went on to hold,

"We think the terms of the statute warrant us in going further, **[***8]** [than did the court in *Freels, supra]* and in saying, positively, that the contract was unlawful and compensation therefore can not be recovered." *(37 Ill. App. 74, 75.)*

We also note the following statement found in Annot., *11 A.L.R. 3d 907, 908,* (1967), relying in part upon *Freels* and *Sellers*:

"Most courts take the view that in the absence of some extenuating circumstance, an out-of-state attorney who renders services locally falls within the prohibition against illegally practicing law and cannot recover compensation from his client for the local services."

See also 4 Ill. L.&Pr. *Attorneys and Counselors* § § 12 and 125 (1971) and *Spivak v. Sachs (1965), 16 N.Y.2d 163, 263*

N.Y.S.2d 953, 211 N.E.2d 329.

In arriving at the above decision we are not unmindful of the decisions of *Mock v. Higgins (1954), 3 Ill. App. 2d 281, 121 N.E.2d 865,* and *Dorf v. Relles (7th Cir. 1966), 355 F.2d 488.*

In *Mock v. Higgins*, the appellate court in substance held that under section 12 of the Attorneys and Counselors Act, a Missouri lawyer could, in fact, practice in Illinois. Section 12 reads as follows:

"When any counselor or attorney at law, residing **[***9]** in any other state or territory, may desire to practice law in this state, such counselor or attorney shall be allowed to practice in the several courts of law and equity in this state upon the same terms and in the same manner that counselors and attorneys at law residing in this state now are or hereafter may be admitted to practice law in such other state or territory."

It is to be noted that this provision provides that an attorney residing outside of the State shall be allowed to practice in the several courts of law and equity in this State upon the same terms and in the same manner an Illinois lawyer is *admitted* to practice law in such other State or territory. It is conceded that this section of the statute is somewhat difficult to analyze. It would appear the provision, using the words "admitted to practice law" doubtless means "allowed to practice law." However, if section 12 is read in conjunction with Supreme Court Rule 707, there appears at first blush to be a conflict. This may not necessarily be so. Rule 707 specifically provides that an attorney from **[*702]** outside the State of Illinois, from another jurisdiction of the United States or foreign country, **[***10]** may be permitted to participate before the court in a trial of a particular case for the time being he is expressly employed. It would appear that section 12 must be read in conjunction with Supreme Court Rule 707. In other words, a foreign attorney, in the discretion of the court, may be allowed to appear in the courts of this State on specific cases for which he is then presently employed. The difficulty arises, however, in such case as the one before us where appearance in court is not an issue but the rendition of legal services by a foreign attorney in the State of Illinois is the problem.

[480]** In *Mock v. Higgins*, the plaintiff, Mock, had entered into a contract with attorney Leahy who was an attorney licensed to practice law in Missouri but not in Illinois. The contract entered into was signed by Leahy, the St. Louis attorney, together with the plaintiff Constance Mock and George F. Higgins, the public administrator of Du Page County, Illinois. Under the provisions of the contract both Leahy, the St. Louis attorney, Higgins, the public administrator, Farthing, an Illinois attorney and Joseph Sam Perry, an Illinois attorney, were to receive for their services **[***11]** the sum of 10% of the amount collected by Constance Mock in a certain probate claim or the sum of $ 250,000, whichever was the larger. They were successful in their efforts and Constance Mock was decreed to be entitled to one-third of the estate, which was in the neighborhood of $ 3,500,000. After Constance Mock had received the money, she became dissatisfied with the contract and sued Higgins, the administrator, Leahy, the St. Louis attorney, Farthing, the Illinois attorney and Joseph Sam Perry, the Illinois attorney, alleging that Leahy was not admitted to practice law in the State of Illinois and that the entire contract was therefore void. In passing upon this issue, as indicated above, the court specifically held that it was common knowledge that Missouri lawyers practice in the State of Illinois and, although Leahy was not admitted to practice law in the State of Illinois, the contract involving Mr. Leahy, the St. Louis attorney, was not void. The court in *Mock* at no time considered the provisions of Supreme Court Rule 707 or its predecessor, if any.

In *Dorf v. Relles*, the Federal court cited with approval the above finding in *Mock*. We do not adhere to *Mock* **[***12]** insofar as it relates to the case at bar, nor do we adhere to *Dorf* insofar as it follows *Mock*. We find that section 12, relative to nonresident lawyers practicing law in Illinois, must be read in conjunction with Supreme Court Rule 707. In other words, the Missouri lawyer, or as here a Wisconsin lawyer, may, in certain instances, in the discretion of the trial court, be allowed or **[*703]** admitted to practice law before the courts of this State. Insofar as *Mock* holds to the contrary, we disagree.

We therefore find that plaintiff is precluded from recovering for legal services rendered in Illinois when he was not licensed to practice law in Illinois.

The judgment appealed from is hereby reversed and judgment is entered in favor of the defendants.

Reversed.

223 Ill. App. 3d 594, *; 585 N.E.2d 625, **;
1992 Ill. App. LEXIS 10, ***; 165 Ill. Dec. 894

22 of 41 DOCUMENTS

AARON J. BLUE, Plaintiff-Appellant, v. THE PEOPLE OF THE STATE OF ILLINOIS, Defendant-Appellee.

No. 2-91-0434

APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

223 Ill. App. 3d 594; 585 N.E.2d 625; 1992 Ill. App. LEXIS 10; 165 Ill. Dec. 894

January 9, 1992, Filed

SUBSEQUENT HISTORY:
[*1]**
Released for Publication February 18, 1992, Rehearing Denied February 18, 1992. Petition for Appeal as a Matter of Right or Leave to Appeal Denied June 3, 1992.

PRIOR HISTORY:
Appeal from the Circuit Court of Lake County. No. 91-MR-53. Honorable Bernard E. Drew, Jr., Judge, Presiding.

DISPOSITION:
Appeal dismissed; judgment vacated.

COUNSEL:
Blue, Robert Z., RELATED NAME: Blue, Aaron J. (FATHER), (PRO SE), Robert Z. Blue, 1107 Westgate Rd., Mt. Prospect, IL 60056, (708) 870-0616, Bell, Boyd & Lloyd, Attorneys at Law, William L. Barr, Jr., Bell, Boyd & Lloyd, 3 First Natl. Plaza, Suite 3200, Chicago, IL 60602, (312) 372-1121

Honorable Michael J. Waller, Lake County State's Attorney, William L. Browers, Deputy Director, State's Attorneys Appellate Prosecutor, Honorable Roland W. Burris, Attorney General, State of Illinois, Claudia E. Sainsot, Assistant Attorney General, 100 West Randolph Street - 12th Floor, Chicago, IL 60601, (312) 814-4683, Rosalyn B. Kaplan, Solicitor General, 100 West Randolph Street, Room 12-302, Chicago, IL 60601, (312) 814-4684, PARTY: People

JUDGES:
McLAREN, GEIGER, NICKELS

OPINIONBY:
McLAREN

OPINION:

[*595] **[**625]** JUSTICE McLAREN delivered the opinion of the court:

Robert Z. Blue, a nonlawyer proceeding pro se, filed a "Complaint for an Order of Habeas Corpus" (complaint) in the name of his minor 'child, **[***2]** plaintiff Aaron J. Blue, with the circuit court of Lake County. The complaint alleged that plaintiff was being held in custody without due process of law by his mother, Susan Fisher, as the result of certain visitation orders entered by the circuit court of Cook County in Robert and Susan's pending dissolution of marriage suit. The trial court dismissed the complaint pursuant to section 2-619(a)(3) of the Code of Civil Procedure (section 2-619(a)(3)) (Ill. Rev. Stat. 1989, ch. 110, par. 2-619(a)(3)), which provides for involuntary dismissal where there is another action pending between the same parties for the same cause. On appeal, plaintiff argues that the trial court abused its discretion in dismissing the action for habeas corpus.

[626]** We strike plaintiff's briefs, dismiss the appeal, and hold that the proceedings below were void and must be vacated. As a nonlawyer **[*596]** who is not a party to this suit, Robert Blue may not represent plaintiff in this court and had no authority to do so at the trial level.

Robert Blue filed the complaint pro se. After the trial court dismissed the complaint under section 2-619(a)(3), Blue filed a notice of appeal, an appellant's brief and **[***3]** a reply brief, all "pro se" as "Father of Appellant." Approximately three weeks after the reply brief was filed, William L. Barr, Jr., an attorney, filed his motion for leave to appear as attorney for plaintiff. This court allowed the motion, and Barr entered his "additional appearance" for plaintiff.

One not duly authorized to practice law may not represent another in a court of law. (Ill. Rev. Stat. 1989,

ch. 13, par. 1; *National Bank v. First Wisconsin National Bank (1977), 53 Ill. App. 3d 482, 488-89.)* Lay people may appear only in their "proper persons" (Ill. Rev. Stat. 1989, ch. 13, par. 11), i.e., only on their own behalf. (*National Bank, 53 Ill. App. 3d at 489.)* A pleading signed by a person who is not licensed to practice law in this State is a nullity even if a duly licensed attorney subsequently appears in court. (*Fruin v. Northwestern Medical Faculty Foundation, Inc. (1990), 194 Ill. App. 3d 1061, 1063.)* Where one not licensed to practice law has instituted legal proceedings 'on behalf of another, the suit should be dismissed; if the suit has proceeded to judgment, the judgment is void and will be reversed. **[***4]** *Leonard v. Walsh (1966), 73 Ill. App. 2d 45, 47.*

That Robert Blue has labeled himself "pro se" does not bring this case within the right of a party to represent himself. Robert Blue is at most the "next friend" of the minor plaintiff. A next friend is not a party to a suit but represents the real party, who, as a minor, lacks the capacity to sue in his own name. *Severs v. Country Mutual Insurance Co. (1982), 89 Ill. 2d 515, 520; Clarke v. Chicago Title & Trust Co. (1946), 393 Ill. 419, 430-31; Hoare v. Harris (1849), 11 Ill. 24, 25;* 27 Ill. L. & Prac. Minors § 71, at 54; § 74, at 57 (1956).

Although we have found no published opinion from this State addressing this particular set of circumstances, we believe that the authority set out above compels the conclusion that one not authorized to practice law may not represent a minor in a court of record. We note that several Federal courts have addressed this precise issue and have held that the Federal right to self-representation does not allow a nonlawyer next friend to represent a minor. (See *Cheung v. Youth Orchestra Foundation of Buffalo, Inc. (2d Cir. 1990), 906 F.2d 59.;* **[***5]** *Meeker v. Kercher (10th Cir. 1986), 782 F.2d 153, 154; Lawson v. Edwardsburg Public School (W.D. Mich. 1990), 751 F. Supp. 1257, 1258-59.)* The Cheung court explained that allowing a nonlawyer parent to sue in the name of his minor child without obtaining counsel **[*597]** does not promote the interest in free choice that underlies the right of a party to self-representation. Furthermore, allowing those without proper legal training to represent minors undermines the full protection of the minors' legal rights and "also invites abuse, as the present case may demonstrate." (Emphasis added.) (*Cheung, 906 F.2d at 61.)* We agree fully with this reasoning.

As Robert Blue was neither authorized to bring this action "pro se" nor to file the briefs that he filed in connection with this appeal, we strike the briefs on appeal and hold that the proceedings below are void and of no effect. We therefore dismiss the appeal and vacate the judgment of the circuit court.

The appeal is dismissed, and the judgment of the circuit court of Lake County is vacated.

Appeal dismissed; judgment vacated.

GEIGER and **[***6]** NICKELS, JJ., concur.

SHERRY RATCLIFFE and GLEN RATCLIFFE, Plaintiffs-Appellants, v. DR. FRANK APANTAKU, BARBARA MCGEE, Administrator of ILLINOIS HOME HEALTH CARE, INC., TRINITY HOSPITAL and UNIVERSITY OF CHICAGO HOSPITAL, Defendants-Appellees.

No. 1-99-1461

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

318 Ill. App. 3d 621; 742 N.E.2d 843; 2000 Ill. App. LEXIS 1007; 252 Ill. Dec. 305

December 29, 2000, Decided

SUBSEQUENT HISTORY:
[***1] Released for Publication February 26, 2001.

PRIOR HISTORY:
Appeal from the Circuit Court of Cook County. Honorable Michael Hogan, Judge Presiding.

DISPOSITION:
Appeal dismissed, judgment vacated.

JUDGES:
JUSTICE McBRIDE delivered the opinion of the court. CAHILL, P.J., and GORDON, J., concur.

OPINIONBY:
McBRIDE

OPINION:

[*623] [844]**

JUSTICE McBRIDE delivered the opinion of the court:

This appeal arises from the dismissal of plaintiff's complaint for failure to file a physician's report as required by *735 ILCS 5/2-622* (West 1998). Plaintiff's complaint alleged numerous acts of medical negligence committed by defendants that resulted in the death of Irma Ratcliffe ("Decedent"). Plaintiff-Appellants are Sherry and Glen Ratcliffe who are husband and wife (collectively referred to as "Ratcliffe"). Decedent was Sherry Ratcliffe's mother. Sherry Ratcliffe filed this action on behalf of Decedent and was later appointed Special Administrator of Decedent's Estate by the trial judge. Ratcliffe has not retained counsel and is representing Decedent's interests in the matter pro se as she did below.

The Defendants-Appellees are Dr. Frank Apantaku ("Apantaku"); **[***2]** Trinity Hospital ("Trinity"); University of Chicago Hospital ("UCH"); and Illinois Home Health Care, Inc. ("Home") (hereinafter collectively referred to as "Defendants"). We state only those facts necessary for disposition of this appeal. Ratcliffe's complaint alleges that Apantaku's negligent treatment of Decedent resulted in her death due to urosepsis. According to Ratcliffe, the urosepsis developed because of an unchecked urinary tract infection which both Apantaku and Trinity negligently failed to detect and promptly treat. Ratcliffe also alleges that Trinity and Home failed to acknowledge and respond to complaints made by Ratcliffe concerning the negligent care administered to Decedent by Apantaku. Because of Apantaku and Trinity's alleged negligence concerning Decedent's care, Ratcliffe brought Decedent into the emergency room at UCH. Ratcliffe further asserts that UCH was also negligent in failing to administer proper care and effectively hastened the death of Decedent. Based on the above allegations, Ratcliffe, on behalf of Decedent's estate, sought monetary damages in **[**845]** excess of fifty-thousand dollars against each Defendant

Ratcliffe filed her complaint in the circuit court **[***3]** on April 10, 1998. On July 6, 1998, Trinity filed a motion to dismiss Ratcliffe's complaint and UCH was granted leave by the trial court to join in that motion. Apantaku also filed a motion to dismiss the complaint on August 13, 1998. One of the grounds alleged in the Defendants' motion to dismiss was Ratcliffe's failure to file a physician's report as required by *735 ILCS 5/2-622*.

Section 2-622 states in relevant part:

"(a) In any action, *** in tort *** in which the plaintiff seeks damages for injuries or death by reason of medical, hospital or an **[*624]** other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding [pro se], shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

1. That the affiant has consulted and reviewed the facts of

the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine **[***4]** that is at issue in the particular action; and (iii) is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for filing such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing such action.
***
(g) The failure to file a certificate required by this section shall be grounds for dismissal under Section 2-619." *735 ILCS 5/2-622* (West 1998).

On September 18, 1998, the trial court granted Ratcliffe until November 9, 1998, to file a physicians report pursuant to *735 ILCS 5/2-622*. On November 9, 1998, Ratcliffe was appointed special Administrator of Decedent's estate and she complained that she had yet to receive medical records from Trinity and, thus, could not file her physician's report as required under the above statute.

In a variety of different **[***5]** orders, the trial court instructed the Defendants to produce copies of Decedent's records to Ratcliffe. Based upon a review of the orders and Defendants' allegations, it appears that Ratcliffe received UCH's records on October 7, 1998; Trinity's records on November 30, 1998; and Home's records on February 17, 1999. Additionally, Apantaku represented to the court on September 28, 1998, that he possessed no independent office letters concerning the Decedent and would indicate so in a letter to Ratcliffe, Ratcliffe admits receiving all of Defendants' records by February 18, 1999.

Despite having UCH and Trinity's records for months, Ratcliffe did not file a physician's report pursuant to *735 ILCS 5/2-622*. On February 16, 1999, prior to hearing Defendants' motions to dismiss, the trial court ordered Ratcliffe to **[*625]** produce a physician's report by March 22, 1999, or the case would be dismissed in accordance with the statute. On March 22, 1999, Ratcliffe had not filed the physician's report and the trial court dismissed Ratcliffe's complaint with prejudice. Ratcliffe appeals from the order dismissing the complaint.

The two main questions raised by this appeal **[***6]** are: (1) whether the trial court abused its discretion in granting Defendants' motions to dismiss pursuant to *735 ILCS 5/2-622*; and (2) whether the trial **[**846]** court's dismissal of the complaint was justified based on the fact that it was improper for Ratcliffe, a pro se litigant, to represent Decedent's estate in a wrongful death or survivor action.

We apply an abuse of discretion standard of review concerning the trial court's dismissal of a complaint based on failure to comply with section 2-622. *Mueller v. North Suburban Clinic, Ltd., 299 Ill. App. 3d 568, 572, 701 N.E.2d 246, 233 Ill. Dec. 603 (1998)*. As the second question involves a question of law, our standard of review will be *de novo. Daley v. American Drug Stores, Inc., 294 Ill. App. 3d 1024, 1026, 691 N.E.2d 846, 229 Ill. Dec. 373 (1998)*.

Because we conclude that it was improper for Ratcliffe, a pro se litigant, to represent the legal interests of Decedent's estate in the action below and because we find this fact is dispositive of the appeal, we will only address this issue. At a court hearing on September 18, 1998, in the instant case the trial judge **[***7]** advised Ratcliffe that under *Blue v. People of the State of Illinois, 223 Ill. App. 3d 594, 585 N.E.2d 625, 165 Ill. Dec. 894 (1992)*, he did not believe Ratcliffe could represent Decedent's estate in a pro se capacity. The trial judge however did not dismiss the action at that time and on a subsequent court date appointed Ratcliffe as special administrator of Decedent's estate.

In Blue, a pro se plaintiff filed a complaint for an order of habeas corpus in the name of his minor child alleging that the plaintiff was being held in his mother's custody in violation of due process of law. The trial court dismissed the complaint based on the fact that another action was pending between the same parties for the same cause under section 2-619(a)(3) of the Illinois Code of Civil Procedure. Plaintiff appealed the trial court's dismissal. The appellate court dismissed plaintiff's appeal and vacated the circuit court's judgment. *Blue, 223 Ill. App. 3d at 597.*

In Blue, the appellate court noted that under "Ill. Rev. Stat. 1989, ch. 13, par. 1 [now codified as *705 ILCS 205/1*]," "One not duly authorized to practice **[***8]** law may not represent another in a court of law." *Blue, 223 Ill. App. 3d at 596.* Further, the court held that:
[*626]

"Lay people may appear only in their 'proper persons' *** only on their own behalf. [Citation omitted.] *** A pleading signed by a person who is not licensed to practice law in this State is a nullity even if a duly licensed attorney subsequently appears in court. [Citation omitted.] Where one not licensed to practice law has instituted legal proceedings on behalf of another, the suit should be dismissed; if the suit has proceeded to judgment, the judgment is void and will be reversed. [Citation omitted]."

Blue, 223 Ill. App. 3d at 596.

The court then held that plaintiff could not represent the interests of another, his son, without being authorized to practice law, Thus, although a pro se litigant is entitled to represent his or her own personal interest, a non-attorney cannot represent another's legal interests on behalf of that individual. Part of the rationale behind the court's ruling was that an individual (a minor) who lacks the capacity to represent himself is entitled to the protection and expertise of **[***9]** an attorney.

In further support of their position that the trial court's order dismissing this complaint should be affirmed, defendants also rely upon a decision by the Court of Appeals of Nebraska entitled *Waite v. Carpenter, 1 Neb. App. 321, 496 N.W.2d 1 (1992).* In Waite, a pro se litigant filed several claims against defendants as personal representative of Harriet Waite's estate. The complaints did not state plaintiff's relationship with Harriet Waite but indicated the plaintiff was acting as personal representative of the estate. The court found that:

[847]** "As wrongful death actions, [these cases] are of the type which may only be maintained by a personal representative, and *** a non-lawyer may represent himself or herself, but may not act as the legal representative for anyone else. This rule includes a non-attorney personal representative acting for an estate. Obviously, the personal representative who brings a wrongful death suit is bringing it for the benefit of the other heirs and those persons are entitled to have their legal interests represented by one who is trained and licensed to do so. This is not to say that personal representatives **[***10]** must be attorneys, but rather, that one who seeks to represent the legal interests of the personal representative must be an attorney. This rule protects the estate, its heirs, and its creditors." *Waite, 1 Neb. App. at 328.*

We have reviewed Ratcliffe's complaint and although entitled a "Complaint Of Professional Negligence," it is styled more in the nature of a wrongful death or survival action. We also note that during the proceedings below the trial judge appointed Ratcliffe as the Special Administrator of Decedent's estate and Ratcliffe's complaint seeks money damages.

Because claims for both wrongful death and survival actions **[*627]** are brought in a representative capacity we find that they may not be brought pro se. The Wrongful Death Act provides: "Every such action shall be brought by and in the names of the personal representatives of such deceased person***." *740 ILCS 180/2* (West 1998). The Illinois Survival Statute likewise provides that such a cause of action shall be brought in a representative capacity. *755 ILCS 5/27-6* (West 1998).

Thus, we agree with the Waite reasoning and hold that Ratcliffe **[***11]** cannot represent the legal interests of Decedent's estate in a pro se capacity because she is not an attorney licensed to practice law. As Waite points out, medical malpractice and wrongful death actions are complex cases that require the expertise of an attorney and the dismissal of Ratcliffe's complaint under section 2-622 only reinforces this proposition. *Waite, 1 Neb. App. at 330.* As a result of our reading of both Blue and Waite, we believe this appeal should be dismissed.

Although we have determined this appeal should be dismissed because Ratcliffe could not represent the legal interests of Decedent's estate as she is not a licensed attorney, we address Ratcliffe's claim that the trial court erred in not appointing counsel to represent her in the lawsuit that she filed in violation of *705 ILCS 205/1* (West 1998).

Ratcliffe contends that the trial court's failure to appoint counsel on her behalf was erroneous and was also abusive is some fashion. We disagree. First, an individual in a civil action has no right to counsel under the Illinois Constitution. *In re Marriage of Schmidt, 241 Ill. App. 3d 47, 48, 609 N.E.2d 345, 182 Ill. Dec. 42 (1993).* **[***12]** Ratcliffe provides us with no authority to the contrary. Moreover, we fail to see how, under these facts, Ratcliffe, as personal representative of Decedent's estate, has a right to counsel. Ratcliffe as much as concedes so in her amended brief.

Further, we are not persuaded by any of the cases cited by Ratcliffe in support of her alleged entitlement to counsel. In *Zarnes v. Rhodes, 64 F.3d 285, 288 (1995),* the court affirmatively stated that "civil litigants do not have a right, either constitutional or statutory, to counsel [Citation.]" Further, the court determined that the district court did not abuse its discretion in denying Zarnes' request for counsel. *Zarnes, 64 F.3d at 288.* Thus, the express language of Zarnes defeats Ratcliffe's argument on this question.

Ratcliffe also relies on *Thomas v. Pate, 493 F.2d 151, 156 (1974).* In Thomas, a federal discrimination case, the court also stated that, "A plaintiff in a civil action *** has no sixth amendment right to competent counsel." *Thomas, 493 F.2d at 157.* **[**848]** Thus, Thomas merely reiterates the same proposition expressed in Zarnes. As earlier noted, **[***13]** **[*628]** In re Marriage of Schmidt, Zarnes and Thomas defeat Ratcliffe's position on this question.

The final case cited by Ratcliffe on this point exclusively concerns a plaintiff's right to self-representation and not the right to appointment of counsel. See *O'Reilly v. New York Times Company, 692 F.2d 863*

(1982). Therefore, the case is not germane to the question at issue. Accordingly, we dismiss this appeal because Ratcliffe, a pro se litigant, could not represent the legal interest of Decedent's estate in the action below.

The appeal is dismissed and the judgment of the circuit court is vacated.

Appeal dismissed, judgment vacated.

CAHILL, P.J., and GORDON, J., concur.

LEXSEE 66 Ill. 2d 398

EMANUEL S. LOZOFF, Appellant, v. SHORE HEIGHTS, LTD., et al., Appellees

No. 48378

Supreme Court of Illinois

66 Ill. 2d 398; 362 N.E.2d 1047; 1977 Ill. LEXIS 267; 6 Ill. Dec. 225

April 5, 1977, Filed

SUBSEQUENT HISTORY:
[*1]**

Rehearing Denied May 26, 1977.

PRIOR HISTORY:

Appeal from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Kane County; the Hon. Paul W. Schnake, Judge, presiding.

DISPOSITION:

Judgment affirmed.

COUNSEL:

Albert Brooks Friedman, Ltd., of Chicago, for appellant.

Tyler, Peskind & Solomon, of Aurora (Lloyd J. Tyler, David P. Peskind, and Gail L. Erschen, of counsel), for appellees.

JUDGES:

Mr. CHIEF Justice WARD delivered the opinion of the court.

OPINIONBY:

WARD

OPINION:

[*399] **[**1047]** The plaintiff, Emanuel S. Lozoff, an attorney, filed an action in the circuit court of Kane County alleging that he "rendered legal services to the defendants, for which the defendants agreed to pay" him $ 65,000 and that he had not been paid. Lozoff was licensed to practice law in Wisconsin but not in Illinois at the times involved. A jury returned a verdict in the plaintiff's favor and awarded him $ 65,000. The appellate court reversed, holding that the plaintiff was not entitled to recover legal fees because he was not licensed to practice in this State when he performed the services. *(35 Ill. App. 3d 697.)* We granted the plaintiff's petition **[***2]** for leave to appeal. 58 Ill. 2d R. 315.

[*400] **[**1048]** The defendants are Shore Heights, Ltd., Delores Greene, its president, and Charles Greene, its general manager. Shore Heights is the beneficiary of a land trust holding title to a tract in Kendall County. In the spring of 1971 Shore Heights contracted to sell the land to Flintlock Investments of Aurora (Flintlock), but the agreement was rescinded. Flintlock had intended to resell the property to Aldridge Construction Company (Aldridge).

The plaintiff was a member of the group that engaged in negotiations for Flintlock with both Shore Heights and Aldridge. After the Shore Heights - Flintlock agreement was rescinded, the plaintiff persuaded Aldridge's representatives to negotiate directly with Shore Heights for the sale of the property. At the same time the plaintiff approached Norman Lawrence, the Shore Heights attorney, and told him that he probably could effect an agreement between Shore Heights and Aldridge for a conveyance. The plaintiff suggested to Lawrence that Shore Heights retain the plaintiff to arrange the sale. To discuss this there was a meeting on July 20, 1971, in Lawrence's office, **[***3]** attended by the plaintiff, Charles Greene and Lawrence. Greene agreed to employ the plaintiff in the negotiations with Aldridge, and the plaintiff prepared a statement that was later signed by Mrs. Greene as president of Shore Heights. It provided:

"This letter is to serve as a memorandum of our agreement in which you will be paid the sum of $ 65,000.00 as attorneys fee for the legal services rendered by you in the Aldridge Construction Company - Shore Heights land agreement * * *."

Thereafter on August 6, 1971, Shore Heights entered into a contract with Aldridge for the sale of the tract. On November 21, 1971, the parties met to close the sale, but during the meeting differences arose and Aldridge stated that it would not complete the transaction. Shortly thereafter the plaintiff brought the suit to collect fees.

The plaintiff does not deny that he was only licensed **[*401]** to practice law in Wisconsin at the time the

contract between Shore Heights and Aldridge was made. He contends, however, that if an attorney who is licensed in another State, though not in Illinois, collaborates with an Illinois attorney in providing legal services in this State, he can recover **[***4]** compensation for his services.

The evidence shows that the plaintiff approached Lawrence and the defendants and offered his professional services regarding the proposed conveyance of land in Illinois. It appears that all of the parties involved, excepting the plaintiff, were from Illinois. The evidence further shows that the plaintiff actively participated in the negotiations leading to the Shore Heights - Aldridge contract and that he gave legal advice to the defendants. It seems clear that the plaintiff engaged in the practice of law in Illinois.

It is for this court to determine who shall be permitted to practice law in Illinois. (*In re Anastaplo (1954), 3 Ill. 2d 471; People ex rel. Chicago Bar Association v. Goodman (1937), 366 Ill. 346; People ex rel. Illinois State Bar Association v. Peoples Stock Yards State Bank (1931), 344 Ill. 462.)* At the time the plaintiff was retained by the defendants our Rule 707 made it possible for an attorney not admitted to practice in Illinois to take part in court proceedings. The rule provided:

"Anything in these rules to the contrary notwithstanding, an attorney from any other jurisdiction in the United States, or foreign **[***5]** country, may in the discretion of any court of this state be permitted to participate before the court in the trial or argument of any particular cause in which, for the time being, he is employed." (Ill. Rev. Stat. 1969, ch. 110A, par. 707.)

There was no litigation here, and the plaintiff, of course, did not come within the rule. It is clear, however, that the plaintiff did engage in the unauthorized practice of law, and he cannot recover attorney fees. There is a statutory prohibition, too, against the allowance of legal fees for persons other **[**1049]** than licensed attorneys. Section 1 of "An **[*402]** Act to revise the law in relation to attorneys and counselors" (Ill. Rev. Stat. 1969, ch. 13, par. 1) provided:

"No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State.

No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney."

Legislation such as this is not to be considered antagonistic to the judicial authority to govern the practice **[***6]** of law. We noted in *People ex rel. Chicago Bar Association v. Goodman (1937), 366 Ill. 346, 349:*

"The power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government created by article 3 of our constitution. The legislative department may pass acts declaring the unauthorized practice of law illegal and punishable. Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law."

The plaintiff cites *Mock v. Higgins (1954), 3 Ill. App. 2d 281,* and *Dorf v. Relles (7th Cir. 1966), 355 F.2d 488,* to support his position. Both of these decisions are distinguishable, for they involve matters that were before trial courts and the participation by out-of-State attorneys was within Rule 707. We would observe that the *dictum* in *Mock* to the apparent effect that an attorney licensed in one jurisdiction may, without more, practice in another *(3 Ill. App. 2d 281, 293),* as can be seen from what we have said here, is erroneously overbroad.

We do not mean in our holding today to have it understood that there can never **[***7]** be circumstances that will allow an out-of-State attorney who is not within Rule 707 to recover for legal services. We recognize there are **[*403]** transactions involving parties and attorneys from more than one State which would require a result different from today's holding.

In *Spivak v. Sachs (1965), 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953,* the plaintiff, an attorney who was licensed in California, spent 14 days in New York during which he advised the defendant, a New York resident, concerning her pending divorce. The New York Court of Appeals, in affirming the dismissal of the plaintiff's complaint for fees, observed:

"The statute [prohibiting the practice of law by unlicensed persons] aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.
***

There is, of course, a danger that section 270 could under other circumstances be stretched to outlaw customary and innocuous practices. We agree with the Supreme Court of New Jersey (*Appell v. Reiner, 43 N.J. 313, [204 A.2d 146])* that, recognizing **[***8]** the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely

unlike the present one." *16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S. 2d 953, 956.* See generally Annot., *11 A.L.R.3d 907 (1967).*

For the reasons given, the judgment of the appellate court is affirmed.

Judgment affirmed.

LISA FRUIN, Plaintiff-Appellant, v. NORTHWESTERN MEDICAL FACULTY FOUNDATION, INC., et al., Defendants-Appellees

No. 1-89-0663

Appellate Court of Illinois, First District, Sixth Division

194 Ill. App. 3d 1061; 551 N.E.2d 1010; 1990 Ill. App. LEXIS 230; 141 Ill. Dec. 667

February 23, 1990, Filed

SUBSEQUENT HISTORY:
[***1]

Rehearing Denied April 3, 1990.

PRIOR HISTORY:
Appeal from the Circuit Court of Cook County; the Hon. Thomas E. Hoffman, Judge, presiding.

DISPOSITION:
Order affirmed.

COUNSEL:
Kenneth C. Chessick and John W. Fisk, both of Schaumburg, for appellant.

Cecil A. Partee, State's Attorney, of Chicago (Joan S. Cherry, Myra J. Brown, and Helen Haynes, Assistant State's Attorneys, of counsel), for appellee Robert A. Miller.

Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago (D. Kendall Griffith, Maxwell W. Griffin, and Bruce L. Carmen, of counsel), for appellee Arthur De Boer.

JUDGES:
JUSTICE McNAMARA delivered the opinion of the court. LaPORTA, P.J., and RAKOWSKI, J., concur.

OPINIONBY:
McNAMARA

OPINION:

[*1062] [**1010] Plaintiff, Lisa Fruin, appeals from the order of the circuit court of Cook County dismissing with prejudice her complaint against defendants, Arthur DeBoer, M.D., S.C., Arthur DeBoer, M.D., and Robert A. Miller, M.D. The basis of the dismissal [**1011] was that the complaint was signed and filed by an attorney who was not licensed to practice in Illinois.

Plaintiff's appeal arises from the following undisputed facts. On January 11, 1984, plaintiff underwent a surgical procedure for the implantation of a prosthetic aortic valve. The surgery [***2] was performed by Dr. DeBoer, and plaintiff was seen and treated by both Drs. DeBoer and Miller for post-operative care and examinations from January 21, 1984, through March 5, 1984. On March 27, 1985, plaintiff underwent emergency open-heart surgery.

On March 27, 1987, plaintiff filed a complaint alleging medical malpractice against Drs. DeBoer, Miller, and the Northwestern Medical Faculty Foundation. (Northwestern Medical has also been dismissed from the case but is not involved in this appeal.) Plaintiff's complaint alleged that Drs. DeBoer and Miller failed to prescribe an appropriate anticoagulation regime for plaintiff, and that this failure led to medical problems resulting in the required emergency open-heart surgery. Plaintiff further alleged that the first time she knew or should have known that she should have maintained an anticoagulation regime was on or about April 1, 1985. Thus, her complaint was filed four days before the expiration of the applicable statute of limitations. See Ill. Rev. Stat. 1985, ch. 110, par. 13-212.

The complaint was signed and filed by Michael J. Colgan, an attorney licensed in Wisconsin, but not in Illinois. Colgan consulted with an Illinois [***3] law firm, and that firm prepared the initial pleadings. On August 17, 1987, after the statute of limitations had run, a supplemental appearance was filed on plaintiff's behalf by Kenneth C. [*1063] Chessick, a licensed Illinois attorney. On January 6, 1988, Drs. DeBoer and Miller were served by alias summons. They filed a motion to dismiss, and on February 6, 1989, the trial court granted the motion to dismiss with prejudice.

Plaintiff alleges that the unique circumstances of her case require this court to reverse the trial court's order of dismissal. Plaintiff notes that she did not know that Colgan was not licensed to practice in Illinois. Further, she points

out that Colgan made reasonable and diligent efforts to secure the participation of Illinois counsel, and that she secured such participation by the entry of the supplemental appearance of licensed Illinois counsel. Finally, she observes that defendants have not suffered any prejudice as a result of the filing of the complaint by an attorney not licensed to practice in Illinois.

. 1 Absent leave of court pursuant to Supreme Court Rule 707, an attorney licensed to practice law in another State may not practice law in **[***4]** Illinois. (*Lozoff v. Shore Heights, Ltd. (1976), 35 Ill. App. 3d 697, 342 N.E.2d 475;* 107 Ill. 2d R. 707.) Generally, a pleading signed by a person not licensed to practice in Illinois is a nullity. (*Marken Real Estate & Management Corp. v. Adams (1977), 56 Ill. App. 3d 426, 371 N.E.2d 1192; National Bank v. First Wisconsin National Bank (1977), 53 Ill. App. 3d 482, 368 N.E.2d 119; Leonard v. Walsh (1966), 73 Ill. App. 2d 45, 220 N.E.2d 57.)* This rule applies even when subsequent court appearances are made by a duly licensed attorney. *Housing Authority v. Tonsul (1983), 115 Ill. App. 3d 739, 450 N.E.2d 1248; Marken Real Estate & Management Corp. v. Adams, 56 Ill. App. 3d 426, 371 N.E.2d 1192.*

Plaintiff notes, however, that this court fashioned an exception to the general rule in *Janiczek v. Dover Management Co. (1985), 134 Ill. App. 3d 543, 481 N.E.2d 25.* Plaintiff urges this court to extend its holding in *Janiczek* to encompass the situation here. In *Janiczek*, the plaintiff retained an Illinois licensed attorney to handle a workers' compensation action and a personal injury claim. The attorney settled the workers' compensation action and subsequently **[***5]** was disbarred. He then filed the plaintiff's personal injury action, under the name of another attorney, without authorization to do so. This court held that the plaintiff's case should not have been dismissed because plaintiff initially had retained an Illinois licensed attorney, and unbeknownst to plaintiff, that attorney was later disbarred. Significantly, **[**1012]** the court did not question the reasoning or the results of those cases holding that proceedings instituted by nonattorneys or nonlicensed attorneys are void. Rather, the *Janiczek* court relied upon the unique circumstances of that case in deviating from the rule voiding proceedings **[*1064]** instituted by nonattorneys.

. 2 In our view, this case does not present unique circumstances which would justify a similar deviation from the rule. Unlike the plaintiff in *Janiczek*, who hired an Illinois attorney, with offices in Illinois, plaintiff here hired a Wisconsin attorney, with offices in Wisconsin. Accordingly, plaintiff should have inquired into his ability to practice law in Illinois. Her failure to do so, while unfortunate, is not reason enough to permit a relaxation of the rules regarding the unauthorized practice **[***6]** of law. Similarly, Colgan's failure to ensure that he obtained the necessary authorization to practice in another State cannot justify a deviation from that State's rules.

Accordingly, we find that the trial court properly dismissed plaintiff's complaint with prejudice. The court correctly concluded that the complaint was a nullity and, therefore, that no subsequent complaint could satisfy the applicable statute of limitations.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff- Intervenor,	)	
vs.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Defendants.	)	

ATTORNEY GENERAL'S EMERGENCY MOTION TO STRIKE AND DENY THE LETTER/MOTION OF DEFENDANT DIRECTORS TO STRIKE PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND FILE AN ADDITIONAL BRIEF

Now comes the People of the State of Illinois by the Attorney General James Ryan through his assistant attorney generals and moves the court to strike and deny the attached January 31, 2002 letter/motion of the defendant directors which seeks to have the court disregard and otherwise strike the **Attorney General Proposed Finding of Fact and Conclusions of Law Relative To The Fee Petitions of Defendant Terra, Tucker and Simpson** and deny the defendant director's leave to file another additional brief as they request in said letter/motion to this court and moves and states:

1) The Defendant directors Terra, Tucker and Simpson by their attorneys Cummins & Cronin, LLC have sent the court the attached January 31, 2002 letter which is in sum a motion to strike the

Attorney General Proposed Finding of Fact and Conclusions of Law Relative To The Fee Petitions of Defendant Terra, Tucker and Simpson and the defendant directors argue that the proposed Findings/Conclusions of the Attorney General are a brief, which it is not , and that they seek that such be stricken and otherwise that the defendant directors be given leave to file a brief, a copy of the January 31, 2002 letter is attached as Exhibit A.

2) The Attorney General's proposed Findings and Conclusions is merely proposed Findings and Conclusions consistent entirely with the arguments previously made and set forth in the Attorney General's Response. It submits only modest Findings and Conclusions interspersed with facts and accompanied by a number of paragraphs of undisputed facts and case law that fleshes out the Findings/Conclusions. The proposals do not bring any new issues to the court , they track the issues as made in the filed Response, they do not make new argument and it is not a brief.

3) The proposed Findings/Conclusions are consistent with the previous arguments of the Attorney General which sought that the court's determination of the reasonable services and fees awarded here for work in this case be binding on these defendant directors for the services rendered in this case in any future fee requests. The Findings/Conclusions are proposed to establish which services were rendered in this case, and those not rendered in this case; and of those rendered in this case, which are reasonable or compensable, and those services rendered in this case which are not.

4) It is the fact that the defendant directors submitted services in other cases with the services rendered in this case and did not separate the services by the several cases, which makes some Findings/Conclusions on that matter necessary to resolve which services were rendered in this case and which were rendered in other cases, as well as, those that are reasonable and compensable in

this case, and those services in this case which are unreasonable and/or not compensable by the Terra Foundation.

5) The Attorney General by his proposed Findings/Conclusions is totally consistent with his previously filed Response and arguments already made, and provides to this court for its benefit a framework of Findings and Conclusions that would allow this court to state in its judgment order Findings/Conclusions which would clarify the services which it adjudges were rendered in this case and which it adjudges were rendered in other cases; as well as, which it adjudges were reasonable services in this case and those services rendered in this case that it adjudge were unreasonable and/or not compensable by the Foundation .

6) The court order entered January 15, 2002 is typical and routine, and it allowed the parties to submit proposed orders. It is well understood that this court will not hesitate to enter the Findings it independently determines. Clearly this court will not be persuaded in the least by the content of the Attorney General's proposed Findings/Conclusions where it disagrees. Certainly such will not be utilized by the court to the extent the court is ruling otherwise. Clearly where not consistent with the court's intent they will be ignored or easily modified by slight insertions to effect the court's decision. They are proposed as the Attorney General would hope they would be found and entered, but that is the nature of a party submitting its proposed Findings/Conclusions. The defendant directors could have submitted.some, but they chose not to do so. A copy of the Attorney General Proposed Finding of Fact and Conclusions of Law Relative To The Fee Petitions of Defendant Terra, Tucker and Simpson is attached as Exhibit B.

7) One half of proposed Findings/Conclusions are undisputed facts or case law as actually cited

in the Response. The undisputed facts flesh out the background for the Findings and Conclusions in the proposal. Much of what is submitted in the original Response and arguments and now covered by the proposals was made necessary by the actions of the defendant directors when they filed fee petitions herein seeking fees under the bylaws and statute.

8) The defendant directors seek $1.2 million for their attorney fees and have already received $450,000. This court has indicated it is looking at fees pursuant to the Consent Decree for services rendered in work regarding this case only. The defendant directors' fee petitions at issue seek fees for five additional law firms for work on a federal case, this case and a separate new state action. The fee petitions do not segregate the work between those cases. The defendant directors have stated they do not accept the Consent Decree and while they have submitted fee petitions herein seeking fees, they stated in open court that they do not accept the Consent Decree and the fee petitions state they seek the fees under the bylaws, statute and contract.

9) The Attorney General sought by his previously filed Response and arguments, a ruling that the court find that fees for services awarded by this court on the Consent Decree would be at least if not more than fees owed under the bylaws and statute. The court finding of reasonable fees should be a binding collateral estoppel finding relative to compensable services in this case. **Finding which services and fees were rendered in this case and those rendered in other matters is necessary. Finding the portion of services and fees rendered in this case which is deemed reasonable and the portion not deemed reasonable is necessary. Findings that the amount due the defendant directors for services in this case for these five firms fee petitions under the bylaws is not more than the amount determined under the Consent Decree is necessary.** The proposed Findings/Conclusions were submitted to effect such. In fact, by the position taken by

the defendant directors in their fee petitions they can not dispute the need for Findings on the issue of their right to fees under the bylaws and statute.

10) There had been a pending fee request before this court by the defendant directors filed months ago by the Shefsky firm that sought fees under the by-laws and statute which this court had stated it was poised to resolve when the settlement was reached. The fee petitions here on their face are a continuation of such. The Attorney General's proposal seek to address such and to provide a consistency between the Findings on the Consent Decree and the fee petitions as brought.

11) The Defendant directors do not agree the Consent Decree binds them, the petitions y seek their fees by virtue of the by-laws , statute and contract. The Attorney General's Response shows that under the by-law/statute standard, the fees due these defendant directors for work in this case is the same or less than the fees under the Consent Decree requirement of merely reasonable fees in this case and the proposed Findings/Conclusions set forth such to obtained Findings/Conclusions inclusive of such.

12) The Proposed Findings/Conclusions track the Response and arguments made by the Attorney General adding nothing new. The topics and issues addressed in the Findings is what was in the Response, it is not a new brief. The Response and Findings both deal with the fact the petitions seek fees under the bylaws and statutes and address the bylaw / statute element of "defense of an action". Both address that the Consent Decree standard for awarding fees is broader but still has a reasonableness standard and thus a determination under the Consent Decree would include all fees due these defendants from the Foundation under the bylaws and statute relative to attorney services rendered these defendants in this case . Also the Response and the Findings deal with fees and

services rendered for the federal case and the post Consent Decree new state case filed by the defendants. Both address what was contemplated by the parties relative to placing the fee paying provision in the settlement agreement now a part of the Consent Decree. Both address segregating the services between the three separate matters and the fact of duplication in the subject state case between the five law firms themselves, as well as , in not meeting with the original law firm and its earlier work. Both the Response and the proposed Findings also deal with the contention the services were not worth $600,000 and that certain services were rendered by out of state lawyers. Both the Response and the proposed Findings deal with the Findings relative to the Stebbins matters pre-dating mediation. The proposed Findings raise nothing new in the fee hearing they cover the arguments previously made.

13) The Proposed finding/Conclusions are 50% composed of undisputed fact or merely copied law from the Response specifically :

a) Paragraphs one through six are undisputed fact, except for the last sentence of paragraph six. .
b) Paragraph seven is Findings and Conclusions.
c) Paragraphs eight and nine are undisputed facts.
d) Paragraph ten is Findings and Conclusions.
e) Paragraphs eleven and twelve are undisputed facts.
f) Paragraph thirteen is mixed undisputed fact and Findings and Conclusions.
g) Paragraph fourteen is undisputed fact.
h) Paragraph fifteen is Findings and Conclusions.
i) Paragraph sixteen is not new but copied case law as set forth in the Attorney General's Response.
j) Paragraph seventeen is Findings and Conclusions.
k) Paragraph eighteen is undisputed fact.
l) Paragraphs nineteen and twenty-four is Findings and Conclusions.
m) Paragraphs twenty-five and twenty-six is not new but copied case law as set forth in the Attorney General's Response.
n) Paragraphs twenty-seven through thirty-eight is mixed fact with Findings and Conclusions.

o) Paragraph thirty -nine is not new but copied case law as set forth in the Attorney General's Response.

p) Paragraphs forty through forty-five is mixed fact with Findings and Conclusions.

14) Perhaps these Findings/Conclusions could have left out some of the fact and could have been more concise. But they make no new argument to the court. The Findings and Conclusions sought were argued for in the Response and before the court at hearing , in sum, the present nothing new to this court. The Findings/ Conclusions are straightforward proposed Findings/Conclusions which with the facts submitted provide a busy court with facts and one possible format for Findings/Conclusions in a complicated fact scenario , which this court will clearly reject when such is inconsistent with what it intends to determine and find.

15) The defendant directors counsel's January 31, 2002 letter to the court is outside the record but involves the matters before this court regarding the proposed Findings/Conclusions. These proposed Findings were circulated among the parties and the court , but not filed of record. Given the acerbic nature of the remarks in the Cummin's letter of January 31, 2002, the contentions and the fact the matter is before the court , these matters now need to be made upon the record and hence this motion is filed to spread such of record and resolve the contention raised by Mr. Cummins.

16) Mr. Cummins requests in his letter/ motion that the Attorney General's Proposed Findings and Conclusions be stricken because such is an additional brief by the Attorney General. The Proposed Findings/Conclusions is not a brief, it does not raise new arguments, it will not be followed by the court to the extent it differs from the court's independent decision , it is not a sinister additional

attempt at arguing to this court and the defendant directors' request to ignore and strike such, should be denied for the reasons set forth above.

17) If Mr. Cummins and the Defendant directors are seeking yet additional time to submit their own form of Findings of Fact and Conclusions of Law to the court , we would suggest that such might be a fair resolution of his concerns. While we believe ours to be the appropriate Findings and Conclusions we do not believe his filing such would work an unfairness upon the Attorney General , however, assuming that such be limited to the arguments already made in these fee hearings and subject to not delaying the ruling on fees for the other parties before this court.

WHEREFORE the People of the State of Illinois by the Attorney General move to strike the letter/motion request of defendant directors to strike the Attorney General Proposed Finding of Fact and Conclusions of Law and to otherwise deny the defendant directors leave to file an additional brief, but subject to allowing the defendant directors to submit Proposed Findings of Fact and Conclusions of Law without delay to other parties in this case .

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601

attempt at arguing to this court and the defendant directors' request to ignore and strike such, should be denied for the reasons set forth above.

17) If Mr. Cummins and the Defendant directors are seeking yet additional time to submit their own form of Findings of Fact and Conclusions of Law to the court , we would suggest that such might be a fair resolution of his concerns. While we believe ours to be the appropriate Findings and Conclusions we do not believe his filing such would work an unfairness upon the Attorney General , however, assuming that such be limited to the arguments already made in these fee hearings and subject to not delaying the ruling on fees for the other parties before this court.

WHEREFORE the People of the State of Illinois by the Attorney General move to strike the letter/motion request of defendant directors to strike the Attorney General Proposed Finding of Fact and Conclusions of Law and to otherwise deny the defendant directors leave to file an additional brief, but subject to allowing the defendant directors to submit Proposed Findings of Fact and Conclusions of Law without delay to other parties in this case .

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois

BY: Assistant Attorney General

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ROBERT P. CUMMINS
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THOMAS C. CRONIN
tcc@cumminscronin.com

January 31, 2002

VIA HAND DELIVERY

The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: Buntrock, et al. v. Terra, et al.
No. 00 CH 13859

Dear Judge Kinnaird:

We write on behalf of our clients Terra, Tucker and Simpson.

We just received a copy of Mr. Perkins' letter of January 29 along with a document captioned "Attorney General's Proposed Finding of Fact and Conclusions of Law Relative to the Fee Petitions of Defendants Terra, Tucker and Simpson."

In an effort wholly unbecoming a representative of the state's chief legal officer, Mr. Perkins has – contrary to the Court's direction – submitted yet another brief on the fee issue incorrectly characterized as an "order." The submission is both untimely and unfair; however, we are prepared to file a brief response if the Court intends to consider this improvident submission.

I respectfully request that Your Honor advise us if the Court will entertain a response in the event that Mr. Perkins' brief is to be considered.

Respectfully,

Robert P. Cummins

RPC/pw

cc: Service List

EXHIBIT A 1 of 2

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TO:	William R. Quinlan	**TELECOPIER NO.:**	312-263-5013
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FROM:	Robert P. Cummins		
DATE:	January 31, 2002	**TIME:**	4:14 pm
CLIENT/MATTER NO.:	283	**OPERATOR:**	pw

TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE: 2

If you did not receive all pages, or if you have any questions, please call (312)578-0500.

Exhibit A 2 of 2

THE INFORMATION CONTAINED IN THIS TELECOPIED MESSAGE, INCLUDING ANY ENCLOSURES, IS ATTORNEY PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE AS ADDRESSEE. THE REVIEW, DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION BY OR TO ANYONE OTHER THAN THE INTENDED ADDRESSEE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

January 29, 2002

Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County, Chancery Division
Richard J. Daley Center
50 West Washington Street, Room 2403
Chicago, Illinois 60602

Re: Buntrock, et al. v. Terra, et al.
Case No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed please find a copy of a proposed order in connection with the fee petitions pending before you in the above matter. A copy of this letter and the proposed order has been sent to all counsel on attached service list.

If you need any further information, please do not hesitate to have your clerk contact me.

Sincerely,

Floyd Perkins, Chief
Charitable Trusts and Solicitations Bureau
100 W. Randolph Street, 3rd FL
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(312) 814-2533

cc: w/enclosures/
all counsel on attached service list

Exhibit B

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*, Plaintiffs, v. JUDITH TERRA, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, v. JUDITH TERRA, *et al.*, Defendants.	)	

NOTICE OF EMERGENCY MOTION

TO: **SEE ATTACHED SERVICE LISTS A AND B**

PLEASE TAKE NOTICE that on February 5, 2002 at 9:15 a.m. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Dorothy Kinnaird in Room 2402, in the Circuit Court of Cook County, State of Illinois, and present the ATTORNEY GENERAL'S EMERGENCY MOTION TO STRIKE AND DENY THE LETTER/MOTION OF DEFENDANT DIRECTORS TO STRIKE PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND FILE AN ADDITIONAL BRIEF, a copy of which is hereby served upon you.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
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Telephone: (312) 814-2533

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I personally served a copy of the foregoing Notice and the foregoing document upon the parties listed on the attached Service List A, by personal delivery, this 1st day of February, 2002, before 5:00 p.m.

By: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Bureau of Charitable Trusts and Solicitations
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601
Telephone: (312) 814-2595

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I personally served a copy of the foregoing Notice and the foregoing document upon the parties listed on the attached Service List B by fax transmittal and by depositing a copy of same addressed to the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 1st day of February, 2002, before 5:00 p.m.

By: Assistant Attorney General

FLOYD D. PERKINS #99000
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	FEB 01 2002 No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

ATTORNEY GENERAL'S PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW RELATIVE TO THE FEE PETITIONS OF DEFENDANTS TERRA, TUCKER AND SIMPSON

NOW COMES the PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, and submits the following proposed finding of fact and conclusions of law relative to the Fee Petitions of the individual Defendants Terra, Tucker and Simpson stating and suggesting the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1 In February 2001 the parties agreed, pursuant to a court order, to conduct mediation. On June 19, 2001 the parties, the plaintiffs and six of the eleven directors of the board of directors agreed to

16di-002847

a settlement of the case herein, and as a part thereof a Board of Directors meeting was scheduled for June 29, 2001 to vote on the settlement. The settlement was accepted in principle by the board in its vote of June 29, 2001 and after resolution of Objections filed by the defendant directors the Consent Decree was entered herein on July 26, 2001 and embodied the settlement. The terms of settlement from the date of June 19, 2001 when a mediated agreement was reached , through entry of the Consent Decree on July 26, 2001, provided for a release for each director defendant and a dismissal of the action with prejudice. It also provided for this court to determine reasonable fees for the Foundation directors.

2 The Foundation agreed in the settlement agreement incorporated in the July 26, 2001 Consent Decree to pay and reimburse Terra Foundation directors for reasonable attorney fees incurred by them in this matter as determined by this court.

3 The Defendant-Petitioners Terra, Tucker and Simpson's thereafter filed several fee petitions herein and seek $1,224,552 from the Terra Foundation to pay their several law firm fees and costs. The fees of these defendants original law firm Shefsky and Froelich in the amount of $450,834 have already been approved and paid in full by this court, with no objection by any party or person. The balance of attorney fees and costs sought by defendant directors Terra, Tucker and Simpson of $773,718 are sought for the services of the following law firms in the following amounts:

Bellows & Bellows	$ 67,012
Cummins and Cronin	$ 103,750
Kellogg, Huber, Hansen, Todd and Evans	$ 355,282
Novoselsky Law Offices	$ 45,132
Verner, Lipfert, Bernhard	$ 202,542

4 The Defendant's in filing the several fee petition have stated on the record and contend they

do not accept the Consent Decree and the several defendant director fee petitions filed herein seeking the remaining unpaid $ 773,000 of defendant director attorney fees seek said fees under the Terra Foundation by-laws , the statute and contract obligations owed the directors by the Foundation. The defendant directors originally and pre-dating mediation and settlement also sought an award of their attorney fees relative to the fees of Shefsky & Froelich under said by-laws, statute and contract.

5 The Foundation's statutory , by-law and contract obligation to pay fees all limit fee reimbursement to reasonable fees incurred "to the extent a (Foundation) director... has been successful, on the merits or otherwise, in the **defense of any action**... such person shall be indemnified against expenses (including attorney fees) actually and **reasonably incurred** by such person in connection therewith." (Emphasis added) 805 ILCS 108.75 (c), for purposes hereof the by-laws and contract obligations are in relevant part the same as the statute all require the fees to rendered in defense of an action brought against the director and only reasonable fees will be paid.

6 The Defendant-Petitioners were named Defendants in this action, and technically were successful in the defense of the subject chancery action and incurred expenses and as a result. The parties reached a mediated settlement agreement on June 19, 2001 and as a part thereof the parties contemplated and agreed the Foundation would pay the reasonable attorney fees of all directors incurred in the matter herein. At June 19, 2001 the only attorneys of record for the defendant directors was Shefsky & Froelich, and the services of the subject five new law firms of the defendant directors were not known or then specifically contemplated by the parties when the parties entered into a mediated agreement on June 19, 2001.

7 The Defendants did not like other terms and provisions of the settlement as it related to the governance of the Terra Foundation, and while they no longer had claims or actions to defend against, they initiated their own charges and attacks on others. The Defendants determined and acted to prevent the settlement, not because it left them vulnerable as defendants or required anything of them , but because parts of its provisions affected the Terra Foundation in a manner with which they did not agree. The Defendant-Petitioners engaged the several new firms and made filings charging that others had engaged in wrongful conduct filing pleadings herein and in federal court.

8 The new additional law firms for which Defendant directors seek reimbursement herein did not participate in mediation and were employed to prevent the settlement. The Defendant-Petitioners filed a separate federal suit on June 28, 2001. Three of the new firms time sheets, the Bellows firm, the Verner firm and the Kellogg firm all indicate that they worked on and filed the federal lawsuits against assistant attorney general Floyd Perkins on June 28, 2001, which was dismissed that day by the federal court.

9 None of the five new firms appear before this court until June 29, 2001 the date the Board was meeting to vote on the settlement. On June 29, 2001 the Defendant directors by the Bellows firm, the Verner firm and the Kellogg firm brought an "offensive" motion for a TRO in this court seeking to stop the settlement by seeking to restrain the Terra Foundation Board from meeting to approve the settlement. The June 29 motion for TRO was not granted.

10 The June 29 six page motion for TRO was not a part of a defensive action services incurred defending the defendant directors from the claims made in the action made by plaintiffs, but rather was an offensive action charging others with wrongdoing.

11 The Defendant directors by the three new firms Bellows, Verner and Kellogg thereafter filed on July 2 , 2001 an eleven page motion seeking to file Objections to the settlement agreement. On July 19, 2001 defendant directors filed their 28 page Objections to the Settlement. By then the fourth new firm , Cummins & Cronin , had started to render services and thereafter the services of attorney David Novoselsky were further added in the last weeks of July 2001.

12 The Defendant directors Objections and several related filings charged that others, assistant attorney general Perkins, board members Marshall and Stebbins , had engaged in wrongdoing. The defendant directors were seeking to reject the Consent decree including releases for themselves and dismissal of the action with prejudice and the defendant directors also sought leave to initiate their own counter-claims to prosecute charges they were now making against others.

13 The record here contains a copy of the Defendants' June 28, 2001 federal law suit naming each of the Defendants as plaintiffs along with the Foundation, and naming Assistant Attorney General Floyd Perkins as Defendant. The services for bringing that federal matter were rendered by the petitioning law firms and appears to constitute most, if not all, of the ($210,000) in fee cost listed in the fee petitions for June 2001. Thus the majority if not all of the time of Bellows & Bellows; Kellogg, Huber, Hansen, Todd and Evans; and Verner, Lipfert, Bernhard in June 2001 relates to services for Terra, Simpson and Tucker in preparing that federal case. While some of the June 2001 time clearly is for the TRO motion presented June 29 , that TRO motion was premised upon the federal lawsuit which was filed in this record and was itself an "offensive" pleading not defensive in nature. The federal case (and TRO motion) appears to be the service efforts of the new firms rendered in May and June 2001 which constitute over $210,000 of the costs sought by Defendants in the five new firms fee petitions.

14 The time sheets for Shefsky & Froelich for June 2000 totaled only $28, 134, the defendant directors five new firms show billing in June 2000 of $210,000 and shows extraordinary service time on the days prior to the filing in federal court on June 28 and the motion for TRO on June 29, the time sheets of Bellows firm, Verner firm and the Kellogg firm showing charges as follows :

On June 22 over $11,900 ;

On June 25 over $19,000 ;

On June 26 over $29,400 ;

On June 27 over $39,800 ;

On June 28 over $46,800 ;

On June 29 over $25,900 ;

See Exhibits A and B attached hereto.

15 These directors did not incur these fees merely in "defend[ing]" against the Plaintiffs' action herein. The defendant directors brought their own non-defensive "offensive" actions of their own herein after the settlement was made and they engaged in actions outside of this case including services in a federal court action.

16 In shifting the payment of attorney fees the terms must be strictly construed (*See, e.g.*, Carson Pirie Scott & Co. v. State of Illinois Dept. of Employment Security, 131 Ill. 2d 23, 37-38 (1989); Navarro v. Edgar, 145 Ill. App. 3d 413, 415-16 (1st Dist. 1986); Gonzales-Blanco v. Clayton, 120 Ill. App. 3d 848, 850 (1st Dist. 1983).) Medcom Holding Co. v. Baxter Travenol Laboratories, Inc., 200 F. 3d 518, 521 (7th Cir. 1999). In International Insurance Co. v. Rollprint Packaging Products, Inc., 312 Ill. App. 3d 998, 1014-15 (1st Dist. 2000) the contractual terms in an insurance policy authorizing the recovery of attorney fees for an insurer's failure to "defend" the insured did

not extend to aspects of the litigation which did not strictly constitute "defen[se]" of actions covered by the policy but were in the nature of separate actions and not defense of actions covered by the policy. The Rollprint court ruled that, however sound the practice of combining new matters with the defensive matters, the insured's counterclaim to enjoin that plaintiff from using or revealing trade secrets was not covered by the insurance policy because it sought affirmative relief apart from the negation or limitation of the insured's civil-rights liability.

17 The settlement agreement made between the Foundation and the Plaintiffs herein by its terms eliminated any need for the Defendants to take any action to defend themselves in the case. On June 19, 2001 six members of the board and the plaintiffs reached an agreement to settle the case herein, and a board meeting to approve that settlement was scheduled for June 29, 2001. From June 19, 2001 onward the Defendants were aware that the settlement agreement provided for a dismissal with prejudice and a complete release by plaintiffs for all Defendants and that the settlement made no findings about the Defendants and placed no requirements upon the Defendants. The settlement approved at mediation June 19, 2001, by the Board on June 29, 2001 and as entered by the court on July 26, 2001 eliminated any need for the Defendants to defend themselves any further.

18 The petitions for these five firms (not including the Shefsky firm) claim over $210,000 for services in May-June 2001 and over $390,000 for services in July 2001. The fee petitions of the five new law firms also seek over $165,000 for services after July 2001.

19 The filing of the federal lawsuit was done as plaintiffs against a non-party to this matter, and the TRO motion was a similar "offensive" action relying on the federal complaint filed herein and made against other board members. The Objections filed in mid-July 2001 were in substantial part the same contentions previously made in the federal lawsuit. The court finds the majority of time

spent on these constituted services and costs incurred by Terra, Tucker and Simpson not in the **"defense of any action"**. The $210,000 in fee services and costs of these five law firms incurred in May and June 2001 by Defendants to bring the federal case and June 29 TRO motion were not in defense of an action and have no basis for indemnification under the statute, by-laws or contract. The vast majority of the time spent in July 2001 with a cost of $390,000 was also spent not in defense of an action and has no basis for indemnification. A modest amount of these services might be considered for the protection of the defendant directors through entry of the Consent Decree, that amount is not defined by the defendant directors in their filings. This court however, is aware of the court matters in late June and July 2001 and the court awards $30,000 for the services of said five new firms of defendant directors in protecting the interest of defendant director from the date of mediated settlement through the entry of the Consent Decree.

20 In addition, it is clear from the record that most of the $165,000 of services rendered by Defendants' five law firms after July 2001 involve services in another case, a law division case which was briefly before this court and then transferred, in which these Defendants are plaintiffs and not defendants. In that action Terra, Tucker and Simpson are charging numerous defendants with a myriad of wrongful acts. These services post-July 2001 involve a separate law division action brought by Terra , Simpson and Tucker as plaintiffs and are not related to the **"defense of any action"**, and the $165,000 in attorney fee costs incurred after July 2001 by Defendants to bring a new law division action have no basis for indemnification under the statute, by-laws or the consent settlement herein.

21 Thus the court finds that the fee petitions of defendant directors for these five new law firms brought by the defendant directors seeking fees on the basis of the bylaws, statute and contract do not show services rendered in defense of an action as that terms is intended in the subject statute

16di-002854

contract and by-laws and therefore no more than $30,000 in attorney fees and costs can be awarded to the defendant directors five new law firms for the services of the subject five firms on the basis of right to fees on statute, by-laws or contract.

FEES PER THE TERMS OF THE CONSENT DECREE

22 The court does find that the parties did agree that this court would decide the reasonable attorney fees incurred by the defendant directors in this action and that the Foundation would pay for such as found by the court. The defendant directors have stated they did not accept the terms of the Consent Decree but submitted fee petitions to this court, and the defendant directors have argued the fees and services were reasonable. Under the Consent Decree this court is to determine reimbursement and award of attorney fees determining whether the fees and services are reasonable, whether they were incurred in this action and whether they are within the contemplation of the parties agreement. The defendant directors in submitting their fee petitions for the five additional new law firms have submitted the services and fees for review and award by this court. Thus the matter proceeded upon a basis agreed by the parties and the court has considered the filings and submissions of the parties and heard argument from the parties and can decide the reasonableness of the services and fees , whether they were incurred in this matter and whether they were within the contemplation of the settlement agreement.

23 The mediated agreement and the agreement approved by the board to have the Foundation pay the attorney fees of the directors did include the reasonable fees needed to finalize and complete the board meeting and to reasonably complete the entry of the Consent Decree. However, the court finds that the parties did not agree or contemplate when reaching the subject settlement agreement that subsequent to the agreement on June 19, 2001 that the agreement provision therein was an agreement to pay any and all attorney fees of a director or directors to hire new and several

law firms to prevent and challenge entry of the settlement and Consent Decree.

24 The agreement imposed as a factor of reasonableness the parties' intent that the matter be settled and over with, with no more fees payable by the Foundation. The agreement by its terms called for a termination of the action and shows that the intent of the parties was not to pay open-ended attorney fees for any and all new litigation or charges a director decided to bring, but was to end all controversy and pay the fees incurred up to that point. The six hundred thousands dollars in legal services by five new law firms for services in June and July 2001, was never what the parties or the Foundation agreed to pay and reimburse when the settlement was made. The fee costs of the Defendants' five new firms are not reasonable fees of the directors as contemplated under the terms of the parties settlement agreement and the Consent Settlement. The court finds that the fee petitions of defendant directors for these five new law firms do not show services rendered as contemplated by the settlement agreement and therefore the reasonable fee amount to protect the interest of the defendant directors from date of mediated settlement to Consent Decree entry is no more than $30,000 in attorney fees and costs.

REASONABLENESS AND DUPLICATION

25 When determining the reasonableness of attorneys fees, in addition to its duty to inquire as to the total hours expended by an attorney which benefit the clients, a trial court has a duty to inquire into precise manner in which that time was expended and by whom. (Fiorito v. Jones (1978) 72 Ill.2d 73, 89, 377 N.E.2d 1019, 1026.) The court is obliged, also, to carefully weigh, according to its own knowledge, experience and expertise, whether the hours claimed and the tasks performed are reasonable in relation to the time required by other attorneys to complete similar activities. (Fiorito v. Jones 72 Ill.2d at 89, 377 N.E.2d at 1026.) Wasted time or needless duplications in work

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effort cannot be used to enhance the fees. (Leader v. Cullerton (1976) 62 Ill.2d 483, 491, 343 N.E.2d 897, 901.) In the event the court finds the hours claimed are the result of unnecessary, duplicative work efforts or inefficiency, it must reduce the excessive hours claimed. (Fiorito v. Jones, 72 Ill.2d at 89, 377 N.E.2d at 1026; Leader v. Cullerton, 62 Ill. 2d at 490-91, 343 N.E.2d 897, 901.)

26 The law is clear that a party seeking an award of attorney fees is not necessarily entitled to recover all fees for all of the time and tasks documented; rather, the court must examine whether and to what extent any of the tasks performed or time spent were duplicative of other effort or were unnecessary to achieve the goal of the litigation. Duplicative services will not be compensable (In re Estate of Halas, 159 Ill. App. 3d 818, 832-33 (1st Dist. 1987)), nor will services that are not necessary to the object of the litigation for which the law permits the recovery of fees. (Lasday v. Weiner, 273 Ill. App. 3d 461, 467-68 (1st Dist. 1995).) "Duplication" is usually found by a court as a result of its own experience and judgment. The touchstone is whether the services were reasonable. Substantively, one warning flag of duplication is a multiplicity of law firms — or a multiplicity of personnel from the same law firm — billing for the same general task. (In re Estate of Halas, 159 Ill. App. 3d 818, 832-33 (1st Dist. 1987); see also Kaiser v. MEPC American Properties, Inc., 164 Ill. App. 3d 978, 988-89 (1st Dist. 1987); In re Telesphere International Securities Litigation, 753 F. Supp. 716, 717-18 (N.D. Ill. 1990); David P. Pasulka, An Illinois Attorney's Guide to Fee Dispute Cases, 1996 Ill. B.J. 622, 625.)

27 The Defendant directors' fee petitions and submissions seek to pay from Terra Foundation funds six separate law firms who appear by the time records to have engaged in duplication of efforts, in several different ways.

28 The fee petitions of the five new law firms show that each of those firms often had several persons from each firm charging to meet with and communicate with several lawyers in each of the other defendant directors law firms. The fee petitions of the five new law firms show many days of charges in July 2001 totaling $10,000 or more each day for lawyers talking to one another. The petitions and submissions fail to satisfactorially explain the services and details of how over $390,000 of service time was incurred in July 2001 by these five firms. The time in late June 2001, while rendered on a different matter the federal court case shows the same sort of duplicative service, those fee petition entries show multiple separate individual lawyers billing 10, 15 and even 19 hour each days, with billing in excess of $29,000, $39,000 and $46,000 on June 26, 27 and 28th respectively.

29 The fee petition and proofs here show the defendant directors brought on five new law firms in June and July 2001 and replaced the original law firm of Shefsky & Froelich. There is no statement or suggestion of dissatisfaction with the original counsel. The defendant directors approved and endorsed the work of Shefsky & Froelich and sought and obtained $450,000 herein for Shefsky & Froelich without objection.

30 The record shows that the Verner firm, Bellows firm and the Kellogg firm began intensive legal efforts around June 22, 2001. From June 22 to June 29 these firms rendered over $ 172,000. The service entries in those fee petitions of those firms and the fee petition of the Shefsy & Froelich firm show that there was virtually no consultation between the Shefsky firm and any of the these three firms or any of the new five law firms.

31 Here, it is clear the new replacement firms spent considerable time learning the facts and law that had been developed through the first nine months of the proceedings. The five new law firms

filed the federal lawsuit and motion for TRO therein (which was denied and the suit dismissed), a June 29 motion for TRO to prevent the Foundation's Board from meeting to approve the settlement (which was denied on presentation on June 29, 2001); a motion and first set of Objections to the settlement (which the Defendants withdrew at presentation on July 2, 2001); a new set of Objections to the Settlement in mid-July 2001 (which was denied on July 24, 2001); and a motion to file an accompanying answer and counter-claims and conduct discovery (the answer to a complaint which was by the settlement to be dismissed was allowed to be filed. Leave to file the counter-claims was denied). The record, shows the several new law firms spent considerable time in June and July 2001, re-learning what prior counsel had learned. The Defendants' new five law firms' time sheets assert charges of over $600,000 in June and July (not counting the $28,000 sought by Shefsky & Froelich), and clearly the vast majority of that $600,000, at least $500,000 out of the $600,000, was for duplicative services of learning the law and facts developed and learned first by Shefsky & Froelich and or were duplicative services from the multiple attorneys working between the five law firms hired by the defendant directors.

32 Further the fact the time sheets show that virtually no communication occurred between the new firms and the Shefsky & Froelich lawyers shows that the defendant directors and their agents the lawyers herein determined that they would not meet with Shefsky & Froelich and benefit from their knowledge. This was wasteful.

33 The record clearly shows that the fees sought are for a series of succeeding law firms learning anew what prior counsel and their predecessors all charged to learn. It also shows the Defendants engaged and brought on new law firms without any concern for cost, efficiency or duplication of effort, specifically by failing to have the new firms meet with, elicit and develop the facts from Shefsky & Froelich. The services of the defendant directors five new law firms were

a duplication of effort and the reasonable fees owed for those firms for the time in May, June and July 2001 is no more than $ 30,000.

THE SERVICES RENDERED DO NOT JUSTIFY THE FEES SOUGHT

34 The Defendant directors five new law firms in not meeting with the Shefsky & Froelich law firm misunderstood the facts and circumstances of mediation and the record herein and made arguments that were negated by the prior actions of the very same defendant directors through the services of Shefsky & Froelich. The contention of the five new law firms in the several charging filings they have made was that mediation should not have started, that director Dr. Stebbins had a conflict that prevented him from participating in mediation and in his participation in the settlement vote.

35 Mediation here had been requested by the defendants, including the defendant directors. The defendants and defendant directors requested and started into mediation in late January/ February 2001 when the issues of Dr. Stebbins conflict were already well spread of record in filings in the court record and were set for a preliminary hearing. Mediation began and postponed the hearing on those charges. Mediation began with these defendant directors suggesting and endorsing mediation and with a mediator chosen by the court. The court determined from all parties prior to mediation and during its course that the parties agreed that mediation was possible for all issue and all agreed they all thought mediation for all matters was possible. The Foundation had an interest to protect in getting releases for all directors, specifically ending its potential responsibility for indemnification of each and every director, including the defendant directors and Stebbins.

The five new law firms in their charges misunderstood the history of events in the case and the

circumstances of the mediation and having not met with Shefsky & Froelich brought the erroneous allegations about the Stebbins conflict which were before this court and of record.

36 The Defendants have not supplied any justification or explanation for why they chose to hire a succession of law firms incurring duplication of time and effort, nor for why they failed to have the Shefsky firm supply information to the new firms to limit the costs. Thus the efforts themselves were inaccurate , unnecessary and brought about because of the failure to meet with and learn the facts from the Shefsky & Froelich firm. Not only were the services of these five law firms rendered, so to were the Foundation lawyers services expended , as the services of Quinlan & Crisham. All paid for by the Foundation.

37 A comparison of the $600,000 sought by the Defendants' new firms and the filings made, shows that what the Defendants new firms presented in June and July was not based upon fact or sound legal argument, but was merely the product of the Defendants' desire to prevent a settlement they did not agree with but the majority of the Board had voted to accept, resulting in costs to these Defendants, to the Foundation and to other parties. Such services are not reasonable.

38 The five new law firms, in charging $600,000 for services in June and July 2001, were mistaken on the many matters they pursued. The basis of their actions and their attempts to bring actions and charges against others and stop the settlement was fundamentally flawed. The reasonable value of service here is limited by the lack of success achieved thereby, duplication of services , and the fact that services were rendered because of failure to gather all the relevant information. Thus the court finds the reasonable value of the defendant directors five new law firms is no more than $30,000.

39 The Illinois Supreme Court has stated that the practice of law involves not only appearances in court in connection with litigation, but also services rendered out of court. (People v. People's Stock Yards State Bank, 344 Ill. 462, 476 (1931).) This includes the preparing of documents and rendering of other services involving use of legal knowledge and skill and charging for such services. (People v. People's Stock Yards State Bank, 344 Ill. 462, 477 (1931).) Courts have listed what constitutes unauthorized practices of law. In Chicago Bar Association v. Kellogg, for instance, an out-of-state attorney, who was licenced to practice before the United States Patent Office, engaged in the practice of law regarding Patents in Illinois. There, the attorney was not licensed to practice in Illinois. The court held that an attorney, who is not licenced to practice in Illinois, but who acts in a manner that would lead any layman who viewed him to conclude that he is vested with all the capabilities and privileges of an Illinois Attorney At Law, threatens the public welfare. (Chicago Bar Ass'n v. Kellogg, 338 Ill. App.618, 632 (1949).) The court in Chicago Bar Assoc case considered, and enjoined the following actions finding that they constitute the practice of law. (1) Giving legal advice; (2) Preparing, drafting and construing legal documents, contracts, including patent licenses and deeds, assignments and other evidences of transfer of title to or interests in patent and other property; (3) Rendering legal opinions, including legal opinions relating to title to, and validity, infringement and enforcement of, patents and trademarks, and rights therein and thereto; (4) Preparing, drafting and filing pleadings, and other legal documents and papers in suits at law and in equity, in courts of record and before administrative tribunals, other than the patent office; (5) Participating as an attorney, in legal proceedings; (6) In behalf of persons represented by him, threatening to bring suit against other parties; (7) Preparing and serving notice of and asserting attorney's lien; and (8) Charging and collecting fees for legal services rendered by him and rendered by him and others. (Chicago Bar Ass'n v. Kellogg, 338 Ill. App.618, 636 (1949).) In Lozoff v. Shore Heights, Ltd., the Supreme Court of Illinois held that an attorney engaged in the unauthorized practice of law in Illinois, is barred from claiming attorneys fees. (Lozoff v. Shore Heights, Ltd.,

66 Ill.2d 398, 401 (1977).)

40 The record and fee petitions shows that the Verner firm and the Kellogg firm were rendered in May 2001 and in June 2001, prior to being admitted pro hac vice herein on June 29, 2001. The services of the Verner firm and the Kellogg firm prior to June 29, 2001 are not payable as services in this case because those firms did not have Illinois law licenses and prior to being admitted pro hac vice they were not permitted to practice law in Illinois without a license nor allowed to be paid for services rendered practicing law in Illinois. If the services were rendered in the federal case those services are not compensable under the Consent decree which limits fees to those incurred for services herein.

41 To the extent the Bellows firm, the Kellogg firm and Verner firm's services prior to June 29 relate to preparing for the federal lawsuit, those fee costs are not related to the case herein and not compensable under the Consent Decree which limits fees to fees incurred in this matter. The time in June and July 2001 which the defendant directors five new law firms rendered to reasonable assist the defendant directors in this case should be no more than $30,000.

42 The following alternative is only provided if the court rejects the foregoing findings and conclusions and determines that none of the foregoing should set the limit.

ALTERNATIVE FINDING AND CONCLUSION

43 The service costs of Quinlan and Crisham of $285,000 during June and July is a factor to set the upper limit of fees for these defendant directors legal services for these five new firms. The Quinlan firm service provides guidance because it removes the issue of duplication. Its use as a guide directs how to compare and ascertain what amount of legal service costs were required to address all of the issues raised in June and July 2001 irrespective of whether the objections and claims of defendant directors were contemplated as part of the agreement or were well conceived.

44 The firm of Quinlan & Crisham rendered $285,000 in June and July 2001. The firm of Shefsky & Froelich were paid $28,000 in June 2001. For the period of June and July 2001 the reasonable amount of fees payable to the defendant directors as reimbursed for their five new law firms should not exceed more than $260,000. From that amount the amount spent working on the federal case requires a reduction of at least one half , as that service had no relation to this case and under the Consent Decree this court can only award fees regarding this matter.

45 It is clear from the record that the $165,000 of services rendered by Defendants' five law firms after July 2001 involve services in another case, a law division case which was briefly before this court and then transferred, in which these Defendants are plaintiffs and not defendants. In that action Terra, Tucker and Simpson are charging numerous defendants with a myriad of wrongful acts. These services post-July 2001 involve a separate law division action brought by Terra , Simpson and Tucker as plaintiffs and are not related to the **"defense of any action"**, and the $165,000 in attorney fee costs incurred after July 2001 by Defendants to bring a new law division action have no basis for indemnification under the statute, by-laws or the consent settlement herein.

16di-002864

Wherefore the court finds:

A) That the reasonable amount payable by the Terra Foundation for the services rendered by the defendant directors five additional law firms from May to end of July 2001 was $30,000 and the Terra Foundation is order to pay $30,000 to the defendant directors.

B) That the amounts incurred by the defendant directors after July 2001 were not within the subject of the courts Consent Decree.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois

_____

BY: Assistant Attorney General

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16di-002865

BUNTROCK, ET AL V. TERRA, ET AL
SUMMARY OF HOURS AND FEES BY MONTH- ALL FIRMS
9/00 THROUGH 9/01

	BELLOWS AND BELLOWS, P.C.		CUMMINS & CRONIN, LLC		KELLOGG, HUBER, HANSEN, TODD AND EVANS, PLLC		NOVELSKY LAW OFFICES		QUINLAN & CARROLL, LTD.		SHEFSKY & FROELICH, LTD.		SIDLEY & AUSTIN		VERNER, LIIPFERT, BERNHARD, ET AL		TOTAL	
MONTH/YEAR	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES	HOURS	FEES
September-00									637.55	$148,516.00			147.75	$47,194.00			785.30	$195,710.00
October-00									999.95	$235,745.00	350.80	$85,552.00	575.50	$154,616.00			1926.25	$475,913.00
November-00									467.46	$125,210.00	185.70	$51,405.00	396.00	$106,896.00			1049.16	$283,511.00
December-00									873.00	$208,671.00	187.50	$51,506.00	513.50	$151,399.00			1574.00	$411,576.00
January-01									1175.90	$270,993.00	454.60	$113,007.00					1630.50	$384,000.00
February-01									577.50	$151,699.00	230.90	$61,116.00					808.40	$212,815.00
March-01									255.50	$74,701.00	90.20	$25,803.00					345.70	$100,504.00
April-01									74.00	$29,488.00	44.50	$12,636.00					118.50	$42,124.00
May-01									209.25	$66,870.00	77.50	$21,676.00			5.30	$2,102.00	292.05	$90,648.00
June-01	178.60	$42,866.00			381.5	$101,665.00			513.75	$146,070.00	104.20	$28,134.00			171.70	$67,969.00	1349.75	$386,704.00
July-01	79.75	$22,168.00	143.20	$54,900.00	764.75	$223,941.00	31.03	$12,412.00	539.25	$137,798.00					208.40	$79,448.00	1766.38	$530,667.00
August-01			128.10	$48,850.00	95.25	$29,676.00	81.80	$32,720.00	35.50	$8,759.00					129.30	$53,023.00	469.95	$173,028.00
September-01	6.30	$1,979.00															6.30	$1,979.00
TOTAL	**264.65**	**$67,013.00**	**271.30**	**$103,750.00**	**1241.5**	**$355,282.00**	**112.83**	**$45,132.00**	**6358.61**	**$1,604,520.00**	**1725.90**	**$450,835.00**	**1632.75**	**$460,105.00**	**514.70**	**$202,542.00**	**12122.24**	**$3,289,179.00**

EXH. 617

16di-002866

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
5/18/01	VLB, ET AL	LL	2.50	$465.00	$1,162.50
5/18/01	VLB, ET AL	TS	1.10	$205.00	$225.50
5/18/01 Total			3.60		$1,388.00
5/21/01	VLB, ET AL	HM	1.00	$465.00	$465.00
5/21/01 Total			1.00		$465.00
5/23/01	VLB, ET AL	LL	0.50	$465.00	$232.50
5/23/01 Total			0.50		$232.50
5/24/01	VLB, ET AL	CW	0.20	$85.00	$17.00
5/24/01 Total			0.20		$17.00
6/7/01	VLB, ET AL	LG	2.50	$413.56	$1,033.90
6/7/01 Total			2.50		$1,033.90
6/8/01	VLB, ET AL	LL	1.00	$472.92	$472.92
6/8/01 Total			1.00		$472.92
6/11/01	VLB, ET AL	LG	2.50	$413.56	$1,033.90
6/11/01	VLB, ET AL	LL	2.00	$472.92	$945.84
6/11/01 Total			4.50		$1,979.74
6/14/01	VLB, ET AL	LG	5.00	$413.56	$2,067.80
6/14/01	VLB, ET AL	LL	3.50	$472.92	$1,655.22
6/14/01 Total			8.50		$3,723.02
6/15/01	VLB, ET AL	HM	2.00	$465.00	$930.00
6/15/01	VLB, ET AL	LG	1.00	$413.56	$413.56
6/15/01	VLB, ET AL	LL	3.00	$472.92	$1,418.76
6/15/01 Total			6.00		$2,762.32
6/17/01	VLB, ET AL	LG	5.00	$413.56	$2,067.80
6/17/01 Total			5.00		$2,067.80
6/18/01	VLB, ET AL	LG	4.00	$413.56	$1,654.24
6/18/01	VLB, ET AL	LL	5.00	$472.92	$2,364.60
6/18/01 Total			9.00		$4,018.84
6/19/01	VLB, ET AL	LG	5.00	$413.56	$2,067.80
6/19/01	VLB, ET AL	LL	3.00	$472.92	$1,418.76
6/19/01 Total			8.00		$3,486.56
6/20/01	VLB, ET AL	JM	1.20	$320.00	$384.00
6/20/01	VLB, ET AL	LG	2.30	$413.56	$951.19
6/20/01	VLB, ET AL	LL	3.00	$472.92	$1,418.76
6/20/01 Total			6.50		$2,753.95
6/21/01	VLB, ET AL	LG	3.00	$413.56	$1,240.68
6/21/01	VLB, ET AL	LL	2.50	$472.92	$1,182.30
6/21/01 Total			5.50		$2,422.98
6/22/01	KHHT&E	KCT	6.50	$450.00	$2,925.00
6/22/01	KHHT&E	NMG	3.00	$375.00	$1,125.00
6/22/01	KHHT&E	SKA	4.50	$285.00	$1,282.50
6/22/01	BELLOWS & BELLOWS	LGB	1.00	$350.00	$350.00
6/22/01	VLB, ET AL	EM	1.50	$100.00	$150.00
6/22/01	VLB, ET AL	LG	8.00	$413.56	$3,308.48
6/22/01	VLB, ET AL	LL	6.00	$472.92	$2,837.52
6/22/01 Total			30.50		$11,978.50

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
6/23/01	KHHT&E	KCT	4.75	$450.00	$2,137.50
6/23/01	KHHT&E	SKA	7.50	$285.00	$2,137.50
6/23/01 Total			12.25		$4,275.00
6/24/01	KHHT&E	JAR	2.00	$125.00	$250.00
6/24/01	KHHT&E	JHL	3.00	$235.00	$705.00
6/24/01	KHHT&E	NMG	6.00	$375.00	$2,250.00
6/24/01	BELLOWS & BELLOWS	LGB	0.80	$350.00	$280.00
6/24/01 Total			11.80		$3,485.00
6/25/01	KHHT&E	BMM	1.50	$145.00	$217.50
6/25/01	KHHT&E	JAR	2.00	$125.00	$250.00
6/25/01	KHHT&E	JHL	13.50	$235.00	$3,172.50
6/25/01	KHHT&E	KCT	9.00	$450.00	$4,050.00
6/25/01	KHHT&E	NMG	13.00	$375.00	$4,875.00
6/25/01	KHHT&E	SKA	3.50	$285.00	$997.50
6/25/01	BELLOWS & BELLOWS	LGB	2.10	$350.00	$735.00
6/25/01	BELLOWS & BELLOWS	MTW	3.50	$240.00	$840.00
6/25/01	BELLOWS & BELLOWS	MTW	1.00	$240.00	$240.00
6/25/01	VLB, ET AL	EM	0.20	$100.00	$20.00
6/25/01	VLB, ET AL	EM	0.20	$100.00	$20.00
6/25/01	VLB, ET AL	EM	0.80	$100.00	$80.00
6/25/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/25/01	VLB, ET AL	LG	2.00	$413.56	$827.12
6/25/01	VLB, ET AL	LL	7.50	$472.92	$3,546.90
6/25/01 Total			60.10		$19,901.52
6/26/01	KHHT&E	BMM	8.25	$145.00	$1,196.25
6/26/01	KHHT&E	JAR	6.75	$125.00	$843.75
6/26/01	KHHT&E	JAW	5.00	$115.00	$575.00
6/26/01	KHHT&E	JHL	15.00	$235.00	$3,525.00
6/26/01	KHHT&E	KAM	5.50	$115.00	$632.50
6/26/01	KHHT&E	KCT	9.00	$450.00	$4,050.00
6/26/01	KHHT&E	NMG	9.50	$375.00	$3,562.50
6/26/01	KHHT&E	RHC	2.00	$105.00	$210.00
6/26/01	KHHT&E	SCD	5.50	$115.00	$632.50
6/26/01	KHHT&E	SKA	8.25	$285.00	$2,351.25
6/26/01	BELLOWS & BELLOWS	JJB	0.80	$325.00	$260.00
6/26/01	BELLOWS & BELLOWS	LGB	5.50	$350.00	$1,925.00
6/26/01	BELLOWS & BELLOWS	LGB	4.30	$350.00	$1,505.00
6/26/01	BELLOWS & BELLOWS	LGB	4.20	$350.00	$1,470.00
6/26/01	BELLOWS & BELLOWS	MTW	6.00	$240.00	$1,440.00
6/26/01	VLB, ET AL	EM	4.40	$100.00	$440.00
6/26/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/26/01	VLB, ET AL	LG	2.00	$413.56	$827.12
6/26/01	VLB, ET AL	LL	8.50	$472.92	$4,019.82
6/26/01 Total			110.75		$29,495.69
6/27/01	KHHT&E	BMM	15.25	$145.00	$2,211.25
6/27/01	KHHT&E	JAW	18.00	$115.00	$2,070.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	LAW FIRM	ATTY.	HOURS	RATE	FEES
6/27/01	KHHT&E	JHL	16.50	$235.00	$3,877.50
6/27/01	KHHT&E	JMB	6.00	$115.00	$690.00
6/27/01	KHHT&E	KAM	4.50	$115.00	$517.50
6/27/01	KHHT&E	KCT	13.00	$450.00	$5,850.00
6/27/01	KHHT&E	LRM	3.00	$75.00	$225.00
6/27/01	KHHT&E	MRD	9.75	$115.00	$1,121.25
6/27/01	KHHT&E	NMG	12.00	$375.00	$4,500.00
6/27/01	KHHT&E	RHC	3.50	$105.00	$367.50
6/27/01	KHHT&E	SCD	7.00	$115.00	$805.00
6/27/01	KHHT&E	SKA	3.50	$285.00	$997.50
6/27/01	BELLOWS & BELLOWS	CLG	0.20	$205.00	$41.00
6/27/01	BELLOWS & BELLOWS	JJB	0.60	$325.00	$195.00
6/27/01	BELLOWS & BELLOWS	LC	2.00	$50.00	$100.00
6/27/01	BELLOWS & BELLOWS	LC	3.00	$50.00	$150.00
6/27/01	BELLOWS & BELLOWS	LC	2.00	$50.00	$100.00
6/27/01	BELLOWS & BELLOWS	LGB	8.00	$350.00	$2,800.00
6/27/01	BELLOWS & BELLOWS	LGB	9.00	$350.00	$3,150.00
6/27/01	BELLOWS & BELLOWS	MTW	7.50	$240.00	$1,800.00
6/27/01	VLB, ET AL	BB	0.50	$160.00	$80.00
6/27/01	VLB, ET AL	EM	2.50	$100.00	$250.00
6/27/01	VLB, ET AL	EM	1.70	$100.00	$170.00
6/27/01	VLB, ET AL	EM	1.90	$100.00	$190.00
6/27/01	VLB, ET AL	EM	2.70	$100.00	$270.00
6/27/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/27/01	VLB, ET AL	EM	0.50	$100.00	$50.00
6/27/01	VLB, ET AL	EM	1.00	$100.00	$100.00
6/27/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/27/01	VLB, ET AL	LG	8.00	$413.56	$3,308.48
6/27/01	VLB, ET AL	LL	8.00	$472.92	$3,783.36
6/27/01 Total			171.70		$39,830.34
6/28/01	KHHT&E	BMM	9.75	$145.00	$1,413.75
6/28/01	KHHT&E	JAW	14.00	$115.00	$1,610.00
6/28/01	KHHT&E	JHL	7.00	$235.00	$1,645.00
6/28/01	KHHT&E	KCT	19.50	$450.00	$8,775.00
6/28/01	KHHT&E	LRM	5.25	$75.00	$393.75
6/28/01	KHHT&E	NMG	21.00	$375.00	$7,875.00
6/28/01	KHHT&E	RHC	8.00	$105.00	$840.00
6/28/01	KHHT&E	SKA	1.25	$285.00	$356.25
6/28/01	BELLOWS & BELLOWS	CLG	2.50	$205.00	$512.50
6/28/01	BELLOWS & BELLOWS	JJB	1.00	$325.00	$325.00
6/28/01	BELLOWS & BELLOWS	JJB	9.00	$325.00	$2,925.00
6/28/01	BELLOWS & BELLOWS	LC	4.00	$50.00	$200.00
6/28/01	BELLOWS & BELLOWS	LC	5.30	$50.00	$265.00
6/28/01	BELLOWS & BELLOWS	LC	8.50	$50.00	$425.00
6/28/01	BELLOWS & BELLOWS	LC	8.50	$50.00	$425.00
6/28/01	BELLOWS & BELLOWS	LC	9.50	$50.00	$475.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
6/28/01	BELLOWS & BELLOWS	LGB	16.20	$350.00	$5,670.00
6/28/01	BELLOWS & BELLOWS	LGB	2.00	$350.00	$700.00
6/28/01	BELLOWS & BELLOWS	MTW	3.00	$240.00	$720.00
6/28/01	BELLOWS & BELLOWS	MTW	12.00	$240.00	$2,880.00
6/28/01	BELLOWS & BELLOWS	TES	2.10	$165.00	$346.50
6/28/01	VLB, ET AL	LG	8.00	$413.56	$3,308.48
6/28/01	VLB, ET AL	LL	10.00	$472.92	$4,729.20
6/28/01 Total			187.35		$46,815.43
6/29/01	KHHT&E	JHL	2.00	$235.00	$470.00
6/29/01	KHHT&E	KCT	11.75	$450.00	$5,287.50
6/29/01	KHHT&E	NMG	15.50	$375.00	$5,812.50
6/29/01	BELLOWS & BELLOWS	JJB	7.50	$325.00	$2,437.50
6/29/01	BELLOWS & BELLOWS	LC	1.00	$50.00	$50.00
6/29/01	BELLOWS & BELLOWS	LC	2.00	$50.00	$100.00
6/29/01	BELLOWS & BELLOWS	LGB	8.20	$350.00	$2,870.00
6/29/01	BELLOWS & BELLOWS	MTW	4.50	$240.00	$1,080.00
6/29/01	BELLOWS & BELLOWS	TES	2.20	$165.00	$363.00
6/29/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/29/01	VLB, ET AL	EM	0.40	$100.00	$40.00
6/29/01	VLB, ET AL	EM	0.40	$100.00	$40.00
6/29/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/29/01	VLB, ET AL	EM	0.30	$100.00	$30.00
6/29/01	VLB, ET AL	EM	0.50	$100.00	$50.00
6/29/01	VLB, ET AL	EM	0.40	$100.00	$40.00
6/29/01	VLB, ET AL	EM	1.50	$100.00	$150.00
6/29/01	VLB, ET AL	LG	8.00	$413.56	$3,308.48
6/29/01	VLB, ET AL	LL	8.00	$472.92	$3,783.36
6/29/01 Total			74.75		$25,972.34
6/30/01	BELLOWS & BELLOWS	JJB	4.80	$325.00	$1,560.00
6/30/01	BELLOWS & BELLOWS	LGB	3.30	$350.00	$1,155.00
6/30/01	VLB, ET AL	LG	8.00	$413.56	$3,308.48
6/30/01 Total			16.10		$6,023.48
7/1/01	KHHT&E	KCT	7.00	$450.00	$3,150.00
7/1/01	KHHT&E	NMG	12.00	$375.00	$4,500.00
7/1/01	BELLOWS & BELLOWS	JJB	4.50	$325.00	$1,462.50
7/1/01	BELLOWS & BELLOWS	LGB	1.50	$350.00	$525.00
7/1/01	VLB, ET AL	LG	8.00	$400.00	$3,200.00
7/1/01 Total			33.00		$12,837.50
7/2/01	KHHT&E	JHL	6.50	$235.00	$1,527.50
7/2/01	KHHT&E	KCT	13.00	$450.00	$5,850.00
7/2/01	KHHT&E	LRM	4.50	$75.00	$337.50
7/2/01	KHHT&E	NMG	4.00	$375.00	$1,500.00
7/2/01	BELLOWS & BELLOWS	JJB	10.00	$325.00	$3,250.00
7/2/01	BELLOWS & BELLOWS	LC	0.50	$50.00	$25.00
7/2/01	BELLOWS & BELLOWS	LGB	2.00	$350.00	$700.00
7/2/01	BELLOWS & BELLOWS	LGB	8.00	$350.00	$2,800.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	LAW FIRM	ATTY.	HOURS	RATE	FEES
7/2/01	BELLOWS & BELLOWS	MTW	7.00	$240.00	$1,680.00
7/2/01	BELLOWS & BELLOWS	TES	2.10	$165.00	$346.50
7/2/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/2/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/2/01	VLB, ET AL	HM	2.50	$465.00	$1,162.50
7/2/01	VLB, ET AL	LG	8.00	$400.00	$3,200.00
7/2/01	VLB, ET AL	LL	6.50	$465.00	$3,022.50
7/2/01 Total			75.90		$25,531.50
7/3/01	KHHT&E	JHL	5.25	$235.00	$1,233.75
7/3/01	KHHT&E	KCT	3.50	$450.00	$1,575.00
7/3/01	KHHT&E	LRM	4.50	$75.00	$337.50
7/3/01	KHHT&E	NMG	8.00	$375.00	$3,000.00
7/3/01	BELLOWS & BELLOWS	JJB	2.00	$325.00	$650.00
7/3/01	BELLOWS & BELLOWS	LC	1.50	$50.00	$75.00
7/3/01	BELLOWS & BELLOWS	MTW	1.00	$240.00	$240.00
7/3/01	VLB, ET AL	LG	2.50	$400.00	$1,000.00
7/3/01	VLB, ET AL	LL	5.00	$465.00	$2,325.00
7/3/01 Total			33.25		$10,436.25
7/4/01	KHHT&E	JHL	2.25	$235.00	$528.75
7/4/01	KHHT&E	KCT	1.25	$450.00	$562.50
7/4/01	KHHT&E	NMG	1.00	$375.00	$375.00
7/4/01	BELLOWS & BELLOWS	JJB	1.50	$325.00	$487.50
7/4/01	BELLOWS & BELLOWS	LGB	1.50	$350.00	$525.00
7/4/01 Total			7.50		$2,478.75
7/5/01	KHHT&E	DER	5.00	$325.00	$1,625.00
7/5/01	KHHT&E	JHL	12.50	$235.00	$2,937.50
7/5/01	KHHT&E	KCT	3.00	$450.00	$1,350.00
7/5/01	BELLOWS & BELLOWS	JJB	3.20	$325.00	$1,040.00
7/5/01	BELLOWS & BELLOWS	LC	6.50	$50.00	$325.00
7/5/01	VLB, ET AL	EM	1.10	$100.00	$110.00
7/5/01	VLB, ET AL	EM	2.50	$100.00	$250.00
7/5/01	VLB, ET AL	LG	5.00	$400.00	$2,000.00
7/5/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00
7/5/01 Total			42.80		$11,497.50
7/6/01	KHHT&E	DER	8.75	$325.00	$2,843.75
7/6/01	KHHT&E	JHL	8.00	$235.00	$1,880.00
7/6/01	KHHT&E	JON	4.00	$285.00	$1,140.00
7/6/01	KHHT&E	KCT	3.25	$450.00	$1,462.50
7/6/01	KHHT&E	NMG	1.00	$375.00	$375.00
7/6/01	BELLOWS & BELLOWS	JJB	1.80	$325.00	$585.00
7/6/01	BELLOWS & BELLOWS	LGB	0.50	$350.00	$175.00
7/6/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/6/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/6/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/6/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/6/01	VLB, ET AL	LG	3.00	$400.00	$1,200.00

PEOPLE V. TERRA
SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND
5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
7/6/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
7/6/01 Total			34.90		$11,398.75
7/7/01	KHHT&E	DER	4.00	$325.00	$1,300.00
7/7/01	KHHT&E	JHL	5.00	$235.00	$1,175.00
7/7/01 Total			9.00		$2,475.00
7/8/01	KHHT&E	DER	4.00	$325.00	$1,300.00
7/8/01	KHHT&E	JHL	4.50	$235.00	$1,057.50
7/8/01	KHHT&E	JON	6.50	$285.00	$1,852.50
7/8/01	KHHT&E	KCT	1.00	$450.00	$450.00
7/8/01 Total			16.00		$4,660.00
7/9/01	KHHT&E	DER	11.00	$325.00	$3,575.00
7/9/01	KHHT&E	JHL	7.50	$235.00	$1,762.50
7/9/01	KHHT&E	JON	4.00	$285.00	$1,140.00
7/9/01	BELLOWS & BELLOWS	JJB	1.30	$325.00	$422.50
7/9/01	BELLOWS & BELLOWS	LC	2.00	$50.00	$100.00
7/9/01	BELLOWS & BELLOWS	LGB	0.30	$350.00	$105.00
7/9/01	VLB, ET AL	EM	0.40	$100.00	$40.00
7/9/01	VLB, ET AL	EM	2.10	$100.00	$210.00
7/9/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/9/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/9/01	VLB, ET AL	EM	0.10	$100.00	$10.00
7/9/01	VLB, ET AL	EM	0.70	$100.00	$70.00
7/9/01	VLB, ET AL	LG	3.50	$400.00	$1,400.00
7/9/01	VLB, ET AL	LL	5.50	$465.00	$2,557.50
7/9/01 Total			39.60		$11,512.50
7/10/01	KHHT&E	DER	9.00	$325.00	$2,925.00
7/10/01	KHHT&E	JHL	7.50	$235.00	$1,762.50
7/10/01	KHHT&E	JON	8.75	$285.00	$2,493.75
7/10/01	KHHT&E	KCT	0.75	$450.00	$337.50
7/10/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/10/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/10/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/10/01	VLB, ET AL	LG	1.00	$400.00	$400.00
7/10/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
7/10/01 Total			31.40		$9,636.25
7/11/01	KHHT&E	DER	12.75	$325.00	$4,143.75
7/11/01	KHHT&E	JHL	6.50	$235.00	$1,527.50
7/11/01	KHHT&E	JON	6.50	$285.00	$1,852.50
7/11/01	KHHT&E	KCT	1.25	$450.00	$562.50
7/11/01	KHHT&E	NMG	3.00	$375.00	$1,125.00
7/11/01	BELLOWS & BELLOWS	JJB	1.60	$325.00	$520.00
7/11/01	BELLOWS & BELLOWS	LC	1.00	$50.00	$50.00
7/11/01	VLB, ET AL	EM	0.10	$100.00	$10.00
7/11/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/11/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/11/01	VLB, ET AL	EM	0.20	$100.00	$20.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
7/11/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/11/01	VLB, ET AL	LG	2.00	$400.00	$800.00
7/11/01	VLB, ET AL	LL	5.50	$465.00	$2,557.50
7/11/01 Total			41.30		$13,258.75
7/12/01	KHHT&E	DER	14.25	$325.00	$4,631.25
7/12/01	KHHT&E	JHL	8.50	$235.00	$1,997.50
7/12/01	KHHT&E	JON	12.25	$285.00	$3,491.25
7/12/01	KHHT&E	KCT	0.75	$450.00	$337.50
7/12/01	KHHT&E	NMG	1.00	$375.00	$375.00
7/12/01	BELLOWS & BELLOWS	JJB	2.10	$325.00	$682.50
7/12/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/12/01	VLB, ET AL	LG	1.00	$400.00	$400.00
7/12/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
7/12/01 Total			43.15		$13,340.00
7/13/01	KHHT&E	DER	10.25	$325.00	$3,331.25
7/13/01	KHHT&E	JHL	6.50	$235.00	$1,527.50
7/13/01	KHHT&E	JON	9.25	$285.00	$2,636.25
7/13/01	KHHT&E	KCT	1.75	$450.00	$787.50
7/13/01	KHHT&E	NMG	1.25	$375.00	$468.75
7/13/01	BELLOWS & BELLOWS	LGB	0.30	$350.00	$105.00
7/13/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/13/01	VLB, ET AL	EM	2.50	$100.00	$250.00
7/13/01	VLB, ET AL	LG	3.50	$400.00	$1,400.00
7/13/01	VLB, ET AL	LL	5.00	$465.00	$2,325.00
7/13/01 Total			40.80		$12,881.25
7/14/01	KHHT&E	DER	4.25	$325.00	$1,381.25
7/14/01	KHHT&E	JHL	2.50	$235.00	$587.50
7/14/01	KHHT&E	JON	6.50	$285.00	$1,852.50
7/14/01 Total			13.25		$3,821.25
7/15/01	KHHT&E	DER	12.25	$325.00	$3,981.25
7/15/01	KHHT&E	JHL	4.50	$235.00	$1,057.50
7/15/01	KHHT&E	KCT	1.75	$450.00	$787.50
7/15/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/15/01 Total			19.50		$5,926.25
7/16/01	KHHT&E	DER	13.75	$325.00	$4,468.75
7/16/01	KHHT&E	JHL	14.00	$235.00	$3,290.00
7/16/01	KHHT&E	JON	4.00	$285.00	$1,140.00
7/16/01	KHHT&E	KCT	12.50	$450.00	$5,625.00
7/16/01	BELLOWS & BELLOWS	LGB	3.30	$350.00	$1,155.00
7/16/01	BELLOWS & BELLOWS	LGB	0.40	$350.00	$140.00
7/16/01	VLB, ET AL	EM	1.20	$100.00	$120.00
7/16/01	VLB, ET AL	EM	0.40	$100.00	$40.00
7/16/01	VLB, ET AL	EM	0.10	$100.00	$10.00
7/16/01	VLB, ET AL	LG	2.00	$400.00	$800.00
7/16/01	VLB, ET AL	LL	6.00	$465.00	$2,790.00
7/16/01 Total			57.65		$19,578.75

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
7/17/01	KHHT&E	BMM	6.25	$145.00	$906.25
7/17/01	KHHT&E	DER	14.00	$325.00	$4,550.00
7/17/01	KHHT&E	JHL	13.50	$235.00	$3,172.50
7/17/01	KHHT&E	KCT	1.50	$450.00	$675.00
7/17/01	KHHT&E	RHC	11.50	$105.00	$1,207.50
7/17/01	BELLOWS & BELLOWS	JJB	1.20	$325.00	$390.00
7/17/01	BELLOWS & BELLOWS	MTW	0.50	$240.00	$120.00
7/17/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/17/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/17/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/17/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/17/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/17/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/17/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/17/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/17/01	VLB, ET AL	EM	1.50	$100.00	$150.00
7/17/01	VLB, ET AL	LG	1.50	$400.00	$600.00
7/17/01	VLB, ET AL	LL	5.00	$465.00	$2,325.00
7/17/01 Total			60.75		$14,526.25
7/18/01	KHHT&E	BMM	16.25	$145.00	$2,356.25
7/18/01	KHHT&E	DER	14.00	$325.00	$4,550.00
7/18/01	KHHT&E	DMB	6.00	$125.00	$750.00
7/18/01	KHHT&E	JHL	14.50	$235.00	$3,407.50
7/18/01	KHHT&E	JON	2.50	$285.00	$712.50
7/18/01	KHHT&E	KCT	13.50	$450.00	$6,075.00
7/18/01	KHHT&E	NMG	10.00	$375.00	$3,750.00
7/18/01	KHHT&E	RHC	14.75	$105.00	$1,548.75
7/18/01	BELLOWS & BELLOWS	JJB	2.40	$325.00	$780.00
7/18/01	CUMMINS & CRONIN	RPC	4.20	$500.00	$2,100.00
7/18/01	CUMMINS& CRONIN	TCC	4.80	$300.00	$1,440.00
7/18/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/18/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/18/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/18/01	VLB, ET AL	EM	0.30	$100.00	$30.00
7/18/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/18/01	VLB, ET AL	LG	1.00	$400.00	$400.00
7/18/01	VLB, ET AL	LL	5.00	$465.00	$2,325.00
7/18/01 Total			110.90		$30,395.00
7/19/01	KHHT&E	BMM	7.00	$145.00	$1,015.00
7/19/01	KHHT&E	DER	19.75	$325.00	$6,418.75
7/19/01	KHHT&E	JHL	7.50	$235.00	$1,762.50
7/19/01	KHHT&E	KCT	7.75	$450.00	$3,487.50
7/19/01	KHHT&E	NMG	1.00	$375.00	$375.00
7/19/01	KHHT&E	RHC	19.75	$105.00	$2,073.75
7/19/01	BELLOWS & BELLOWS	JJB	0.75	$325.00	$243.75
7/19/01	CUMMINS& CRONIN	RPC	8.50	$500.00	$4,250.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	LAW FIRM	ATTY.	HOURS	RATE	FEES
7/19/01	CUMMINS& CRONIN	TCC	9.20	$300.00	$2,760.00
7/19/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
7/19/01 Total			84.70		$24,013.75
7/20/01	KHHT&E	DER	8.00	$325.00	$2,600.00
7/20/01	KHHT&E	JHL	6.00	$235.00	$1,410.00
7/20/01	KHHT&E	KCT	7.25	$450.00	$3,262.50
7/20/01	BELLOWS & BELLOWS	JJB	1.00	$325.00	$325.00
7/20/01	BELLOWS & BELLOWS	LGB	1.00	$350.00	$350.00
7/20/01	CUMMINS& CRONIN	RPC	8.20	$500.00	$4,100.00
7/20/01	CUMMINS& CRONIN	TCC	10.40	$300.00	$3,120.00
7/20/01	VLB, ET AL	EM	0.50	$100.00	$50.00
7/20/01	VLB, ET AL	EM	0.70	$100.00	$70.00
7/20/01	VLB, ET AL	LG	2.00	$400.00	$800.00
7/20/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
7/20/01 Total			49.55		$18,180.00
7/21/01	CUMMINS& CRONIN	RPC	5.20	$500.00	$2,600.00
7/21/01 Total			5.20		$2,600.00
7/22/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
7/22/01 Total			3.80		$1,140.00
7/23/01	KHHT&E	DER	8.75	$325.00	$2,843.75
7/23/01	KHHT&E	JHL	3.25	$235.00	$763.75
7/23/01	KHHT&E	KCT	9.00	$450.00	$4,050.00
7/23/01	KHHT&E	NMG	10.00	$375.00	$3,750.00
7/23/01	KHHT&E	RHC	2.50	$105.00	$262.50
7/23/01	CUMMINS& CRONIN	RPC	8.50	$500.00	$4,250.00
7/23/01	CUMMINS& CRONIN	TCC	9.00	$300.00	$2,700.00
7/23/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/23/01	VLB, ET AL	EM	0.20	$100.00	$20.00
7/23/01	VLB, ET AL	LG	4.00	$400.00	$1,600.00
7/23/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
7/23/01 Total			58.40		$21,655.00
7/24/01	KHHT&E	BMM	2.75	$145.00	$398.75
7/24/01	KHHT&E	DER	17.50	$325.00	$5,687.50
7/24/01	KHHT&E	KCT	16.00	$450.00	$7,200.00
7/24/01	KHHT&E	RHC	3.50	$105.00	$367.50
7/24/01	BELLOWS & BELLOWS	JJB	2.30	$325.00	$747.50
7/24/01	NOVELSKY	DAN	8.62	$400.00	$3,448.00
7/24/01	CUMMINS& CRONIN	RPC	10.50	$500.00	$5,250.00
7/24/01	CUMMINS& CRONIN	TCC	12.00	$300.00	$3,600.00
7/24/01	VLB, ET AL	LG	10.50	$400.00	$4,200.00
7/24/01	VLB, ET AL	LL	10.50	$465.00	$4,882.50
7/24/01 Total			94.17		$35,781.75
7/25/01	KHHT&E	DER	2.00	$325.00	$650.00
7/25/01	KHHT&E	JHL	4.00	$235.00	$940.00
7/25/01	KHHT&E	JON	1.00	$285.00	$285.00
7/25/01	KHHT&E	KCT	9.50	$450.00	$4,275.00

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
7/25/01	KHHT&E	NMG	3.00	$375.00	$1,125.00
7/25/01	NOVELSKY	DAN	2.83	$400.00	$1,132.00
7/25/01	CUMMINS& CRONIN	RPC	7.40	$500.00	$3,700.00
7/25/01	CUMMINS& CRONIN	TCC	8.60	$300.00	$2,580.00
7/25/01	VLB, ET AL	LG	4.00	$400.00	$1,600.00
7/25/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00
7/25/01 Total			46.33		$18,147.00
7/26/01	KHHT&E	DER	0.75	$325.00	$243.75
7/26/01	KHHT&E	JHL	3.50	$235.00	$822.50
7/26/01	KHHT&E	KCT	4.75	$450.00	$2,137.50
7/26/01	KHHT&E	LRM	3.25	$75.00	$243.75
7/26/01	KHHT&E	NMG	1.50	$375.00	$562.50
7/26/01	NOVELSKY	DAN	6.00	$400.00	$2,400.00
7/26/01	NOVELSKY	DAN	4.17	$400.00	$1,668.00
7/26/01	CUMMINS& CRONIN	RPC	1.00	$500.00	$500.00
7/26/01	CUMMINS& CRONIN	TCC	7.40	$300.00	$2,220.00
7/26/01	VLB, ET AL	EM	0.80	$100.00	$80.00
7/26/01	VLB, ET AL	EM	1.30	$100.00	$130.00
7/26/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00
7/26/01 Total			38.42		$12,868.00
7/27/01	KHHT&E	BMM	0.25	$145.00	$36.25
7/27/01	KHHT&E	DER	5.00	$325.00	$1,625.00
7/27/01	KHHT&E	JHL	5.50	$235.00	$1,292.50
7/27/01	KHHT&E	KCT	2.00	$450.00	$900.00
7/27/01	KHHT&E	LRM	2.50	$75.00	$187.50
7/27/01	KHHT&E	RHC	1.50	$105.00	$157.50
7/27/01	BELLOWS & BELLOWS	JJB	1.30	$325.00	$422.50
7/27/01	CUMMINS& CRONIN	RPC	1.00	$500.00	$500.00
7/27/01	CUMMINS& CRONIN	TCC	5.50	$300.00	$1,650.00
7/27/01	VLB, ET AL	EM	2.00	$100.00	$200.00
7/27/01	VLB, ET AL	LG	2.00	$400.00	$800.00
7/27/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00
7/27/01 Total			32.55		$9,631.25
7/30/01	KHHT&E	DER	8.50	$325.00	$2,762.50
7/30/01	KHHT&E	JHL	7.00	$235.00	$1,645.00
7/30/01	KHHT&E	KCT	2.75	$450.00	$1,237.50
7/30/01	KHHT&E	NMG	4.00	$375.00	$1,500.00
7/30/01	KHHT&E	RHC	8.00	$105.00	$840.00
7/30/01	BELLOWS & BELLOWS	JJB	0.90	$325.00	$292.50
7/30/01	NOVELSKY	DAN	6.33	$400.00	$2,532.00
7/30/01	CUMMINS& CRONIN	TCC	4.60	$300.00	$1,380.00
7/30/01	VLB, ET AL	EM	0.80	$100.00	$80.00
7/30/01	VLB, ET AL	LG	2.50	$400.00	$1,000.00
7/30/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
7/30/01 Total			49.88		$15,362.00
7/31/01	KHHT&E	DER	9.00	$325.00	$2,925.00

PEOPLE V. TERRA
SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND
5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
7/31/01	KHHT&E	JHL	4.25	$235.00	$998.75
7/31/01	KHHT&E	KCT	1.75	$450.00	$787.50
7/31/01	KHHT&E	NMG	4.00	$375.00	$1,500.00
7/31/01	KHHT&E	RHC	6.50	$105.00	$682.50
7/31/01	BELLOWS & BELLOWS	JJB	1.00	$325.00	$325.00
7/31/01	NOVELSKY	DAN	3.08	$400.00	$1,232.00
7/31/01	CUMMINS& CRONIN	RPC	5.20	$500.00	$2,600.00
7/31/01	CUMMINS& CRONIN	TCC	8.20	$300.00	$2,460.00
7/31/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/31/01	VLB, ET AL	EM	1.00	$100.00	$100.00
7/31/01	VLB, ET AL	EM	0.40	$100.00	$40.00
7/31/01	VLB, ET AL	EM	0.60	$100.00	$60.00
7/31/01	VLB, ET AL	LL	7.50	$465.00	$3,487.50
7/31/01 Total			53.48		$17,298.25
8/1/01	KHHT&E	DER	4.25	$325.00	$1,381.25
8/1/01	KHHT&E	JHL	0.75	$235.00	$176.25
8/1/01	KHHT&E	KCT	0.75	$450.00	$337.50
8/1/01	KHHT&E	NMG	0.75	$375.00	$281.25
8/1/01	CUMMINS& CRONIN	TCC	2.50	$300.00	$750.00
8/1/01	VLB, ET AL	EM	0.40	$100.00	$40.00
8/1/01	VLB, ET AL	EM	1.40	$100.00	$140.00
8/1/01	VLB, ET AL	EM	0.20	$100.00	$20.00
8/1/01	VLB, ET AL	EM	0.50	$100.00	$50.00
8/1/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/1/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
8/1/01 Total			16.50		$5,468.75
8/2/01	KHHT&E	DER	0.75	$325.00	$243.75
8/2/01	KHHT&E	JHL	1.00	$235.00	$235.00
8/2/01	KHHT&E	KCT	0.75	$450.00	$337.50
8/2/01	KHHT&E	NMG	1.00	$375.00	$375.00
8/2/01	NOVELSKY	DAN	6.67	$400.00	$2,668.00
8/2/01	CUMMINS& CRONIN	RPC	4.20	$500.00	$2,100.00
8/2/01	CUMMINS& CRONIN	TCC	1.60	$300.00	$480.00
8/2/01	VLB, ET AL	EM	0.70	$100.00	$70.00
8/2/01	VLB, ET AL	EM	1.50	$100.00	$150.00
8/2/01	VLB, ET AL	EM	1.00	$100.00	$100.00
8/2/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/2/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
8/2/01 Total			24.17		$9,051.75
8/3/01	KHHT&E	DER	2.75	$325.00	$893.75
8/3/01	KHHT&E	JHL	1.50	$235.00	$352.50
8/3/01	KHHT&E	KCT	0.75	$450.00	$337.50
8/3/01	KHHT&E	NMG	3.00	$375.00	$1,125.00
8/3/01	NOVELSKY	DAN	5.33	$400.00	$2,132.00
8/3/01	CUMMINS& CRONIN	RPC	2.20	$500.00	$1,100.00
8/3/01	CUMMINS& CRONIN	TCC	2.00	$300.00	$600.00

PEOPLE V. TERRA
SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND
5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
8/3/01	VLB, ET AL	EM	0.50	$100.00	$50.00
8/3/01	VLB, ET AL	EM	0.30	$100.00	$30.00
8/3/01	VLB, ET AL	EM	0.20	$100.00	$20.00
8/3/01	VLB, ET AL	EM	2.00	$100.00	$200.00
8/3/01	VLB, ET AL	EM	0.80	$100.00	$80.00
8/3/01	VLB, ET AL	EM	0.30	$100.00	$30.00
8/3/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/3/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/3/01 Total			25.63		$8,778.25
8/4/01	NOVELSKY	DAN	4.40	$400.00	$1,760.00
8/4/01	CUMMINS& CRONIN	RPC	4.20	$500.00	$2,100.00
8/4/01	CUMMINS& CRONIN	TCC	4.00	$300.00	$1,200.00
8/4/01 Total			12.60		$5,060.00
8/6/01	KHHT&E	KCT	0.25	$450.00	$112.50
8/6/01	KHHT&E	NMG	2.00	$375.00	$750.00
8/6/01	CUMMINS& CRONIN	RPC	2.80	$500.00	$1,400.00
8/6/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/6/01 Total			8.55		$3,890.00
8/7/01	KHHT&E	KCT	0.25	$450.00	$112.50
8/7/01	NOVELSKY	DAN	2.00	$400.00	$800.00
8/7/01	CUMMINS& CRONIN	RPC	2.50	$500.00	$1,250.00
8/7/01	CUMMINS& CRONIN	TCC	1.00	$300.00	$300.00
8/7/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/7/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
8/7/01 Total			9.25		$4,057.50
8/8/01	KHHT&E	JHL	1.50	$235.00	$352.50
8/8/01	KHHT&E	KCT	1.00	$450.00	$450.00
8/8/01	KHHT&E	NMG	0.50	$375.00	$187.50
8/8/01	CUMMINS& CRONIN	RPC	2.20	$500.00	$1,100.00
8/8/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/8/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/8/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
8/8/01 Total			14.00		$5,522.50
8/9/01	KHHT&E	DER	0.75	$325.00	$243.75
8/9/01	CUMMINS& CRONIN	TCC	6.20	$300.00	$1,860.00
8/9/01	VLB, ET AL	LG	0.50	$400.00	$200.00
8/9/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/9/01 Total			10.95		$3,931.25
8/10/01	KHHT&E	DER	6.50	$325.00	$2,112.50
8/10/01	KHHT&E	JHL	1.50	$235.00	$352.50
8/10/01	KHHT&E	NMG	1.00	$375.00	$375.00
8/10/01	NOVELSKY	DAN	3.83	$400.00	$1,532.00
8/10/01	CUMMINS& CRONIN	RPC	2.00	$500.00	$1,000.00
8/10/01	CUMMINS& CRONIN	TCC	6.50	$300.00	$1,950.00
8/10/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/10/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00

PEOPLE V. TERRA
SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND
5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
8/10/01 Total			27.33		$9,982.00
8/11/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/11/01 Total			3.80		$1,140.00
8/12/01	KHHT&E	DER	1.50	$325.00	$487.50
8/12/01	KHHT&E	JHL	0.50	$235.00	$117.50
8/12/01	KHHT&E	KCT	0.50	$450.00	$225.00
8/12/01	NOVELSKY	DAN	6.08	$400.00	$2,432.00
8/12/01	CUMMINS& CRONIN	RPC	2.10	$500.00	$1,050.00
8/12/01	CUMMINS& CRONIN	TCC	4.60	$300.00	$1,380.00
8/12/01	VLB, ET AL	LG	3.00	$400.00	$1,200.00
8/12/01 Total			18.28		$6,892.00
8/13/01	KHHT&E	DER	5.75	$325.00	$1,868.75
8/13/01	KHHT&E	JON	1.00	$285.00	$285.00
8/13/01	KHHT&E	KCT	0.75	$450.00	$337.50
8/13/01	KHHT&E	NMG	0.50	$375.00	$187.50
8/13/01	NOVELSKY	DAN	7.75	$400.00	$3,100.00
8/13/01	CUMMINS& CRONIN	RPC	1.80	$500.00	$900.00
8/13/01	CUMMINS& CRONIN	TCC	9.50	$300.00	$2,850.00
8/13/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/13/01	VLB, ET AL	LL	6.50	$465.00	$3,022.50
8/13/01 Total			35.55		$13,351.25
8/14/01	KHHT&E	DER	2.25	$325.00	$731.25
8/14/01	KHHT&E	JHL	3.50	$235.00	$822.50
8/14/01	KHHT&E	KCT	1.00	$450.00	$450.00
8/14/01	KHHT&E	LRM	4.00	$75.00	$300.00
8/14/01	NOVELSKY	DAN	1.12	$400.00	$448.00
8/14/01	CUMMINS& CRONIN	RPC	1.70	$500.00	$850.00
8/14/01	CUMMINS& CRONIN	TCC	2.00	$300.00	$600.00
8/14/01	VLB, ET AL	LL	4.00	$465.00	$1,860.00
8/14/01 Total			19.57		$6,061.75
8/15/01	KHHT&E	DER	3.75	$325.00	$1,218.75
8/15/01	KHHT&E	JHL	2.50	$235.00	$587.50
8/15/01	KHHT&E	LRM	4.00	$75.00	$300.00
8/15/01	NOVELSKY	DAN	1.33	$400.00	$532.00
8/15/01	CUMMINS& CRONIN	RPC	1.50	$500.00	$750.00
8/15/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/15/01	VLB, ET AL	KA	1.40	$280.00	$392.00
8/15/01	VLB, ET AL	LG	3.00	$400.00	$1,200.00
8/15/01	VLB, ET AL	LL	4.50	$465.00	$2,092.50
8/15/01 Total			25.78		$8,212.75
8/16/01	NOVELSKY	DAN	7.50	$400.00	$3,000.00
8/16/01	NOVELSKY	DAN	2.83	$400.00	$1,132.00
8/16/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/16/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/16/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/16/01 Total			19.63		$7,699.50

PEOPLE V. TERRA
SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND
5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
8/17/01	KHHT&E	DER	0.50	$325.00	$162.50
8/17/01	KHHT&E	JHL	1.00	$235.00	$235.00
8/17/01	CUMMINS& CRONIN	TCC	3.00	$300.00	$900.00
8/17/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
8/17/01 Total			7.50		$2,692.50
8/20/01	KHHT&E	DER	2.50	$325.00	$812.50
8/20/01	KHHT&E	JON	1.00	$285.00	$285.00
8/20/01	KHHT&E	KCT	0.25	$450.00	$112.50
8/20/01	KHHT&E	NMG	0.50	$375.00	$187.50
8/20/01	NOVELSKY	DAN	4.92	$400.00	$1,968.00
8/20/01	CUMMINS& CRONIN	RPC	1.80	$500.00	$900.00
8/20/01	CUMMINS& CRONIN	TCC	2.50	$300.00	$750.00
8/20/01	VLB, ET AL	LG	4.00	$400.00	$1,600.00
8/20/01	VLB, ET AL	LL	0.50	$465.00	$232.50
8/20/01 Total			17.97		$6,848.00
8/21/01	KHHT&E	DER	4.50	$325.00	$1,462.50
8/21/01	KHHT&E	KCT	0.75	$450.00	$337.50
8/21/01	KHHT&E	NMG	2.00	$375.00	$750.00
8/21/01	NOVELSKY	DAN	5.25	$400.00	$2,100.00
8/21/01	CUMMINS& CRONIN	RPC	3.20	$500.00	$1,600.00
8/21/01	CUMMINS& CRONIN	TCC	1.00	$300.00	$300.00
8/21/01 Total			16.70		$6,550.00
8/22/01	KHHT&E	DER	0.50	$325.00	$162.50
8/22/01	CUMMINS& CRONIN	RPC	3.90	$500.00	$1,950.00
8/22/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/22/01	VLB, ET AL	LG	0.30	$400.00	$120.00
8/22/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
8/22/01 Total			11.50		$4,767.50
8/23/01	KHHT&E	DER	0.75	$325.00	$243.75
8/23/01	CUMMINS& CRONIN	RPC	4.20	$500.00	$2,100.00
8/23/01	CUMMINS& CRONIN	TCC	6.80	$300.00	$2,040.00
8/23/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/23/01 Total			15.25		$6,011.25
8/23/01 AND 8/24/01	NOVELSKY	DAN	11.62	$400.00	$4,648.00
8/23/01 AND 8/24/01 Total			11.62		$4,648.00
8/24/01	KHHT&E	DER	3.50	$325.00	$1,137.50
8/24/01	CUMMINS& CRONIN	RPC	4.80	$500.00	$2,400.00
8/24/01	CUMMINS& CRONIN	TCC	3.80	$300.00	$1,140.00
8/24/01	VLB, ET AL	LG	3.00	$400.00	$1,200.00
8/24/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/24/01 Total			18.60		$7,505.00
8/27/01	KHHT&E	DER	3.50	$325.00	$1,137.50
8/27/01	CUMMINS& CRONIN	RPC	1.00	$500.00	$500.00
8/27/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/27/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50

PEOPLE V. TERRA

SUMMARY OF ATTY. FEES OF BELLOWS AND BELLOWS,PC ; CUMMINS AND CRONIN,LLC; KELLOG, HUBER, HANSEN, TODD AND EVANS, PLLC; D.A.NOVELSKY; VERNER, LIIPFERT, BERNHARD, MCPHERSON AND HAND

5/01 THROUGH 9/01

DATE	*LAW FIRM*	*ATTY.*	*HOURS*	*RATE*	*FEES*
8/27/01 Total			10.00		$4,065.00
8/27/01 AND 8/28/01	NOVELSKY	DAN	10.17	$400.00	$4,068.00
8/27/01 AND 8/28/01 Total			10.17		$4,068.00
8/28/01	KHHT&E	DER	3.25	$325.00	$1,056.25
8/28/01	KHHT&E	KCT	2.75	$450.00	$1,237.50
8/28/01	KHHT&E	NMG	2.00	$375.00	$750.00
8/28/01	CUMMINS& CRONIN	RPC	4.20	$500.00	$2,100.00
8/28/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/28/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/28/01 Total			17.70		$7,571.25
8/29/01	NOVELSKY	DAN	1.00	$400.00	$400.00
8/29/01	CUMMINS& CRONIN	RPC	1.80	$500.00	$900.00
8/29/01	VLB, ET AL	KA	2.30	$280.00	$644.00
8/29/01	VLB, ET AL	LG	1.00	$400.00	$400.00
8/29/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
8/29/01 Total			9.10		$3,739.00
8/30/01	VLB, ET AL	BB	1.00	$160.00	$160.00
8/30/01	VLB, ET AL	LG	2.00	$400.00	$800.00
8/30/01	VLB, ET AL	LL	3.00	$465.00	$1,395.00
8/30/01 Total			6.00		$2,355.00
8/31/01	VLB, ET AL	BB	1.00	$160.00	$160.00
8/31/01	VLB, ET AL	LG	5.00	$400.00	$2,000.00
8/31/01	VLB, ET AL	LL	3.50	$465.00	$1,627.50
8/31/01 Total			9.50		$3,787.50
9/4/01	BELLOWS & BELLOWS	MTW	0.80	$240.00	$192.00
9/4/01 Total			0.80		$192.00
9/20/01	BELLOWS & BELLOWS	JJB	2.00	$325.00	$650.00
9/20/01 Total			2.00		$650.00
9/21/01	BELLOWS & BELLOWS	JJB	0.60	$325.00	$195.00
9/21/01 Total			0.60		$195.00
9/23/01	BELLOWS & BELLOWS	JJB	2.90	$325.00	$942.50
9/23/01 Total			2.90		$942.50
Grand Total			2403.73		$773,157.08

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*,

Plaintiffs,

v.

JUDITH TERRA, *et al.*,

Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff- Intervenor,

v.

JUDITH TERRA, *et al.*,

Defendants.

AMENDED

NOTICE OF EMERGENCY MOTION

TO: **SEE ATTACHED SERVICE LISTS A AND B**

10:00AM

PLEASE TAKE NOTICE that on February 5, 2002 at 9[redacted] a.m. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Dorothy Kinnaird in Room [redacted], 2403 in the Circuit Court of Cook County, State of Illinois, and present the ATTORNEY GENERAL'S EMERGENCY MOTION TO STRIKE AND DENY THE LETTER/MOTION OF DEFENDANT DIRECTORS TO STRIKE PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW AND FILE AN ADDITIONAL BRIEF, a copy of which is hereby served upon you.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2533

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*, Plaintiffs, v. JUDITH TERRA, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, v. JUDITH TERRA, *et al.*, Defendants.	)	

NOTICE OF FILINGS

TO: **SEE ATTACHED SERVICE LISTS**

PLEASE TAKE NOTICE that on February 4, 2002, I caused the Attorney Generals' Notice of Emergency Motion and Motion to Strike and Deny the Letter/Motion of Defendant Directors to Strike Proposed Findings of Fact and Conclusions of Law to be filed with the Clerk of the Circuit Court of Cook County, Illinois in the above-captioned matter, a copy of which has been previously served upon you.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
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Mulroy, Scandaglia, Marrinson, Ryan
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William P. Schuman
Debra Tucker
McDermott, Will & Emery
227 W. Monroe Street
Chicago, IL 60603

FAX TRANSMISSION

Charitable Trusts and Solicitations Bureau, 100 W. Randolph Street, 11th Floor, Chicago, IL 60601-3175

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To:

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Lawrence Levinson	
David A. Novoselsky	(312) 346-9453
William P. Schuman	(312) 984-7700
Debra Tucker	
Robert Cummins	(312) 578-1234
Cummins & Cronin, LLC.	

Date February 4, 2002

Pages: 5 including this cover sheet.

From: Floyd D. Perkins, Chief
Charitable Trusts and Solicitations Bureau

Subject: **Re: Buntrock v. Terra No. 00CH 13859**

COMMENTS:

This FAX may contain attorney-client, attorney work product or other privileged and/or confidential information. This FAX is intended only for the use of the individual for whom or entity to which it is addressed. If you have received this FAX in error, please notify the sender at the above telephone number and destroy his FAX. If you are not the intended recipient, you are hereby notified that any retention or dissemination of this FAX and/or the information it contains is strictly prohibited.

ORIGINAL (check one) ___ WILL _X_ WILL NOT BE SENT BY MAIL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

February 4, 2002

The attached service list

Re: Buntrock, et al. v. Terra, et al.
Case No. 00 CH 13859

Please be advised that pursuant to the discussion with Judge Kinnaird's clerk, the Attorney General's Emergency Motion to Strike and Deny the Letter/Motion of Defendant Directors to Strike Proposed Findings of Fact and Conclusions of Law and File an additional Brief will be heard at 10:a.m. on February 5, 2002 and not at 9:15 a.m. Also, the room number is 2403.

Sincerely,

Floyd D. Perkins, Chief
Charitable Trusts and Solicitations Bureau
100 W. Randolph Street, 3rd FL
Chicago, Illinois 60601-3175
(312) 814-2533

FDP/erv.

ORDER 05-1307

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DENN BUNTROCK ET AL
Plaintiffs

v.

JUDITH TERRA ET AL
Defendants

No. 00 CH 13859

ORDER

COMING UPON THE ATTORNEY GENERAL'S EMERGENCY MOTION TO STRIKE & DENY THE LETTER MOTION FOR DEFENDANT DIRECTORS TO STRIKE PROPOSED FINDING OF FACT & CONCLUSIONS OF LAW & FILE AN AMENDED BRIEF THE PARTIES HAVING RECEIVED NOTICE, AND HAVING APPEARED AND THE COURT BEING ADVISED IN THE PREMISES

(A) THE COURT ORDERS THAT SAID EMERGENCY MOTION IS DENIED, THE LETTER IS OF RECORD & THE COURT WILL CONSIDER ITEMS SUBMITTED

(B) THE COURT MUST STRIKE THE DATE OF 2/13/02 AND RESETS THE 9:00 DATE FOR RULING BY FEES TO 2/20/02 AT 2:00 PM

ENTERED

ENTER: FEB - 5 2002

DOROTHY KINNAIRD
DOROTHY BROWN
CLERK OF CIRCUIT COURT

Judge Judge's No.

Atty. No.: 99100

Name: FLOYD PERKIN ASST ATTY GEN

Atty. for: PLAINTIFF PEOPLE

Address: 100 W RANDOLPH

City/State/Zip: CHGO IL 60601

Telephone: 312 814 2533

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

NMG
COPY

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Jim Ryan
ATTORNEY GENERAL

February 5, 2002

VIA FAX

To Counsel on Service List

Re: Buntrock, et al. v. Terra, et al.
No. 00 CH 13859

Dear Counsel:

The enclosed Order was entered by Judge Kinnaird on February 5, 2002. The Attorney General's Emergency Motion to Strike and Deny the Letter/Motion of Defendant Directors to Strike Proposed Finding of Fact and Conclusions of Law and File an Additional Brief was denied. The February 13, 2002 date for ruling on fee petitions has been stricken and reset to February 20, 2002 at 2 p.m.

Sincerely,

Floyd D. Perkins, Chief
Charitable Trusts Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601
(312) 814-2533

SERVICE LIST

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Washington, DC 20036

Leonard Garment
Lawrence Levinson
Verner, Lupfert, Bernhard, McPherson & Hand
901 - 15th Street, N.W. Suite 700
Washington, DC 20005

COPY

NMG

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Judge Dorothy Kirie Kinnaird

ORDER AWARDING ATTORNEYS' FEES

This case is before the Court on the fee petitions of various Directors of the Terra Foundation. Those Directors are plaintiffs Dean L. Buntrock and Ronald Gidwitz, non-party Directors Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, and defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson. In total, fees in excess of $2,400,000 and costs in excess of $315,000 are sought herein.

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16di-002893

These figures do not include fees and costs of counsel for the Terra Foundation and they do not include the fees and costs in the amount of $468,376.17 which were previously awarded to counsel for defendants Terra, Tucker and Simpson.

The Court has received and reviewed Dean L. Buntrock and Ronald Gidwitz's Petition for Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001, the Supplemental Petition filed by those plaintiffs, the Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock, and the plaintiffs' Reply. Unredacted billing statements covering the period from September 18, 2000 through August 31, 2001 have also been reviewed.

Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall have filed their Petition for Reimbursement of Fees and Costs together with unredacted billing statements covering the period from January 26, 2001 through September 10, 2001. That Petition together with the Attorney General's Response to the Fee Petition Submitted by Attorneys for Dr. Stebbins and Dr. Marshall have been reviewed by the Court.

On behalf of defendants Alan Simpson, Judith Terra and Paul Hayes Tucker five additional fee petitions have been filed and reviewed. They are: 1) the Motion for Attorneys' Fees and Costs filed by Verner Liipfert, Bernhard, McPherson & Hand, Chartered; 2) an Amended Petition for Fees and Costs filed by Bellows and Bellows, P.C.; 3) the Motion for Attorney's Fees and Costs filed by Kellogg, Huber, Hanson, Todd & Evans, P.L.L.C.; 4) the Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses; and 5) the Petition for Fees and Expenses filed by Cummins & Cronin, LLC. The unredacted billing statements filed in support of these petitions cover the period from May 18, 2001 through August 31, 2001.

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16di-002894

In connection with the defendant Directors' fee petitions, the Court has also received and the reviewed the Attorney General's Response to the Fee Petitions Submitted by Attorneys for Terra, Tucker and Simpson, the Terra Foundation's Motion to Reject any Fee Petitions Seeking Attorneys' Fees Not in Connection with this Lawsuit, the Reply Memorandum of Defendants Terra, Tucker and Simpson, and the Terra Foundation's Reply Memorandum in Support of its Motion to Reject. For the period from May 18, 2001 through June 29, 2001, the Court re-reviewed Shefsky & Froelich Ltd.'s Petition for Fees and Costs regarding communications between the departing Shefsky firm and the appearance of the Verner, Bellows and Kellogg firms.

In reviewing all of the pending fee petitions, the Court has reviewed all affidavits and exhibits submitted. The Court compared the fee requests herein with the Billing Statements Submitted to the Terra Foundation by Sidley Austin Brown & Wood, covering the period from September 21, 2000 through July 31, 2001, and with the Shefsky and Froelich bills covering the period October 8, 2000 through June 21, 2001. The Court also reviewed its notes on the history of this case, as well as pertinent documents from the court file. The Court entertained oral argument on the fee petitions on January 15, 2002, and reviewed and considered the proposed orders and/or proposed findings of fact submitted by parties.

On July 26, 2001, this Court entered a Consent Judgment and Order resolving all issues in this case with the exception of the award of attorneys' fees and costs. As part of the mediated settlement of this case the parties agreed and the Court ordered that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." This Court has determined that all of the petitions before the Court include requests for fees which were not incurred in connection with this lawsuit. Specifically, certain of the petitions

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contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook Law Division case filed after this case was concluded. This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case. In regard to the Quinlan and Carroll invoices and the McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. In regard to the defendant Directors' attorneys' invoices, it is not possible to make such a determination.

This was an extremely complex and fiercely litigated case involving some novel issues. There was extensive motion practice and multiple appeals. Over thirty court sessions, many of them lengthy, were held prior to the entry of the Consent Judgment and Order. The more complex of the issues involved related to special litigation committees, attorney ethics and disqualification, museum ethics, breaches of fiduciary duties, and the Attorney General's responsibilities in regard to charitable trusts and not-for-profit corporations. Many experts were retained and their opinions differed. Much out-of-state law was supplied and argued.

In reviewing the fee petitions this Court has considered, among other things, the magnitude and complexity of the case, the novelty and importance of the legal issues involved, the benefits conferred, the number of hours expended, the manner and tasks in which the time was expended, by whom the time was expended, the hourly rate charged by each person for a given task, the time required by other attorneys in the community to perform tasks of a comparable nature, the hourly fee charged for similar services by other attorneys with similar skills and qualifications, the degree to which the tasks performed contributed to the result obtained, and whether the fees have been paid by the clients. The Court has taken note that in regard to the Quinlan & Carroll bills and the McDermott, Will & Emery bills, the Attorney General has not objected to the requested fees and costs. The Court has also noted

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that the fee petitions of those firms are not inconsistent with the bills of Sidley and Austin submitted to, and presumably paid by, the Foundation. (This Court has not approved the bills of the Foundation's counsel).

Notwithstanding the lack of an objection from the Attorney General, this Court believes that certain of the fees and costs submitted by the Quinlan and McDermott firms should not be approved, particularly considering that charitable funds are involved here. [The Court agrees with current counsel for the Foundation that "(t)he Foundation exists to promote American art, not to fund litigation."] As to attorneys' time entries in the Quinlan & Carroll petition, these include multiple entries for duplicative and excessive billing for four partners (at their respective hourly rates) and for one associate (at a blended rate of $180), totaling $421,200. That figure includes a reduction of $4,700 in fees incurred after the entry of the Consent Judgment and Order which were reflected in the September 25, 2001 invoice. Finally, the Court has determined that $10,166.25 was billed in connection with the federal court litigation and that that amount should be excluded. As to costs, the Court has granted all costs with the exception of an expert witness fee reflected in the September 25, 2001 invoice and with the exception of all costs incurred for the public relations firm of Kemper Lesnik.

The McDermott Will & Emery fees are approved herein, eliminating the fees and costs for "Terra II" and $1,980.00 in fees for the federal action. The costs relating to "Terra I" are approved.

This Court is not able to adjudicate at this time the five additional fee petitions filed on behalf of defendants Terra, Tucker and Simpson. In order to do so, this Court needs to receive revised fee petitions from any of the five firms who may wish to provide them. The revised fee petitions should eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). The revised fee petitions should be supported by affidavits of counsel

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16di-002897

and/or the defendant Directors which should include the following: 1) the dates counsel was retained; 2) the reason for the retention of the additional counsel; 3) if applicable, the dates counsel was discharged or withdrew and the reason for the discharge or withdrawal; 4) the dates and manner in which any counsel of record in this case was advised that additional counsel for defendants Terra, Tucker and Simpson had been retained; 5) the dates and manner of first communication with the firm of Shefsky and Froelich about additional representation for defendant Directors in this case; 6) the dates on which any parties to the mediated settlement were first advised that defendants Terra, Tucker and Simpson would be seeking fees pursuant to the Consent Judgment and Order for fees for any firm other than Shefsky and Froelich; 7) all attempts to avoid duplication of effort between former and new counsel; and 8) a statement as to when and how much of the attorneys' fees and costs set forth in the revised fee petitions have been paid to date. In regard to the Verner Liipfert firm, an explanation should be given of the $35,000 notation regarding Bellows and Bellows which appears on the summary of invoices and the $25,000 cost entry to Bellows and Bellows for professional services which appears in Invoice No. 183977.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit is granted.

2. Plaintiffs Dean L. Buntrock and Ronald Gidwitz are awarded attorneys' fees in the amount of $1,172,182.00 and costs in the amount of $162,768.65, for a total award of $1,334,950.65 .

3. Directors Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall are awarded attorneys' fees in the amount of $35,026.25 and costs in the amount of $768.16, for a total award of $35,794.41.

03/20/2002 11:36 312-603-6787 PRES JUDGE CHANCERY PAGE 06/07

16di-002898

4. Defendants Terra, Tucker and Simpson have 28 days to file revised fee petitions and supporting affidavits as set forth above. No additional briefing will be entertained.

5. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTER:

ENTERED
MAR 13 2002
JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

March 13, 2002

03/20/2002 11:36 312-603-6787 PRES JUDGE CHANCERY PAGE 07/07

16di-002899

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	
	)	**No. 00 CH 13859**
	)	**Hon. Dorothy Kirie Kinnaird**
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,	)	
	)	
Plaintiff-Intervenor,	)	
v.	)	
	)	
JUDITH TERRA, et al.,	)	
	)	
Defendants.	)	

AGREED ORDER

THIS CAUSE COMING ON TO BE HEARD on the agreement of the parties and with this Court's consent:

IT IS HEREBY ORDERED that counsel for Terra, Tucker and Simpson are granted an additional 14 days to and including April 24, 2002 within which to respond to this Court's order of March 13, 2002 and particularly the matters set forth at pages 5 and 6 of that order.

DATED: _____

ENTERED: **ENTERED**
APR 05 2002
JUDGE
STEPHEN A SCHILLER-167

Judge

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 W. Wacker, Suite 4800
Chicago IL 60601

APPEAL TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation,	)	Hon. Dorothy K. Kinnaird Judge Presiding
Defendants-Appellees.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff-Intervenor,	)	
vs.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	

FILED
02 APR 12 PM 1:37
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL

NOTICE OF APPEAL

Plaintiffs-Appellants Dean L. Buntrock and Ronald Gidwitz, by and through their attorneys,

Quinlan & Carroll, Ltd., hereby appeal to the Appellate Court of Illinois, First Judicial District, from the Order entered by the Circuit Court of Cook County on March 13, 2002. Appellants seek an order from the appellate court including, without limitation: 1) reversing the March 13, 2002 Order insofar as it reduces plaintiffs-appellants' award of attorneys' fees and costs by $538,868.65; 2) directing the trial court to award the additional attorneys' fees and costs of $538,868.65; 3) remanding to the circuit court for entry of an order including the additional attorneys' fees and costs of $538,868.65; and 4) for such other and further relief as this Court deems just and reasonable.

Respectfully submitted,

DEAN L. BUNTROCK AND RONALD GIDWITZ

By One Of Their Attorneys

William R. Quinlan
James R. Carroll
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
312-263-0900

No. _____

APPEAL TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	Hon. Dorothy K. Kinnaird Judge Presiding
Defendants-Appellees.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff-Intervenor,	)	
vs.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	

2002 APR 12 PM 2:24
CLERK OF COURT
1st DIST.

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on April 12, 2002, we filed with the Clerk of the Appellate Court, First District, the attached **Notice of Appeal,** filed with the Clerk of the Circuit Court of Cook County, Illinois on April 12, 2002, a copy of which is hereby served upon you.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900

CERTIFICATE OF SERVICE

Under the penalties as provided by law pursuant to 735 ILCS 5/1-109, the undersigned certifies it to be true and correct that copies of the **Notice Of Filing** and **Notice of Appeal** were served on the individuals to whom this notice is directed at their respective addresses as indicated on the attached service list by depositing said copies in the U.S. mail at 30 North LaSalle Street, Chicago, IL 60602 before 5:00 p.m. on April 12, 2002, proper postage prepaid.

[x] Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth herein are true and correct.

Mary Butler

SERVICE LIST

Floyd D. Perkins
Therese Harris
Barry Goldberg
Assistant Attorney General & Bureau Chief
of Charitable Trusts
100 W. Randolph Street
3rd Floor
Chicago, Illinois 60601

Stephen C. Carlson
Susan A. Stone
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Washington, D.C. 20036

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Lawrence Levinson
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Debra Tucker
McDermott Will & Emery
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Naftali Michaeli
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Washington, D.C. 20007

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Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive
Suite 4800
Chicago, Illinois 60601

Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
55 E. Monroe Street
Chicago, Illinois 60603

The Honorable Dorothy K. Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

No. 1-02-1192

IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding

APPELLATE COURT
1ST DIST.
2002 MAY -1 PM 3:57
CLERK OF COURT

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

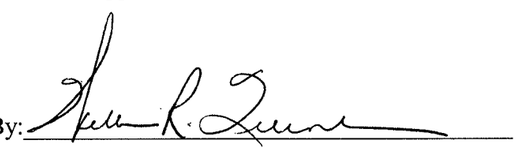
NOTICE OF FILING

TO: (See attached Service List)

PLEASE TAKE NOTICE that on May 1, 2002, we filed with the Clerk of the Illinois Appellate Court, First District, 160 N. LaSalle St., Chicago, IL 60601, a **Docketing Statement**, a copy of which is hereby served upon you.

Respectfully submitted,

Plaintiffs-Appellants

By: 

One Of Their Attorneys

William R. Quinlan
James R. Carroll
Jasmine de la Torre
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900

PROOF OF SERVICE

The undersigned, a non-attorney, deposes and states that she caused copies of the foregoing **Notice of Filing** and **Docketing Statement** to be served on the individuals to whom this notice is directed at their respective addresses as indicated on the attached service list by depositing said copies in the U.S. mail at 30 North LaSalle Street, Chicago, IL 60602 before 5:00 p.m. on May 1, 2002, proper postage prepaid.

{x} Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Mary Butler

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859
1-02-1192

SERVICE LIST

Floyd D. Perkins
Therese Harris
Barry Goldberg
Assistant Attorney General & Bureau Chief
of Charitable Trusts
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Stephen C. Carlson
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Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
55 E. Monroe Street
Chicago, Illinois 60603

The Honorable Dorothy K. Kinnaird
Circuit Court of Cook County
Chancery Division
2403 Richard J. Daley Center
Chicago, Illinois 60602

Doc:189460

No. 1-02-1192

IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding

1ST DIST.
2002 MAY -1 PM 3:57
CLERK OF COURT

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

DOCKETING STATEMENT

1. Is this a cross-appeal, separate appeal, joining in a prior appeal, or related to another appeal which is currently pending or which has been disposed of by this court? If so, state the docket number(s) of the other appeal(s):

ANSWER: This is a separate appeal from an order entered on March 13, 2002. In addition to this appeal, a notice of appeal has been filed by other parties from an order entered July 26, 2001, Appellate Number 1-01-3152. In addition, there have been two prior appeals in this case: No. 01-0031 consolidated with No. 01-0034. These appeals were disposed of by this Court on January 9, 2001 (No. 01-0031), January 19, 2001 (No. 01-0034), and February 16, 2001 (denial of petition for rehearing, No. 01-0034).

2. If any party is a corporation, or association, identify any affiliate, subsidiary, or parent group:

ANSWER: N/A

3. Full name of appellant(s) filing this statement:

ANSWER: Dean L. Buntrock and Ronald Gidwitz

COUNSEL ON APPEAL
FOR APPELLANTS FILING THIS STATEMENT

Name of Appellant: Dean L. Buntrock and Ronald Gidwitz
Name of Counsel: William R. Quinlan
James R. Carroll
Address: Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
Telephone: 312/263-0900
Facsimile: 312/263-5013

Trial Counsel - Same

4. COUNSEL ON APPEAL FOR APPELLEES

Name of Appellee:	Terra Foundation for the Arts	
Name of Counsel:	Thomas R. Mulroy, Jr. Mulroy, Scandaglia, Marrinson, Ryan	Stephen C. Carlson Sidley Austin Brown & Wood
Address:	53 E. Monroe Street Chicago, Illinois 60603	Ten South Dearborn Chicago, Illinois 60603
Telephone:	(312) 580-2020	
Facsimile:	312-782-3806	

5. Court Reporter(s)

Name: Certain defendants have filed a prior notice of appeal in this action. Plaintiffs-Appellants herein are working with those appellants to coordinate the compilation of the record and/or any transcript.

Telephone:

Approximate duration of court proceedings to be transcribed:

See above.

Can this appeal be accelerated? Yes.

6. Briefly state the Supreme Court Rule, or other law which confers jurisdiction upon the reviewing court; the facts of the case which bring it within this rule or other law; and the date that the order being appealed was entered and any other facts which are necessary to demonstrate that the appeal is timely:

Appellate jurisdiction is predicated upon Supreme Court Rules 301 and 303. On March 13, 2002, a final order was entered as to the award of attorneys fees to Plaintiffs-Appellants in this appeal. On April 12, 2002, Plaintiffs-Appellants filed their Notice of Appeal.

7. Nature of case:

Administrative Review	_____
Contract	_____
Estates	_____
Personal Injury	_____
Tort	_____
Juvenile	_____
Domestic Relations	_____
Child Custody or Support	_____
Product Liability	_____
Forcible Detainer	_____
Other	__X__

This appeal is from a denial of attorneys fees ordered to be paid pursuant to a Consent Judgment and Order.

8. Briefly describe the nature of the case and the result in the trial court, and set forth any reasons for an expedited schedule:

This appeal arises from an order entered March 13, 2002 denying a portion of an award of attorneys fees and costs sought by Plaintiffs-Appellants pursuant to a Consent Judgment and Order approved and entered in this matter on July 26, 2001.

9. State the general issues proposed to be raised (failure to include an issue in this statement will not result in the waiver of the issue on appeal):

The issues proposed to be raised include, *inter alia*, whether the trial court erred in denying a portion of the attorneys fees and costs sought by Plaintiffs-Appellants pursuant to the Consent Judgment and Order in this case.

I, as attorney for the appellants, hereby certify that on _____, the Clerk of the Circuit Court of Cook County completed preparation of the record. ***See answer to number 5 above.***

Date: 1 May 2002 _____ _____

Appellants' Attorney

In lieu of reporter's signature I have attached the written request to the court reporter(s) to prepare the transcript(s).

Certain defendants have filed a prior notice of appeal in this action. Plaintiffs-Appellants herein are working with those appellants and with the Official Court Reporters to coordinate the compilation of the record and/or any transcript.

Date: 1 May 2002 _____

Appellants' Attorney _____

I hereby acknowledge receipt of an order for the preparation of a report of proceedings.

Date: N/A _____ N/A _____

Court Reporter or Supervisor

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	Case No. 00 CH 13859
v.	)	Honorable Dorothy Kirie Kinnaird
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	

PETITIONER STEBBINS' AGREED MOTION TO MODIFY MARCH 13, 2002 ORDER

Petitioner Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins"), by his attorneys, respectfully moves this Court for an Order modifying the Court's Order of March 13, 2002 in respect to Professor Mnookin's invoice of $1,980.00. In support of this Motion, Dr. Stebbins states the following:

1. In this Court's Order of March 13, 2002, the Court stated that it believed Professor Mnookin's invoice for $1,980.00 was for work rendered on behalf of Dr. Stebbins in the federal court action. The Court stated that it was not approving the reimbursement by the Terra Foundation ("the Foundation") of Professor Mnookin's fees solely on this basis. *See* Opinion, p. 5 (attached hereto as Exhibit A).

2. In so stating, the Court overlooked the information provided by Dr. Stebbins on this subject in his Fee Petition. As we explained at page 6 of Dr. Stebbins' Fee Petition, Professor Mnookin's work for Dr. Stebbins was initiated in response to the Attorney General's original attack on Dr. Stebbins as an elected member of the Independent Litigation Committee appointed pursuant to Court Order in this case, before this Court. As the Court may recall, Professor Mnookin was hired by Dr. Stebbins when this Court suggested that Dr. Stebbins may need independent counsel to deal with the issues raised by the Attorney General. Professor Mnookin assisted Dr. Stebbins in preparing an affidavit which was submitted by Dr. Stebbins in response to the Attorney General's motions. Copies of Dr. Stebbins' original Fee Petition (without most of the exhibits) and Professor Mnookin's invoice (which was included as Exhibit D to Dr. Stebbins' original Fee Petition) are attached hereto as Exhibit B.

3. As Professor Mnookin's invoice shows, his work was performed from December 30, 2000 through January 8, 2001, during the course of this case, and many months prior to the initiation by Terra, Tucker and Simpson of the federal court action.

4. No parties in this case have claimed that Professor Mnookin's work was rendered in the federal case, or that his fees should not be approved for reimbursement by the Foundation.

5. The Foundation, through its Counsel, has advised counsel for Dr. Stebbins that the Foundation is in complete agreement with this motion, and that the Foundation believes that Professor Mnookin's services are properly reimbursable by the Foundation as having been rendered during the pendency of, and in connection with, Dr. Stebbins' role as a member of the Independent Litigation Committee appointed pursuant to Court Order in this action before this Court.

WHEREFORE, for the foregoing reasons, Petitioner Dr. Stebbins respectfully requests that the Court grant this motion and issue an order modifying the March 13, 2002 Order by providing that the Court approves, and directs the Foundation to reimburse Dr. Stebbins for, Professor Mnookin's fees in the amount of $1,980.00.

Dated: May 2, 2002

DR. THEODORE E. STEBBINS, JR.

By: _____
One of His Attorneys

William P. Schuman
Lizabeth A. Boyer
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5097
(312) 372-2000
Firm I.D. No. 90539

Exhibit A

WPS DESK COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859

THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

Judge Dorothy Kirie Kinnaird

ORDER AWARDING ATTORNEYS' FEES

This case is before the Court on the fee petitions of various Directors of the Terra Foundation. Those Directors are plaintiffs Dean L. Buntrock and Ronald Gidwitz, non-party Directors Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, and defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson. In total, fees in excess of $2,400,000 and costs in excess of $315,000 are sought herein.

16di-002925

These figures do not include fees and costs of counsel for the Terra Foundation and they do not include the fees and costs in the amount of $468,376.17 which were previously awarded to counsel for defendants Terra, Tucker and Simpson.

The Court has received and reviewed Dean L. Buntrock and Ronald Gidwitz's Petition for Attorneys Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001, the Supplemental Petition filed by those plaintiffs, the Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock, and the plaintiffs' Reply. Unredacted billing statements covering the period from September 18, 2000 through August 31, 2001 have also been reviewed.

Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall have filed their Petition for Reimbursement of Fees and Costs together with unredacted billing statements covering the period from January 26, 2001 through September 10, 2001. That Petition together with the Attorney General's Response to the Fee Petition Submitted by Attorneys for Dr. Stebbins and Dr. Marshall have been reviewed by the Court.

On behalf of defendants Alan Simpson, Judith Terra and Paul Hayes Tucker five additional fee petitions have been filed and reviewed. They are: 1) the Motion for Attorneys' Fees and Costs filed by Verner Liipfert, Bernhard, McPherson & Hand, Chartered; 2) an Amended Petition for Fees and Costs filed by Bellows and Bellows, P.C.; 3) the Motion for Attorney's Fees and Costs filed by Kellogg, Huber, Hanson, Todd & Evans, P.L.L.C.; 4) the Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses; and 5) the Petition for Fees and Expenses filed by Cummins & Cronin, LLC. The unredacted billing statements filed in support of these petitions cover the period from May 18, 2001 through August 31, 2001.

16di-002926

In connection with the defendant Directors' fee petitions, the Court has also received and the reviewed the Attorney General's Response to the Fee Petitions Submitted by Attorneys for Terra, Tucker and Simpson, the Terra Foundation's Motion to Reject any Fee Petitions Seeking Attorneys' Fees Not in Connection with this Lawsuit, the Reply Memorandum of Defendants Terra, Tucker and Simpson, and the Terra Foundation's Reply Memorandum in Support of its Motion to Reject. For the period from May 18, 2001 through June 29, 2001, the Court re-reviewed Shefsky & Froelich Ltd.'s Petition for Fees and Costs regarding communications between the departing Shefsky firm and the appearance of the Verner, Bellows and Kellogg firms.

In reviewing all of the pending fee petitions, the Court has reviewed all affidavits and exhibits submitted. The Court compared the fee requests herein with the Billing Statements Submitted to the Terra Foundation by Sidley Austin Brown & Wood, covering the period from September 21, 2000 through July 31, 2001, and with the Shefsky and Froelich bills covering the period October 8, 2000 through June 21, 2001. The Court also reviewed its notes on the history of this case, as well as pertinent documents from the court file. The Court entertained oral argument on the fee petitions on January 15, 2002, and reviewed and considered the proposed orders and/or proposed findings of fact submitted by parties.

On July 26, 2001, this Court entered a Consent Judgment and Order resolving all issues in this case with the exception of the award of attorneys' fees and costs. As part of the mediated settlement of this case the parties agreed and the Court ordered that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." This Court has determined that all of the petitions before the Court include requests for fees which were not incurred in connection with this lawsuit. Specifically, certain of the petitions

contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook Law Division case filed after this case was concluded. This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case. In regard to the Quinlan and Carroll invoices and the McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. In regard to the defendant Directors' attorneys' invoices, it is not possible to make such a determination.

This was an extremely complex and fiercely litigated case involving some novel issues. There was extensive motion practice and multiple appeals. Over thirty court sessions, many of them lengthy, were held prior to the entry of the Consent Judgment and Order. The more complex of the issues involved related to special litigation committees, attorney ethics and disqualification, museum ethics, breaches of fiduciary duties, and the Attorney General's responsibilities in regard to charitable trusts and not-for-profit corporations. Many experts were retained and their opinions differed. Much out-of-state law was supplied and argued.

In reviewing the fee petitions this Court has considered, among other things, the magnitude and complexity of the case, the novelty and importance of the legal issues involved, the benefits conferred, the number of hours expended, the manner and tasks in which the time was expended, by whom the time was expended, the hourly rate charged by each person for a given task, the time required by other attorneys in the community to perform tasks of a comparable nature, the hourly fee charged for similar services by other attorneys with similar skills and qualifications, the degree to which the tasks performed contributed to the result obtained, and whether the fees have been paid by the clients. The Court has taken note that in regard to the Quinlan & Carroll bills and the McDermott, Will & Emery bills, the Attorney General has not objected to the requested fees and costs. The Court has also noted

that the fee petitions of those firms are not inconsistent with the bills of Sidley and Austin submitted to, and presumably paid by, the Foundation. (This Court has not approved the bills of the Foundation's counsel).

Notwithstanding the lack of an objection from the Attorney General, this Court believes that certain of the fees and costs submitted by the Quinlan and McDermott firms should not be approved, particularly considering that charitable funds are involved here. [The Court agrees with current counsel for the Foundation that "(t)he Foundation exists to promote American art, not to fund litigation."] As to attorneys' time entries in the Quinlan & Carroll petition, these include multiple entries for duplicative and excessive billing for four partners (at their respective hourly rates) and for one associate (at a blended rate of $180), totaling $421,200. That figure includes a reduction of $4,700 in fees incurred after the entry of the Consent Judgment and Order which were reflected in the September 25, 2001 invoice. Finally, the Court has determined that $10,166.25 was billed in connection with the federal court litigation and that that amount should be excluded. As to costs, the Court has granted all costs with the exception of an expert witness fee reflected in the September 25, 2001 invoice and with the exception of all costs incurred for the public relations firm of Kemper Lesnik.

The McDermott Will & Emery fees are approved herein, eliminating the fees and costs for "Terra II" and $1,980.00 in fees for the federal action. The costs relating to "Terra I" are approved.

This Court is not able to adjudicate at this time the five additional fee petitions filed on behalf of defendants Terra, Tucker and Simpson. In order to do so, this Court needs to receive revised fee petitions from any of the five firms who may wish to provide them. The revised fee petitions should eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). The revised fee petitions should be supported by affidavits of counsel

16di-002929

and/or the defendant Directors which should include the following: 1) the dates counsel was retained; 2) the reason for the retention of the additional counsel; 3) if applicable, the dates counsel was discharged or withdrew and the reason for the discharge or withdrawal; 4) the dates and manner in which any counsel of record in this case was advised that additional counsel for defendants Terra, Tucker and Simpson had been retained; 5) the dates and manner of first communication with the firm of Shefsky and Froelich about additional representation for defendant Directors in this case; 6) the dates on which any parties to the mediated settlement were first advised that defendants Terra, Tucker and Simpson would be seeking fees pursuant to the Consent Judgment and Order for fees for any firm other than Shefsky and Froelich; 7) all attempts to avoid duplication of effort between former and new counsel; and 8) a statement as to when and how much of the attorneys' fees and costs set forth in the revised fee petitions have been paid to date. In regard to the Verner Liipfert firm, an explanation should be given of the $35,000 notation regarding Bellows and Bellows which appears on the summary of invoices and the $25,000 cost entry to Bellows and Bellows for professional services which appears in Invoice No. 183977.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit is granted.

2. Plaintiffs Dean L. Buntrock and Ronald Gidwitz are awarded attorneys' fees in the amount of $1,172,182.00 and costs in the amount of $162,768.65, for a total award of $1,334,950.65 .

3. Directors Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall are awarded attorneys' fees in the amount of $35,026.25 and costs in the amount of $768.16, for a total award of $35,794.41.

4. Defendants Terra, Tucker and Simpson have 28 days to file revised fee petitions and supporting affidavits as set forth above. No additional briefing will be entertained.

5. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTER:

ENTERED
MAR 13 2002
JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

March 13, 2002

16di-002931

16di-002932

Exhibit B

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	Case No. 00 CH 13859 Honorable Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	

FILED
2001 SEP 12 PM 3:54
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
DOROTHY KINNAIRD
CLERK

DR. STEBBINS' AND DR. MARSHALL'S
PETITION FOR REIMBURSEMENT OF FEES AND COSTS

Petitioners, Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall"), hereby petition this Court, pursuant to the Consent Judgment and Order entered in this matter on July 26, 2001, to enter an order directing the Terra Foundation for the Arts ("the Foundation") to pay the attorneys' fees and costs incurred by Dr. Stebbins and Dr. Marshall as a result of their involvement in this litigation and closely related cases. As the Court will see, most of this Petition deals with Dr. Stebbins, because Dr. Marshall did not incur outside attorneys' fees and costs until recently. In support of their Petition, Dr. Stebbins and Dr. Marshall state as follows:

1. On September 22, 2000, two of the Directors of the Foundation filed this action against the Foundation and three of its Directors. Shortly thereafter, the Attorney General of the State of Illinois filed a similar, companion intervenor action ("the Attorney General Action") against most of the same defendants named in the original lawsuit. Together these two lawsuits are hereafter referred to as "Terra I".

2. Dr. Stebbins served as a Director of the Foundation, but was not named as a defendant in Terra I. Accordingly, Dr. Stebbins was eligible to serve as a member of the Independent Litigation Committee ("the ILC") for the Foundation and was subsequently elected to the ILC by the Foundation's Board of Directors on November 30, 2000.

3. In December, 2000, after Dr. Stebbins became an ILC member, the Plaintiffs and the Attorney General in Terra I asserted that Dr. Stebbins had a conflict of interest and had breached his fiduciary duties as a Director of the Foundation. According to the Plaintiffs and the Attorney General, this disqualified Dr. Stebbins from serving on the ILC. Based on these allegations, the Plaintiffs and the Attorney General filed a motion to remove Dr. Stebbins as a member of the ILC and to take discovery of Dr. Stebbins on

these issues. The motion to take discovery was granted. Thereafter, the Attorney General threatened to add Dr. Stebbins as a defendant in Terra I and prepared a draft amended complaint purporting to add Dr. Stebbins as a defendant. The draft complaint was provided to the Foundation, but was never filed.

4. As a result of the Plaintiffs' and the Attorney General's allegations against Dr. Stebbins, the Foundation's lawyers, Sidley & Austin, recommended that Dr. Stebbins obtain independent counsel to advise and represent Dr. Stebbins in connection with these threats and all other aspects of the Terra litigation as they affected Dr. Stebbins individually.

5. Accordingly, in January, 2001, Dr. Stebbins retained McDermott, Will & Emery ("MW&E") to represent him in the Terra litigation. *See* Schuman Affidavit at ¶ 2, attached hereto as Exhibit A.

6. Independent counsel for Dr. Stebbins was necessary because the claims that the Attorney General and the Plaintiffs asserted against Dr. Stebbins were distinct from the claims that were asserted against the Foundation, and because the Attorney General and the Plaintiffs were claiming that Dr. Stebbins' purported conduct had been contrary to the interests of the Foundation. Once the Attorney General and the Plaintiffs began attacking Dr. Stebbins' conduct, the interests of Dr. Stebbins and the Foundation had the potential of being divergent. While the record plainly shows that the Attorney General's and the Plaintiffs' assertions against Dr. Stebbins were utterly without merit, the need for independent counsel arose upon the assertion of such claims. Id. at ¶ 3.

7. As detailed more fully in the Schuman Affidavit, MW&E provided counsel to Dr. Stebbins in connection with Dr. Stebbins' duties and responsibilities as a member of

the Terra Board and the ILC and concerning the purported claims that the Attorney General and the Plaintiffs were threatening to assert against him. Accordingly, while MW&E did not file a formal appearance for Dr. Stebbins in Terra I (because Dr. Stebbins was never named as a defendant), counsel for Dr. Stebbins kept abreast of all important developments, reviewed and analyzed the important and pertinent pleadings and correspondence, regularly consulted with Dr. Stebbins, and regularly consulted with the Foundation's attorneys. At the same time, counsel for Dr. Stebbins' was careful not to duplicate efforts by the Foundation's lawyers. Rather, Dr. Stebbins' counsel focused their efforts on providing advice on the issues pertinent to Dr. Stebbins. Id. at ¶4.

8. After extensive, complicated negotiations, a mediated settlement of Terra I was approved by the Court. As a result, this Court entered the Consent Judgment and Order on July 26, 2001. Id. at ¶5.

9. In an effort to prevent the consummation of a mediated settlement, three of the Foundation's Directors who were defendants in Terra I (collectively referred to hereinafter as "the Tucker Plaintiffs") filed an injunction action in federal court. Their emergency motion for a temporary restraining order and their complaint were predicated in large part on the contention that Dr. Stebbins and Dr. Marshall (also a Terra director) changed their position as to the adequacy of the proposed settlement as a result of improper coercion by the Attorney General. As a consequence, MW&E continued to provide counsel to Dr. Stebbins (Dr. Marshall had not yet retained MW&E) in connection with the federal case. The TRO motion was denied, the Tucker Plaintiff's federal court complaint was dismissed, and the Tucker Plaintiffs thereafter filed a Notice of Appeal to the Seventh Circuit. Id. at ¶6.

10. On July 31, 2001, the Tucker Plaintiffs filed another action ("Terra II") in the Circuit Court of Cook County, Illinois County Department, Law Division. The Tucker Plaintiffs raised the same issues in Terra II that already had been resolved in Terra I. Id. at ¶7.

11. In Terra II, the Tucker Plaintiffs asserted claims against the Foundation, against Dr. Stebbins, individually, Dr. Marshall, individually, and each of the Foundation's other Directors, individually, and against the Illinois Attorney General and Assistant Attorney General. Among other things, the Tucker Plaintiffs claimed in Terra II that Dr. Stebbins breached his fiduciary duties by voting in favor of the mediated settlement of Terra I. The Tucker Plaintiffs asserted a similar claim against Dr. Marshall. Id. at ¶8.

12. Accordingly, MW&E continued to represent Dr. Stebbins in connection with Terra II. In addition, on approximately August 22, 2001, MW&E began representing Dr. Marshall in Terra II and the related Terra litigation. Id. at ¶9.

13. The Court's July 26, 2001 Consent Judgment and Order provided that "[r]easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation."

14. The determination of what are reasonable attorneys' fees is within the sound discretion of the trial court. *Anderson v. Anchor Org. for Health Maintenance*, 274 Ill. App. 3d 1001, 1007, 654 N.E.2d 675, 681 (1st Dist. 1995). The factors that a court should consider when exercising that discretion include:

> [T]he services performed, the time expended thereon, the attorney's hourly rate, the skill and standing of the attorney, the nature of the case, the difficulty of the issues involved, the importance of the matter, the degree of responsibility

> required, the usual and customary charges for comparable services, and the benefit resulting to the client.

Id. at 1008, 654 N.E.2d at 682. In considering each of these factors, a court is not limited solely to the evidence of reasonableness presented, but may also apply its own general knowledge of the practice of law, and its specific knowledge of the case at hand, in arriving at the reasonable value of professional services. Id.

15. In addition, at the time Dr. Stebbins and Dr. Marshall joined the Terra Board, they had each received a contractual commitment from the Foundation as an inducement for joining Terra's Board that the Foundation would fully reimburse them for litigation fees and expenses such as those at issue here. Copies of this commitment are attached hereto as Exhibit C. Dr. Stebbins and Dr. Marshall relied on this commitment.

16. MW&E's fees and costs for representing Dr. Stebbins in Terra I and the federal court action from the inception of its representation through September 10, 2001 are $37,006.25 and $768.16 respectively, for a total of $37,774.41. MW&E's fees and costs for representing Dr. Stebbins in Terra II through September 10, 2001 are $10,133.75 and $194.14 respectively, for a total of $10,327.89. Accordingly, MWE's fees and costs for its representation of Dr. Stebbins total $48,102.30. Schuman Affidavit at ¶¶10-11.

17. In addition, prior to MW&E's retention, Dr. Stebbins hired Professor Robert H. Mnookin of the Harvard Law School, a renowned legal scholar and attorney, to provide independent legal counsel to Dr. Stebbins in connection with the preparation of an affidavit by Dr. Stebbins and related work in response to the Attorney General's original attack on Dr. Stebbins. Professor Mnookin's fees and expenses were $1,980.00. A copy of professor Mnookin's invoice is attached hereto as Exhibit D. Id. at ¶12.

18. Accordingly, the total fees and costs incurred by Dr. Stebbins in connection with this litigation through September 10, 2001 are $49,120 and $962.30 for a grand total of $50,082.30. Id. at ¶¶10-12.

19. Upon being engaged by Dr. Marshall, MW&E has met and conferred with Dr. Marshall and has begun to review materials pertinent to her circumstances. In an effort to reduce fees and costs and eliminate duplication, MW&E is allocating the fees and costs that equally benefit both Dr. Stebbins and Dr. Marshall evenly between Dr. Stebbins and Dr. Marshall. Id. at ¶13.

20. Dr. Marshall has incurred fees and costs in connection with Terra II and the related matters through September 10, 2001 in the amount of $5,990 and $107.20 respectively for a total of $6,097.20. Id. at ¶14.

21. As for the future, the Tucker Plaintiffs have caused this litigation to multiply on several fronts. Terra I is on appeal. Terra II is now underway. The federal case is also being pursued on appeal. Accordingly, Dr. Stebbins and Dr. Marshall seek leave to supplement this Petition at future dates to seek reimbursement for the additional fees and costs that they incur in responding to and defending these actions, unless the Court finds that the provision in the Consent Judgement requiring court approval of directors' attorneys' fees and costs includes only Terra I and that the Foundation may reimburse directors' fees and costs in connection with the related litigation without court approval.

22. Considering all of the relevant factors, MW&E's fees and costs are reasonable. The need for independent representation of Dr. Stebbins arose approximately three months after Terra I began. *See* Schuman Aff. at ¶¶2-3. Accordingly, MW&E had to

study the prior history of the case to effectively represent Dr. Stebbins. Id. at ¶4. This involved reviewing voluminous pleadings, transcripts and other documents. In addition, much necessary time was spent in consultation with Dr. Stebbins. Moreover, consultations with the Foundation's counsel facilitated review of appropriate matters on behalf of Dr. Stebbins, and later Dr. Marshall, and provided the ability to avoid duplication of efforts. Id. at ¶¶4, 15-16.

23. MW&E's fees for representing Dr. Stebbins and Dr. Marshall are reasonable given the tasks and the issues involved. The parties in the various proceedings raised numerous complex issues of corporate governance and conflicts of interest, and those who attacked Dr. Stebbins and Dr. Marshall did so aggressively, and in several forums. As a result, this matter required a great deal of attention, analysis and skill. Id. at ¶¶3-9, 15-16. The mediated settlement of Terra I was complex, and many difficult issues relating directly to Dr. Stebbins arose from it. The attack on the settlement has been even more contentious and complicated. Id.

24. In addition, MW&E's fees are reasonable considering the skill and standing of the MW&E attorney, Mr. William Schuman, who was primarily responsible for representing Dr. Stebbins and Dr. Marshall. Mr. Schuman is a Harvard Law School graduate, a member of the bars of the Supreme Court of the United States, the U.S. Court of Appeals for the Seventh Circuit, the U.S. District Courts for the Northern District of Illinois (trial bar) and the Central District of Illinois, and the Supreme Court of Illinois. He is also a member of the American, Illinois State and Chicago bar associations. Mr. Schuman has over twenty-two years of experience in representing clients in commercial litigation. Mr. Schuman has vast experience in providing counseling concerning, and

litigating, breach of fiduciary duty and conflict of interest issues. Among other things, Mr. Schuman has chaired MW&E's Professional Responsibility Committee for more than seven years and in that role deals with complicated conflicts of interest issues on a regular basis. Id. at ¶1. Mr. Schuman's hourly rate of $440.00 is usual and customary in the marketplace for an attorney of his skill and expertise on this kind of matter. Other clients of Mr. Schuman are charged, and regularly pay, this hourly rate. Id. at ¶¶1, 16-17.

25. Professor Mnookin's fees are also reasonable, given the professor's substantial credentials and experience and the complexity of the matter. Professor Mnookin's hourly rate of $495.00 is also usual and customary in the marketplace for an attorney of such credentials and skill on this kind of matter. Id. at ¶18.

26. MW&E's fees (and those of Professor Mnookin) are reasonable considering the benefit that Dr. Stebbins received from MW&E's representation. The litigation has been bitterly fought and the risks to Dr. Stebbins have been substantial. The benefits to Dr. Marshall have been similar and commensurate, albeit on a smaller scale, with the short time that MW&E has represented Dr. Marshall. Id. at ¶19.

WHEREFORE, Petitioners Dr. Theodore E. Stebbins, Jr., and Dr. Stephanie Pace Marshall respectfully request that this Court enter an order directing the Terra Foundation for the Arts to remit to Dr. Stebbins the sum of $50,082.30, for payment to McDermott, Will & Emery the sum of $48,102.30 and to Professor Mnookin the sum of $1,980.00, and to remit to Dr. Marshall, for payment to McDermott, Will & Emery the sum of $6,097.20, which sums represent the reasonable value of the legal services rendered and costs incurred to date for the representation of Dr. Stebbins and Dr. Marshall through September 10,

2001, and further providing leave to Dr. Stebbins and Dr. Marshall to file Supplemental Petitions for Reimbursement of Fees and Costs as they are incurred.

DATED: September 12, 2001

Respectfully submitted,

DR. THEODORE E. STEBBINS, JR. and
DR. STEPHANIE PACE MARSHALL

By: _____
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

CERTIFICATE OF SERVICE

I, William P. Schuman, P.C., an attorney on oath, certify that I caused copies of the foregoing **Dr. Stebbins' and Dr. Marshall's Petition for Reimbursement of Fees and Costs** to be served upon the following individuals via regular U.S. Mail postage prepaid on this 12th day of September, 2001.

William Quinlan
James R. Carroll
Lisa M. Hegedus
Jasmine de la Torre
Quinlan & Crisham, Ltd.
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
Sidley Austin Brown & Wood
10 South Dearborn Street
Chicago, Illinois 60603

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive
Suite 4800
Chicago, Illinois 60601

Floyd D. Perkins
Thomas Ioppolo
Jeffrey Gray
Therese Harris
Assistant Attorney General & Bureau Chief of Charitable Trusts
100 West Randolph Street
Third Floor
Chicago, Illinois 60601

Laurel G. Bellows, Esq.
Bellows & Bellows P.C.
79 West Monroe, Suite 800
Chicago, IL 60603

James D. Wilson
Shefsky & Froelich Ltd.
444 North Michigan Avenue
Chicago, IL 606011

William P. Schuman, P.C.

ROBERT H. MNOOKIN

Mr. Donald Ratner
Vice President, Finance and Administration
Terra Foundation for the Arts
664 North Michigan Avenue
Chicago, IL 60611

Dear Mr. Ratner:

I represented your trustee, Dr. Theodore Stebbins in connection with the preparation of his affidavit in the pending litigation involving your foundation. At Ted's request, I enclosed my statement for legal services rendered between December 2000 and January 8, 2001.

Should you have any questions, please do not hesitate to call me.

Sincerely,

Robert H. Mnookin

Enclosure
cc. Theodore Stebbins

1575 MASSACHUSETTS AVENUE CAMBRIDGE, MASSACHUSETTS 02138 (617) 495-9201, FAX 496-3777

Robert H. Mnookin
1575 Massachusetts Avenue
Cambridge, MA 02138

Statement

January 11, 2001

Terra Foundation for the Arts
Chicago, IL

RE: Dean L. Buntrock, et al v. Judith Terra, et al (Case# 00 CH 13859)

For legal services rendered from December 30, 2000 through January 8, 2001 in connection with the preparation and review of Dr. Stebbins' affidavit in connection with this litigation

Hourly Services:
4.0 hours @$495... ... ... $1,980.00

TOTAL $1,980.00

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	Case No. 00 CH 13859
v.	)	Honorable Dorothy Kirie Kinnaird
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	

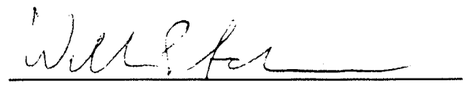
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,	)	
Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on 5-8-02 at 10 a.m. or as soon thereafter as counsel may be heard, I shall appear before the Honorable Dorothy Kirie Kinnaird, or any judge sitting in her stead, in Courtroom 2402 of the Richard J. Daley Center, Chicago, Illinois and shall then and there present Petitioner Stebbins' Agreed Motion to Modify March 13, 2002 Order, a copy of which is attached hereto.

DR. THEODORE E. STEBBINS, JR.



One of the Attorneys for Dr. Theodore E. Stebbins, Jr.

William P. Schuman, P.C.
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Firm No. 90539

CERTIFICATE OF SERVICE

I, William P. Schuman, attorney for Dr. Theodore E. Stebbins, Jr., state that I caused to be served a copy of the attached Notice of Motion and Petitioner Stebbins' Agreed Motion to Modify March 13, 2002 Order upon:

See Attached Service List

by causing it to be placed in a postage-paid envelope addressed to the foregoing and deposited in the United States Mail located at 227 West Monroe Street, Chicago, Illinois on May 2, 2002.

William P. Schuman

Service List
Buntrock, et al. v Terra, et al.
Case No. 00 CH 13859

William Quinlan
James R. Carroll
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Chicago, IL 60606
Counsel for: James Donnelley, Marshall Field V, Kathleen Foster, Dr. Robert Hamada & Frederick Krehbiel

Nafti Michaeli
3263 N. Street N.W.
Washington, D.C. 20007
Defendant named in 00 CH 13859

Mark Heatwole
Scott J. Szala
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35 West Wacker Drive
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Counsel for: Terra Foundation

Joel J. Bellows
Bellows & Bellows
79 West Monroe, Suite 800
Chicago, IL 60603

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

REVISED MOTION FOR ATTORNEYS' FEES AND COSTS OF KELLOGG, HUBER, HANSEN, TODD & EVANS, PLLC, BY DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER IN RESPONSE TO ORDER OF MARCH 13, 2002

1. Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker (collectively, "Defendant Directors") respectfully submit this revised motion for an order directing the Terra Foundation for the Arts ("Terra") to pay their attorneys' fees and costs pursuant to the Restated Bylaws of Terra Foundation for the Arts ("Bylaws") and this Court's Orders of March 13, 2002 and August 29, 2001.

2. In support hereof, Defendant Directors incorporate by reference their original motion for attorneys' fees of Kellogg, Huber, Hansen, Todd & Evans, PLLC, filed Sept. 14, 2001, including the declaration of K. Chris Todd in support thereof and the detailed billing statements submitted to the Court in conjunction therewith, and all subsequent briefing on the matter.

3. In its Order of March 13, 2002, the Court directed that any revised fee petition be supported by affidavits of counsel, Defendant Directors, or both, addressing various circumstances of the retention and representation. The declaration of Leonard Garment is submitted in conjunction with this revised petition in response to the Court's order. See Exh A. Also attached to this application are confirmations signed by each Defendant Director of the accuracy of statements in this petition and the declaration, and the reasonableness of the fees and expenses of counsel.

4. The Court also directed the Defendant Directors to eliminate billing entries relating to certain actions in the United States District Court for the Northern District of Illinois and the Law Division of this Court. Defendant Directors reiterate their position that all Kellogg, Huber fees and expenses sought in the original petition ($392,106.66) were incurred in connection with this lawsuit. In response to the Court's order, however, Defendant Directors have calculated the amount that Kellogg, Huber, Hansen, Todd & Evans, PLLC, billed for preparation, travel to Chicago and appearances in federal court on June 28, 2001, as $25,939.59. Defendants have also calculated the amount billed by Kellogg Huber from July 27, 2001, to August 31, 2001, as $37,299.40. If it is the Court's intention to decline to consider fees for any work in the federal court or law division actions, Defendant Directors submit, without waiving their objections to this

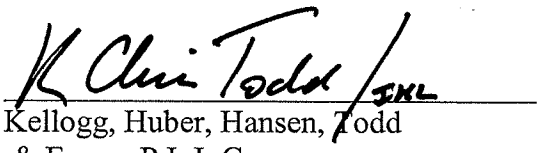
16di-002952

approach, that the above amounts should be subtracted from the total originally requested. Accordingly, for the Court's convenience, Defendant Directors have recalculated fees and expenses for Kellogg Huber as $328,867.67.

5. This application is without prejudice to Defendant Directors' substantive and procedural objections to the Consent Judgment and Order entered by the Court in this matter on July 26, 2001, and without prejudice to Defendant Directors' right to indemnification from the Foundation.

Respectfully submitted,

ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER



Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
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Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
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Attorneys for Defendants

April 24, 2002

16di-002953

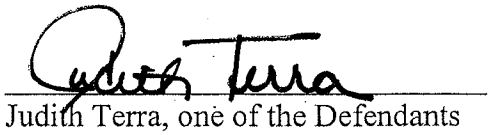
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

CONFIRMATION OF JUDITH TERRA

I, Judith Terra, a defendant in the above-captioned matter, hereby state under penalty of perjury that I have reviewed the Revised Motions for Attorney's Fees and Costs of counsel for Defendant Directors in the above matter and the declaration of Leonard Garment in support thereof, and state that to the best of my knowledge and belief that the references insofar as they relate to the undersigned are true and correct.

In addition, I have reviewed the bills submitted by my counsel in connection with the above-captioned case and believe them to be necessarily incurred and reasonable.



Judith Terra, one of the Defendants

16di-002954

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kiris Kinnaird

CONFIRMATION OF ALAN SIMPSON

I, Alan Simpson, a defendant in the above-captioned matter, hereby state under penalty of perjury that I have reviewed the Revised Motions for Attorney's Fees and Costs of counsel for Defendant Directors in the above matter and the declaration of Leonard Garment in support thereof, and state that to the best of my knowledge and belief that the references insofar as they relate to the undersigned are true and correct.

In addition, I have reviewed the bills submitted by my counsel in connection with the above-captioned case and believe them to be necessarily incurred and reasonable.

Alan Simpson, one of the Defendants

16di-002955

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

Plaintiffs,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,

Defendants.

No. 00 CH 13859

Hon. Dorothy Kirie Kinnaird

CONFIRMATION OF PAUL TUCKER

I, Paul Tucker, a defendant in the above-captioned matter, hereby state under penalty of perjury that I have reviewed the Revised Motions for Attorney's Fees and Costs of counsel for Defendant Directors in the above matter and the declaration of Leonard Garment in support thereof, and state that to the best of my knowledge and belief that the references insofar as they relate to the undersigned are true and correct.

In addition, I have reviewed the bills submitted by my counsel in connection with the above-captioned case and believe them to be necessarily incurred and reasonable.

Paul Tucker

Paul Tucker, one of the Defendants

489921.1

16di-002956

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker (collectively, "Defendants") respectfully move the Court for an order directing the Terra Foundation for the Arts ("Terra") to pay their attorneys' fees and costs pursuant to the Restated Bylaws of Terra Foundation for the Arts ("Bylaws") and this Court's order of August 29, 2001.[1] In support

[1]To be clear, Defendants again assert their substantive and procedural objections to the Consent Judgment and Order of July 26, 2001 ("Consent Judgment and Order"). During the August 29, 2001 hearing, however, the Court invited all parties to file petitions for attorneys fees if they are entitled to payment by virtue of either (1) "the filing of this lawsuit" or (2) "the consent decree." Aug. 29, 2001 Tr. at 26. Defendants petition the Court for their fees by virtue

hereof, Defendants submit the Declaration of K. Chris Todd. Defendants further incorporate by reference all pleadings, files, and records in this action; material that may be judicially noticed by this Court; the presentations and arguments of counsel, if any; and other such matters that the Court may properly consider, and in further support state as follows:[2]

1. Since June 22, 2001, Kellogg Huber, Hansen, Todd & Evans, P.L.L.C. ("Kellogg Huber"), has represented the Defendants — each of whom is a director of the Foundation — in the above-captioned matter.

2. Kellogg Huber is a law firm with extensive litigation and telecommunications practices. Eighteen of its attorneys are engaged in an active litigation practice in both state and federal trial and appellate courts across the country. This case was handled at Kellogg Huber primarily by Chris Todd, Neil Gorsuch, David Ross, and John Longwell.

3. Chris Todd has substantial public and private sector litigation experience. For over a decade he served as a federal prosecutor in the United States Attorney's Office for the Southern District of New York, and as an Associate Counsel to the Office of Independent Counsel for the Iran/Contra matter. For the last ten years, Mr. Todd's practice has concentrated

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of "the filing of this lawsuit," not pursuant to the Consent Judgment and Order. Moreover, the Foundation's Bylaws require the Foundation to indemnify directors for "expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they . . . are made parties . . . by reason of being" directors. Terra Bylaws Art. X § a. Defendants thus are submitting this petition on that basis, without prejudice to their objections regarding the substantive and procedural propriety of the Consent Judgment and Order.

[2]The fees sought in this Motion do not include fees and expenses for performed but as-yet unbilled work. It also does not include fees and expenses associated with future work on post-trial motions or any appeal. Accordingly, Defendants anticipate filing a supplemental motion for additional fees and costs at a later date.

on litigation matters in state and federal courts. Before joining Kellogg Huber, Mr. Todd was head of the litigation section of the Washington office of Johnson & Gibbs, which was a three-hundred person law firm. Neil Gorsuch, a Marshall Scholar and Truman Scholar, received his *juris doctor cum laude* from Harvard University Law School in 1991, and clerked for the Honorable David Sentelle (United States Court of Appeals for the District of Columbia Circuit) and for Justice Byron R. White (United States Supreme Court). David Ross graduated from the Columbia University School of Law in 1995. John Longwell graduated *magna cum laude* from the University of Georgia School of Law in 1999, where he was Order of the Coif and an editor of the University of Georgia Law Review. Before entering private practice, Mr. Longwell clerked for the Honorable Vaughn R. Walker (United States District Court for the Northern District of California).

4. The Bylaws provide that the Foundation "shall indemnify any and all of its directors . . . against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties . . . by reason of being or having been" a director, unless that person is found "liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicated on the existence of such liability." Bylaws Art. X § a. None of the Defendants was found liable for any misconduct in his or her service as a director, and the matter was not settled "by agreement predicated on the existence of such liability." Instead, plaintiffs voluntarily dismissed their claims against Defendants.

5. Attached hereto as Exhibit A is the Declaration of K. Chris Todd, which explains that the rates for each individual that worked on the case are Kellogg Huber's standard hourly

billing rates, which were established as the market rates for individuals based upon their skills and education. Concurrent herewith, Defendants have filed a Motion for Leave to Submit Fee Statements Under Seal for *In Camera* Review; once a sealing order is entered, Defendants will submit detailed billing statements evidencing the actual time expended by individuals working on the case each day, the identity of the individuals performing the work, the legal tasks performed, and the applicable hourly rate.

6. The detailed billing statements that will be submitted to the Court reflect that Kellogg Huber performed a large number of significant tasks since becoming involved in the case. In addition to several court appearances, Kellogg Huber has prepared numerous pleadings. Kellogg Huber also handled several related projects, including interviewing Assistant Attorney General Perkins, meeting with clients, interviewing potential witnesses, and learning the extensive file and background information regarding this case.

7. In addition to the services performed, the time expended, the attorneys involved, and the hourly rate, the reasonableness of a petition for attorneys fees depends upon "the skill and standing of the attorney involved, the difficulty of the work, the novelty or difficulty of the issues, the importance of the matter, the benefit obtained by the client, and the usual and customary charge for such services." *Cabrera v. First National Bank of Wheaton*, No. 2-00-0781, 2001 WL 845979 *12 (Ill. App. July 18, 2001) (affirming award of $70,000 for securing dismissal of complaint). These factors further support the award of attorneys fees sought by this Motion.

8. With respect to the "skill and standing of the attorney[s] involved," each lawyer involved in this case is highly qualified to have worked on a matter of this complexity. Mr. Todd

brought over two decades of complex litigation experience to this matter, and he was supported by lawyers with exceptional educations and significant litigation experience. *See* ¶ 3, *supra*.

9. This case also presented significant procedural and substantive difficulties. Most significantly from a procedural prospective, Kellogg Huber did not become involved in the case until June 22, 2001. This required Kellogg Huber to familiarize itself quickly with the history of the Foundation and the case. Moreover, Kellogg Huber was required to deal with three opposing counsel — Sidley Austin Brown & Wood, Quinlan & Crisham, and the Illinois Attorney General — each of whom generally prepared its own papers in response to filings by Kellogg Huber. For example, Kellogg Huber was required to respond in less than one day to three briefs totaling over 80 pages in opposition to the Defendants' objections to the proposed settlement.

10. Substantively, this case has presented complex novel legal issues, including the fiduciary duties of not-for-profit foundation directors, the proper role of Attorneys General in such cases, and the proper role for the courts in settlements of such cases. This required counsel to expend significant time and resources researching these areas of law, and searching decisions from across the country for analogous cases. For this reason alone, both the "the difficulty of the work" and the "novelty [and] difficulty of the issues" favor awarding the attorneys fees sought by this motion.

11. Finally, this matter is one of significant public interest. The Attorney General intervened in the case purportedly "to protect the interests of the People of Illinois." *See* Attorney General's Complaint for Declaratory Judgment, Injunction, Breach of Fiduciary Duty, Removal, Accounting, Receiver and Appointment of New Directors ¶ 1 (Sept. 25, 2000). And

the efforts of Kellogg Huber have generated significant public interest. See Exhibit B (collecting examples of such materials).[3]

For all of the reasons set forth herein, as well as in the accompanying declaration, Defendants respectfully request that the Court direct the Foundation to pay Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., $392,106.06, which represents the reasonable value of the services rendered and costs disbursed by Kellogg Huber to date in its representation of Defendants.

A proposed order is attached.

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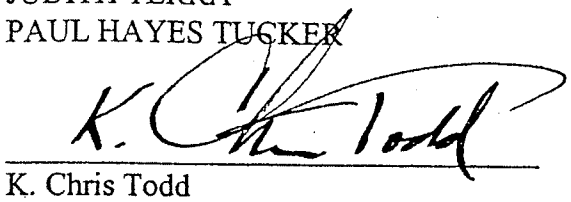
[3]Neither the "the benefit obtained by the client" nor "the usual and customary charge for such services" is applicable here. As to the former, fee petitions are often filed after a case is completed. Nevertheless, while Defendants' efforts to date have not always resulted in favorable rulings, those adverse decisions are being appealed; "[t]he benefit obtained by the client" will not be capable of complete determination until those appeals are resolved. As to the latter, given the unique nature of the proceedings in this case and the time at which Kellogg Huber became involved, it is not possible to determine a "usual and customary charge." Significantly, however, Kellogg Huber charged its standard rates and handled the case as it would any other dispute of this nature. *See generally* Declaration of K. Chris Todd (September 14, 2001).

Respectfully submitted,

ALAN K. SIMPSON
JUDITH TERRA
PAUL HAYES TUCKER



K. Chris Todd
Neil M. Gorsuch
David E. Ross
John H. Longwell
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
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Telephone: (202) 326-7900
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Attorneys for Defendants

September 14, 2001

16di-002963

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

ORDER GRANTING THE MOTION FOR ATTORNEYS' FEES AND COSTS OF DEFENDANTS ALAN K. SIMPSON, JUDITH TERRA, AND PAUL HAYES TUCKER

The Court having considered the Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker, all papers and materials filed in opposition thereto, the arguments of counsel, the entire record herein, and being duly advised in the premises:

IT IS HEREBY ORDERED THAT Defendants' motion be, and hereby is, GRANTED.

IT IS FURTHER ORDERED THAT within ten days of entry of this order, the Foundation shall send to Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., a check in the

amount of $392,106.06, payable to "Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.", for fees and expenses related to the representation of Alan K. Simpson, Judith Terra, and Paul Hayes Tucker.

_____

Dorothy Kirie Kinnaird
Circuit Court Judge

Dated: _____, 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	Hon. Dorothy Kirie Kinnaird

DECLARATION OF K. CHRIS TODD

I, K. Chris Todd, declare as follows in support of the Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker:

1. I am a member of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. I am also a member in good standing of the bars of New York, Texas, and the District of Columbia. I served as a law clerk for the Honorable William M. Taylor, Jr., United States District Court, Northern District of Texas (1972-73), as a trial attorney in the United States Department of Justice, Tax Division, Criminal Section (1975-78), and as an Assistant United States Attorney for

the Southern District of New York (1978-87). I also served as Associate Counsel in the Office of Independent Counsel for the Iran/Contra Matter, as head of the White House/National Security Council group (1987-89).

2. I have been lead or co-lead counsel in numerous matters in federal and state courts, including complex antitrust, commercial, RICO, securities, contract and tort cases. I served as head of the litigation section of the Washington office of Johnson & Gibbs, which was a three-hundred person law firm.

3. I am responsible for supervising the work performed by Kellogg, Huber, Hansen, Todd & Evans during its representation of Judith Terra, Alan K. Simpson, and Paul Hayes Tucker in this matter. The following attorneys at my firm, among others, also represented Ms. Terra, Senator Simpson, and Dr. Tucker in this matter: Neil M. Gorsuch, partner, David E. Ross, partner, and John H. Longwell, associate.

4. The aforementioned Kellogg, Huber, Hansen, Todd & Evans attorneys, among other attorneys and legal assistants, spent a total of 1,241.5 hours representing Ms. Terra, Senator Simpson and Dr. Tucker in this matter.

5. My firm typically bills clients for time spent on their matters at hourly rates. Our partner rates — during this engagement — ranged from $325 to $450; associate rates ranged from $235 to $285; and legal assistant rates ranged from $75 to $145. These rates are comparable to, if not significantly below, the rates charged by other firms in analogous cases, and were established as the market rates for individuals based upon their skills and education.

6. At the firm's standard rates, multiplied by the hours expended by each of the professionals who worked on the matter, the total fee request for the services provided by

Kellogg, Huber, Hansen, Todd & Evans to date is $355,282.50. I regularly reviewed the time records for this matter, which were provided to the client on a monthly basis, and attest that the hours of service provided were reasonable and necessary in support of the work on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker.

7. In addition, Kellogg, Huber, Hansen, Todd & Evans incurred expenses in the amount of $36,823.56. I reviewed these expenses and attest that the expenses incurred were reasonable and necessary in support of the work on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker.

8. The total request for fees and related expenses for Kellogg, Huber, Hansen, Todd & Evans on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker in this matter is $392,106.06.

9. Once Defendants' Motion for Leave to Submit Fee Statements Under Seal for *In Camera* Review is entered, Defendants will submit detailed billing statements of the services rendered and out-of-pocket expenses incurred by Kellogg, Huber, Hansen, Todd & Evans on behalf of Ms. Terra, Senator Simpson, and Dr. Tucker since June 22, 2001.

10. The statements to be submitted once a sealing order is entered include the date of service rendered, the person rendering the service, a detailed statement of the service rendered, and the amount of time spent providing the service.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

Date: September 14, 2001

K. Chris Todd

16di-002969

Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, NW
Suite 400
Washington, DC 20036

June 30, 2001
Invoice # 20010653

Terra Foundation for the Arts
c/o Verner, Liipfert, Bernhard, McPherson
& Hand
901 15th Street, NW
Suite 700
Washington DC 20005-2301
Attn: Leonard Garment, Esquire
Re: U.S.D.C. Litigation - Terra
Foundation for the Arts
Matter #: 3015-01402

Professional Services

			Hours
06/22/2001	KCT	Conference with Neil Gorsuch; telephone conference with Neil Gorsuch, and Leonard Garment; conference with Neil Gorsuch, and Scott Attaway.	6.50
	NMG	Review materials; attend telephone conference.	3.00
	SKA	Conference with Chris Todd, Neil Gorsuch, and David Ledecky; research REDACTED	4.50
06/23/2001	KCT	Review materials in preparation for filing TRO in Chicago.	4.75
	SKA	Research REDACTED ; draft summary of cases.	7.50
06/24/2001	NMG	Review materials from Leonard Garment and legal memorandum from Scott Attaway; telephone conferences with Paul Tucker, Chris Todd and John Longwell.	6.00
	JHL	Telephone conferences with Paul Tucker, Chris Todd and Neil Gorsuch on REDACTED	3.00

			Hours
06/24/2001	JAR	Proofread memorandum in support of TRO.	2.00
06/25/2001	KCT	Telephone conferences with Neil Gorsuch, and John Longwell; dictate affidavit of Alan K. Simpson; review materials in preparation of TRO-Chicago federal court; telephone conference with John Longwell; telephone conference with Laurel Bellows; telephone conference with Paul Hayes Tucker; telephone conference with Donald Ratner; review Alan K. Simpson's affidavit; review Paul Hayes Tucker's affidavit.	9.00
	NMG	Prepare temporary restraining order papers and various conferences on same.	13.00
	SKA	Research REDACTED	3.50
	JHL	Draft and revise declaration of Paul Tucker; review litigation documents and other materials from Donald Ratner; research various legal issues for TRO.	13.50
	BMM	Conference with Neil Gorsuch; arrange schedule for paralegal resources in anticipation of filing TRO; telephone conference with C. Smith regarding summons and civil action sheet.	1.50
	JAR	Proofread memorandum in support of TRO.	2.00
06/26/2001	KCT	Telephone conference with Laurel Bellows; telephone conference with Leonard Garment; multiple conferences with Neil Gorsuch; review Alan Simpson's affidavit; telephone conference with Paul Hayes Tudker, and John Longwell; edit Paul Tucker's affidavit over the phone with John Longwell; conference with Judith Terra regarding REDACTED ; telephone conference	9.00

16di-002972

			Hours
		with Laurel Bellows, Neil Gorsuch, and John Longwell; prepare for TRO hearing (review historical materials).	
06/26/2001	NMG	Prepare temporary restraining order papers and conferences on same.	9.50
	SKA	Research REDACTED conference and exchange emails with Neil Gorsuch; review and comment on draft TRO brief.	8.25
	JHL	Revise declaration of Paul Tucker; review documents and draft fact section of TRO brief; research various legal issues and draft section of TRO brief on irreparable harm.	15.00
	BMM	Cite-check and edit memorandum in support of TRO; review court rules; telephone conferences with Bellows & Bellows; review summons and complaint.	8.25
	JAR	Proofread and cite-check memorandum in support of TRO; organize research materials.	6.75
	SCD	Cite-check the TRO memorandum; collect the exhibit and affidavit documents; prepare clean copies of the documents for exhibits; review facts and confirm the cites to uniform format and style; proof the memorandum.	5.50
	KAM	Cite-check motion for temporary restraining order; review federal and local court rules regarding service of process; perform internet research regarding defendants' official titles.	5.50
	JAW	Assist with cite-checking of TRO.	5.00

16di-002973

			Hours
06/26/2001	RHC	Compile, organize, and redact exhibits in support of motion for temporary restraining order.	2.00
06/27/2001	KCT	Conference with Neil Gorsuch; telephone conference with John Longwell; telephone conference with Neil Gorsuch, John Longwell, and Laurel Bellows; review declaration of Paul Hayes Tucker; telephone conference with Paul Hayes Tucker; telephone conference with Larry Livinson, and Emily Murphy regarding conferences in Chicago; multiple conferences with Neil Gorsuch, and John Longwell; telephone conference with John Longwell, and Laurel Bellows; telephone conference with Neil Gorsuch, John Longwell, and Marsha Wolf; telephone conference with Laurel Bellows, Neil Gorsuch and Johnl Longwell regarding Stephanie Marshall.	13.00
	NMG	Prepare TRO papers; multiple conferences regarding same.	12.00
	SKA	Research and draft memo on REDACTED ; exchange emails with Neil Gorsuch; review and comment on draft TRO brief.	3.50
	JHL	Coordinate and revise declarations; revise fact section of TRO brief; prepare complaint; proof documents; obtain verifications from Judith Terra; final proofreading and preparations for filing.	16.50

16di-002974

			Hours
06/27/2001	BMM	Cite-check, proof, and edit memorandum of law; prepare and review notice of motion, civil cover sheet, summons; edit complaint, memorandum; prepare exhibits; edit index and cover to exhibits; prepare for filing with the court and service; telephone conferences and e-mail communication with Marsha Wolf.	15.25
	JMB	Create case binder; proof briefs; create civil cover sheet; coordinate logistics with local counsel in Chicago.	6.00
	SCD	Cite-check the TRO memorandum; collect the exhibit and affidavit documents; prepare clean copies of the documents for exhibits; review facts and confirm the cites to uniform format and style; proof the memorandum.	7.00
	MRD	Cite-check fact section; organize exhibits; prepare exhibit list.	9.75
	KAM	Cite-check and review subsequent history of cases cited in motion for temporary restraining order.	4.50
	JAW	Assist with cite-check of TRO and preparation of exhibits.	18.00
	RHC	Compile, organize, and redact exhibits in support of motion for temporary restraining order; proof and cite-check memorandum in support of motion for TRO.	3.50
	LRM	Research REDACTED ; discuss case with John Longwell.	3.00
06/28/2001	KCT	Travel to Chicago for emergency hearing before Judge Bucklo; conferences with all participants in effort to compel TRO filing;	19.50

16di-002975

			Hours
		conference with Neil Gorsuch, Larry Livinson, Leonard Garment, and Laurel Bellows at Bellows & Bellows; appearance in federal court; prepare TRO to be filed in Cook County Circuit Court Chancery Division.	
	NMG	Travel to Chicago, Illinois; prepare for and attend federal court hearing; prepare papers for state court.	21.00
	SKA	Research and draft e-mail to Neil Gorsuch regarding **REDACTED**	1.25
	JHL	Research issues of **REDACTED** for TRO; provide assistance on various projects to team in Chicago.	7.00
	BMM	Cite-check, proof, and edit memorandum, motion; prepare exhibits; telephone conferences with Bellows firm; research.	9.75
	JAW	Assist with cite-checking TRO and motion; prepare of exhibits.	14.00
	RHC	Compile, organize, and redact exhibits in support of motion for temporary restraining order; proof and cite-check memorandum in support of motion for TRO.	8.00
	LRM	Research **REDACTED** research discuss with John Longwell; draft memorandum summarizing holdings of key cases.	5.25
06/29/2001	KCT	Conferences with Leonard Garment, Neil Gorsuch, Laurel Bellows, and Joel Bellows in Chicago; file TRO motion in Cook County Circuit Court (Judge Kinnaird); appear at TRO motion hearing; consult with Neil	11.75

16di-002976

			Hours	
		Gorsuch, Leonard Garment, Laurel and Joel Bellows regarding next steps.		
06/29/2001	NMG	Prepare for and attend state court hearing; return to Washington, D.C.	15.50	
	JHL	Research **REDACTED**	2.00	
		For professional services rendered	381.50	Amount $101,665.00
		Additional Charges :		
06/25/2001	KCT	Facsimile		25.00
	NMG	Lexis/Nexis - N. Gorsuch		10.87
	NMG	Federal Express Invoice # - 5-041-48395 - M. Wolf		13.54
	NMG	Lexis/Nexis - N. Gorsuch		11.09
	SKA	Westlaw - S. Attaway		411.11
	JHL	Westlaw - J. Longwell		605.71
	BMM	Temp Help- LegalSource Inv# 01-558 6/25-7/01/01		977.50
	JMB	Duplication		5.00
	JMB	Facsimile		1.50
	JMB	Westlaw - J. Bartlow		113.51
	JMB	Duplication		0.50
	JMB	Facsimile		1.00
	JMB	Duplication		0.30
	JMB	Duplication		0.40
	JMB	Duplication		2.70
	JMB	Duplication		0.30

16di-002977

			Amou
06/25/2001	MB	Duplication	0.60
	MB	Duplication	36.60
	MB	Duplication	14.50
	MB	Duplication	64.30
	MB	Duplication	12.00
	MB	Duplication	6.40
	MB	Duplication	4.20
06/26/2001	KCT	Facsimile	20.50
	KCT	Facsimile	20.50
	KCT	Duplication	54.30
	KCT	Duplication	301.10
	KCT	Duplication	40.00
	NMG	Lexis/Nexis - N. Gorsuch	267.47
	NMG	Lexis/Nexis - N. Gorsuch	291.78
	NMG	Federal Express Invoice # - 612-81-5855 - Marsha Wolf	13.54
	SKA	Westlaw - S. Attaway	657.42
	JHL	Facsimile	2.50
	JHL	Facsimile	4.00
	JHL	Facsimile	4.50
	JHL	Facsimile	5.00
	BMM	Local transportation- Cab- Red Top Inv# 1285908275 for M. Nemith to 1200 S Hayes Street	31.93
	BMM	Duplication	2.70
	BMM	Duplication	15.40

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			Amount
06/26/2001	JMB	Duplication	0.40
	JMB	Duplication	8.70
	JMB	Facsimile	14.00
	MB	Facsimile	13.00
	MB	Duplication	0.80
	MB	Duplication	0.70
	MB	Duplication	0.40
	MB	Facsimile	7.50
	MB	Facsimile	0.50
	MB	Facsimile	24.00
	MB	Facsimile	7.50
	MB	Duplication	1.20
	MB	Facsimile	1.50
	SCD	Duplication	17.00
	SCD	Duplication	2.40
	SCD	Duplication	0.30
	SCD	Duplication	13.10
	KAM	Lexis/Nexis - K. McEwen	86.00
	GW	Facsimile	5.00
	JAW	Duplication	3.50
	JAW	Lexis/Nexis - J. Woodson	251.00
	JAW	Westlaw - J. Woodson	130.48
	JAW	Duplication	2.70
06/27/2001	NMG	Long Distance	2.90

			Amou
06/27/2001	NMG	Long Distance	1.50
	NMG	Lexis/Nexis - N. Gorsuch	14.43
	SKA	Westlaw - S. Attaway	133.66
	SKA	Lexis/Nexis - S. Attaway	199.00
	JHL	Duplication	3.90
	JHL	Duplication	8.10
	JHL	Duplication	1.20
	JHL	Westlaw - J. Longwell	153.66
	JHL	Duplication	2.20
	JHL	Duplication	0.20
	BMM	Long Distance	1.60
	BMM	Lexis/Nexis - B. Murphy	278.5?
	JMB	Duplication	1.00
	JMB	Duplication	0.30
	JMB	Lexis/Nexis - J. Bartlow	10.00
	JMB	Westlaw - J. Bartlow	695.31
	MB	Facsimile	5.00
	MB	Facsimile	5.00
	MB	Duplication	12.40
	SCD	Duplication	2.70
	SCD	Duplication	17.60
	SCD	Duplication	0.40
	SCD	Duplication	4.50

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			Amount
06/27/2001	SCD	Local transportation- Cab- Red Top Inv# 1285908275 to/from 7729 Virginia Lane	51.41
	MRD	Duplication	0.60
	MRD	Duplication	6.10
	MRD	Duplication	5.70
	MRD	Duplication	1.10
	MRD	Duplication	4.80
	KAM	Lexis/Nexis - K. McEwen	47.50
	FAX	Long Distance	1.10
	GW	Duplication	171.00
	GW	Duplication	97.80
	JAW	Lexis/Nexis - J. Woodson	285.00
	JAW	Duplication	1.10
	RHC	Duplication	0.80
	RHC	Duplication	33.50
	RHC	Duplication	7.20
	RHC	Duplication	1.80
06/28/2001	KCT	Local transportation- Cab- Red Top Inv# 1285908275 to NAP	29.24
	SFB	Facsimile	18.00
	NMG	Airfare: Diners Club Inv. 7/13/01 - N. Gorsuch - Trip to Chicago	1,391.58
	NMG	Lexis/Nexis - N. Gorsuch	23.54
	SKA	Westlaw - S. Attaway	209.53
	JHL	Westlaw - J. Longwell	695.34

			Amou
06/28/2001	BMM	Duplication	2.30
	BMM	Duplication	64.10
	BMM	Local transportation- Cab- Red Top Inv# 1285908275 for M. Nemith from United Air to KHHTE	53.25
	BMM	Local transportation- Cab- Red Top Inv# 1285908275 Temp Cab Home for M. Nemith	26.34
	BMM	Duplication	7.00
	JMB	Document delivery- Washington Express Inv# 21065-10821 to Terra Res	6.87
	JMB	Facsimile	1.50
	JMB	Duplication	0.20
	MB	Duplication	2.40
	GW	Duplication	1.50
	JAW	Duplication	40.50
	RHC	Duplication	18.00
	RHC	Duplication	36.00
	RHC	Local transportation- Cab- Red Top Inv# 1285908275 to IAD	57.18
	RHC	Duplication	1.80
	RHC	Duplication	1.50
	RHC	Duplication	0.40
	RHC	Duplication	7.50
	RHC	Duplication	4.50
	RHC	Duplication	2.50
	RHC	Duplication	4.50

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			Amount
06/28/2001	RHC	Duplication	0.10
	RHC	Duplication	4.50
	RHC	Duplication	5.80
06/29/2001	JHL	Westlaw - J. Longwell	1,089.24
	JMB	Duplication	29.50
	MB	Duplication	3.60
06/30/2001	NMG	Lexis/Nexis - N. Gorsuch	224.25
		Total costs	$10,978.61
		Total amount of this bill	$112,643.61

Timekeeper Summary

Name	Hours	Rate	Amount
K. Chris Todd	73.50	450.00	$33,075.00
Neil M. Gorsuch	80.00	375.00	$30,000.00
Scott K. Attaway	28.50	285.00	$8,122.50
John H. Longwell	57.00	235.00	$13,395.00
Bernadette M. Murphy	34.75	145.00	$5,038.75
Jonathan A. Rabkin	10.75	125.00	$1,343.75
Jarnitha A. Woodson	37.00	115.00	$4,255.00
Jessica M. Bartlow	6.00	115.00	$690.00
Kathy A. McEwen	10.00	115.00	$1,150.00
Michelle R. Dawson	9.75	115.00	$1,121.25
Subash C. Dalai	12.50	115.00	$1,437.50
R. Heath Carver	13.50	105.00	$1,417.50
Leland R. Miller	8.25	75.00	$618.75

16di-002983

Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, NW
Suite 400
Washington, DC 20036

July 31, 2001
Invoice # 200107701

Terra Foundation for the Arts
c/o Verner, Liipfert, Bernhard, McPherson
& Hand
901 15th Street, NW
Suite 700
Washington DC 20005-2301
Attn: Leonard Garment, Esquire

Re: U.S.D.C. Litigation - Terra
Foundation for the Arts
Matter #: 3015-01402

Professional Services

			Hours
07/01/2001	KCT	Telephone conference with Neil Gorsuch; review historical documents in preparation for July 2 hearing before Judge Kinnaird.	7.00
	NMG	Conference with Chris Todd, et al.; prepare papers for state court hearing.	12.00
07/02/2001	KCT	Telephone conference with Joel Bellows; conferences with Laurel Bellows, Joel Bellows, and Leonard Garment at Bellows & Bellows in Chicago; telephone conference with Neil Gorsuch and John Longwell regarding hearing and objection process.	13.00
	NMG	Conference with Chris Todd, John Longwell, et al. regarding hearing and objection process; memorandum regarding same.	4.00
	JHL	Research	6.50

REDACTED

; telephone

			Hours
		conference regarding options with Chris Todd and Neil Gorsuch; draft outline of litigation options.	
	LRM	Discuss case with John Longwell; research REDACTED	4.50
07/03/2001	KCT	Conference with Neil Gorsuch, John Longwell, Larry Levinson, and Leonard Garment regarding hearing on July 2 and next steps; conference with Neil Gorsuch, and John Longwell; telephone conference with Joel Bellows, Neil Gorsuch, and John Longwell.	3.50
	NMG	Telephone conference with working group; outline responses.	8.00
	JHL	Telephone conferences with Leonard Garment, Chris Todd, Neil Gorsuch, et al. regarding litigation options; research REDACTED ; draft agenda items for July 4 telephone conference.	5.25
	LRM	Research REDACTED draft memorandum to John Longwell summarizing findings.	4.50
07/04/2001	KCT	Telephone conference with Neil Gorsuch, and John Longwell; telephone conference with Joel Bellows and Laurel Bellows.	1.25
	NMG	Telephone conference with working group.	1.00
	JHL	Telephone conferences regarding litigation options with Joel Bellows, Laurel Bellows, Chris Todd,	2.25

			Hours
		and Neil Gorsuch; research REDACTED	
07/05/2001	KCT	Conference with John Longwell; telephone conference with Joel Bellows, and John Longwell; telephone conference with Leonard Garment, Larry Levinon, John Longwell, and Joel Bellows; review documents; conference with David Ross, and John Longwell.	3.00
	DER	Conference with Chris Todd and John Longwell regarding status; review pleadings and transcripts; outline potential issues.	5.00
	JHL	Draft speaking points for telephone conference; review tape of board meeting; research REDACTED	12.50
07/06/2001	KCT	Telephone conference with John Longwell; telephone conference with Neil Gorsuch, and John Longwell; review draft letter from Leonard Garment; telephone conference with Neil Gorsuch; telephone conference with John Longwell; review historical documents; conference with Neil Gorsuch, Jide Nzelbie, John Lonwell, and David Ross.	3.25
	NMG	Conference with David Ross, John Longwell, Chris Todd, et al.	1.00
	DER	Conference with Chris Todd, Neil Gorsuch, John Longwell and Jide Nzelibe regarding status; review pleadings and transcripts; research REDACTED	8.75
	JON	Research REDACTED conference with Neil Gorsuch, John Longwell and David Ross on who to proceed on Terra Foundation matter.	4.00

16di-002986

			Hours
07/06/2001	JHL	Contact Professor Brody and discuss background and declaration; draft letter to Therese Harris concerning Hal Perkins interview; provide background to David Ross and Jide Nzelibe; discuss motion for leave to add counterclaims and parties; review cases and statutes on REDACTED conference with Chris Todd, Neil Gorsuch, Jide Nzelbe, and David Ross.	8.00
07/07/2001	DER	Research REDACTED	4.00
	JHL	Review litigation materials and draft counterclaims.	5.00
07/08/2001	KCT	Review historical documents.	1.00
	DER	Research REDACTED draft insert regarding same.	4.00
	JON	Research legal issues; begin draft of motion to amend.	6.50
	JHL	Review litigation materials and draft counterclaims.	4.50
07/09/2001	DER	Research REDACTED draft insert regarding same; conference with John Longwell regarding same; review file regarding earlier proceedings.	11.00
	JON	Research on REDACTED ; draft of motion to amend to add counterclaims; review documents and procedural history of case.	4.00
	JHL	Conference with Larry Levinson regarding mediation materials; telephoone conference with Don Ratner to discuss needed documents and background material; revise counterclaims; review transcript from July 2 hearing.	7.50

16di-002987

			Hours
07/10/2001	KCT	Telephone conference with John Longwell; review documents.	0.75
	DER	Conferences with Neil Gorsuch, John Longwell, and Jide Nzelibe regarding objections; draft same; research same.	9.00
	JON	Draft motion to amend; finish memorandum in support of motion to amend; draft proposed order; conferences with David Ross, John Longwell, and Neil Gorsuch to discuss strategy in Terra Foundation case; research and review of procedural history of case and background facts.	8.75
	JHL	Review counterclaims motion; review fairness hearing insert to brief; revise counterclaims; discuss and formulate outline for objections brief; discuss Hal Perkins interview with Attorney Generals office; coordinate Theodore Stebbins letter and revisions; telephone conference with Professor Evelyn Brody regarding declaration and compile materials.	7.50
07/11/2001	KCT	Telephone conference with John Longwell regarding case; telephone conference with Neil Gorsuch, David Ross, and John Longwell; review documents; telephone conference with Neil Gorsuch.	1.25
	NMG	Review and revise outline; conferences with David Ross, John Longwell, et al regarding motion papers; telephone conference with Chris Todd.	3.00
	DER	Conference with John Longwell regarding status; draft objections; research same; telephone conference wtih Chris Todd, Neil Gorsuch, and John Longwell.	12.75

16di-002988

			Hours
07/11/2001	JON	Telephone conference with Professor Brody on Terra case; review and edit motion to amend; start research on REDACTED	6.50
	JHL	Discuss objections with David Ross, Neil Gorsuch and Jide Nzebile; telephone conference with with Joel Bellows regarding Stephanie Marshall interview and litigation materials; draft response to Attorney General office regarding Hal Perkins interview; telephone conference with Chris Todd regarding brief and interviews; research REDACTED telephone conference with Chris Todd, Neil Gorsuch, and David Ross.	6.50
07/12/2001	KCT	Telephone conferences with Neil Gorsuch, David Ross, John Longwell, and Leonard Garment; conferences with Neil Gorsuch, David Ross and John Longwell.	0.75
	NMG	Conferences with Chris Todd, David Ross, and John Longwell on ideas for objections.	1.00
	DER	Conference with Chris Todd, Neil Gorsuch, John Longwell and Jide Nzelibe regarding status; draft objections; research same.	14.25
	JON	Research REDACTED ; research on ; draft portion of motion on substantive claims; review Brody declaration materials; conference with Chris Todd, Neil Gorsuch, John Longwell, and David Ross regarding status.	12.25

16di-002989

			Hours
07/12/2001	JHL	Telephone conferences with Professor Evelyn Brody, Don Ratner, Jim Wilson, Leonard Garment, and Joel Bellows; conferences with Chris Todd, Neil Gorsuch, and David Ross to discuss brief; review pleading index from Jim Wilson; review documents received from Don Ratner; draft facts on Theodore Stebbins and Stephanie Marshall conflict of interest for objections brief; research and draft section on REDACTED	8.50
07/13/2001	KCT	Conferences with Neil Gorsuch, David Ross, and John Longwell; conferences with Leonard Garment, Larry Levinson, local counsel, Neil Gorsuch, David Ross, Jide Nzelibe, and John Longwell; review documents in preparation for interview of Floyd Perkins.	1.75
	NMG	Conference with team on objections and counterclaims.	1.25
	DER	Conference with John Longwell regarding status; draft objections; research same; conferences with Leonard Garment, Larry Levinson, Emily Murphy, Chris Todd, Neil Gorsuch, John Longwell, and Jide Nzelibe regarding status.	10.25
	JON	Research on REDACTED research on ; draft portion of motion on substantive claims; review Brody declaration materials; conference with clients REDACTED	9.25
	JHL	Interview Paul Tucker REDACTED ; revise section of brief on waste of corporate assets; conferences with Leonard Garment, Chris Todd, and Terra team regarding Floyd Perkins interview,	6.50

16di-002990

			Hours
		counterclaims and objections to settlement.	
07/14/2001	DER	Draft objections; research same.	4.25
	JON	Draft list of issues to be reviewed by declarants; research on REDACTED	6.50
	JHL	Review documents received from Brian Crowe; compile documents and questions for Floyd Perkins interview.	2.50
07/15/2001	KCT	Prepare for examination of Assistant Attorney General Floyd Perkins; conference with D. Ross regarding same.	1.75
	DER	Draft objections; research same; conference with John Longwell regarding status; conference with Chris Todd regarding status; conferences with Leonard Garment and Suzie Garment regarding status.	12.25
	JHL	Compile outline of questions and document binder for Floyd Perkins interview; review and edit draft objections.	4.50
07/16/2001	KCT	Telephone conference with Leonard Garment; telephone conferences with David Ross and John Longwell; telephone conferences with Leonard Garment, David Ross, and John Longwell; travel to Chicago; attend interview with Assistant Attorney General Floyd Perkins before Thomas Ioppollo, Assistant Attorney General; telephone conference with David Ross regarding the interview; discuss same with John Longwell.	12.50
	DER	Draft objections; research same; conference with John Longwell regarding status; conference with Chris Todd regarding status;	13.75

16di-002991

			Hours
		telephone conference with Laurel Bellows regarding status; telephone conference with Larry Levinson regarding same.	
07/16/2001	JON	Review Brody Affidavit; research on	4.00
		REDACTED	
	JHL	Conference with Chris Todd in preparation for Floyd Perkins interview; conferences with various counsel; participate in interview of Floyd Perkins.	14.00
07/17/2001	KCT	Telephone conference with Leonard Garment; telephone conference with Leonard Garment, David Ross and John Longwell regarding interview with Floyd Perkins; telephone with Laura Bellows, David Ross, and John Longwell; telephone conference with David Ross.	1.50
	DER	Draft objections; research same; conference with John Longwell regarding status; conference with Chris Todd regarding status; telephone conference with Laurel Bellows regarding status; telephone conference with Larry Levinson regarding same; telephone conference with Emily Murphy regarding status.	14.00
	JHL	Draft and revise counterclaims; draft Paul Tucker affidavit; telephone conference with Laurel Bellows regarding interview and objections; compile exhibits for objections.	13.50
	BMM	Conference with David Ross; cite check, proof, and edit opposition.	6.25
	RHC	Proof and cite-check objections of defendants to the proposed settlement; compile, organize and	11.50

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			Hours
		proof citation Materials for Inclusion with Filing.	
07/18/2001	KCT	Telephone conferences with Neil Gorsuch; telephone conference with David Ross; telephone conference with David Ross, and John Longwell; conference with Neil Gorsuch; multiple telephone conferences with Leonard Garment; multiple telephone conferences with Robert Cummins, local counsel; multiple telephone conference with John Longwell; multiple telephone conferences with David Ross, and John Longwell; preparation of objections to proposed settlement and change in Terra by-laws.	13.50
	NMG	Review and revise objections for filing; conferences on same; conferences with Chris Todd.	10.00
	DER	Draft objections; research same; conference with John Longwell regarding status; conference with Chris Todd regarding status; conference with Neil Gorsuch regarding status; telephone conference with Larry Levinson regarding same; telephone conference with Emily Murphy regarding status.	14.00
	JON	Review and correct Brody declaration.	2.50
	JHL	Draft John Longwell affidavit regarding Floyd Perkins interview; review Evelyn Brody affidavit; compile exhibits; edit, review and proofread counterclaims and objections to settlement in preparation for filing.	14.50
	BMM	Telephone conference with court; cite check, proof, and edit objections to proposed settlement agreement; prepare exhibits to appendices; review motions regarding	16.25

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			Hours
		counterclaims; conferences with David Ross and John Longwell.	
07/18/2001	DMB	Proofread and cite-check portion of objections to proposed settlement; assist with organizing exhibits; proofread final version of brief and input edits.	6.00
	RHC	Proof and cite-check objections of defendants to the proposed settlement; compile, organize and proof citation materials for inclusion with filing.	14.75
07/19/2001	KCT	Multiple telephone conferences with Robert Cummins, local counsel; multiple telephone conferences with John Longwell; telephone conferences with Leonard Garment and John Longwell; conference with John Longwell; telephone conferences with Neil Gorsuch and Joel Bellows; telephone conferences with David Ross and John Longwell; review documents and exhibits of case; telephone conferences with Neil Gorsuch and John Longwell; telephone conferences with Paul Hayes Tucker and John Longwell; review counterclaims.	7.75
	NMG	Telephone conferences with Chris Todd and Joel Bellows; telephone conferences with Chris Todd and John Longwell.	1.00
	DER	Revise objections; telephone conference with Chris Todd regarding status; telephone conference with Leonard Garment regarding same; conferences with Bob Cummins and Tom Cronin regarding status; research REDACTED	19.75
	JHL	Revise and circulate REDACTED to Paul Tucker, Judith Terra and Alan Simpson; incorporate REDACTED	7.50

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			Hours
		; prepare for filing with Chicago counsel.	
07/19/2001	BMM	Cite check, proof, and edit revised version of objections to settlement agreement; compile and assemble exhibits to appendices; prepare objections and appendices for filing with the court and service on parties.	7.00
	RHC	Proof and cite-check objections of defendants to the proposed settlement; compile, organize and proof citation materials for inclusion with filing; make filing and distribute service copies in Chicago.	19.75
07/20/2001	KCT	Telephone conference with Tom Cronin, local counsel; telephone conferences with Robert Cummins, David Ross, and John Longwell; multiple telephone conferences with Robert Cummins; telephone conference with Leonard Garment; multiple telephone conferences with Senator Alan Simpson; multiple telephone conferences with Paul Hayes Tucker; conferences with Judith Terra, Naftali Micheli, David Ross, and John Longwell; review documents with Alan Simpson; review documents with David Ross.	7.25
	DER	Draft motion to unseal proceedings; research same; conferences with Chris Todd, Judith Terra, and John Longwell **REDACTED** ; review draft answer and counterclaims.	8.00
	JHL	Draft and review consolidated answers and counterclaims of Judith Terra, Paul Tucker, and Alan Simpson; prepare for filing with Chicago counsel.	6.00

			Hours
07/23/2001	KCT	Telephone conference with David Ross; telephone conference with Leonard Garment; conferences with Robert Cummins and Tom Cronin; prepare for hearing July 24, Circuit Court, Cook County (Chancery Division); review responses to objections (Attorney General, Plaintiffs Buntrock/Gidwitz; Terra Foundation); conferences with Neil Gorsuch, and David Ross.	9.00
	NMG	Review opposition briefs; conference with Chris Todd, et al. on same; draft reply brief.	10.00
	DER	Prepare for hearing; review opposition briefs; research and draft reply to same.	8.75
	JHL	Review responses of Attorney General, Foundation and Gidwitz/Buntrock to objections to settlement; conferences with Leonard Garment, Chris Todd, and Robert Cummins regarding responses, reply brief and hearing.	3.25
	RHC	Compile and organize materials from objections of defendants to proposed settlement filing for use in preparation for reply brief.	2.50
07/24/2001	KCT	Conference with David Ross in preparation for hearing before Judge Kinnaird; conferences with Robert Cummins, Tom Cronin, Leonard Garment, and Larry Levinson; conference with counsel for plaintiffs; appearance before Judge Kinnaird.	16.00
	DER	Travel to Chicago; prepare for hearing; conference with Chris Todd, Leonard Garment, Larry Levinson, Bob Cummins, and Tom Cronin regarding same; attend hearing; travel to Washington.	17.50

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			Hours
07/24/2001	BMM	Cite check, proof, and edit reply in support of opposition; email edited brief to co-counsel.	2.75
	RHC	Proof and cite-check reply brief.	3.50
07/25/2001	KCT	Telephone conferences with Leonard Garment, David Ross, and Robert Cummins regarding hearing on July 24; telephone conferences with Leonard Garment, Larry Levinson, Robert Cummins, Neil Gorsuch, David Ross, and John Longwell; telephone conferences with Robert Cummins, Neil Gorsuch, Leonard Garment, and Larry Levinson; telephone conference with Paul Hayes Tucker; telephone conference with Robert Cummins; review documents in preparation for appeal.	9.50
	NMG	Conference with team on strategy; review latest research results.	3.00
	DER	Review recent correspondence; research **REDACTED**/ conference with Chris Todd and John Longwell regarding status.	2.00
	JON	Correspond with Professor Brody on status of Terra Foundation case.	1.00
	JHL	Review complaint and accompanying materials; review arguments for motions to dismiss statutory and unjust enrichment counts; telephone conference with Leonard, Chris Todd and Robert Cummins regarding hearing and appeal options.	4.00
07/26/2001	KCT	Telephone conference with Larry Levinson; telephone conferences with Larry Levinson, Leonard Garment, Robert Cummins, Tom Cronin, David Novoselski, Neil Gorsuch, David Ross, and John Longwell; telephone conferences with Tom Cronin, Neil	4.75

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			Hours
		Gorsuch, David Ross, and John Longwell; conferences with Neil Gorsuch, David Ross, and John Longwell.	
07/26/2001	NMG	Attend team conference.	1.50
	DER	Review recent correspondence; conference with John Longwell regarding status.	0.75
	JHL	Telephone conferences with Larry Levinson, Chris Todd, and Robert Cummins regarding motion to vacate and possible independent causes of action; review Charitable Trust Act.	3.50
	LRM	Research REDACTED research REDACTED as well as REDACTED ; send memorandum on findings to John Longwell.	3.25
07/27/2001	KCT	Conferences with David Ross, and John Longwell regarding counterclaims and factual gathering.	2.00
	DER	Participate in strategy telephone conference; review recent correspondence; research REDACTED	5.00
	JHL	Review Illinois REDACTED REDACTED cases telephone conferences with Leonard Garment, Larry Levinson, Chris Todd, and Robert Cummins regarding motion to vacate, directors' meeting, and issues for appeal.	5.50
	BMM	Provide John Longwell with jury instructions.	0.25

			Hours
07/27/2001	RHC	Compile and organize unsealed exhibits to objections of defendants to proposed settlement to be filed.	1.50
	LRM	Research REDACTED short memorandum to John Longwell summarizing findings. send	2.50
07/30/2001	KCT	Telephone conferences with Robert Cummins, Larry levinson, Neil Gorsuch, and David Ross; review counter-claims.	2.75
	NMG	Conferences with David Ross, John Longwell, Bob Cummins, Chris Todd, et al.; regarding REDACTED REDACTED review memorandum.	4.00
	DER	Participate in multiple telephone conferences with Chris Todd, Neil Gorsuch, John Longwell, Leonard Garment, Larry Levinson, Bob Cummins and Tom Cronin regarding status and strategy; research REDACTED draft memorandum regarding same; research REDACTED draft memorandum regarding same; review recent correspondence regarding conflicts of interest.	8.50
	JHL	Draft chronology of Terra litigation; draft memorandum regarding REDACTED telephone conferences with Leonard Garment, Larry Levinson, Robert Cummins, Judith Terra and Paul Tucker regarding REDACTED	7.00

			Hours	
		REDACTED ; review cases on claim and issue preclusion.		
07/30/2001	RHC	Compile and organize unsealed exhibits to objections of defendants to proposed settlement to be filed.	8.00	
07/31/2001	KCT	Telephone conferences with co-counsel and David Ross; review counter-claims.	1.75	
	NMG	Attend conference calls; review pleadings.	4.00	
	DER	Participate in multiple telephone conferences with Chris Todd, Neil Gorsuch, John Longwell, Larry Levinson, Bob Cummins, and Tom Cronin regarding status and strategy; research REDACTED draft memorandum regarding same; conference with Judith Terra regarding REDACTED ; draft script for board of directors meeting.	9.00	
	JHL	Draft section of memorandum on REDACTED telephone conferences with Larry Levinson and Robert Cummins regarding filing of counterclaims as independent action and other issues; interview Judith Terra regarding REDACTED ; review new complaint.	4.25	
	RHC	Compile, organize, and send unsealed exhibits to objections of defendants to proposed settlement to be filed in Chicago.	6.50	
		For professional services rendered	764.75	Amount $223,941.25

Additional Charges :

			Amount
06/28/2001	KCT	Cell Phone Charges - Verizon Wireless Inv# 0284947353 6/28-7/2/01	55.07
	NMG	Business Meals - N. Gorsuch Trip to Chicago, IL 6/28-6/29/01	9.48
	NMG	Cell Phone Charges - Verizon Wireless Inv# 0285655262 6/28-6/29/01	24.53
	NMG	Long Distance Other- N. Gorsuch Trip to Chicago, IL 6/28-6/29/01	13.93
	NMG	Parking - N. Gorsuch Trip to Chicago, IL 6/28-6/29/01	54.00
	NMG	Local Transportation- Cabs - N. Gorsuch Trip to Chicago, IL 6/28-6/29/01	45.00
	NMG	Lodging- N. Gorsuch Trip to Chicago, IL 6/28-6/29/01	226.36
07/01/2001	NMG	Facsimile	6.50
	NMG	Lexis/Nexis - N. Gorsuch	338.89
07/02/2001	NMG	Lexis/Nexis - N. Gorsuch	108.44
	NMG	Facsimile	14.50
	JHL	Westlaw - J. Longwell	721.15
	JMB	Facsimile	1.50
	JMB	Facsimile	6.00
	JMB	Duplication	1.80
	JMB	Duplication	0.90
07/03/2001	NMG	Lexis/Nexis - N. Gorsuch	25.33
	JHL	Westlaw - J. Longwell	134.95
	JMB	Duplication	0.60

			Amount
07/03/2001	MB	Facsimile	0.50
	MB	Facsimile	0.50
	MB	Long Distance	6.20
07/04/2001	JHL	Westlaw - J. Longwell	325.80
07/05/2001	KCT	Duplication	11.50
	DER	Westlaw - D. Ross	253.45
	JHL	Westlaw - J. Longwell	780.25
	JMB	Duplication	31.40
	JMB	Duplication	11.40
	MB	Long Distance	6.60
	KJT	Facsimile	1.50
	KJT	Facsimile	1.50
	KJT	Facsimile	1.50
	KJT	Westlaw - K. Thompson	220.03
	KJT	Westlaw - K. Thompson	2.08
07/06/2001	DER	Lexis/Nexis - D. Ross	44.00
	DER	Westlaw - D. Ross	710.15
	JHL	Delivery - Washington Express Inv. #21070-10821- 2130 H ST-NW WASH DC	11.63
	JHL	Facsimile	1.00
	JHL	Facsimile	1.00
	JHL	Westlaw - J. Longwell	660.45
	JHL	Duplication	0.10
	JHL	Facsimile	1.00
	JHL	Facsimile	1.00

			Amount
07/06/2001	JHL	Federal Express Invoice # - 6-128-15866 - Ms. Therese Harris	13.54
	JMB	Duplication	11.30
	KJT	Duplication	0.50
	KJT	Duplication	0.40
07/08/2001	JON	Westlaw - J. Nzelibe	547.84
	JHL	Duplication	7.30
07/09/2001	DER	Westlaw - D. Ross	765.75
	JON	Westlaw - J. Nzelibe	212.09
	JHL	Transcripts- Perfect Solution Inv# 7/9/01 for meeting	235.13
	MB	Duplication	7.20
07/10/2001	DER	Duplication	12.90
	DER	Westlaw - D. Ross	227.90
	JON	Westlaw - J. Nzelibe	84.54
	JHL	Long Distance	2.00
	JHL	Federal Express Invoice # - 6-128-15868 - Prof. Evelyn Brody	26.90
	JHL	Duplication	17.00
	JHL	Duplication	3.10
	JHL	Duplication	16.80
	JHL	Duplication	22.20
	JHL	Duplication	16.60
	JMB	Duplication	7.80
	MB	Duplication	0.10
07/11/2001	DER	Duplication	4.80

			Amount
07/11/2001	DER	Westlaw - D. Ross	311.06
	JON	Westlaw - J. Nzelibe	610.15
	JHL	Westlaw - J. Longwell	61.10
	JHL	Duplication	0.80
	JHL	Facsimile	4.50
	MB	Facsimile	2.00
07/12/2001	DER	Westlaw - D. Ross	720.25
	DER	Duplication	0.90
	JON	Delivery - Washington Express Inv. #21070-10821 - 555 12 ST-NW WASH DC	12.69
	JHL	Westlaw - J. Longwell	154.51
	MB	Facsimile	2.00
	MB	Facsimile	1.50
	MB	Duplication	0.30
	MB	Facsimile	2.00
	TRS	Federal Express Invoice # - 6-128-15872 - Thomas Ioppollo	13.54
07/13/2001	DER	Duplication	31.20
	DER	Westlaw - D. Ross	405.31
	JON	Westlaw - J. Nzelibe	381.11
	AMS	Duplication	22.80
	MB	Business Meals - Petty Cash - M. Bennour	26.27
	MB	Parking - Petty Cash - M. Bennour	7.00
	MB	Duplication	23.90
	KJT	Duplication	1.70

			Amount
07/14/2001	JON	Westlaw - J. Nzelibe	561.02
07/15/2001	DER	Westlaw - D. Ross	603.33
	DER	Duplication	25.20
	JHL	Duplication	30.10
07/16/2001	RHS	Federal Express Invoice # 6-128-15877 - J. William Roberts	13.54
	DER	Duplication	0.10
	DER	Facsimile	0.50
	DER	Duplication	1.20
	DER	Duplication	0.20
	DER	Lexis/Nexis - D. Ross	156.00
	DER	Westlaw - D. Ross	363.54
	JON	Westlaw - J. Nzelibe	535.45
	JHL	Duplication	63.20
	JHL	Airfare: Diners Club Inv. 8/15/01 - J. Longwell - Trip to Chicago	280.00
	JHL	Duplication	18.60
	JHL	Duplication	26.20
	JHL	Duplication	25.50
	JHL	Federal Express Invoice # 5-044-93478 - J. Wilson	27.14
	AMS	Facsimile	2.00
07/17/2001	DER	Duplication	0.10
	DER	Facsimile	1.00
	DER	Facsimile	15.50
	DER	Duplication	0.10

			Amount
07/17/2001	DER	Westlaw - D. Ross	263.43
	DER	Duplication	12.00
	JON	Westlaw - J. Nzelibe	284.71
	JHL	Long Distance	1.10
	JHL	Westlaw - J. Longwell	212.66
	JHL	Facsimile	1.00
	BMM	Duplication	3.00
	BMM	Duplication	3.00
	BMM	Lexis/Nexis - B. Murphy	281.25
	DDL	Westlaw - D. Leverette	30.96
	DDL	Lexis/Nexis - D. Leverette	72.50
	AMS	Duplication	29.6(
	AMS	Duplication	33.80
	AMS	Facsimile	6.50
	AMS	Duplication	43.00
	MB	Facsimile	0.50
	MB	Facsimile	0.50
	JAW	Duplication	24.60
	RHC	Duplication	14.80
	RHC	Duplication	1.70
	RHC	Duplication	1.70
	RHC	Duplication	0.80
	RHC	Duplication	1.50
	RHC	Duplication	2.40

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			Amount
07/17/2001	RHC	Duplication	1.30
	RHC	Duplication	3.70
	RHC	Duplication	0.50
	RHC	Duplication	5.80
	RHC	Duplication	1.80
	RHC	Duplication	0.10
07/18/2001	KCT	Delivery - Washington Express Inv.# 21072-10821- 1 THOS CIRCLE NW	11.63
	DER	Westlaw - D. Ross	181.40
	DER	Duplication	5.60
	DER	Duplication	10.40
	BMM	Westlaw - B. Murphy	25.12
	BMM	Duplication	2.60
	BMM	Duplication	1.80
	DMB	Duplication	1.30
	DMB	Duplication	0.60
	DMB	Westlaw - D. Burke	54.93
	DDL	Lexis/Nexis - D. Leverette	3.75
	AMS	Duplication	81.90
	AMS	Facsimile	2.00
	MB	Duplication	1.60
	MB	Facsimile	13.50
	MB	Facsimile	13.50
	KAM	Lexis/Nexis - K. McEwen	80.00

			Amount
07/18/2001	KAM	Duplication	1.10
	RHC	Duplication	5.40
	RHC	Duplication	0.60
	RHC	Duplication	1.10
	RHC	Duplication	3.60
	RHC	Duplication	0.40
	RHC	Duplication	0.20
	RHC	Duplication	3.30
	RHC	Duplication	0.60
	RHC	Duplication	2.00
	RHC	Duplication	6.40
	RHC	Duplication	100.50
	RHC	Duplication	0.70
	RHC	Duplication	0.10
	RHC	Duplication	0.10
	KJT	Duplication	0.60
	CLT	Westlaw - M. Nemith	435.34
	CLT	Westlaw - M. Nemith	1.23
07/19/2001	DER	Duplication	5.60
	DER	Duplication	0.30
	DER	Duplication	1.40
	DER	Westlaw - D. Ross	504.94
	JHL	Facsimile	2.00
	JHL	Long Distance	3.20

			Amount
07/19/2001	JHL	Facsimile	13.50
	JHL	Facsimile	15.00
	JHL	Facsimile	29.00
	JHL	Facsimile	0.50
	JHL	Long Distance	0.80
	JHL	Long Distance	1.30
	BMM	Duplication	8.80
	BMM	Duplication	4.40
	BMM	Duplication	3.00
	BMM	Duplication	1.40
	BMM	Duplication	1.00
	BMM	Duplication	1.60
	BMM	Duplication	69.00
	BMM	Duplication	1.50
	DMB	Westlaw - D. Burke	5.29
	DMB	Duplication	2.60
	MB	Long Distance	2.20
	RHC	Airfare: Diners Club Inv. 8/15/01 - H. Carver - Trip to Chicago	280.00
	RHC	Business Meals - Petty Cash - H. Carver - Trip to Chicago	28.24
	RHC	Transit Card - Petty Cash - H. Carver - Trip to Chicago	1.50
	RHC	Duplication	0.30
	RHC	Duplication	3.10
	RHC	Duplication	1.30

			Amou
07/19/2001	RHC	Duplication	33.30
07/20/2001	KCT	Delivery - Washington Express Inv.# 21072-10821- 1 THOS CIRCLE NW	11.63
	DER	Facsimile	1.50
	DER	Facsimile	6.00
	DER	Facsimile	6.00
	DER	Westlaw - D. Ross	394.39
	DER	Duplication	2.20
	DER	Long Distance	2.20
	JHL	Long Distance	2.40
	MB	Facsimile	19.00
	MB	Facsimile	8.50
	MB	Facsimile	0.5
	MB	Facsimile	19.00
	MB	Facsimile	1.50
	MB	Facsimile	1.50
	MB	Facsimile	2.50
	MB	Duplication	0.40
07/23/2001	KCT	Postage	0.34
	DER	Westlaw - D. Ross	472.12
	DER	Duplication	1.90
	DER	Duplication	0.10
	JHL	Duplication	18.80
	JHL	Westlaw - J. Longwell	335.88
	MB	Duplication	108.60

			Amount
07/23/2001	MB	Facsimile	0.50
	MB	Facsimile	0.50
	MB	Facsimile	0.50
	MB	Duplication	289.40
	MB	Duplication	0.30
	MB	Duplication	12.20
	KJT	Duplication	4.20
07/24/2001	KCT	Duplication	83.90
	NMG	Long Distance	3.10
	DER	Westlaw - D. Ross	79.26
	JON	Federal Express Invoice # - 6-128-15888 - Evelyn Brody	19.42
	JHL	Long Distance	0.90
	BMM	Westlaw - B. Murphy	34.37
	MB	Duplication	87.00
	RHC	Duplication	1.70
	RHC	Duplication	7.10
	MLM	Duplication	0.10
	MLM	Duplication	15.10
07/25/2001	MB	Duplication	2.50
	MB	Long Distance	0.80
	MB	Long Distance	2.10
	MB	Duplication	17.50
	MB	Duplication	2.00
	MB	Duplication	5.50

			Amount
07/25/2001	KJT	Duplication	11.20
07/26/2001	KCT	Federal Express Invoice # - 6-128-15890 - Tom Cronin	13.54
	DER	Delivery - Washington Express Inv. # 21072-10821- 901 15 ST NW REAR LOBBY	5.81
	DER	Duplication	0.10
	JON	Delivery - Washington Express Inv. # 21072-10821- 555 12 ST-NW WASH DC	12.69
	JMB	Duplication	3.00
	MB	Duplication	0.80
	MB	Facsimile	2.50
	MB	Duplication	0.50
07/27/2001	DER	Westlaw - D. Ross	347.79
	JHL	Westlaw - J. Longwell	598.71
07/28/2001	RHC	Duplication	263.50
	RHC	Duplication	66.00
	RHC	Duplication	146.40
07/30/2001	DER	Westlaw - D. Ross	680.66
	DER	Long Distance	1.92
	DER	Duplication	0.40
	JHL	Westlaw - J. Longwell	773.41
	JHL	Westlaw - J. Longwell	26.12
	MB	Facsimile	4.00
	MB	Facsimile	2.50
	RHC	Duplication	0.80
	KJT	Facsimile	3.00

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			Amount
07/30/2001	KJT	Facsimile	3.00
	KJT	Facsimile	2.50
	KJT	Facsimile	3.00
	KJT	Facsimile	2.50
	KJT	Duplication	1.50
	KJT	Facsimile	2.50
07/31/2001	DER	Duplication	0.20
	DER	Duplication	0.10
	DER	Facsimile	1.00
	DER	Facsimile	3.00
	DER	Facsimile	3.00
	DER	Facsimile	3.00
	DER	Facsimile	0.50
	DER	Facsimile	1.00
	DER	Westlaw - D. Ross	53.77
	DER	Facsimile	1.00
	DER	Facsimile	1.00
	DER	Long Distance	2.08
	DER	Federal Express Invoice # 6-128-15896 - Robert P. Cummins	62.00
	DER	Duplication	0.50
	AMS	Duplication	12.00
	MB	Facsimile	8.50
	MB	Facsimile	2.50
	MB	Duplication	1.20

		Amount
07/31/2001 RHC	Duplication	136.30
	Total costs	$21,444.66
	Total amount of this bill	$245,385.91

Timekeeper Summary

Name	Hours	Rate	Amount
K. Chris Todd	126.50	450.00	$56,925.00
Neil M. Gorsuch	64.75	375.00	$24,281.25
David E. Ross	216.50	325.00	$70,362.50
Jide O. Nzelibe	65.25	285.00	$18,596.25
John H. Longwell	170.50	235.00	$40,067.50
Bernadette M. Murphy	32.50	145.00	$4,712.50
David M. Burke	6.00	125.00	$750.00
R. Heath Carver	68.00	105.00	$7,140.00
Leland R. Miller	14.75	75.00	$1,106.25

16di-003014

Kellogg, Huber, Hansen, Todd & Evans, PLLC
1615 M Street, NW
Suite 400
Washington, DC 20036

August 31, 2001
Invoice # 20010821[illegible]4

Terra Foundation for the Arts
c/o Verner, Liipfert, Bernhard, McPherson
& Hand
901 15th Street, NW
Suite 700
Washington DC 20005-2301
Attn: Leonard Garment, Esquire
Re: U.S.D.C. Litigation - Terra
Foundation for the Arts
Matter #: 3015-01402

Professional Services

			Hours
08/01/2001	KCT	Telephone conferences with Larry Levinson, Neil Gorsuch, Robert Cummins, Tom Cronin, David Ross and John Longwell regarding status and strategy.	0.75
	NMG	Attend mulitple telephone conferences with working group.	0.75
	DER	Participate in multiple telephone conferences with Chris Todd, Neil Gorsuch, John Longwell, Larry Levinson, Robert Cummins and Tom Cronin regarding status and strategy; telephone conferences with Senator Simpson and Dr. Tucker REDACTED ; conference with Judith Terra and Larry Levinson regarding same; participate in board of director's meeting.	4.25
	JHL	Telephone conference regarding REDACTED with Larry Levinson, Robert Cummins, Judith Terra and Paul Tucker.	0.75

			Hours
08/02/2001	KCT	Telephone conferences with Larry Levinson, Neil Gorsuch, Robert Cummins, John Longwell, and David Ross.	0.75
	NMG	Attend telephone conference and review materials.	1.00
	DER	Participate in telephone conferences with Larry Levinson, Robert Cummins, Chris Todd, Neil Gorsuch and John Longwell.	0.75
	JHL	Telephone conference regarding REDACTED with Larry Levinson, Robert Cummins, Judith Terra and Paul Tucker.	1.00
08/03/2001	KCT	Telephone conferences with Larry Levinson, Robert Cummins, Neil Gorsuch, John Longwell, and David Ross.	0.75
	NMG	Attend telephone conferences; review Sidley and Winston memoranda and documents.	3.00
	DER	Participate in telephone conferences with Larry Levinson, Robert Cummins, Chris Todd, Neil Gorsuch and John Longwell; review draft amended complaint; review documents regarding potential conflicts of interest by counsel for Terra.	2.75
	JHL	Telephone conference with Larry Levinson and Bob Cummins regarding additional defendants and claims against law firms.	1.50
08/06/2001	KCT	Telephone conference with Neil Gorsuch and Larry Levinson.	0.25

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			Hours
08/06/2001	NMG	Telephone conferences with Larry Levinson, Chris Todd, et al.; review materials.	2.00
08/07/2001	KCT	Telephone conference with John Longwell.	0.25
08/08/2001	KCT	Telephone conference with Larry Levinson, Robert Cummins, and John Longwell; conference with Neil Gorsuch and John Longwell.	1.00
	NMG	Conference with John Longwell and Chris Todd.	0.50
	JHL	Telephone conference regarding board meeting and next steps with Larry Levinson, Robert Cummins, Chris Todd; revise Judith Terra letter regarding meeting; telephone conference with Chris Todd and Neil Gorsuch.	1.50
08/09/2001	DER	Draft script for August 14 board meeting; review letter regarding August 8 conference and assignments.	0.75
08/10/2001	NMG	Telephone conference with working group.	1.00
	DER	Telephone conference with Larry Levinson regarding status; review draft amended complaint; conference with Neil Gorsuch and John Longwell regarding same; prepare edits for same; participate in defense counsel telephone conference regarding status and strategy; review draft script.	6.50
	JHL	Telephone conferences with Larry Levinson, Len Garment, Robert Cummins, Neil Gorsuch and David Ross regarding motion for temporary restraining order to halt August 14	1.50

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			Hours
		Board meeting; discuss strategy with Neil Gorsuch and David Ross.	
08/12/2001	KCT	Telephone conference with David Ross and others.	0.50
	DER	Review draft amended complaint; telephone conference with Chris Todd regarding same; participate in defense group; telephone conference regarding same.	1.50
	JHL	Telephone conferences with Leonard Garment, Larry Levinson, Robert Cummins and David Ross regarding TRO filing.	0.50
08/13/2001	KCT	Conferences with David Ross; conference with Neil Gorsuch; telephone conference with Robert Cummins; review transcript.	0.75
	NMG	Telephone conference with working group.	0.50
	DER	Telephone conference with Larry Levinson regarding status; revise draft script; prepare memorandum to David Novoselsky regarding REDACTED prepare edits to motion for temporary restraining order; telephone conference with Chris Todd regarding status; research REDACTED draft same; review transcript of hearing on objections to entry of consent judgment; telephone conference with Tom Cronin regarding revisions and status; conferences with John Longwell and Neil Gorsuch regarding motion for temporary restraining order.	5.75
	JON	Review latest filings in Terra Foundation case; telephone conference with Larry Levinson to	1.00

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			Hours
		discuss Professor Brody's compensation.	
08/14/2001	KCT	Telephone conference with David Ross regarding next steps; telephone conference with Leonard Garment, Robert Cummins, and John Longwell.	1.00
	DER	Research and edit motion for attorneys fees; draft affidavit for Chris Todd; conference with Chris Todd regarding next steps.	2.25
	JHL	Telephone conferences with Leonard Garment, Chris Todd and Robert Cummins; discuss interview of Paul Tucker with Larry Levinson; review transcript of July 24 hearing.	3.50
	LRM	Review cases research REDACTED REDACTED research REDACTED	4.00
08/15/2001	DER	Research and edit motion for attorneys fees; draft affidavit for Chris Todd.	3.75
	JHL	Review documents for interview of Paul Tucker regarding REDACTED ; conduct telephone interview; draft memorandum regarding interview; discuss interview with Larry Levinson.	2.50
	LRM	Research REDACTED draft memorandum REDACTED discuss issue with J. Longwell.	4.00

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			Hours
08/17/2001	DER	Review motion to transfer.	0.50
	JHL	Review defendants' motion to transfer; review research for REDACTED and report to Neil Gorsuch and David Ross.	1.00
08/20/2001	KCT	Conference with Neil Gorsuch.	0.25
	NMG	Review memorandum on REDACTED conference with Chris Todd.	0.50
	DER	Revise motion for fees; revise affidavit of Chris Todd in support of motion for fees; research REDACTED	2.50
	JON	Draft letter update to Professor Brody regarding compensation.	1.00
08/21/2001	KCT	Telephone conference with Robert Cummins; conference with David Ross; telephone conference with Robert Cummins, Neil Gorsuch, and David Ross.	0.75
	NMG	Telephone conference with working group; review correspondence and cases REDACTED conference with David Ross regarding same.	2.00
	DER	Participate in defense counsel telephone conference regarding strategy; research REDACTED conference with Neil Gorsuch regarding same; draft memorandum regarding REDACTED	4.50
08/22/2001	DER	Telephone conference with Larry Levinson regarding Seventh Circuit appeal; review recent correspondence.	0.50

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			Hours
08/23/2001	DER	Review draft opposition to motion to transfer.	0.75
08/24/2001	DER	Review draft opposition to motion to transfer; research insert for same; draft insert for same; telephone conference with Tom Cronin regarding same.	3.50
08/27/2001	KCT	Telephone conference with David Ross; review motion for reassignment.	1.25
	DER	Review transcript of recent proceedings; telephone conference with Debbie Alstrand of Attorney General's office regarding withdrawing appeal; telephone conference with Larry Levinson regarding same; telephone conference with Robert Cummins regarding status; draft motion to withdraw appeal; prepare docketing statement and Rule 26 disclosure; review Sidley reply brief regarding transfer.	3.50
08/28/2001	KCT	Telephone conference with Leonard Garment and Neil Gorsuch; conference with Leonard Garment, Neil Gorsuch, and David Ross at Verner & Liipfert Office.	2.75
	NMG	Conference with Leonard Garment, Larry Levinson, Chris Todd and David Ross.	2.00
	DER	Conferences with Leonard Garment, Larry Levinson, Chris Todd, and Neil Gorsuch regarding status and strategy; revise motion to dismiss Seventh Circuit appeal; revise motion for attorneys fees.	3.25

	Hours	Amount
For professional services rendered	95.25	$29,676.25

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Additional Charges :

			Amount
06/28/2001	BMM	Local transportation - Cabs - Petty Cash - B. Murphy - Travel to Airport	29.00
07/06/2001	KCT	Cell Phone Charges - Voice Stream Wireless Inv# 8/8/01 7/6-7/9/01	61.47
07/17/2001	JHL	Local transportation- Cab- from NAP to Home	20.00
	RHC	Duplication - outside: Sequential Inv# 18430	470.72
07/18/2001	MWN	Duplication - outside: Sequential Inv# 18448	1,180.17
07/19/2001	DER	Local Travel -Cabs : D. Ross Trip to Chicago, IL	25.00
	DER	Airfare: D. Ross Trip to Chicago, IL	369.00
	DER	Business Meals : D. Ross Trip to Chicago, IL	6.55
	RHC	Local transportation- Cab- DCX Inv# 0081-7/01 to NAP	21.95
07/23/2001	KCT	Other - ConferenceCall.com Inv# I2175	68.88
07/24/2001	DER	Parking : D. Ross Trip to Chicago, IL	14.00
	DER	Airfare: D. Ross Trip to Chicago, IL	1,265.04
08/01/2001	DER	Facsimile	2.00
	DER	Facsimile	1.50
	DER	Business Meals - Cosi Catering and Delivery Inv# 84758	26.33
	DER	Duplication	1.00
	MB	Facsimile	0.50

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			Amount
08/01/2001	JHM	Duplication	78.90
	KRR	Long Distance	0.88
	KJT	Duplication	16.80
08/02/2001	DER	Duplication	2.90
	DER	Duplication	58.00
08/03/2001	DER	Duplication	0.90
	MLM	Duplication	0.10
08/06/2001	NMG	Long Distance	1.20
	NMG	Long Distance	0.88
	MB	Duplication	2.00
	MLM	Postage	0.55
08/09/2001	MB	Duplication	144.30
08/10/2001	DER	Facsimile	4.50
	AMS	Facsimile	1.50
	MB	Facsimile	1.50
	MB	Duplication	1.00
	MB	Facsimile	0.50
	MB	Facsimile	0.50
	MB	Facsimile	1.50
	MB	Duplication	11.00
	MB	Duplication	19.00
08/13/2001	DER	Westlaw - D. Ross	113.51
	DER	Facsimile	6.00

			Amount
08/13/2001	DER	Facsimile	1.50
	DER	Facsimile	1.50
	DER	Facsimile	2.00
	DER	Facsimile	6.00
	DER	Facsimile	4.50
	DER	Facsimile	1.50
	DER	Duplication	0.10
	MB	Duplication	22.40
08/14/2001	DER	Duplication	0.40
	MB	Duplication	7.50
	MB	Duplication	38.00
	KJT	Facsimile	2.00
08/15/2001	KCT	Facsimile	9.00
	DER	Duplication	1.80
	DER	Duplication	3.60
	DER	Facsimile	5.00
	JHL	Long Distance	2.56
08/16/2001	MB	Facsimile	1.00
	MB	Duplication	0.40
	MB	Facsimile	1.00
	MB	Facsimile	1.00
	MB	Facsimile	1.00
	MB	Facsimile	1.00

			Amount
08/16/2001	MB	Duplication	3.00
	MB	Facsimile	1.00
08/17/2001	JHL	Westlaw - J. Longwell	90.76
08/20/2001	MB	Duplication	0.50
	MB	Duplication	6.00
08/21/2001	MB	Duplication	51.00
	LRM	Duplication	6.50
	KJT	Duplication	0.20
08/22/2001	DER	Duplication	0.60
	DER	Facsimile	1.50
	MB	Facsimile	1.50
08/23/2001	DER	Duplication	12.40
08/24/2001	DER	Duplication	3.40
	JMB	Duplication	1.70
	MB	Duplication	5.10
	MB	Duplication	1.00
	MB	Facsimile	1.00
08/27/2001	DER	Duplication	0.10
	DER	Federal Express Invoice # 6-128-15933 - Robert P. Cummins	13.54
	DER	Duplication	0.10
	MB	Duplication	5.50
08/29/2001	MB	Duplication	25.30

			Amount
08/31/2001	MB	Duplication	0.30
	MB	Facsimile	22.50
		Total costs	$4,400.29
		Total amount of this bill	$34,076.54

Timekeeper Summary

Name	Hours	Rate	Amount
K. Chris Todd	11.00	450.00	$4,950.00
Neil M. Gorsuch	13.25	375.00	$4,968.75
David E. Ross	47.25	325.00	$15,356.25
Jide O. Nzelibe	2.00	285.00	$570.00
John H. Longwell	13.75	235.00	$3,231.25
Leland R. Miller	8.00	75.00	$600.00

16di-003026

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al., Defendants.	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

DECLARATION OF LEONARD GARMENT
IN SUPPORT OF REVISED MOTION FOR FEES

1. I am a member in good standing of the bars of the District of Columbia and the State of New York. I am of counsel to the Washington, D.C. law firm of Verner, Liipfert, Bernhard, McPherson & Hand, Chartered. My firm is counsel to defendants Alan Simpson, Judith Terra, and Paul Hayes Tucker, directors of the Terra Foundation for the Arts (the "Defendant Directors;" the "Foundation"), in this matter. The Foundation is a private nonprofit corporation organized under the laws of the State of Illinois. It owns and manages two museums, one in Chicago, Illinois, and one in

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Giverny, France. The value of the Foundation's art collection, real estate, and cash assets is approximately $450 million.

2. In addition to my law firm, the following firms and solo practitioners have performed legal services for the Defendant Directors in connection with the present case: Bellows and Bellows, P.C.; Cummins & Cronin, L.L.C.; Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.; David A. Novoselsky; and Shefsky & Froelich, Ltd. Pursuant to the Court's order dated August 29, 2001, all of the above practitioners filed petitions for reimbursement of fees.

3. By order dated December 14, 2001, the Court awarded Shefsky & Froelich $468,376.17 for legal services rendered from October 8, 2000, through June 21, 2001. By order dated March 13, 2002, the Court conditioned its award of reimbursement of fees to the remaining firms and practitioners upon their provision of the following information: (a) the dates on which counsel were retained; (b) the reasons for retention; (c) the dates, if any, of discharge; (d) when and how notice of retention was given to any counsel of record; (e) when and how such notice was given to, and other communications conducted with, Shefsky & Froelich; (f) when "parties to the mediated settlement" were notified of the intention of the above firms and practitioners, with the exception of Shefsky & Froelich, to seek reimbursement of fees; (g) what attempts have been made to avoid duplication of effort; and (h) how much of the fees for which reimbursement is sought has been paid.

4. The Court's questions appear directed towards the legitimate issue of why, given the expenditure of large sums of Court-approved money to reimburse previous counsel for the Defendant Directors, these same directors were compelled to retain new

counsel in order to secure proper representation of their interests. I provide answers to Court's specific questions below, but the answer to the general question may be summarized as follows. When this litigation began, the Defendant Directors had an interest in the well-being of the Foundation and an interest in avoiding personal liability. At that time, the Defendant Directors were in the majority of the board; their interest in the well-being of the Foundation appeared to have been adequately represented by the Foundation's counsel, Sidley & Austin. The Defendant Directors retained their own counsel, Shefsky & Froelich, to protect their personal interests.

However, during the Court-ordered mediation, the Assistant Attorney General, by unlawful and otherwise improper acts, took control of the board majority in the service of plans that were, in the view of the Defendant Directors, inimical to the well-being of the Foundation. Sidley & Austin, representing the Attorney General's majority, no longer represented the Defendant Directors' interest in the well-being of the Foundation. Shefsky & Froelich had secured agreement to releases of personal liability for the Defendant Directors. The recovery of Shefsky & Froelich's fees was bound up with the successful termination of the mediation process. Shefsky & Froelich declined to expand the scope of their representation so as to fill the void left by the change in Sidley's role.

Thus if the Defendant Directors were to pursue their interest in the well-being of the Foundation, they had to act quickly to secure new counsel. The new counsel, in turn, were forced to act quickly to try to stop the process.

5. On May 18, 2001, an adviser to Judith Terra visited Verner, Liipfert, Bernhard, McPherson & Hand to meet with me and my colleagues Harry McPherson and Lawrence Levinson. I had briefly represented Mrs. Terra several years before, on another

matter. I was told that Mrs. Terra was facing a crisis and had lost confidence in her existing counsel.

6. Mrs. Terra was seeking legal help in connection with a lawsuit filed in late September 2000 against her, Senator Simpson, and Dr. Tucker by two dissident directors of the Foundation, Dean Buntrock and Ronald Gidwitz. The two plaintiff directors alleged various acts of waste and mismanagement of Foundation resources. The Defendant Directors viewed these charges as "contrived" and wholly false.

7. The Attorney General of Illinois had joined in the complaint almost as soon as it was filed, further alleging that the Directors of the Foundation could not move the Foundation or its art collection outside the State of Illinois. The Attorney General's position, as it was described to me, was much the same as the position he took before the Court on the first day of this proceeding, September 25, 2000.

> The Court: [L]et's assume there is a museum in town that is simply not making it. There is not attendance, it is not doing well. It is just not supporting its efforts, it is not growing and, for whatever reason, it has to close. It is your position that even if that were the case, the assets would ultimately remain in the State of Illinois or the collection would be sold for the benefit of the people of the State of Illinois.
>
> Mr. Perkins: Yes, Judge, absolutely.
>
> The Court: And that is really what it comes down to. They can't ever move these assets elsewhere.
>
> Mr. Perkins: Your Honor, I have been on many cases and that is our position in every case.

See Exh B (Excerpt from 9/25/00 Transcript of Proceedings).

8. I was told that the Assistant Attorney General, in support of the above position, had asserted that Dan Terra, Mrs. Terra's late husband and the founder of the

Terra Foundation, intended that the Foundation stay in the Chicago area. But, we were told at the meeting, the contrary was true. The Foundation's governing documents placed no restriction on the Board's discretion to move Foundation assets. In fact, Dan Terra had been planning and taking steps, right up until his sudden death in June 1996, to move the headquarters of the Foundation and the bulk of his art collection to Washington, D.C. in order to expand the Foundation's artistic and educational reach beyond Chicago and Illinois.

9. At this initial meeting we learned that the parties to the dispute had entered into mediation under unusual circumstances. The head of the Foundation's independent litigation committee in the months leading up to the mediation was board member Theodore Stebbins, who was at that time in general agreement with the views of the Defendant Directors. The Assistant Attorney General, a strong proponent of mediation, had challenged Mr. Stebbins' role on the independent litigation committee and aired charges of conflicts of interest on Mr. Stebbins' part. Mr. Stebbins became a strong proponent of mediation. When the case moved into mediation, the proceedings and papers were "sealed" and Mr. Stebbins was able to avoid a public trial of the Attorney General's allegations.

10. Sidley & Austin believed that the Foundation's position on the key issue of Mr. Terra's intent was extremely strong. See Exh. C (Feb. 14, 2001, Mediation Statement). Nevertheless, Sidley & Austin agreed that the Foundation should participate in the mediation. Shefsky & Froelich advised the Defendant Directors to participate, explaining that mediation offered a potentially simple way to secure releases of personal liability.

11. At the meeting, we were also told that the Defendant Directors had agreed to enter into mediation in the mistaken belief that, since the charges against them were groundless, the process would produce a fair result. They were further reassured by the advice of Foundation counsel that a mediated settlement would require the agreement of the parties to the dispute. See Exh. D (Memorandum to Directors from Sidley & Austin). As the mediation progressed, however, the Assistant Attorney General played an increasingly dominant role, asserting non-negotiable positions and insisting not only that the Foundation had to be confined to Chicago, with a majority of its board composed of Illinois residents, but also that Senator Simpson, in particular, had to be dismissed from office as a director of the Foundation. See, e.g., Exh. E (correspondence representative of Attorney General's requirements, which varied in detail during the mediation, but maintained insistence on Illinois control). As of the time of our initial meeting with Mrs. Terra's advisor, the Foundation board was divided over the Attorney General's proposals, though it appeared that there were enough votes to enable the board to refuse his demands for control in the mediation process or otherwise.

12. The Defendant Directors felt they needed alternative legal representation because Shefsky & Froelich had declined, despite repeated requests, to mount a major attack on the mediation process, even as pressures by the Attorney General became more intense. Counsel had also declined Mrs. Terra's request that they bring to the Court's attention the "true facts" concerning Dan Terra's intent with regard to the Foundation. See Exh. F (May 19, 2001, Memorandum from Judith Terra to James Wilson) (one of many communications in which Mrs. Terra expressed dissatisfaction with the course of mediation and her representation by Shefsky & Froelich).

13. Most disturbing to the Defendant Directors, we were told, was the fact that one of the Shefsky & Froelich attorneys had written a letter to Mrs. Terra in which he complained about not having been paid and said that the firm would not allow him to continue the representation if its fees were not paid. See Exh. G (Letter of April 17, 2001, from James D. Wilson to Defendant Directors). The Defendant Directors, particularly Mrs. Terra, had come to the conclusion that they must withdraw from the mediation. They feared that Shefsky & Froelich, because of its expressed anxiety over fees, had an interest, contrary to the interests of the Defendant Directors, in continuing to participate in the mediation in order to bring it to a rapid conclusion, thereby expediting court action on their fee petition.

14. In sum, the Defendant Directors felt that they were, for all intents and purposes, without representation in their concern for the welfare of the Foundation. Indeed, Defendant Directors often felt compelled to take it upon themselves to communicate independently with the mediator. See, e.g., Exh. H (Letter of May 24, 2001, from Paul H. Tucker to David Hilliard).

15. After the initial meeting, we undertook, beginning on May 18, 2001, a preliminary inquiry into Illinois law on the governance of private corporate charitable foundations. We thought that if the Attorney General claimed a right to confine an Illinois foundation within the state, there must be some feature of Illinois law that supported his claim. On the contrary, we found that Illinois law, like the laws of most states, construes the purposes and powers of a foundation by reference to the founder's intent and the instruments of incorporation embodying that intent and requires of foundation directors the normal exercise of care and loyalty within this framework.

16. On May 23, we obtained a copy of the lengthy court docket in the case and used it as a starting point for our efforts to understand its procedural aspects. Our firm continued to review the legal and procedural background until June 7, when we discussed the case in more detail with Mrs. Terra. After this discussion, Mrs. Terra supplied us with additional documents and materials related to the case, including pleadings, trial transcripts, and communications between Mrs. Terra and the Court-appointed mediator. Our preliminary conclusion after the foregoing reviews and discussions was that the Assistant Attorney General had interfered, without any discernible justification, in the governance of a private foundation.

17. On June 8, the day after our meeting with Mrs. Terra, it was our understanding that a majority of the Foundation directors continued to oppose the Assistant Attorney General's demands. This majority consisted of Judith Terra, Senator Alan Simpson, Dr. Paul Tucker, Helene Ahrweiler, Ambassador Jacques Andreani, and Stephanie Marshall. We also understood that as of that date, Mr. Stebbins's support for the majority had become uncertain; we later learned that the Attorney General had continued applying pressure on Mr. Stebbins through circulation of a draft amended complaint, to be filed if the mediation was unsuccessful, naming Mr. Stebbins as a defendant and accusing him of serious professional misconduct. See Exh. I (March 21, 2001, Letter from James D. Wilson of Shefsy & Froelich to the Defendant Directors) ("[W]e had an agreement with the Attorney General that the copies [of the proposed amended complaint] would be marked 'confidential' so that Ted Stebbins need not endure these as public charges if the matter was settled.") The other likely supporters of

the Attorney General were the plaintiffs in the suit, Messrs. Buntrock and Gidwitz, as well as Ambassador Arthur Hartman and Margaret Daley.

18. Also on June 8, in order to verify aspects of the Defendant Directors' account and to initiate communication with their counsel, Shefsky & Froelich, Mr. Levinson contacted the respected Chicago litigator Lee Freeman, of Freeman, Freeman & Salzman, P.C. Mr. Freeman said he was generally familiar with the case from newspaper accounts. He agreed to contact Shefsky & Froelich in order to discuss the possibility of our entering the case as co-counsel to their firm.

19. On June 13, Mr. Freeman reported to Mr. Levinson. Shefsky & Froelich had told Mr. Freeman that their firm was owed $500,000. Shefsky & Froelich also told Mr. Freeman that it would withdraw from the case if any co-counsel, or any new local counsel, were retained to help represent the Defendant Directors.

20. On June 14, Mr. Levinson and I placed a conference call to Steven Carlson, a partner at Sidley & Austin and counsel to the Terra Foundation, to advise him that our firm was considering formal involvement in the case on behalf of the Defendant Directors; we asked for information about the case, particularly about the role of the Assistant Attorney General. In a conversation of an hour and a half, Mr. Carlson discussed with us the background of the case and of the mediation process. He told us that Sidley & Austin, in a motion made the previous January for judgment on the pleadings, had argued that the Attorney General had exceeded his authority in entering the case and was impermissibly interfering with the governance of a private foundation. Also, Mr. Carlson said that Sidley & Austin had presented the Court and the mediator

with substantial evidence that Dan Terra, before his death, had actively planned to move the Foundation to Washington. See Exh. C (Feb. 14, 2001, Mediation Statement) at 3.

21. At some point after our telephone conversation of June 14 with Mr. Carlson, the Assistant Attorney General issued an administrative subpoena to the Illinois Mathematics and Science Academy ("IMSA"), a largely state-supported institution. IMSA was headed by Foundation director Stephanie Marshall, who had until that time opposed the Assistant Attorney General's proposals. The subpoena initiated an official state inquiry into the possibility of improper financial dealings by Ms. Marshall as treasurer of the Foundation and president of IMSA. The Assistant Attorney General had informed Ms. Marshall of his plans to issue the administrative subpoena and thereafter, in a closed meeting, discussed the matter with her counsel, whom she had retained to represent her in the official inquiry.

22. On or about June 19, Mrs. Terra told us that in a "straw vote" of Foundation directors, taken on June 18 in anticipation of the June 29 meeting at which the directors would vote on the Assistant Attorney General's proposals, Ms. Marshall had joined Mr. Stebbins in voting to accede to the Assistant Attorney General's demands. The Assistant Attorney General now appeared to command a majority of the board.

23. On June 21, the firm sent a letter to Mrs. Terra to "confirm our agreement" that the firm "has been engaged to provide you with services with respect to issues affecting the Terra Foundation."

24. On June 22, I presided over a day-long meeting attended by Mrs. Terra, Mr. Naftali Michaeli (a close friend and adviser of Mrs. Terra, who had also been named as a defendant in the lawsuit), Mr. Levinson, and Donald Ratner, the Foundation's vice

president for administration. Dr. Tucker joined us by telephone for the morning session. The purpose of the meeting was to determine the next legal steps to be taken, in light of the extremely short time before the Foundation board meeting on June 29 and the possible approval of a settlement by the Court soon thereafter.

25. As the meeting began, we focused on issues of corporate governance. I stated that if the directors were to vote to accede to the Assistant Attorney General, I believed the Foundation would sail away from its Terra moorings to be entirely controlled by the State of Illinois and the City of Chicago.

26. As the June 22 meeting proceeded, the issue of coercion by the Attorney General became at least as important in the discussion as the issue of the proper role of the Attorney General in corporate governance. Both issues were raised by the question of whether the Foundation board was capable any longer of voting in a voluntary, independent and disinterested manner on issues vital to the future of the Foundation. As Dr. Tucker put it, the coercion issue was critical, because if Stephanie Marshall removed herself from the action of the Board, the next meeting would result in a tie vote. Without a majority, no Court action could take place. The moment of truth, I added, occurred when Stephanie Marshall became the subject of an investigation by the Assistant Attorney General. The crux of the case, the participants agreed, was that individuals trying to get control of a private foundation had managed to engage the coercive power of the State to implement their plan. We believed that we had a prima facie case of coercion and that, if allowed the normal means of discovery, we would produce sufficient evidence to prove this assertion.

27. At the conclusion of the meeting, I was authorized by the Defendant Directors to begin preparing documents to attempt to restrain the Foundation board from its June 29 meeting and vote. The grounds for such restraint would be the improper nature of the Attorney General's original intervention, the coercion of Theodore Stebbins and Stephanie Marshall and the complete absence of an opportunity, to that point, for the Defendant Directors to adduce the evidence of Dan Terra's actual intent with respect to the Foundation. Senator Simpson was notified and agreed with our plan of action. Senator Simpson said that he was looking forward to the chance to raise his hand in court for the first time to tell the truth about Dan Terra's intent and the usurping of the Terra Foundation's ability to govern itself.

28. It was now our job to take immediate action to protect the expressed and objective interests of our clients. Because the issues in the case now encompassed not only corporate governance but illegal State action, we sought help from a firm that, unlike our own, had general litigation depth and substantial experience in Constitutional law. I contacted K. Chris Todd of Kellogg, Huber, Hansen, Todd & Evans, with whom I had worked previously, to ask whether his firm would join our legal team. On the evening of June 22, we supplied him with background on the case, forwarded a copy of the initial complaint, outlined the involvement of the Assistant Attorney General, and discussed the various issues that the case raised. Kellogg, Huber agreed to begin immediately drafting a motion to be filed in Chicago for a temporary restraining order.

29. It was also our job to retain new Chicago counsel. We contacted the firm of Bellows and Bellows on June 22. We outlined the case to Laurel Bellows, as we had done to Chris Todd, and sent the Bellows firm documents they needed in order to begin

the local admission of the Washington attorneys, advise Shefsky & Froelich of the entry of the Bellows firm into the case, and prepare to provide the logistical support that would allow us to file and argue our motions in Chicago.

30. On Saturday, June 23, and Sunday, June 24, we worked on the drafting of the motion for a temporary restraining order and on the accompanying affidavits. Kellogg, Huber did the bulk of the drafting, with support from the Bellows firm; we did overall editing and were in charge of clearances. By Monday, June 25, we had rough drafts of the papers and proceeded to clear them with our clients.

31. On June 25 we collected detailed affidavits from parties with first-hand knowledge of Dan Terra's 1996 preparations to move the Foundation and the bulk of the Terra art collection to Washington, D.C. We did so because such affidavits, appended to the motion papers, would rebut any claim by the Attorney General that Mr. Terra had wished to keep his collection in Chicago. We learned that Dan Terra's plans for the move had proceeded to an advanced stage: He had rented Washington office space for the Foundation, hired an architect who had completed designs for a new Washington museum, and printed change-of-address cards. On the new Washington, D.C., letterhead of the Foundation, Dan Terra, just days before his death, sent handwritten instructions to the then-president of the Foundation, directing that "All Terra and Terra Foundation mail should be directed to" the Terra Foundation for the Arts, 1072 Thomas Jefferson Street, Washington, D.C.

32. On June 26 and 27, we began the final drafting of motions for the temporary restraining order. We wanted to be prepared to file in state or federal court, as tactical considerations dictated; but the facts adduced and the law argued would be

substantially the same in either case. The core of our case was a demonstration that the evidence of misconduct by the Assistant Attorney General was serious and credible enough to warrant a court's blocking a board meeting that had been called for the purpose of acceding to the Assistant Attorney General's demands. We rested our case on the additional ground that the evidence of the Assistant Attorney General's traducing of Dan Terra's intent was clear and irrefutable.

33. On June 28, with the board meeting scheduled for the next day, we chose to go first into federal court because of the prospect of faster injunctive relief there. We filed a motion in the U.S. District Court for the Northern District of Illinois and flew to Chicago to argue it. On the evening of June 28, Judge Bucklo denied our motion on grounds of federal abstention doctrine and on the assumption that we could bring our Constitutional claims before the Chancery Court.

34. By the time we filed the above motion on June 28, all counsel for the parties to the mediated settlement were aware that the Defendant Directors had retained new counsel.

35. On the evening of June 28, we completed final papers for filing in the Chancery Court. On June 29, we filed our motion in the Chancery Court and participated in argument, asking for a suspension of the Foundation board meeting "until this Court can take steps [so] that a free, untainted vote can occur . . . without the corrupting influence [of] a state official." After that hearing, the Court denied our motion. The Court set a schedule by which our clients' objections to any settlement order could be filed on or before July 14; a hearing on the settlement was scheduled for the end of July.

36. On June 29, the Foundation board met. Our firm assisted Mrs. Terra in the preparation of a statement which she delivered to the board, urging her fellow directors to reject the Assistant Attorney General's proposal as the tainted product of illegal state action. By the time of the meeting, however, the outcome of the vote was foreordained. On June 19, the mediator had announced that the Foundation directors had declared themselves and that the vote would be 6 to 5 in favor of the Attorney General's terms. Three of the five minority directors—Senator Simpson, Ambassador Andreani and Mrs. Ahrweiler—anticipating the outcome did not join the June 29 meeting. As a result of their absence, the vote of the board was 6-2 to approve the settlement, with Ms. Marshall and Mr. Stebbins now providing the two essential votes for the new majority. After voting, both Ms. Marshall and Mr. Stebbins voiced their complaints about the Assistant Attorney General's conduct.

37. On July 2, in response to the Court's request for a status conference, I appeared before this Court together with Chris Todd of Kellogg Huber and Joel and Laura Bellows of Bellows and Bellows. In connection with this hearing we filed a motion for leave to file written objections and for an evidentiary hearing on the proposed settlement. In support of that motion, I stated that we would seek the Court's permission to offer evidence and seek the opportunity to examine witnesses to demonstrate the improper means by which the Attorney General's actions had caused directors Stebbins and Marshall to shift their votes. The Court instructed us to file our objections to the proposed settlement by July 19; a hearing was scheduled for July 24.

38. Because of a potential conflict of interest, and by agreement of counsel, the firm of Bellows & Bellows withdrew as local counsel, and the Chicago firm of Cummins & Cronin took its place on July 18, 2001.

39. Over the next three weeks, we continued to research the relevant case law, collected additional affidavits, further investigated the standards applicable to the fiduciary duties of directors, and obtained additional factual information to accompany our motions. Throughout this period, we continually discussed our litigation strategies with Mrs. Terra, Senator Simpson and Dr. Tucker, who fully supported our efforts.

40. On July 19, pursuant to the Court's order, we filed a 28-page memorandum, together with a number of exhibits, objecting to the proposed settlement. One of these exhibits was an affidavit prepared by John Longwell, a Kellogg Huber attorney, who reported the content of a voluntary interview of Assistant Attorney General Floyd Perkins. Mr. Longwell had been present at the interview, which was conducted on July 12 by counsel for the Defendant Directors. Mr. Perkins declined to testify under oath.

41. Our memorandum of July 19 brought the following issues to the Court's attention: (a) without the votes of the two conflicted directors, Stebbins and Marshall, the proposed settlement was a legal nullity and could not be approved by the Court; (b) the Court could not approve the settlement without countenancing a breach of fiduciary duty owed by directors Stebbins and Marshall to the Foundation; (c) the mediation process was fatally infected by improper governmental action; (d) by permitting a seizure of the Foundation's property and powers by the Attorney General, approval of the settlement would set a precedent that would strongly discourage not-for-profit corporations from

locating in Illinois; and (e) the Defendant Directors should be permitted reasonable discovery and an evidentiary hearing to allow an airing of relevant facts.

42. On July 24, we filed an eight-page reply brief in support of the Defendant Directors' objections to the purported settlement agreement and the proposed Consent Judgment. Prior to lodging these objections, we also filed with the Court, on July 20, a 61-page "Consolidated Verified Answer, Affirmative Defenses and Counterclaims" to the complaint of Buntrock and Gidwitz. In our papers, the Defendant Directors, now Counterclaim Plaintiffs, asked the Court to enter a judgment declaring that the proposed settlement of the litigation was unlawful because it was not approved by the Board in accordance with Illinois law, that the proposed settlement was the product of breaches of directors' fiduciary duties and unlawful interference on the part of the Attorney General, and that the proposed settlement was incompatible with the Foundation's charter, its bylaws, and the intent of the donor, Daniel J. Terra.

43. On July 24, together with co-counsel, I appeared before the Court to urge that the settlement agreement be disapproved, that an evidentiary hearing be scheduled and discovery allowed, and that the counterclaims embodied in our July 20, motion be allowed. At the conclusion of the hearing, the Court denied permission to conduct discovery, rejected the motion for the filing of a counterclaim, and stated that the Court would proceed to sign the order approving the settlement. The Court also stated that the remaining issue was the various attorneys' petitions for fees.

44. On the morning of July 26, the Court entered the Consent Judgment and Order in the case. On August 22, Mrs. Terra, Dr. Tucker and Senator Simpson filed a notice of appeal to the Appellate Court of Illinois for the First Judicial District from the

Circuit Court of Cook County, County Department, Chancery Division, in case number 00CH13859.

45. There was no duplication of effort in our representation, because the work that we conducted for the Defendant Directors was different, in both critical facts and legal theories, from the case prepared for them by Shefsky & Froelich. Shefsky & Froelich represented the interests of the Defendant Directors in avoiding personal liability; Shefsky & Froelich did not represent the interests of the Defendant Directors, as they conceived them, to serve the well-being of the Foundation. Nor were those interests represented by Sidley & Austin because of the shift of support by Mr. Stebbins and Mrs. Marshall.

46. As I explained to the Court in some detail during the hearing of January 15 of this year, new counsel were retained to take on new efforts rather than to continue the ongoing work of Shefsky & Froelich. See Exh J (Excerpts of 1/15/02 Transcript of Proceedings). Therefore, there was only limited benefit to be gained from an extended transition. Nevertheless, new counsel sought to make use of work that had been done before. Counsel requested and received copies of key pleadings and other documents from Shefsky & Froelich and conferred on several occasions with both Shefsky & Froelich and counsel for the Foundation. The fact that the Defendant Directors agreed to retain common counsel, rather than availing themselves of their right under the Terra Foundation bylaws to retain separate counsel to defend against the charges against them, at the inception of this litigation or at any time thereafter, was another sign of the general consciousness of the need to avoid unnecessary duplication of effort.

47. Of the fees for which reimbursement is sought, $412,750.00 has been paid by the Defendant Directors. See Exh. K (chart detailing amounts paid by Defendant Directors). The payment of these fees strongly evidences the *bona fides* of the Defendant Directors' belief in the merit and public policy importance of their claims.

48. We entered this case at the request of clients who believed that their interests were not being adequately pursued by their existing counsel. We did not seek to supplant existing counsel. As the Court has recognized, this case is "extremely complex and fiercely litigated" and rife with "novel issues." Order of March 13, 2002, at 4. To deny the Defendant Directors reimbursement of fees for the attorneys they have chosen would be, under these circumstances, to deny them fair access to proper representation. Just as important, in a hotly contested lawsuit such as this one, the purpose of reimbursement of attorneys' fees is not to reward the victors; it is to insure that competing positions have appropriate resources for effective representation. And in a case as significant for the future of foundations as this one is, the Court should not be seen to deny reasonable awards to attorneys who have raised legal and policy issues of the utmost seriousness.

I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge.

DATED: April 24, 2002

Leonard Garment

Leonard Garment

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
	)	**No. 00 CH 13859**
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	**Hon. Dorothy Kirie Kinnaird**
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

BELLOWS AND BELLOWS'
SECOND AMENDED PETITION FOR FEES AND COSTS

Now Comes Bellows and Bellows, P.C., and as its Second Amended Petition for Fees and Costs states:

1. Bellows and Bellows, P.C., submits this Second Amended Petition for Fees and Costs pursuant to the direction and order of the Court, the inherent supervisory power of the Court over attorneys fees, the obligation of the Terra Foundation for the Arts to pay such fees and costs, and

pursuant to all other applicable law. Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson ("Clients") have filed objections to the "Consent Judgment" and reassert those objections. The filing of this Amended Petition is not intended to, nor does it in any way, waive those objections.

2. Attached is the Affidavit of Laurel G. Bellows, including as its Exhibit 1, an explanation of the fees and costs requested by the firm of Bellows and Bellows, P.C.

3. This Amended Petition is filed under terms of a protective order, specifically reserving to Judith Terra, Paul Hayes Tucker, and Alan K. Simpson all privileges each has and they jointly may have of confidentiality, attorney work product, and any other matter accruing to them by statute, in law or in equity.

4. Bellows and Bellows was employed by Clients from June 22 through July 31, 2001 in connection with the defense of their interests as Directors of the Terra Foundation arising out of the two lawsuits consolidated herein and thereafter in connection with the recovery of fees herein. Bellows and Bellows' representation necessarily included (in general terms): familiarizing itself with the facts and circumstances giving rise to Clients becoming Defendants herein; involvement in an action (in aid of Clients' position in this action) filed in the United States District Court, entitled The Terra Foundation For The Arts, et al. v. Floyd Perkins, Case No. 01 C 4976 (the "federal action"); restatement of the allegations in the federal action so as to incorporate them to seek relief in the instant action; representation of Clients in the instant action (as more fully elaborated in Exhibit 1 to the Affidavit of Laurel G. Bellows); the response of Bellows and Bellows to the claim of R. Gidwitz, a named Plaintiff, that Bellows and Bellows' representation of Clients in the instant action was improper and presented a conflict of interest with its ongoing representation of the

Foundation in another matter (in connection with which claim the undersigned retained a noted ethicist for assistance); and, presentation of the various Petitions for Fees and Costs (including the original, first and the instant Second Amended Petition for Fees and Costs), all as specified in the attached Affidavit and Exhibit 1 attached to it.

5. In connection with the representation specified in paragraph 4, above, Clients became indebted to Bellows and Bellows for $68,373.50 in fees and $5,201.95 in costs that were incurred in relation to this case (but excluding the fees and costs associated solely with the federal action); and, Clients will become indebted to Bellows and Bellows for costs and fees in connection with all proceedings as may hereafter occur in connection with this Second Amended Petition and the subject matter hereof.

WHEREFORE, Bellows and Bellows, P.C. requests that this Court approve payment pursuant to its Second Amended Petition for Fees and Costs, together with such additional costs and fees as Clients incur to Bellows and Bellows by virtue of the proceedings hereafter in aid of this Second Amended Petition.

Laurel G. Bellows

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Attorney # 01000

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	**Hon. Dorothy Kirie Kinnaird**
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

AFFIDAVIT OF LAUREL G. BELLOWS IN SUPPORT OF BELLOWS AND BELLOWS' SECOND AMENDED PETITION FOR FEES AND COSTS

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

LAUREL G. BELLOWS, being duly sworn, hereby deposes and says:

1. Affiant has full knowledge of the facts contained in this Affidavit and if called as a witness could testify competently thereto.

2. Affiant is a Principal in the law firm of Bellows and Bellows, P.C. Affiant was involved in the work performed by Bellows and Bellows during the time it represented Judith Terra, Paul Hayes Tucker, and Alan K. Simpson ("Clients") in this matter, from June 22 to July 31, 2001. Affiant is the attorney with overall responsibility for supervising the activities of the employees of Bellows and Bellows in the instant litigation. Affiant has been licensed to practice law in the states of Illinois (1974), Florida (1975) and California (1981). Affiant has supervised attorneys and staff involved in complex litigation, and has herself been involved in litigation throughout that period. Affiant has also been involved in litigation concerning fee petitions sufficiently often to be able to have an informed opinion as to the reasonableness of attorneys fees generally and the award of appropriate fees for litigation in matters such as those involved in the instant matter, specifically.

3. Attached to this Affidavit as Exhibit 1 is a detailed explanation of the work performed by members of Bellows and Bellows in connection with the subject litigation and the charges for those services. (Exhibit 1 consists of the time report that was attached to Bellows and Bellows' Amended Petition For Fees And Costs, a time report for the subsequent time spent, and the report of all costs expended.)

4. As set forth in Bellows and Bellows's previously-submitted Amended Petition, the fee and cost items contained in Exhibit 1 that relate solely to the case filed in the United States District Court, entitled The Terra Foundation For The Arts, et al. v. Floyd Perkins, No. 01 C 4976, are no more than $400.00 in costs and $5,972.50 in fees. Therefore, Bellows and Bellows' Second Amended Petition is reduced by $6,372.00 to the current amounts of $68,373.50 in fees and

$5,201.95 in costs. Affiant is of the opinion that all work done and amounts paid as represented on Exhibit 1 were necessary for the proper representation of the Clients, that they are reasonable in rate and total, and that none duplicate any service performed by any other firm.

5. Clients retained Bellows and Bellows on June 22, 2001.

6. Affiant was informed that the reason for the retention of Bellows and Bellows as additional (local) counsel was (in substance) that: Shefsky & Froelich had not been paid by the Foundation or this Court; it was owed in excess of $400,000; it was understandably anxious to withdraw and would be unwilling to undertake the major commitment that would be necessitated by opposing what was obviously an illegal State action; and, the Clients were not being well served by a continuation of that firm's representation and more particularly that the Shefsky firm was not representing them adequately or independently. (The foregoing was confirmed by subsequent events and information.) In consequence, Bellows and Bellows agreed to Clients' request that Bellows and Bellows serve as local counsel.

7. Bellows and Bellows withdrew from its representation on July 31, 2001 because the posture of the case had changed since it was retained, and the firm was concerned that a potential conflict would arise. More particularly, on and for a brief period after June 29, 2001, the Clients' interests and those of the Foundation were closely aligned; nevertheless, after a series of rulings by this Court, it appeared that that alignment might separate. Consequently, and although the firm's withdrawal was not granted until July 31, 2001, the Clients were timely advised that the firm wished to withdraw and that Clients would be afforded an opportunity to obtain new local counsel.

8. On June 28, 2001, all counsel of record in this case (other than the Shefsky firm) were advised that Bellows and Bellows had been retained by Clients when Affiant or another member of

the firm called and subsequently served them with a copy of the Petition for Temporary Restraining Order in the federal action. The Shefsky firm had not been advised that the federal action was contemplated because of concern with its independence. (In fact, on June 28 when it learned of the federal aciton, that firm did not call Affiant. Instead, its time records indicate that it called David Hilliard and Steve Carlson.)

9. On June 29, 2001, Affiant advised James Wilson of Shefsky & Froelich of the fact that Clients had additionally retained counsel, including Bellows and Bellows, that a motion seeking to enjoin the Foundation's Board meeting that afternoon would be sought, and that he would be receiving a copy of the motion. Messrs. Wilson and Crowe appeared at the hearing; Mr. Crowe indicated his desire to withdraw (without recriminating over not being invited to the previous days' proceedings), and offered to turn over his file. Affiant accepted that offer.

10. During the time that Bellows and Bellows was counsel of record, the matter of fee petitions was discussed often on the record. Affiant cannot now recall the date of the first such discussion; however, she believes that Bellows and Bellows would have been a participant in any such discussion inasmuch as Clients were and are entitled to reimbursement for the (now) $60,000 advanced against fees and Bellows and Bellows is entitled to be paid the difference.

11. Since the first draft of all substantive pleadings were prepared by other counsel, Bellows and Bellows would not have taken any action to avoid duplication of effort between Shefsky & Froelich and itself. That said, at no time during the period in which Bellows and Bellows was an attorney of record up to and including on or about July 8, 2001 (the date on which Shefsky and Froelich's file was received), was any service performed on behalf of the Clients by her firm, or to her knowledge, by any of the other firms representing Clients, that would have benefitted from any

information or work that had been performed by Shefsky & Froelich. (Indeed, Clients' fear of the lack of independence in work, thought and action is why that firm was replaced.) Going further, Bellows and Bellows was involved in the review of the material received from Shefsky and Froelich, and Affiant is of the belief that none of the material received from that firm would have diminished the work required to be performed by Clients' other counsel before Bellows and Bellows withdrew.

12. Of the total sum set forth on Exhibit 1, Bellows and Bellows received $60,000 ($25,000 on or about June 28, 2001 and $35,000 on or about July 11, 2001).

FURTHER AFFIANT SAYETH NAUGHT.

Laurel G. Bellows

SUBSCRIBED and SWORN to
before me this 24th day of April 2002.

Notary Public

OFFICIAL SEAL
ELIZABETH A STEINHAUSER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES: 11/27/02

Selection Criteria

Slip.Classification	Open
Slip.Date	Earliest - 9/26/01
Client (hand select)	Include: Terra litigation
Slip.Slip Type	Time

Rate Info - identifies rate source and level

Slip ID / Dates and Time / Posting Status / Description	Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
Project: Terra litigation				
54390 TIME 6/22/01 WIP Review preliminary documents. Telephone conversation with L. Garment, K.C. Todd, L. Levinson regarding clients' situation, strategy and allegations involved in pursuit of causes of action including for A.G.'s violation of Section 1983 and in aid of their State case.	LGB GENERAL Terra litigation Terra Litigation	1.00 0.00 0.00 0.00	350.00 T@1	350.00
54389 TIME 6/24/01 WIP Conversation with L. Levinson to confirm factual and legal allegations. Subsequent conversation with client for further fact checking.	LGB GENERAL Terra litigation Terra Litigation	0.80 0.00 0.00 0.00	350.00 T@1	280.00
54289 TIME 6/25/01 WIP Review materials from L. Bellows regarding background. Research regarding miscellaneous issues of Illinois law, including regulations prohibiting state employee from serving on Foundation board with and without compensation.	MTW GENERAL Terra litigation Terra Litigation	3.50 0.00 0.00 0.00	240.00 T@1	840.00
54391 TIME 6/25/01 WIP Telephone conference with DC counsel; conversations with client regarding various litigation matters; conversations with Neil Gorsuch regarding revision status.	LGB GENERAL Terra litigation Terra Litigation	2.10 0.00 0.00 0.00	350.00 T@1	735.00

ip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
56280	TIME	MTW	1.00	240.00	240.00
6/25/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare materials for federal filing and Pro Hac Vice Motion. (Federal)		Terra Litigation	0.00		
54385	TIME	LGB	5.50	350.00	1925.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference call with K.C. Todd to confirm further facts in Affidavit and Petition. Confirm facts surrounding S. Marshall's alleged intimidation by Attorney General and to have IMSA's attorney contact me.		Terra Litigation	0.00		
54384	TIME	LGB	4.30	350.00	1505.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with client regarding facts concerning IMSA. Conversation with K.C. Todd regarding litigation goals. Conversation with L. Garment regarding representation of P. Tucker, J. Terra, A. Simpson, and Foundation.		Terra Litigation	0.00		
54383	TIME	LGB	4.20	350.00	1470.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with K.C. Todd regarding Judith Terra's Declaration; review and revise recent drafts of Affidavit and Memorandum. Confirm facts. Conversations with K.C. Todd, N. Gorsuch and J. Longwell regarding factual and legal issues.		Terra Litigation	0.00		
54287	TIME	MTW	6.00	240.00	1440.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Facilitate various federal court filings. Research issues related to Temporary Restraining Order Motion pursuant to local rules: service on A.G., restricted filing. (Federal)		Terra Litigation	0.00		
54272	TIME	JJB	0.80	325.00	260.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
Conversations with L. Bellows and M. Wolf regarding procedural matters, federal court jurisdiction, pleading and local rules on Temporary Restraining Order. (Federal)		Terra Litigation	0.00		
54295	TIME	MTW	7.50	240.00	1800.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare for filing of Complaint, Temporary Restraining Order and related pleadings. Telephone conversations and e-mails with DC counsel and paralegals regarding procedural matters and necessary filings. Research regarding miscellaneous issues related to filing and notice. (Federal)		Terra Litigation	0.00		
54286	TIME	CLG	0.20	205.00	41.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference with L. Bellows and M. Wolf regarding handling of standing question at Temporary Restraining Order hearing. (Federal)		Terra Litigation	0.00		
54393	TIME	LC	2.00	50.00	100.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare pleadings for filing. Make copies, deliveries. (Federal)		Terra Litigation	0.00		
54283	TIME	JJB	0.60	325.00	195.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference with L. Bellows regarding relief and form of Temporary Restraining Order.		Terra Litigation	0.00		
54387	TIME	LGB	8.00	350.00	2800.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review factual revisions to P. Tucker's Declaration. Conversation with counsel regarding Board. Call from S. Marshall to request that we shelter her from allegations in Declaration, which although true, might become fodder for future Crain's articles. Discuss lack of foundation for Attorney General's actions based on weak Affidavit of Jim Terra with		Terra Litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
DC counsel.					
54386	TIME	LGB	9.00	350.00	3150.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversations with all counsel regarding retention, representation and parties. Review and revise Declaration and pleadings; review revisions and discuss with DC counsel. Review Chancery pleadings filed by Attorney General. Discuss same with DC counsel. Review pleadings filed by James Terra. Telephone call from S. Marshall to inquire regarding status and content of any statements in pleading which concern her or IMSA.		Terra Litigation	0.00		
54334	TIME	LC	3.00	50.00	150.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Research choices for potential defendants in Complaint and manner in which Office of Attorney General must be named when naming an individual government official.		Terra Litigation	0.00		
54263	TIME	LC	2.00	50.00	100.00
6/27/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Collate/photocopy/fax legal documents to N. Gorsuch.		Terra Litigation	0.00		
54394	TIME	LC	4.00	50.00	200.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare documents for state court hearing		Terra Litigation	0.00		
56297	TIME	JJB	1.00	325.00	325.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Coordinate federal court filing, service. (Federal)		Terra Litigation	0.00		
56308	TIME	MTW	3.00	240.00	720.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Finalize and file federal court documents. (Federal)		Terra Litigation	0.00		

ρ ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54388	TIME	LGB	16.20	350.00	5670.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Preparation for federal court hearing; prepare Complaint and Temporary Restraining Order for filing; conversations with client regarding Declaration; conversation with counsel for IMSA regarding status of Temporary Restraining Order; federal court appearance and argument. Draft state court pleading.		Terra Litigation	0.00		
56309	TIME	LGB	2.00	350.00	700.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Notice to various attorneys. Allocation of ID # 54388 work to federal action. (Federal)		Terra Litigation	0.00		
54277	TIME	JJB	9.00	325.00	2925.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Consult in strategy for Chancery Court. Review and multiple revisions to Motion for Temporary Restraining Order.		Terra Litigation	0.00		
54326	TIME	LC	5.30	50.00	265.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare documents for state filing.		Terra Litigation	0.00		
54325	TIME	LC	8.50	50.00	425.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare documents for state filing.		Terra Litigation	0.00		
54324	TIME	LC	8.50	50.00	425.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare documents for state filing.		Terra Litigation	0.00		
54315	TIME	TES	2.10	165.00	346.50
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Research issues for Temporary Restraining Order. (Federal)		Terra Litigation	0.00		

ɔ ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54296	TIME	MTW	12.00	240.00	2880.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare for attendance at federal court hearing on Petition for Temporary Restraining Order. Review opinion of Judge Bucklo. Prepare state court filings.		Terra Litigation	0.00		
54297	TIME	LC	9.50	50.00	475.00
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare and fax pleadings regarding Motion for Temporary Restraining Order in Chancery Court.		Terra Litigation	0.00		
54285	TIME	CLG	2.50	205.00	512.50
6/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Legal research regarding enjoining ultra vires acts involving not-for-profit corporation.		Terra Litigation	0.00		
4332	TIME	JJB	7.50	325.00	2437.50
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Put all filings in order, including Motion to Admit Pro Hac and Verification. Prepare for hearing; hearing. Conference with co-counsel regarding alternative methods of raising issues.		Terra Litigation	0.00		
54317	TIME	MTW	4.50	240.00	1080.00
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare documents for filing in state court. Prepare Order. Telephone conversation with Court regarding filings. Court appearance on Temporary Restraining Order.		Terra Litigation	0.00		
54316	TIME	LC	1.00	50.00	50.00
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare pleadings file.		Terra Litigation	0.00		
54392	TIME	LGB	8.20	350.00	2870.00
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
Call attomeys regarding Temporary Restraining Order notice. Preparation for Court Appearance in Chancery for Temporary Restraining Order. Appearance and argument. Strategize regarding next court date's activities and follow up actions; contact client; complete service of documents.		Terra Litigation	0.00		
54313	TIME	TES	2.20	165.00	363.00
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Preparation for Chancery Court hearing on Temporary Restraining Order.		Terra Litigation	0.00		
54504	TIME	LC	2.00	50.00	100.00
6/29/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Attended court regarding the injunction to stop Board meeting.		Terra Litigation	0.00		
54382	TIME	LGB	3.30	350.00	1155.00
6/30/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Listen to tape of Board meeting; discuss same with counsel; discuss strategy and assignment regarding participation in Monday's Chancery Court hearing. Telephone conference with J. Bellows, L. Levinson regarding July 2 hearing and record.		Terra Litigation	0.00		
54396	TIME	JJB	4.80	325.00	1560.00
6/30/01	12:00 AM	GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Consider strategic alternatives for future activities; conference with L. Bellows regarding same. Telephone conference with L. Bellows, L. Levinson regarding July 2 hearing and activity going forward.		Terra Litigation	0.00		
54476	TIME	JJB	4.50	325.00	1462.50
7/1/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review draft motion. Telephone conferences with S. Garment, N. Gorsuch and C. Todd regarding their first draft of Motion for Leave to File Written		Terra Litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
Objections and earlier conversation with L. Bellows and C. Todd regarding strategy for presentation of objections, counterclaim and separate action.					
54474	TIME	LGB	1.50	350.00	525.00
7/1/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with counsel regarding strategy and presentation of objections.		Terra Litigation	0.00		
54716	TIME	TES	2.10	165.00	346.50
7/2/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Preparation of documents before hearing and legal research.		Terra Litigation	0.00		
54523	TIME	LC	0.50	50.00	25.00
7/2/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Deliver court pleadings to Judge Kinnaird for hearing.		Terra Litigation	0.00		
54508	TIME	JJB	10.00	325.00	3250.00
7/2/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review and revise draft motion for evidentiary hearing. Read cases; prepare for argument. Attend hearing; argument. Conference with Michaeli; telephone conversation with client regarding status.		Terra Litigation	0.00		
54506	TIME	LGB	2.00	350.00	700.00
7/2/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Draft Order and review Motion regarding Chancery Court appearance to obtain briefing schedule and evidentiary hearing in Chancery Court. Draft letter to client regarding professional matters.		Terra Litigation	0.00		
54507	TIME	LGB	8.00	350.00	2800.00
7/2/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review draft Motion to File Objections; conversation with counsel regarding substance and presentation; review documents to be filed with court; contact		Terra Litigation	0.00		

p ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
judge's clerk regarding filing procedures; prepare for court; appear and argue motions; negotiate order; meet with counsel and Mr. Michaeli concerning result and upcoming filing.					
54510 7/2/01 WIP Prepare notices, certificate of service regarding State Court filings. Research withdrawing appearance of counsel and filing under seal. Prepare papers for L. Bellows for court. Prepare orders relating to various filing. Court appearance for status and Motion to File Objections.	TIME	MTW GENERAL Terra litigation Terra Litigation	7.00 0.00 0.00 0.00	240.00 T@1	1680.00
54689 7/3/01 WIP Telephone conference with A.G.'s office regarding request for copy of Pro Hac Vice Order. Organize filings and miscellaneous documents.	TIME	MTW GENERAL Terra litigation Terra Litigation	1.00 0.00 0.00 0.00	240.00 T@1	240.00
54518 7/3/01 WIP Telephone conference with N. Michaeli regarding additional facts; telephone conversation with C. Todd regarding strategy.	TIME	JJB GENERAL Terra litigation Terra Litigation	2.00 0.00 0.00 0.00	325.00 T@1	650.00
54597 7/3/01 WIP Research where the articles of incorportion for charitable foundations are located.	TIME	LC GENERAL Terra litigation Terra Litigation	1.50 0.00 0.00 0.00	50.00 T@1	75.00
54521 7/4/01 WIP Conference call with co-counsel regarding substantive and strategic and procedural issues involved in filing objections before the Chancery Court.	TIME	LGB GENERAL Terra litigation Terra Litigation	1.50 0.00 0.00 0.00	350.00 T@1	525.00

p ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54519	TIME	JJB	1.50	325.00	487.50
7/4/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference call with co-counsel regarding substantive and strategic and procedural issues involved in filing objections before the Chancery Court.		Terra Litigation	0.00		
54596	TIME	LC	6.50	50.00	325.00
7/5/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Research the bylaws and the articles of incorporation for big non-for-profit foundations in Chicago.		Terra Litigation	0.00		
54524	TIME	JJB	3.20	325.00	1040.00
7/5/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review fax from N. Michaeli regarding additional facts; telephone conversation with same regarding same. Telephone conference with all attorneys regarding objections and other strategy.		Terra Litigation	0.00		
54543	TIME	JJB	1.80	325.00	585.00
7/6/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversations with other counsel regarding theory (include intervention); review material received from Foundation and conference with Laurel Bellows regarding her conversation with Foundation's counsel and to communicate agreed upon division of responsibilities.		Terra Litigation	0.00		
54546	TIME	LGB	0.50	350.00	175.00
7/6/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with S. Carlson regarding Tucker, background of lack of attorney presence at mediation, request for verification of facts presented by us to date.		Terra Litigation	0.00		
54598	TIME	LC	2.00	50.00	100.00
7/9/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Research list of trustees for large		Terra Litigation	0.00		

p ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
non-for-profit foundations.					
54593	TIME	LGB	0.30	350.00	105.00
7/9/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with client, J. Longwell, and L. Levinson regarding Petition to Withdraw and docket of case.		Terra Litigation	0.00		
54575	TIME	JJB	1.30	325.00	422.50
7/9/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Receive and review draft counterclaim. Telephone conversation with L. Levinson regarding future limited participation.		Terra Litigation	0.00		
54624	TIME	JJB	1.60	325.00	520.00
7/11/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation L. Levinson, J. Longwell regarding counterclaim, parties, terminating Bellows and Bellows' future responsibilities, and causes of action for further suits. Call to Clerk's office to inquire about Chancery docket.		Terra Litigation	0.00		
54755	TIME	LC	1.00	50.00	50.00
7/11/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Organize case file. Prepare documents for John Longwell regarding: Terra Museum.		Terra Litigation	0.00		
54623	TIME	JJB	2.10	325.00	682.50
7/12/01	12:00 AM	GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Obtain docket sheets of Chancery action, call to J. Longwell regarding same, Crowe's documents and to obtain E-Mail.		Terra Litigation	0.00		
54659	TIME	LGB	0.30	350.00	105.00
7/13/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Brief conversation with C. Todd; attempt to locate Stephanie Marshall to schedule interview.		Terra Litigation	0.00		

ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54660	TIME	LGB	3.30	350.00	1155.00
7/16/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Appearance at interview with Floyd Perkins. Conversation with L. Levinson and L. Garment regarding highlights of interview.		Terra Litigation	0.00		
54666	TIME	LGB	0.40	350.00	140.00
7/16/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with D. Ross regarding Affidavit for Stephanie Marshall. Obtain information for Bill Roberts.		Terra Litigation	0.00		
54806	TIME	MTW	0.50	240.00	120.00
7/17/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with J. Longwell regarding Notice and Filing issues. E-mail to D.C. counsel regarding same. Conference with Laurel G. Bellows regarding same. Review local rules regarding same.		Terra Litigation	0.00		
54745	TIME	JJB	1.20	325.00	390.00
7/17/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Receive and review copies of letters from R. Gidwitz to Sidley and Winston regarding claimed conflict. Brief conversation with Laurel Bellows regarding same. Telephone conversation with C. Todd and J. Longwell regarding their intentions concerning counterclaim. Telephone conversation with M. Heatwole regarding pending response to concerns. Telephone conversation with ethicist Freivogel rgarding his conflict.		Terra Litigation	0.00		
54743	TIME	JJB	2.40	325.00	780.00
7/18/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with Art Garwin, ABA ethicist, for further recommendations. Telephone conversation (with L. Bellows) with Larry Fox concering Gidwitz' allegations and		Terra Litigation	0.00		

lip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
facts. Telephone conversation with C. Todd with decision to withdraw. Telephone conversation with Bob Cummins regarding facts, substitution.					
54759	TIME	JJB	0.75	325.00	243.75
7/19/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with client to confirm withdrawal to facilitate ongoing representation and not as result of present conflict. Telephone conversation with C. Todd regarding same. Telephone conversation with Cummins regarding Court appearance on withdrawal and to advise that not withdrawing due to any conflict.		Terra Litigation	0.00		
54919	TIME	LGB	1.00	350.00	350.00
7/20/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Preparation for and attend status call and withdraw.		Terra Litigation	0.00		
54791	TIME	JJB	1.00	325.00	325.00
7/20/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Preparation for and attend status call and withdraw.		Terra Litigation	0.00		
54804	TIME	JJB	2.30	325.00	747.50
7/24/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Reply to M. Heatwole request stemming from R. Gidwitz' letter to investigate conflict of interest. Telephone conversation with L. Fox regarding same.		Terra Litigation	0.00		
55129	TIME	JJB	1.30	325.00	422.50
7/27/01		GENERAL_1	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with N. Michaeli concerning possibility of settlement. Conference with Laurel Bellows concerning response to ethical issues raised by Gidwitz; revise response and send to ethicist for review.		Terra Litigation	0.00		

p ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
55179	TIME	JJB	0.90	325.00	292.50
7/30/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Receive and review message from ethicist regarding draft response. Revise same.		Terra Litigation	0.00		
55177	TIME	JJB	1.00	325.00	325.00
7/31/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Receive e-mail and telephone conversation ethicest regarding: modification of response to qualify for subsequent events. Revise and finalize response to Heatwole.		Terra Litigation	0.00		
55887	TIME	MTW	0.80	240.00	192.00
9/4/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversations with Jim Wilson and Bob Cummuns regarding Fee Petitions and Order regarding same. Conferences with Laurel G. Bellows and Joel J. Bellows regarding same.		Terra Litigation	0.00		
56281	TIME	JJB	2.00	325.00	650.00
9/20/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Court appearance on status call concerning fee petitions. Review time records report to determine need for redactions.		Terra Litigation	0.00		
56279	TIME	JJB	0.60	325.00	195.00
9/21/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with C. Todd regarding hearing before Judge Kinnaird and her disposition against allowing fees in federal action to determine collective strategy.		Terra Litigation	0.00		
56278	TIME	JJB	2.90	325.00	942.50
9/23/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Revision of Petition for Fees, Affidavit pursuant to Court's directive.		Terra Litigation	0.00		

ID Dates and Time Posting Status Description	Professional Activity Client Matter	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
Total: Terra Litigation				
	Billable	264.65		67012.75
	Unbillable	0.00		0.00
	Total	264.65		67012.75
Total: Terra litigation				
	Billable	264.65		67012.75
	Unbillable	0.00		0.00
	Total	264.65		67012.75
Grand Total				
	Billable	264.65		67012.75
	Unbillable	0.00		0.00
	Total	264.65		67012.75

Selection Criteria

Slip.Date	9/26/01 - 4/23/02
Client (hand select)	Include: Terra litigation
Client (hand select)	Include: Terra litigation
Slip.Transaction Ty	1 - 1
Slip.Classification	Open
Client (hand select)	Include: Terra litigation
Slip.Transaction Ty	1 - 1

Rate Info - identifies rate source and level

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
56541	TIME	LGB	0.60	350.00	210.00
9/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review Amended Petition for Fees, Affidavit and Exhibit.		Terra Litigation	0.00		
56542	TIME	JJB	1.00	325.00	325.00
9/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review and revise Amended Petition for Fees.		Terra Litigation	0.00		
56543	TIME	JJB	0.60	325.00	195.00
9/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Telephone conversation with Washington, D.C. counsel regarding Amended Petition for Fees.		Terra Litigation	0.00		
56527	TIME	JJB	2.75	325.00	893.75
9/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Revise Amended Petition after telephone conversation with C. Todd to expand Court's perception of authority. Attend hearing. Draft Order to permit filing of Bellows' Amended petition. Letter to other counsel enclosing order. Receive and review letter with new dates; docket same.		Terra Litigation	0.00		
56507	TIME	LC	0.80	50.00	40.00
9/28/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Obtain signed Order from Judge Dorothy Kinnard at Daley Center.		Terra Litigation	0.00		
58083	TIME	CLG	1.50	215.00	322.50
11/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review materials regarding fee petition; telephone conversation with Assistant		Terra Litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
Attorney General regarding scheduling; file review regarding status of Amended Petition; conference with J. Bellows regarding materials; further review materials.					
58103 11/27/01 WIP Conference with L. Bellows and J. Bellows regarding fee petition matters; review documents regarding same.	TIME	CLG GENERAL Terra litigation Terra Litigation	0.50 0.00 0.00 0.00	215.00 T@1	107.50
58162 11/28/01 WIP Notes regarding Reply to Fee Petition; conference with co-counsel regarding opposition by Foundation and strategy for reply; legal research regarding same; review materials in file regarding same.	TIME	CLG GENERAL Terra litigation Terra Litigation	3.90 0.00 0.00 0.00	215.00 T@1	838.50
58301 11/29/01 WIP Work regarding preparation of Reply to Attorney Fee Petition; legal research regarding same.	TIME	CLG GENERAL Terra litigation Terra Litigation	1.00 0.00 0.00 0.00	215.00 T@1	215.00
58467 12/8/01 WIP Prepare Reply to Fee Petition.	TIME	CLG GENERAL Terra litigation Terra Litigation	5.00 0.00 0.00 0.00	215.00 T@1	1075.00
58468 12/9/01 WIP Prepare Reply to Fee Petition.	TIME	CLG GENERAL Terra litigation Terra Litigation	2.00 0.00 0.00 0.00	215.00 T@1	430.00
58525 12/10/01 WIP Telephone conversation with C. Gallinari regarding threat of response to objections to fee petition by Attorney General and Foundation. Review and revise draft response, finalizing same.	TIME	JJB GENERAL Terra litigation Terra Litigation	1.00 0.00 0.00 0.00	350.00 T@1	350.00
58469 12/10/01 WIP Prepare Reply to Fee Petition; incorporate J. Bellows input.	TIME	CLG GENERAL Terra litigation Terra Litigation	2.00 0.00 0.00 0.00	215.00 T@1	430.00

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
59104	TIME	CLG	0.30	215.00	64.50
1/12/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review Foundation's reply regarding attorney fees.		Terra Litigation	0.00		
59275	TIME	CLG	2.30	215.00	494.50
1/15/02		ANNUAL REPORT	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare for and attend fee petition hearing		Terra Litigation	0.00		
59514	TIME	CLG	0.10	215.00	21.50
1/25/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review Foundation's draft order.		Terra Litigation	0.00		
59816	TIME	CLG	0.70	215.00	150.50
2/5/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Court conference regarding fee petitition motions.		Terra Litigation	0.00		
60166	TIME	CLG	0.50	215.00	107.50
2/20/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Fee petition hearing.		Terra Litigation	0.00		
61047	TIME	CLG	0.40	215.00	86.00
3/14/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review Court Order; message to J. Bellows and L. Bellows regarding leave to file amended petition.		Terra Litigation	0.00		
61152	TIME	CLG	0.30	215.00	64.50
3/26/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference with J. Bellows regarding status and client emails regarding preparation of Amended Fee Petition.		Terra Litigation	0.00		
61225	TIME	CLG	0.30	215.00	64.50
3/27/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare information for J. Bellows review regarding Amended Fee Petition.		Terra Litigation	0.00		
61536	TIME	CLG	1.30	215.00	279.50
4/5/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Draft Petition and Affidavit for J. Bellows regarding Terra.		Terra Litigation	0.00		

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
61576	TIME	CLG	0.20	215.00	43.00
4/8/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference with R. Cumins regarding extension regarding fee petition.		Terra Litigation	0.00		
61802	TIME	JJB	1.50	350.00	525.00
4/19/02		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Review costs subsequent to Amended Fee Petition; review time report for same. Review and revise Fee Petition and Affidavit.		Terra Litigation	0.00		
Grand Total					
		Billable	30.55		7333.25
		Unbillable	0.00		0.00
		Total	30.55		7333.25

Selection Criteria

Client (hand select)	Include: Terra litigation
Slip.Classification	Open
Slip.Date	Earliest - 4/19/02
Slip.Transaction Ty	2 - 2

Rate Info - identifies rate source and level

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54535 6/23/01 WIP Long distance telephone calls	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	66.14	66.14
54209 6/25/01 WIP To Paul H. Tucker, Cc: Leonard Garment, To Judith Terra, Cc: Leonard Garment	EXP	admin Facsimiles Terra litigation Terra Litigation	4	4.00	16.00
54248 6/26/01 WIP Paid to Clerk of Court - U.S. District N.D.	EXP	admin Filing Fee Terra litigation Terra Litigation	1	150.00	150.00
54251 6/26/01 WIP To Don Ratner	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54250 6/27/01 WIP To Matt Warner, Jessica Bartlo	EXP	admin Facsimiles Terra litigation Terra Litigation	2	4.00	8.00
54261 6/27/01 WIP Paid by cash	EXP	admin COPIES Terra litigation Terra Litigation	1	30.00	30.00
54262 6/27/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	1	21.50	21.50
54244 6/27/01 WIP [No description]	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	3.83	3.83

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54247 6/27/01 WIP Paid to Clerk of Court for 5 Pro Hac Vice Application	EXP	admin Filing Fee Terra litigation Terra Litigation	1	250.00	250.00
54352 6/28/01 WIP Paid by cash	EXP	admin HAND DELIVERY Terra litigation Terra Litigation	1	5.00	5.00
54328 6/28/01 WIP [No description]	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	20.00	20.00
54395 6/28/01 WIP Hand deliveries.	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	12.00	12.00
54355 6/28/01 WIP Paid by cash	EXP	admin HAND DELIVERY Terra litigation Terra Litigation	1	6.00	6.00
54354 6/28/01 WIP Paid by cash	EXP	admin HAND DELIVERY Terra litigation Terra Litigation	1	37.00	37.00
54329 6/28/01 WIP Cab fare.	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	37.00	37.00
54351 6/28/01 WIP Food service.	EXP	admin MISC Terra litigation Terra Litigation	1	48.78	48.78
54327 6/28/01 WIP Deliver documents.	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	11.00	11.00
54265 6/28/01 WIP Hand deliver court documents to Mr. Heatwole, Foundation General Counsel.	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	0.00	0.00

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
54264 6/28/01 WIP Hand deliver court documents to Judge Bucklo's clerk.	EXP	LC HAND DELIVERY Terra litigation Terra Litigation	1	0.00	0.00
54450 6/29/01 WIP Paid by cash to MTW	EXP	admin CABFARE SERVICE Terra litigation Terra Litigation	1	70.00	70.00
54353 6/30/01 WIP Paid by cash	EXP	admin HAND DELIVERY Terra litigation Terra Litigation	1	30.00	30.00
54331 6/30/01 WIP To Paul H. Tucker, K. Chris Todd, Neil M. Gorsuch, Lawrence E. Levinson, Jessica Bartlow, Matt Warner, Judith Terra; all counsel.	EXP	admin Facsimiles Terra litigation Terra Litigation	14	4.00	56.00
54381 6/30/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	2022	0.20	404.40
54567 7/2/01 WIP To Brian L. Crowe	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54566 7/2/01 WIP To William R. Quinlan	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54569 7/2/01 WIP To Counsel of Record	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54568 7/2/01 WIP To Counsel of Record	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54536 7/2/01 WIP	EXP	admin Facsimiles Terra litigation	8	4.00	32.00

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
To Judith Terra, Lawrence Levinson, Leonard Garment, Neil M. Gorsuch, K.Chris Todd, Naftali Michaeli, David Hilliard, Jacqueline Mendoza,		Terra Litigation			
54529 7/5/01 WIP Photocopies by Chicago Copy Solutions, LTD.	EXP	admin COPIES Terra litigation Terra Litigation	1	567.16	567.16
54532 7/6/01 WIP [No description]	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54694 7/18/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	1068	0.20	213.60
55826 7/18/01 WIP To Bob Cummins	EXP	admin Facsimiles Terra litigation Terra Litigation	1	4.00	4.00
54948 7/26/01 WIP Long distance phone	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	27.16	27.16
54964 7/26/01 WIP Lexis online research	EXP	admin Research Terra litigation Terra Litigation	1	72.66	72.66
54966 7/26/01 WIP Tabs paid by cash	EXP	admin SUPPLIES Terra litigation Terra Litigation	1	3.25	3.25
54968 7/26/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	1	1.40	1.40
55828 7/27/01 WIP Lexis online research	EXP	admin Research Terra litigation Terra Litigation	1	88.00	88.00

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
55113	EXP	admin	1	29.02	29.02
7/30/01		AIR COURIER			
WIP		Terra litigation			
Air Courier		Terra Litigation			
55118	EXP	admin	1	22.46	22.46
7/30/01		AIR COURIER			
WIP		Terra litigation			
Air Courier		Terra Litigation			
55124	EXP	admin	1	41.06	41.06
7/30/01		AIR COURIER			
WIP		Terra litigation			
Air Courier		Terra Litigation			
55832	EXP	admin	1	2800.00	2800.00
7/31/01		EXPERT			
WIP		Terra litigation			
L. Fox (Ethicist)		Terra Litigation			
55829	EXP	admin	1	39.71	39.71
8/15/01		Research			
WIP		Terra litigation			
Lexis online research		Terra Litigation			
55830	EXP	admin	1	33.46	33.46
8/27/01		AIR COURIER			
WIP		Terra litigation			
Air Courier		Terra Litigation			
55831	EXP	admin	1	6.90	6.90
8/29/01		Telephone (LD)			
WIP		Terra litigation			
Long distance phone		Terra Litigation			
56173	EXP	admin	1	4.00	4.00
9/19/01		Facsimiles			
WIP		Terra litigation			
To Robert Cummins		Terra Litigation			
56182	EXP	admin	1	7.20	7.20
9/20/01		POSTAGE			
WIP		Terra litigation			
Postage		Terra Litigation			
56183	EXP	admin	1	5.96	5.96
9/20/01		POSTAGE			
WIP		Terra litigation			
Postage		Terra Litigation			

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
56319 9/26/01 WIP [No description]	EXP	admin Telephone (LD) Terra litigation	1	2.74	2.74
56457 9/27/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	660	0.20	132.00
56491 9/28/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	60	0.20	12.00
56537 9/30/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	154	0.20	30.80
56538 9/30/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	80	0.20	16.00
57194 10/26/01 WIP Long distance phone	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	2.38	2.38
58233 11/30/01 WIP Photocopies	EXP	admin COPIES Terra litigation Terra Litigation	38	0.20	7.60
58424 12/12/01 WIP Lexis online research	EXP	admin Research Terra litigation Terra Litigation	1	80.00	80.00
58822 12/31/01 WIP Long distance phone	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	2.43	2.43
60207 2/25/02 WIP Long distance phone	EXP	admin Telephone (LD) Terra litigation Terra Litigation	1	2.35	2.35

Slip ID / Dates and Time / Posting Status / Description		Professional / Activity / Client / Matter	Units / DNB Time / Est. Time / Variance	Rate / Rate Info / Bill Status	Slip Value
61191	EXP	admin	2	4.00	8.00
3/15/02		Facsimiles			
WIP		Terra litigation			
To Leonard Garment, Chris Todd		Terra Litigation			
Grand Total					
		Billable	0.00		5601.95
		Unbillable	0.00		0.00
		Total	0.00		5601.95

CERTIFICATE OF SERVICE

TO: See attached Service List

I, Elizabeth A. Steinhauser, a non-attorney, being first duly sworn upon oath, do hereby certify that copies of the attached Notice of Filing and Bellows and Bellows' Second Amended Petition for Fees and Costs were served upon each party listed upon the attached Service List by depositing such copies into the U.S. mailbox, located at 79 W. Monroe Street, Suite 800, Chicago, Illinois 60603, postage prepaid, at or before 5:00 p.m. on the 24th day of April, 2002.

Elizabeth A. Steinhauser

SUBSCRIBED AND SWORN TO
before me this 24th day of April, 2002.

NOTARY PUBLIC

"OFFICIAL SEAL"
JULI C. MACDONALD
Notary Public, State of Illinois
My Commission Expires 10/25/03

SERVICE LIST

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James R. Carroll
John F. Kennedy
William J. Quinlan
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Chicago, Illinois 60602

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Cummins & Cronin, LLC
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Washington, DC 20036

Leonard Garment
Lawrence Levinson
Verner, Liipfert, Bernhard, McPherson
& Hand
901 15th Street, N.W., Suite 700
Washington, DC 20005

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

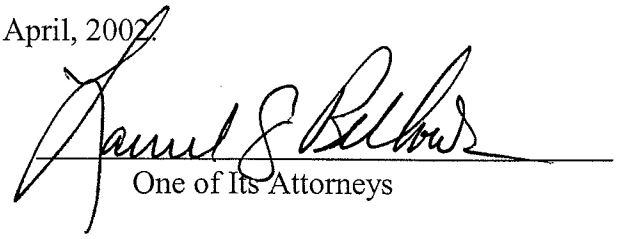
DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	
	)	**No. 00 CH 13859**
	)	
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	**Hon. Dorothy Kirie Kinnaird**
Plaintiff-Intervenor,	)	
v.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service List.

TAKE NOTICE that on April 24, 2002, we caused to be filed with the Clerk of the Circuit Court of Cook County, Illinois, Bellows and Bellows' Second Amended Petition for Fees and Costs.

Dated at Chicago, Illinois this 24th day of April, 2002.



One of Its Attorneys

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RECYCLED PAPER MADE FROM 30% POST CONSUMER CONTENT

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Judge Dorothy Kirie Kinnaird

ORDER MODIFYING ORDER AWARDING ATTORNEYS' FEES

This cause coming to be heard on Petitioner Stebbins' Agreed Motion to Modify March 13, 2002 Order, due notice having been given, counsel for Petitioner Stebbins and for the defendant Terra Foundation before the Court, counsel for the Terra Foundation having agreed to the entry of this Order, and the Court being otherwise fully advised in the premises;

THE COURT FINDS AS FOLLOWS:

1. In adjudicating the Petition for Reimbursement of Fees and Costs filed by Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall this Court deducted fees and costs for Terra II and fees for the federal action. The amount awarded included only fees and costs for Terra I. The amount deducted for the federal action was all the time spent on 6/28/01 and one hour spent on 6/29/01, or 4.5 hours at $440 an hour, for a total deduction of $1,980.

2. In adjudicating the Petition for Reimbursement of Fees and Costs this Court erroneously failed to include the fee of Professor Mnookin for the preparation and review of Dr. Stebbins' affidavit. That fee represented 4.0 hours at $495 an hour, for a total amount of $1,980.

3. This Court correctly deducted $1,980 for the federal action, but incorrectly failed to include $1,980 for Professor Mnookin's fees.

IT IS, THEREFORE, ORDERED THAT the Agreed Motion to Modify is granted and the Order of this Court of March 13, 2002 is amended to provide that an additional $1,980 is awarded to Dr. Theodore E. Stebbins for the services rendered by Professor Mnookin. It is further ordered that the Terra Foundation shall pay the aforestated fee within thirty days of this Order.

ENTER:

ENTERED
MAY - 8 2002
JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

May 8, 2002

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

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THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00CH 13859

Judge D.K. Kinnaird

THE TERRA FOUNDATION'S MOTION FOR LEAVE TO FILE ITS OBJECTIONS TO THE AMENDED FEE PETITIONS

The Terra Foundation, by its attorneys, hereby moves this Court for leave to file its Objections to the Amended Fee Petitions filed by the various attorneys for Directors Terra, Tucker and Simpson. In support thereof, the Foundation states as follows:

1. In the initial proceedings before this Court regarding the award of attorneys' fees, the Terra Foundation for the Arts ("the Foundation") raised only one concern regarding the several fee petitions before this Court: that no director be awarded attorneys' fees in this proceeding for work done in connection with different – albeit related – lawsuits. The Court agreed with the Foundation stating:

> The Court has determined that all of the petitions before the Court include requests for fees that were not incurred in this lawsuit. Specifically, certain of the petitions contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook County Law Division case filed after this case was concluded. ***This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case.*** In regard to Quinlan and Carroll invoices and McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. ***In regard to the defendant Directors' (Tucker, Terra and Simpson) attorneys' invoices, it is not possible to make such a determination.***

(Exh. A, Order Awarding Attorneys' Fees, 3/13/02, at 3-4.)

2. Accordingly, the Court ordered the attorneys for the Defendant Directors to submit revised fee petitions ***"eliminat[ing] all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112)."*** (Exh. A at 5.)

3. Furthermore, in an understandable effort to put an end to this fee litigation, the Court stated that it would not entertain any "additional briefing" on this issue of attorneys' fees. (Exh. A at 7.)

4. On April 24, 2002, the various attorneys for the Defendant Directors submitted their revised fee petitions. After careful review, the Foundation has concluded that the revised fee petitions do not comply with the Court's express directive "to eliminate all billing entries and costs relating to the federal court case (No. 01 C

4976) . . . ." (Exh. A at 5.) In fact, one of the petitioner law firms (Verner, Liipert Bernard McPherson & Hand) failed to make any reduction in its request for fees related to the federal action. Two other fee petitions (Kellogg, Huber et al. and Bellows & Bellows) made some adjustment to their fee petitions, but still seek significant amounts of fees related to that lawsuit in clear contravention of this Court's Order.

5. Thus, although it is respectful of the Court's desire for no additional briefing, the Foundation – as the entity paying the funds – believes that it would appropriate for the Court to consider the attached Terra Foundation's Objections To the Amended Fee Petitions, a copy of which is attached. Indeed, the Illinois Appellate Court has warned courts against making decisions regarding attorneys' fees "in a vacuum" and has stated that "[u]nder our system of justice, the party seeking recovery, whether in damages or attorneys fees, must always be willing to put his proofs to the test of adversarial scrutiny." *LaHood v. Couri,* 236 Ill. App. 3d 641, 649 (3rd Dist. 1992).

6. As the Court can see, the Foundation has made every effort to be as concise as possible in presenting its objections to the amended fee petitions to the Court.

WHEREFORE, the Foundation respectfully requests that this Court grant it leave to file the attached Terra Foundation's Objections to the Amended Fee Petitions and that the Court consider those objections when ruling on the amended petitions.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: Alan Nicgorski

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Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00CH 13859 Judge D.K. Kinnaird

THE TERRA FOUNDATION'S
OBJECTIONS TO THE AMENDED FEE PETITIONS

The Terra Foundation for the Arts ("the Foundation") respectfully submits its objections to the amended fee petitions submitted by certain of the attorneys for defendant directors Terra, Tucker and Simpson.

BACKGROUND

In the initial proceedings before this Court regarding the award of attorneys' fees, the Terra Foundation for the Arts ("the Foundation") raised only one concern regarding the several fee petitions before this Court: that no director be awarded attorneys' fees in this proceeding for work done in connection with different – albeit related – lawsuits. The Court agreed with the Foundation stating:

> The Court has determined that all of the petitions before the Court include requests for fees that were not incurred in this lawsuit. Specifically, certain of the petitions contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook County Law Division case filed after this case was concluded. ***This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case.*** In regard to Quinlan and Carroll invoices and McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. ***In regard to the defendant Directors' (Tucker, Terra and Simpson) attorneys' invoices, it is not possible to make such a determination.***

(Exh. A, Order Awarding Attorneys' Fees, 3/13/02, at 3-4.) Accordingly, the Court ordered the attorneys for the defendant directors to submit revised fee petitions ***"eliminat[ing] all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112)."*** (Exh. A at 5.)

However, in their revised fee petitions, filed on April 24, 2002, certain of the attorneys for the defendant directors failed to comply with the Court's express directive "to eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) . . . ." (Exh. A at 5.) Incredibly, one of the petitioner law firms (Verner, Liipert Bernard McPherson & Hand) failed to take make ***any*** reduction in its fee request for fees related to the federal action. Two other fee petitions (Kellogg, Huber et al. and

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Bellows & Bellows) made some adjustment to their fee petitions, but still seek significant amounts of fees related to that lawsuit in clear contravention of this Court's Order.

ARGUMENT

I. THIS COURT SHOULD DENY THE PETITIONERS' CONTINUED REQUEST FOR REIMBURSEMENT FOR ATTORNEYS' FEES RELATED TO THE FEDERAL ACTION.

"It is well established that a party seeking to recover attorneys' fees from another party bears the burden of presenting sufficient evidence from which the trial court can render a decision as to their reasonableness." *Prior Plumbing and Heating Co. v. Hagins,* 258 Ill. App. 3d 683, 630 N.E.2d 1208 (1st Dist. 1994). Accordingly, under this Court's March 13th order, each of the petitioner law firms bears the burden of demonstrating that the fees sought in their amended fee petitions were not incurred in connection with either the federal action (No. 01 C 4976) or the Law Division action (01 L 9112) now pending before Judge Nowicki. (Exh. A at 5.) However, certain of the petitioner law firms (Verner et al., Kellogg et al., and Bellows & Bellows, collectively "the petitioner law firms") fall well short of sustaining that burden with respect to a substantial amount of the fees and costs sought in the revised fee petitions. In fact, those firms' own submissions clearly indicate that a substantial portion of the fees and costs sought in the amended petitions relate to the federal court case (No. 01 C 4976).

Indeed, the record is clear that on June 22, 2001, the three petitioner law firms began work on a Complaint and a Motion for Temporary Restraining Order to halt a scheduled meeting of the Foundation's Board of Directors to vote on the proposed settlement agreement. (Garment Aff. ¶ 28.[1]) On June 28, 2001, the three petitioner law

[1] The Garment Affidavit is attached to the revised fee petitions of both the Verner firm and the Kellogg firm as Exhibit A.

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firms, on behalf of defendant directors Terra, Tucker and Simpson, filed their complaint and motion for TRO in the United States District Court for the Northern District of Illinois. (*Id.* ¶ 33.) The motion was denied and the complaint was dismissed that same day. At that point (June 29, 2001), the defendant directors sought emergency relief in this lawsuit.

Given this record, the only reasonable inference is that all fees and costs incurred by the petitioner law firms between the dates of June 22 and June 28, 2001 were related to the federal action. Indeed, at a minimum, the three petitioner law firms – in clear contravention of this Court's order -- have made little, if any, effort to segregate and disclaim fees incurred during that time period that were related to the federal action. Because it is the petitioners' burden to prove that those fees were not related to the federal action and because they have not – and indeed cannot – do(ne) so, this Court should reject the three petitioner law firms' request for all fees and costs related to the federal action.[2]

First, despite this Court's express instructions, the Verner firm made no adjustment to its fee petition to account for work on the federal action and instead continues to seek all $27,939.50 in fees incurred by that firm from June 22 to June 28 (including, presumably, the time Mr. Garment spent in federal court on June 28).

[2] Although it is not entirely clear from the papers, the petitioner firms appear to be arguing that they are entitled to compensation for most of the work performed on the federal case because they did not decide until the filing date whether they were going to file their motion for TRO in this case or as part of a separate federal action. (Garment Aff. ¶ 33.) Even if this were true, given the defendant directors' ultimate decision to file their papers first in the federal case, all fees incurred in preparing those papers can only be construed as incurred in connection with the federal lawsuit and thus outside of this Court's March 13th Order. Moreover, this assertion is belied by the petitioner firms' own submissions. Specifically, the Bellows firm time entries reveal that on June 22, 2001 the focus was already on a federal cause of action (42 U.S.C. § 1983). The Bellows entries further indicate that the decision to file in federal court was – *at the latest* – made by June 25, 2001.

Moreover, the Verner firm also seeks reimbursement of $12,950.41 in costs without providing the Court or the Foundation any way to determine which of those costs relate to the federal action. Accordingly, this Court should reject the Verner's firm request for at least the foregoing $40,889.91 in fees and costs.[3]

Second, the Kellogg firm deducted only $25,939.59 from its original fee petition to account for fees and costs related to the federal action. However, as stated above, the Kellogg firm began work on the federal complaint and TRO on June 22 and continued such work through the date of the federal court hearing (June 28) and during that time incurred much more that $25,939.59 in fees and costs. (*See* Kellogg Invoices, attached to revised fee petitions.) In fact, between June 22 and June 28, the Kellogg firm incurred $90,095 in attorneys' fees and $10,060.39 in costs (a total of $100,155.39).[4] Accordingly, this Court should reject the Kellogg's firm request for the $100,155.39 of fees and costs it seeks related to the federal action.[5]

Finally, like the Kellogg firm, Bellows & Bellows still seeks fees related to the federal action. Specifically, the Bellows firm asserts that only $5,972.50 in fees and $400 in costs sought in it original fee petition related to the federal action. However, between June 22 and June 28, the Bellows firm incurred $24,736 in fees and $726.25 in costs. In fact, on June 27 and 28 (the day of the federal hearing) alone, the Bellows firm incurred over $10,000 in fees. Accordingly, taking into account the $6,372.50 reduction already made by the Bellows firm, this Court should reject the additional $19,089.75

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[3] Assuming that the Court determines the remainder of the fees sought by the Verner firm to be reasonable, this reduction would result in a total award to the Verner firm of $109,475.

[4] Certain costs incurred by the Kellogg firm on June 28, 2001 and included in the above number are found on the July 2001 invoice.

[5] Assuming the Court determines that the remainder of the Kellogg firm's fee request is reasonable, this reduction ($100,155.39) and the reduction for fees the Kellogg firm admits were incurred in the second state court action ($37,299.40) would result in a total award to the Kellogg firm of $254,651.87.

((24,736 + 726.25) - 6,372.50) in fees and costs that firm continues to seek for work related to the federal action.[6]

II. THIS COURT SHOULD REJECT PETITIONERS' REQUEST FOR FEES INCURRED IN PREPARING THEIR FEE PETITIONS.

The Foundation further requests that the Court rule that the petitioner law firms are not entitled to reimbursement for fees incurred in preparing their fee petitions. At this juncture, only the Bellows firm is seeking fees for work on their original and revised fee petitions; however, the other petitioner law firms have indicated that they plan to return to the Court at a later date to such seek fees.

In Illinois, the general rule is that where attorneys' fees are authorized pursuant to a fee-shifting statute, the party seeking fees may recover its fees and costs incurred in preparing and prosecuting its fee petition. However, in "common fund" cases, the party seeking fees is not entitled to reimbursement for the services performed in pursuing its fees. *See Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 18 (1st Dist. 1992). The rationale for this rule is that the services performed in pursuit of fees were not performed for the benefit of the fund. *Id.* at 14.

This case is neither a fee-shifting case nor a "common fund" case. However, given that this case involves charitable funds, the rule applying to "common fund" cases should be applied here. Indeed, just as public policy dictates that a "common fund" should not be depleted due to fee litigation, it also dictates that the charitable assets of the Terra Foundation should not be further depleted due to fee litigation.

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[6] Assuming that the Court determines the remainder of the fees sought by the Bellows firm to be reasonable, this reduction would result in a total fee award of $49,283.75. As discussed *infra*, the Foundation also objects to the Bellows firm's request for reimbursement of fees related to its fee petitions; in the event the Court agrees with the Foundation's positions, the Bellows firm's total awarded will be reduced further. *See infra* note 7.

Accordingly, the Foundation respectfully requests that the Court disallow all requests for fees sought by the petitioner law firms (now or in the future) for work related to the fee petitions as it cannot reasonably be argued that such work was done for the benefit of the Foundation.

Specifically, the Bellows firm seeks $8,992.75 in fees and $393.53 in costs for work done after July 31, 2001, all of which related to its original and revised fee petitions. Accordingly, in addition to the reduction sought above to account for fees relating to the federal case, the Foundation requests that this Court also reject the additional $9386.28 in fees in costs sought by the Bellows firm for work on its fee petitions.[7]

[7] This adjustment would reduce the Bellows firm's total award to $39,897.47.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court disallow the petitioner law firms' requests for (1) fees and costs related to the federal action and (2) fees and costs incurred in preparing and prosecuting their original and revised fee petitions.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: Alan Nicgorski

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16di-003102

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Judge Dorothy Kirie Kinnaird

ORDER AWARDING ATTORNEYS' FEES

This case is before the Court on the fee petitions of various Directors of the Terra Foundation. Those Directors are plaintiffs Dean L. Buntrock and Ronald Gidwitz, non-party Directors Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, and defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson. In total, fees in excess of $2,400,000 and costs in excess of $315,000 are sought herein.

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These figures do not include fees and costs of counsel for the Terra Foundation and they do not include the fees and costs in the amount of $468,376.17 which were previously awarded to counsel for defendants Terra, Tucker and Simpson.

The Court has received and reviewed Dean L. Buntrock and Ronald Gidwitz's Petition for Attorneys' Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001, the Supplemental Petition filed by those plaintiffs, the Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock, and the plaintiffs' Reply. Unredacted billing statements covering the period from September 18, 2000 through August 31, 2001 have also been reviewed.

Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall have filed their Petition for Reimbursement of Fees and Costs together with unredacted billing statements covering the period from January 26, 2001 through September 10, 2001. That Petition together with the Attorney General's Response to the Fee Petition Submitted by Attorneys for Dr. Stebbins and Dr. Marshall have been reviewed by the Court.

On behalf of defendants Alan Simpson, Judith Terra and Paul Hayes Tucker five additional fee petitions have been filed and reviewed. They are: 1) the Motion for Attorneys' Fees and Costs filed by Verner Liipfert, Bernhard, McPherson & Hand, Chartered; 2) an Amended Petition for Fees and Costs filed by Bellows and Bellows, P.C.; 3) the Motion for Attorney's Fees and Costs filed by Kellogg, Huber, Hanson, Todd & Evans, P.L.L.C.; 4) the Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses; and 5) the Petition for Fees and Expenses filed by Cummins & Cronin, LLC. The unredacted billing statements filed in support of these petitions cover the period from May 18, 2001 through August 31, 2001.

In connection with the defendant Directors' fee petitions, the Court has also received and the reviewed the Attorney General's Response to the Fee Petitions Submitted by Attorneys for Terra, Tucker and Simpson, the Terra Foundation's Motion to Reject any Fee Petitions Seeking Attorneys' Fees Not in Connection with this Lawsuit, the Reply Memorandum of Defendants Terra, Tucker and Simpson, and the Terra Foundation's Reply Memorandum in Support of its Motion to Reject. For the period from May 18, 2001 through June 29, 2001, the Court re-reviewed Shefsky & Froelich Ltd.'s Petition for Fees and Costs regarding communications between the departing Shefsky firm and the appearance of the Verner, Bellows and Kellogg firms.

In reviewing all of the pending fee petitions, the Court has reviewed all affidavits and exhibits submitted. The Court compared the fee requests herein with the Billing Statements Submitted to the Terra Foundation by Sidley Austin Brown & Wood, covering the period from September 21, 2000 through July 31, 2001, and with the Shefsky and Froelich bills covering the period October 8, 2000 through June 21, 2001. The Court also reviewed its notes on the history of this case, as well as pertinent documents from the court file. The Court entertained oral argument on the fee petitions on January 15, 2002, and reviewed and considered the proposed orders and/or proposed findings of fact submitted by parties.

On July 26, 2001, this Court entered a Consent Judgment and Order resolving all issues in this case with the exception of the award of attorneys' fees and costs. As part of the mediated settlement of this case the parties agreed and the Court ordered that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." This Court has determined that all of the petitions before the Court include requests for fees which were not incurred in connection with this lawsuit. Specifically, certain of the petitions

contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook Law Division case filed after this case was concluded. This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case. In regard to the Quinlan and Carroll invoices and the McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. In regard to the defendant Directors' attorneys' invoices, it is not possible to make such a determination.

This was an extremely complex and fiercely litigated case involving some novel issues. There was extensive motion practice and multiple appeals. Over thirty court sessions, many of them lengthy, were held prior to the entry of the Consent Judgment and Order. The more complex of the issues involved related to special litigation committees, attorney ethics and disqualification, museum ethics, breaches of fiduciary duties, and the Attorney General's responsibilities in regard to charitable trusts and not-for-profit corporations. Many experts were retained and their opinions differed. Much out-of-state law was supplied and argued.

In reviewing the fee petitions this Court has considered, among other things, the magnitude and complexity of the case, the novelty and importance of the legal issues involved, the benefits conferred, the number of hours expended, the manner and tasks in which the time was expended, by whom the time was expended, the hourly rate charged by each person for a given task, the time required by other attorneys in the community to perform tasks of a comparable nature, the hourly fee charged for similar services by other attorneys with similar skills and qualifications, the degree to which the tasks performed contributed to the result obtained, and whether the fees have been paid by the clients. The Court has taken note that in regard to the Quinlan & Carroll bills and the McDermott, Will & Emery bills, the Attorney General has not objected to the requested fees and costs. The Court has also noted

that the fee petitions of those firms are not inconsistent with the bills of Sidley and Austin submitted to, and presumably paid by, the Foundation. (This Court has not approved the bills of the Foundation's counsel).

Notwithstanding the lack of an objection from the Attorney General, this Court believes that certain of the fees and costs submitted by the Quinlan and McDermott firms should not be approved, particularly considering that charitable funds are involved here. [The Court agrees with current counsel for the Foundation that "(t)he Foundation exists to promote American art, not to fund litigation."] As to attorneys' time entries in the Quinlan & Carroll petition, these include multiple entries for duplicative and excessive billing for four partners (at their respective hourly rates) and for one associate (at a blended rate of $180), totaling $421,200. That figure includes a reduction of $4,700 in fees incurred after the entry of the Consent Judgment and Order which were reflected in the September 25, 2001 invoice. Finally, the Court has determined that $10,166.25 was billed in connection with the federal court litigation and that that amount should be excluded. As to costs, the Court has granted all costs with the exception of an expert witness fee reflected in the September 25, 2001 invoice and with the exception of all costs incurred for the public relations firm of Kemper Lesnik.

The McDermott Will & Emery fees are approved herein, eliminating the fees and costs for "Terra II" and $1,980.00 in fees for the federal action. The costs relating to "Terra I" are approved.

This Court is not able to adjudicate at this time the five additional fee petitions filed on behalf of defendants Terra, Tucker and Simpson. In order to do so, this Court needs to receive revised fee petitions from any of the five firms who may wish to provide them. The revised fee petitions should eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). The revised fee petitions should be supported by affidavits of counsel

and/or the defendant Directors which should include the following: 1) the dates counsel was retained; 2) the reason for the retention of the additional counsel; 3) if applicable, the dates counsel was discharged or withdrew and the reason for the discharge or withdrawal; 4) the dates and manner in which any counsel of record in this case was advised that additional counsel for defendants Terra, Tucker and Simpson had been retained; 5) the dates and manner of first communication with the firm of Shefsky and Froelich about additional representation for defendant Directors in this case; 6) the dates on which any parties to the mediated settlement were first advised that defendants Terra, Tucker and Simpson would be seeking fees pursuant to the Consent Judgment and Order for fees for any firm other than Shefsky and Froelich; 7) all attempts to avoid duplication of effort between former and new counsel; and 8) a statement as to when and how much of the attorneys' fees and costs set forth in the revised fee petitions have been paid to date. In regard to the Verner Liipfert firm, an explanation should be given of the $35,000 notation regarding Bellows and Bellows which appears on the summary of invoices and the $25,000 cost entry to Bellows and Bellows for professional services which appears in Invoice No. 183977.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit is granted.

2. Plaintiffs Dean L. Buntrock and Ronald Gidwitz are awarded attorneys' fees in the amount of $1,172,182.00 and costs in the amount of $162,768.65, for a total award of $1,334,950.65 .

3. Directors Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall are awarded attorneys' fees in the amount of $35,026.25 and costs in the amount of $768.16, for a total award of $35,794.41.

4. Defendants Terra, Tucker and Simpson have 28 days to file revised fee petitions and supporting affidavits as set forth above. No additional briefing will be entertained.

5. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTERED

ENTER: MAR 13 2002

JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

March 13, 2002

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00CH 13859

Judge D.K. Kinnaird

FILED
02 MAY -5 PM 2:26

Notice of Motion

To: See Attached Service List

On May 15 at 10 AM, in courtroom 2403 of the Richard J. Daley Center, 50 West Washington Street Chicago, Illinois, defendant, Terra Foundation for the Arts, through its attorneys, Mulroy Scandaglia Marrinson Ryan, will present its **Motion For Leave To File Its Objections To The Amended Fee Petitions**, a copy of which is hereby served upon you.

Alan Nicgorski

Mulroy Scandaglia Marrinson & Ryan
55 East Monroe Street, 39th Floor
Chicago, Illinois 60603
(312) 580-2020
Counsel for Terra Foundation for the Arts

16di-003111

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that a copy of the above document(s) was served on the parties above via messenger or via federal express, by 5 p.m. on May 9, 2002.

Alan Nicgorski

Attorney for Terra Foundation for the Arts

Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/28/01)

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16di-003114

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock et al.

v.

Terra et al.

No. 00 CH 13859

ORDER

This cause coming to be heard on the TERRA FOUNDATION'S MOTION FOR LEAVE TO FILE ITS OBJECTIONS TO THE AMENDED FEE PETITIONS, the Court being advised of the premises, the TERRA FOUNDATION'S motion is hereby GRANTED.

All parties were provided with notice of this Motion. Counsel for the Foundation was the only attorney to appear on the noticed date.

Atty. No.: 38050

Name: Alan W. Nicgorski

Atty. for: Terra Foundation

Address: 55 E. Monroe, Str. 3930

City/State/Zip: Chicago, IL 60603

Telephone: (312) 580-0035

ENTERED

ENTER: MAY 15 2002

JUDGE
DOROTHY KIRIE KINNAIRD • 276

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1601003116

CCG-N002-200M-10/29/01 (25480852)

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	
THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00CH 13859 Judge D.K. Kinnaird

Notice of Filing

To: See Attached Service List

PLEASE TAKE NOTICE that on May 15, 2002, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **The Terra Foundation's Objections To The Amended Fee Petitions**, a copy of which is hereby served upon you.

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Counsel for Terra Foundation for the Arts

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned states that a copy of the above document(s) was served on the parties above via United States mail, by 5 p.m. on May 15, 2002.

Alan Nigorski

Attorney for Terra Foundation for the Arts

Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/28/01)

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16di-003121

Firm ID: 38050

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex. rel. JAMES E. RYAN, Attorney General of Illinois

Plaintiff-Intervenor,

v.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00CH 13859

Judge D.K. Kinnaird

THE TERRA FOUNDATION'S
OBJECTIONS TO THE AMENDED FEE PETITIONS

The Terra Foundation for the Arts ("the Foundation") respectfully submits its objections to the amended fee petitions submitted by certain of the attorneys for defendant directors Terra, Tucker and Simpson.

BACKGROUND

In the initial proceedings before this Court regarding the award of attorneys' fees, the Terra Foundation for the Arts ("the Foundation") raised only one concern regarding the several fee petitions before this Court: that no director be awarded attorneys' fees in this proceeding for work done in connection with different – albeit related – lawsuits. The Court agreed with the Foundation stating:

> The Court has determined that all of the petitions before the Court include requests for fees that were not incurred in this lawsuit. Specifically, certain of the petitions contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook County Law Division case filed after this case was concluded. ***This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case.*** In regard to Quinlan and Carroll invoices and McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. ***In regard to the defendant Directors' (Tucker, Terra and Simpson) attorneys' invoices, it is not possible to make such a determination.***

(Exh. A, Order Awarding Attorneys' Fees, 3/13/02, at 3-4.) Accordingly, the Court ordered the attorneys for the defendant directors to submit revised fee petitions ***"eliminat[ing] all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112)."*** (Exh. A at 5.)

However, in their revised fee petitions, filed on April 24, 2002, certain of the attorneys for the defendant directors failed to comply with the Court's express directive "to eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) . . . ." (Exh. A at 5.) Incredibly, one of the petitioner law firms (Verner, Liipert Bernard McPherson & Hand) failed to take make ***any*** reduction in its fee request for fees related to the federal action. Two other fee petitions (Kellogg, Huber et al. and

16di-003123

Bellows & Bellows) made some adjustment to their fee petitions, but still seek significant amounts of fees related to that lawsuit in clear contravention of this Court's Order.

ARGUMENT

I. THIS COURT SHOULD DENY THE PETITIONERS' CONTINUED REQUEST FOR REIMBURSEMENT FOR ATTORNEYS' FEES RELATED TO THE FEDERAL ACTION.

"It is well established that a party seeking to recover attorneys' fees from another party bears the burden of presenting sufficient evidence from which the trial court can render a decision as to their reasonableness." *Prior Plumbing and Heating Co. v. Hagins,* 258 Ill. App. 3d 683, 630 N.E.2d 1208 (1st Dist. 1994). Accordingly, under this Court's March 13th order, each of the petitioner law firms bears the burden of demonstrating that the fees sought in their amended fee petitions were not incurred in connection with either the federal action (No. 01 C 4976) or the Law Division action (01 L 9112) now pending before Judge Nowicki. (Exh. A at 5.) However, certain of the petitioner law firms (Verner et al., Kellogg et al., and Bellows & Bellows, collectively "the petitioner law firms") fall well short of sustaining that burden with respect to a substantial amount of the fees and costs sought in the revised fee petitions. In fact, those firms' own submissions clearly indicate that a substantial portion of the fees and costs sought in the amended petitions relate to the federal court case (No. 01 C 4976).

Indeed, the record is clear that on June 22, 2001, the three petitioner law firms began work on a Complaint and a Motion for Temporary Restraining Order to halt a scheduled meeting of the Foundation's Board of Directors to vote on the proposed settlement agreement. (Garment Aff. ¶ 28.[1]) On June 28, 2001, the three petitioner law

[1] The Garment Affidavit is attached to the revised fee petitions of both the Verner firm and the Kellogg firm as Exhibit A.

16di-003124

firms, on behalf of defendant directors Terra, Tucker and Simpson, filed their complaint and motion for TRO in the United States District Court for the Northern District of Illinois. (*Id.* ¶ 33.) The motion was denied and the complaint was dismissed that same day. At that point (June 29, 2001), the defendant directors sought emergency relief in this lawsuit.

Given this record, the only reasonable inference is that all fees and costs incurred by the petitioner law firms between the dates of June 22 and June 28, 2001 were related to the federal action. Indeed, at a minimum, the three petitioner law firms – in clear contravention of this Court's order -- have made little, if any, effort to segregate and disclaim fees incurred during that time period that were related to the federal action. Because it is the petitioners' burden to prove that those fees were not related to the federal action and because they have not – and indeed cannot – do(ne) so, this Court should reject the three petitioner law firms' request for all fees and costs related to the federal action.[2]

First, despite this Court's express instructions, the Verner firm made no adjustment to its fee petition to account for work on the federal action and instead continues to seek all $27,939.50 in fees incurred by that firm from June 22 to June 28 (including, presumably, the time Mr. Garment spent in federal court on June 28).

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[2] Although it is not entirely clear from the papers, the petitioner firms appear to be arguing that they are entitled to compensation for most of the work performed on the federal case because they did not decide until the filing date whether they were going to file their motion for TRO in this case or as part of a separate federal action. (Garment Aff. ¶ 33.) Even if this were true, given the defendant directors' ultimate decision to file their papers first in the federal case, all fees incurred in preparing those papers can only be construed as incurred in connection with the federal lawsuit and thus outside of this Court's March 13th Order. Moreover, this assertion is belied by the petitioner firms' own submissions. Specifically, the Bellows firm time entries reveal that on June 22, 2001 the focus was already on a federal cause of action (42 U.S.C. § 1983). The Bellows entries further indicate that the decision to file in federal court was – *at the latest* – made by June 25, 2001.

Moreover, the Verner firm also seeks reimbursement of $12,950.41 in costs without providing the Court or the Foundation any way to determine which of those costs relate to the federal action. Accordingly, this Court should reject the Verner's firm request for at least the foregoing $40,889.91 in fees and costs.[3]

Second, the Kellogg firm deducted only $25,939.59 from its original fee petition to account for fees and costs related to the federal action. However, as stated above, the Kellogg firm began work on the federal complaint and TRO on June 22 and continued such work through the date of the federal court hearing (June 28) and during that time incurred much more that $25,939.59 in fees and costs. (*See* Kellogg Invoices, attached to revised fee petitions.) In fact, between June 22 and June 28, the Kellogg firm incurred $90,095 in attorneys' fees and $10,060.39 in costs (a total of $100,155.39).[4] Accordingly, this Court should reject the Kellogg's firm request for the $100,155.39 of fees and costs it seeks related to the federal action.[5]

Finally, like the Kellogg firm, Bellows & Bellows still seeks fees related to the federal action. Specifically, the Bellows firm asserts that only $5,972.50 in fees and $400 in costs sought in it original fee petition related to the federal action. However, between June 22 and June 28, the Bellows firm incurred $24,736 in fees and $726.25 in costs. In fact, on June 27 and 28 (the day of the federal hearing) alone, the Bellows firm incurred over $10,000 in fees. Accordingly, taking into account the $6,372.50 reduction already made by the Bellows firm, this Court should reject the additional $19,089.75

---

[3] Assuming that the Court determines the remainder of the fees sought by the Verner firm to be reasonable, this reduction would result in a total award to the Verner firm of $109,475.

[4] Certain costs incurred by the Kellogg firm on June 28, 2001 and included in the above number are found on the July 2001 invoice.

[5] Assuming the Court determines that the remainder of the Kellogg firm's fee request is reasonable, this reduction ($100,155.39) and the reduction for fees the Kellogg firm admits were incurred in the second state court action ($37,299.40) would result in a total award to the Kellogg firm of $254,651.87.

((24,736 + 726.25) - 6,372.50) in fees and costs that firm continues to seek for work related to the federal action.[6]

II. THIS COURT SHOULD REJECT PETITIONERS' REQUEST FOR FEES INCURRED IN PREPARING THEIR FEE PETITIONS.

The Foundation further requests that the Court rule that the petitioner law firms are not entitled to reimbursement for fees incurred in preparing their fee petitions. At this juncture, only the Bellows firm is seeking fees for work on their original and revised fee petitions; however, the other petitioner law firms have indicated that they plan to return to the Court at a later date to such seek fees.

In Illinois, the general rule is that where attorneys' fees are authorized pursuant to a fee-shifting statute, the party seeking fees may recover its fees and costs incurred in preparing and prosecuting its fee petition. However, in "common fund" cases, the party seeking fees is not entitled to reimbursement for the services performed in pursuing its fees. *See Baksinski v. Northwestern Univ.*, 231 Ill. App. 3d 7, 18 (1st Dist. 1992). The rationale for this rule is that the services performed in pursuit of fees were not performed for the benefit of the fund. *Id.* at 14.

This case is neither a fee-shifting case nor a "common fund" case. However, given that this case involves charitable funds, the rule applying to "common fund" cases should be applied here. Indeed, just as public policy dictates that a "common fund" should not be depleted due to fee litigation, it also dictates that the charitable assets of the Terra Foundation should not be further depleted due to fee litigation.

---

[6] Assuming that the Court determines the remainder of the fees sought by the Bellows firm to be reasonable, this reduction would result in a total fee award of $49,283.75. As discussed *infra*, the Foundation also objects to the Bellows firm's request for reimbursement of fees related to its fee petitions; in the event the Court agrees with the Foundation's positions, the Bellows firm's total awarded will be reduced further. *See infra* note 7.

Accordingly, the Foundation respectfully requests that the Court disallow all requests for fees sought by the petitioner law firms (now or in the future) for work related to the fee petitions as it cannot reasonably be argued that such work was done for the benefit of the Foundation.

Specifically, the Bellows firm seeks $8,992.75 in fees and $393.53 in costs for work done after July 31, 2001, all of which related to its original and revised fee petitions. Accordingly, in addition to the reduction sought above to account for fees relating to the federal case, the Foundation requests that this Court also reject the additional $9386.28 in fees in costs sought by the Bellows firm for work on its fee petitions.[7]

[7] This adjustment would reduce the Bellows firm's total award to $39,897.47.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that this Court disallow the petitioner law firms' requests for (1) fees and costs related to the federal action and (2) fees and costs incurred in preparing and prosecuting their original and revised fee petitions.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: Alan Nicgorski

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16di-003129

Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Judge Dorothy Kirie Kinnaird

ORDER AWARDING ATTORNEYS' FEES

This case is before the Court on the fee petitions of various Directors of the Terra Foundation. Those Directors are plaintiffs Dean L. Buntrock and Ronald Gidwitz, non-party Directors Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, and defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson. In total, fees in excess of $2,400,000 and costs in excess of $315,000 are sought herein.

These figures do not include fees and costs of counsel for the Terra Foundation and they do not include the fees and costs in the amount of $468,376.17 which were previously awarded to counsel for defendants Terra, Tucker and Simpson.

The Court has received and reviewed Dean L. Buntrock and Ronald Gidwitz's Petition for Attorneys' Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001, the Supplemental Petition filed by those plaintiffs, the Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock, and the plaintiffs' Reply. Unredacted billing statements covering the period from September 18, 2000 through August 31, 2001 have also been reviewed.

Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall have filed their Petition for Reimbursement of Fees and Costs together with unredacted billing statements covering the period from January 26, 2001 through September 10, 2001. That Petition together with the Attorney General's Response to the Fee Petition Submitted by Attorneys for Dr. Stebbins and Dr. Marshall have been reviewed by the Court.

On behalf of defendants Alan Simpson, Judith Terra and Paul Hayes Tucker five additional fee petitions have been filed and reviewed. They are: 1) the Motion for Attorneys' Fees and Costs filed by Verner Liipfert, Bernhard, McPherson & Hand, Chartered; 2) an Amended Petition for Fees and Costs filed by Bellows and Bellows, P.C.; 3) the Motion for Attorney's Fees and Costs filed by Kellogg, Huber, Hanson, Todd & Evans, P.L.L.C.; 4) the Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses; and 5) the Petition for Fees and Expenses filed by Cummins & Cronin, LLC. The unredacted billing statements filed in support of these petitions cover the period from May 18, 2001 through August 31, 2001.

In connection with the defendant Directors' fee petitions, the Court has also received and the reviewed the Attorney General's Response to the Fee Petitions Submitted by Attorneys for Terra, Tucker and Simpson, the Terra Foundation's Motion to Reject any Fee Petitions Seeking Attorneys' Fees Not in Connection with this Lawsuit, the Reply Memorandum of Defendants Terra, Tucker and Simpson, and the Terra Foundation's Reply Memorandum in Support of its Motion to Reject. For the period from May 18, 2001 through June 29, 2001, the Court re-reviewed Shefsky & Froelich Ltd.'s Petition for Fees and Costs regarding communications between the departing Shefsky firm and the appearance of the Verner, Bellows and Kellogg firms.

In reviewing all of the pending fee petitions, the Court has reviewed all affidavits and exhibits submitted. The Court compared the fee requests herein with the Billing Statements Submitted to the Terra Foundation by Sidley Austin Brown & Wood, covering the period from September 21, 2000 through July 31, 2001, and with the Shefsky and Froelich bills covering the period October 8, 2000 through June 21, 2001. The Court also reviewed its notes on the history of this case, as well as pertinent documents from the court file. The Court entertained oral argument on the fee petitions on January 15, 2002, and reviewed and considered the proposed orders and/or proposed findings of fact submitted by parties.

On July 26, 2001, this Court entered a Consent Judgment and Order resolving all issues in this case with the exception of the award of attorneys' fees and costs. As part of the mediated settlement of this case the parties agreed and the Court ordered that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." This Court has determined that all of the petitions before the Court include requests for fees which were not incurred in connection with this lawsuit. Specifically, certain of the petitions

contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook Law Division case filed after this case was concluded. This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case. In regard to the Quinlan and Carroll invoices and the McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. In regard to the defendant Directors' attorneys' invoices, it is not possible to make such a determination.

This was an extremely complex and fiercely litigated case involving some novel issues. There was extensive motion practice and multiple appeals. Over thirty court sessions, many of them lengthy, were held prior to the entry of the Consent Judgment and Order. The more complex of the issues involved related to special litigation committees, attorney ethics and disqualification, museum ethics, breaches of fiduciary duties, and the Attorney General's responsibilities in regard to charitable trusts and not-for-profit corporations. Many experts were retained and their opinions differed. Much out-of-state law was supplied and argued.

In reviewing the fee petitions this Court has considered, among other things, the magnitude and complexity of the case, the novelty and importance of the legal issues involved, the benefits conferred, the number of hours expended, the manner and tasks in which the time was expended, by whom the time was expended, the hourly rate charged by each person for a given task, the time required by other attorneys in the community to perform tasks of a comparable nature, the hourly fee charged for similar services by other attorneys with similar skills and qualifications, the degree to which the tasks performed contributed to the result obtained, and whether the fees have been paid by the clients. The Court has taken note that in regard to the Quinlan & Carroll bills and the McDermott, Will & Emery bills, the Attorney General has not objected to the requested fees and costs. The Court has also noted

that the fee petitions of those firms are not inconsistent with the bills of Sidley and Austin submitted to, and presumably paid by, the Foundation. (This Court has not approved the bills of the Foundation's counsel).

Notwithstanding the lack of an objection from the Attorney General, this Court believes that certain of the fees and costs submitted by the Quinlan and McDermott firms should not be approved, particularly considering that charitable funds are involved here. [The Court agrees with current counsel for the Foundation that "(t)he Foundation exists to promote American art, not to fund litigation."] As to attorneys' time entries in the Quinlan & Carroll petition, these include multiple entries for duplicative and excessive billing for four partners (at their respective hourly rates) and for one associate (at a blended rate of $180), totaling $421,200. That figure includes a reduction of $4,700 in fees incurred after the entry of the Consent Judgment and Order which were reflected in the September 25, 2001 invoice. Finally, the Court has determined that $10,166.25 was billed in connection with the federal court litigation and that that amount should be excluded. As to costs, the Court has granted all costs with the exception of an expert witness fee reflected in the September 25, 2001 invoice and with the exception of all costs incurred for the public relations firm of Kemper Lesnik.

The McDermott Will & Emery fees are approved herein, eliminating the fees and costs for "Terra II" and $1,980.00 in fees for the federal action. The costs relating to "Terra I" are approved.

This Court is not able to adjudicate at this time the five additional fee petitions filed on behalf of defendants Terra, Tucker and Simpson. In order to do so, this Court needs to receive revised fee petitions from any of the five firms who may wish to provide them. The revised fee petitions should eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). The revised fee petitions should be supported by affidavits of counsel

and/or the defendant Directors which should include the following: 1) the dates counsel was retained; 2) the reason for the retention of the additional counsel; 3) if applicable, the dates counsel was discharged or withdrew and the reason for the discharge or withdrawal; 4) the dates and manner in which any counsel of record in this case was advised that additional counsel for defendants Terra, Tucker and Simpson had been retained; 5) the dates and manner of first communication with the firm of Shefsky and Froelich about additional representation for defendant Directors in this case; 6) the dates on which any parties to the mediated settlement were first advised that defendants Terra, Tucker and Simpson would be seeking fees pursuant to the Consent Judgment and Order for fees for any firm other than Shefsky and Froelich; 7) all attempts to avoid duplication of effort between former and new counsel; and 8) a statement as to when and how much of the attorneys' fees and costs set forth in the revised fee petitions have been paid to date. In regard to the Verner Liipfert firm, an explanation should be given of the $35,000 notation regarding Bellows and Bellows which appears on the summary of invoices and the $25,000 cost entry to Bellows and Bellows for professional services which appears in Invoice No. 183977.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit is granted.

2. Plaintiffs Dean L. Buntrock and Ronald Gidwitz are awarded attorneys' fees in the amount of $1,172,182.00 and costs in the amount of $162,768.65, for a total award of $1,334,950.65 .

3. Directors Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall are awarded attorneys' fees in the amount of $35,026.25 and costs in the amount of $768.16, for a total award of $35,794.41.

16di-003136

4. Defendants Terra, Tucker and Simpson have 28 days to file revised fee petitions and supporting affidavits as set forth above. No additional briefing will be entertained.

5. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTERED

ENTER: MAR 13 2002

JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

March 13, 2002

MURROY
SCANDAGLIA
MARRINSON
RYAN

May 15, 2002

VIA MESSENGER
The Honorable Dorothy Kirie Kinnaird
Richard J. Daley Center
Courtroom 2302
50 West Washington Street
Chicago, Illinois 60603

***Re: Buntrock et al. v. Terra et al.*, 00 CH 13859**

Dear Judge Kinnaird:

Pursuant to the Court's order granting the Foundation's motion for leave to file its objections to the amended fee petitions, please find enclosed two copies of the Terra Foundation's Objections To the Amended Petitions and copies of the authorities cited therein. The original has been filed with the Clerk.

Very truly yours,

Alan Nicgorski

Alan W. Nicgorski

AWN:cr

Enclosures

cc: All Attorneys of Record *(Via U.S. Mail)*
See attached Service List

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Dean Buntrock, et al. v. Judith Terra, et al.
Case No. 00 CH 13859
(Rev. 11/28/01)

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IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

MOTION FOR EXTENSION OF TIME TO FILE RECORD ON APPEAL

Plaintiffs-Appellants, Dean L. Buntrock and Ronald Gidwitz, ("Plaintiffs") by their attorneys, Quinlan & Carroll Ltd., hereby move this Court for a 60-day extension of time, through and including August 13, 2002, within which to file the record on appeal in connection with this appeal. In support of their motion, Plaintiffs submit the attached affidavit of William R. Quinlan (Exhibit A) and state as follows:

1. On March 13, 2002, the circuit court entered an order denying a portion of the attorneys fees and costs sought by the Plaintiffs in connection with the Consent Judgment and Order entered in this matter.

2. On April 12, 2002, the Plaintiffs filed their notice of appeal, appealing the portion of the March 13, 2002 order which denied those attorneys fees and costs.

3. The Record on Appeal in connection with Plaintiffs' appeal is presently due to be filed on June 14, 2002. However, as set forth in the attached affidavit of William R. Quinlan (Exhibit A), despite the diligent efforts of counsel, the Plaintiffs will require an additional 60 days, through and including August 13, 2002, in which to have the record on appeal prepared and filed with the Court. The office of the Official Court Reporter has not completed preparation of the transcripts in this matter and the record on appeal has not yet been prepared by the Clerk of the Circuit Court.

4. This is the Plaintiffs' first request for an extension of time, and this request is made in good faith and not for the purpose of delay.

WHEREFORE, Plaintiffs-Appellants, Dean L. Buntrock and Ronald Gidwitz, hereby request a 60-day extension of time in which to file their record on appeal, through and including August 13, 2002.

Dated: June 12, 2002

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900

Exhibit A

No. 1-02-1192

IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

AFFIDAVIT OF WILLIAM R. QUINLAN

William R. Quinlan, being duly sworn, states as follows:

1. I am one of the attorneys of record for Plaintiffs-Appellants Dean L. Buntrock and Ronald Gidwitz. I am lead counsel responsible for this appeal on behalf of the Plaintiffs-Appellants.

2. This affidavit is submitted in connection with Plaintiffs-Appellants' Motion for Extension of Time to File Record on Appeal.

3. Despite diligent efforts of counsel, the record on appeal in this matter is not yet prepared and ready to be filed. The Plaintiffs-Appellants' have ordered transcripts and have requested that the record be prepared by the circuit court clerk. At present, several of the transcripts are still outstanding and the record cannot be prepared without those transcripts.

4. In addition, an independent appeal has been filed by the director defendants challenging the entry of the Consent Judgement and Order entered in this case. That appeal is No. 1-01-3152. The various appellants are making efforts to cooperate with regard to the preparation of the record and to avoid duplicative records on appeal. Because of this additional element, namely the multiple appeals pending, preparation of the record may take additional time.

5. The Plaintiffs-Appellants are seeking an additional 60 days within which to have the record on appeal prepared and filed. The Office of the Official Court Reporter at this time could not provide us with a date by which the transcripts will be completed. For that reason, we have asked for 60 days in which to provide sufficient time for the Official Court Reporter to complete those transcripts.

6. This request for an extension of time is made in good faith and not for the purpose of delay.

William R. Quinlan

Signed and sworn to before me June 12, 2002.

Mary Butler
Notary Public

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

No. 1-02-1192

IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

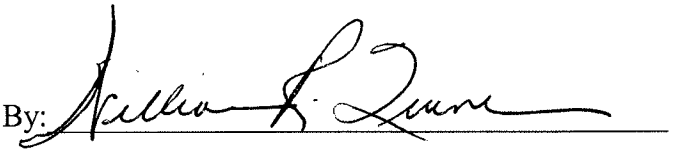
NOTICE OF FILING

TO: (See attached Service List)

PLEASE TAKE NOTICE that on June 12, 2002, we filed with the Clerk of the Illinois Appellate Court, First District, 160 N. LaSalle St., Chicago, IL 60601, a **Motion For Extension of Time to File Record on Appeal**, a copy of which is hereby served upon you.

Respectfully submitted,

Plaintiffs-Appellants

By: 

One Of Their Attorneys

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James R. Carroll
Jasmine de la Torre
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PROOF OF SERVICE

The undersigned, a non-attorney, deposes and states that she caused copies of the foregoing **Motion For Extension of Time to File Record on Appeal**, **Draft Order** and **Notice of Filing** to be served on the individuals to whom this notice is directed at their respective addresses on June 12, 2002 by the method indicated on the attached service list.

{x} Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Mary Butler

Doc:190846

Dean L. Buntrock and Ronald Gidwitz v.
Judith Terra, Paul Hayes Tucker, et al.
No. 00 CH 13859
1-02-1192

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IN THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation, Defendants-Appellees.	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division No. 00 CH 13859 The Honorable Dorothy K. Kinnaird, Judge Presiding
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

ORDER

THIS CAUSE coming to be heard on Plaintiffs-Appellants' Motion for Extension of Time to File Record on Appeal (the "Motion"), due and proper notice having been given, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED:

1. That the Motion is GRANTED/DENIED; and

2. That the Plaintiffs-Appellants are granted through and including August 13, 2002 within which to have the Record on Appeal prepared and filed with this Court.

ENTERED: _____
Justice

_____
Justice

_____
Justice

William R. Quinlan
James R. Carroll
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, **vs.** JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

ATTORNEY GENERAL'S OBJECTION TO THE POST TRIAL FURTHER SUBMISSIONS AND FILINGS OF DEFENDANT DIRECTORS AND MOTION TO STRIKE AND HOLD THE POST TRIAL FILINGS AND AFFIDAVITS SUBMITTED BY DEFENDANTS TERRA, TUCKER AND SIMPSON VOID AND A NULLITY

NOW COMES the PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, and objects to the post trial admission of further evidence contained in the several further submissions and filings by the defendant directors relative to their fee petitions and the Attorney General further moves to strike and hold as a nullity said filings and submissions and specifically the affidavit of Leonard Garment which was filed herein after the close of the evidence and argument on the fee petitions , and in support states as follows:

1) After the close of the evidence and trial herein , the defendant directors have now made several

16di-003155

filings as purported supplements and proofs relative to their Petition for Attorney Fees. The Plaintiff People object to such post trial submission made by defendant directors after the proofs closed and the parties had concluded argument. The Attorney General further moves to strike said submissions and seeks that they be held as a nullity as such is untimely, inadmissible conjecture, hearsay and not properly considered as evidence herein .

2) Six separate attorney fee petitions were filed by the individual defendant directors seeking an award of attorney fees from the Terra Foundation which on their face claim fees from the Terra Foundation under both the court's order herein and under the not for profit corporation act and the Foundation's bylaws. These several fee petitions were filed last September 2001, and those petitions were joined at issue by filings of the Attorney General. The process for resolution of said fees, acquiesced to by all parties , was a trial on the facts contained in the papers , the facts of record and the argument of parties from those papers.

3) The submission of facts, argument and hearing on all of the defendant directors' fee petitions occurred and concluded on January 15, 2002. The defendant directors had every opportunity to submit affidavits and evidence then if they so saw fit. After the close of argument the Court issued its order ruling on certain fees on March 13, 2002.

4) In relevant part the Court also stated in its March 13,2002 order that the five additional fee petitions and the evidence relative thereto that had been submitted by the defendant directors seeking fees for the five new law firms were insufficient to allow the court to reach an adjudication on the additional five fee petitions submitted by the defendant directors. The court in sum states that after a full hearing the defendants had failed to submit proper and complete proofs to establish or show any entitlement to fees for the services of those five additional firms.

5) . The court had previously awarded $500,000 in fees on the defendant directors fee petition for fees payable to Shefsky & Froelich . The court in the March 13, 2002 order , however, provided that the defendant directors could amend the fee petitions and proofs to provide specific additional information. The Court explained these additional materials might allow the court to further consider and rule upon said fee requests. The Court , however, also stated in said order that no additional briefing by other parties will be entertained. A copy of the court's March 13, 2002 order is attached hereto as Exhibit A.

6) Since March 13, 2002 the defendant directors filed amended fee petitions for the fees sought for the firms of : Cummins & Cronin LLC, Bellows & Bellows, Kellogg, Huber, Hansen, Todd & Evans, PLLC, and Verner, Liipert, Bernhard, McPherson & Hand, Chartered. Said filings were accompanied by what is entitled an affidavit of Laurel Bellows and also an affidavit of Declaration of Leonard Garment, which attaches his exhibits B through K . On May 21, 2002 a further and yet additional supplement was made by the defendant directors.

7) These filings are post trial after the close of proofs and while the court invited a limited further explanation of facts, these additional filings are far beyond what the court order provided and are an attempt by defendants to unfairly submit additional purported evidence inappropriately after the proofs have closed. In addition , the purported facts are substantially inadmissible hearsay and in significant part erroneous and certainly disputed. Specifically, the Declaration of Leonard Garment in the main misrepresents the facts and events in this case and it is substantially inadmissible inappropriate hearsay which exceeds this court's permitted additions. Defendant directors have taken excessive liberty with the court's very limited order and their submissions are unfair and inappropriate.

8) The additional information supplied by these defendants is erroneous and works an unfair

advantage upon the People of the State of Illinois and the People object to the defendant directors conduct and state it is not right that such be filed after the proofs were closed.

9) Plaintiff People hereby move to strike and bar all of said additional materials filed by defendant directors and state that the proofs were closed and the matter went to hearing and was completed and that the People have not had an opportunity to dispute the incorrect facts set forth by the defendants, and that the process intended by the Court for a straightforward simple answer to several questions was abused by the defendant directors in these submissions.

10) The People would not and do not object to simple answers to the straight forward questions poised by the court in its March 13, 2002 order, except the People do object and do not believe it fair or appropriate for the defendants to be able to call into question the propriety of any Shefsky & Froelich services or in any way suggest that those services were not fully and properly performed. The defendant directors are estopped from raising issue with those fees, they submitted those services for payment and did not raise issue with a single hour for which fees were sought , and took the funds for those services from charity. The People specifically raised the issue in it filings herein relative to the fees, raising the issue in light in the change of counsel and the lack of time of record relative to new counsel debriefing former counsel. The People raised and urged that the defendants be required to explain any dissatisfaction with any services before any payments were made. The defendant directors stood silent and received full fees for the Shefsky firm payable from charity funds. As a matter of law the defendant directors have vouched for said services of Shefsky & Froelich and can not now suggest otherwise and such stricken.

11) The courts order of March 13, 2002 which allowed a further supplement of a few facts after the close of the hearing and argument, expressly denies the parties the right to further briefing, but these defendant directors have gone too far and have abused the court's limited opening of proofs.

In what the defendant directors filed, they take new positions, submit inaccurate facts, call into question the services of Shefsky & Froelich (now after those fees have been paid) and allows the defendant directors to distort this record with these inaccurate supplements. Moreover these defendants have filed a motion in the appellate court seeking more time, stating they plan to add these additional filings to the record on appeal, a copy of said motion is attached as Exhibit B.

12) The Court's order of March 13, 2002, ordered no further briefing , but given the actions of the defendant directors, the Plaintiff People respectfully assert a right to respond and protect the record, what was filed by the defendant directors exceeds what the court order allowed, and to allow it to go unchallenged would work an unfairness upon the People.

13) In, Exchange National Bank of Chicago v. Eugene Heller et al.(1st. Dist.,1975) 26 Ill. App. 3d 675; 325 N.E.2d 328, 334; 1975 Ill. App. LEXIS 1949 the Illinois Appellate Court sets forth the well established legal principles applicable hereto stating:

" Once a case has been closed the decision as to whether a party may reopen the proceeding to introduce further testimony is within the sound discretion of the trial court. This decision will not be upset by a reviewing court unless it appears that discretion was clearly abused and that [*683] failure to reopen proofs resulted in substantial [**334] injustice. Department of Public Works v. First National Bank, 61 Ill.App.2d 78, 209 N.E.2d 21; Country Life Insurance Co. v. Goffinet, 117 Ill.App.2d 338, 254 N.E.2d 281.) While such discretion should be exercised liberally where evidence was not accessible or was inadvertently overlooked, it should never be exercised to promote or countenance unfairness in the conduct of a trial. (Herricks v. Chicago & E.I.R.R. Co., 257 Ill. 264, 100 N.E. 897.) Thus, if the proof offered is of such a character that it could have been produced at [***15] an earlier time, a court will not be deemed to have abused its discretion in denying its introduction into evidence."

14) This court's order allowing limited further proofs was a proper exercise of discretion, however, as the facts argued herein show the defendant directors have abused the court's order and have unfairly attempted to insert inaccurate untested hearsay into the record. This court has the clear authority and obligation to assure the opening of the proofs is not abused. In, Rosehill Cemetery

Co. v. City of Chicago, 352 Ill 11, 185 NE 170, (1933) the Illinois Supreme Court sets forth guiding parameters of opening up a case for additional evidence stating:

" The matter of the order of proof and allowing a case to be opened up for taking further evidence rests in the sound judicial discretion of the court and should not be interfered with except for clear abuse, as where its effect is to countenance or aid trickery or unfairness on the part of counsel in the trial of a case. (People v. St. Louis, Iron Mountain and Southern Railway Co. 278 Ill. 25; Brelsford v. Community High School District, 328 id. 27.)"

15) This court's order of March 13, 2002 sought simple direct responses and the defendant directors have abused the court's order. The Plaintiff People of the State of Illinois therefore have responded objecting and fear to not respond and move to strike would serve as a waiver.

16) The most serious violation comes from the affidavit of Leonard Garment, who makes erroneous hearsay statements about facts taking place before he was in the case and about matters of which he has no personal knowledge. Declarant Leonard Garment submits his Declaration containing inadmissible hearsay, misstatements of facts, and distortions of the record, accompanied by select documents taken out of context and untested in foundation or accuracy. These matters being submitted after the close of the proofs left unrebutted is an unfairness.

17) The Declaration of Leonard Garment is not only an impermissible post-trial submission of purported further facts, but it fails to meet the requirements for submitting facts upon affidavit (See Supreme Court Rule 191). Said Declaration should be stricken in its entirety because the affidavit is not stated on personal knowledge, much of it is hearsay, it purports to relate facts which were done by others outside the presence of the declarant , it lacks foundation for its numerous claims of fact, it is clearly inaccurate speculation in many regards, and it misstate facts. Some of the misstatements are known to this Court and involve matters in the presence of this Court, but are not documented in this record. Without dwelling on all of such, the following are some, but not all, of the deficiencies and errors of said submission.

18) In paragraph 4, on page 3, Garment's Declaration states facts of which he has no personal knowledge, provides a list of inaccurate thoughts, and makes the untrue statement that the defendant directors' interim petition for "the Shefsky (firms) fees was bound up with the successful termination of the mediation process". Also in paragraph 4 the declarant uses the words "unlawful" and "improper acts", to ascribe conduct, but fails to supply any bases in fact or law for those conclusions and claims, and uses such throughout to invent the argument the settlement was wrongful, when in fact it was the will of the majority of board members and nothing has been shown that shows otherwise.

19) Paragraph 5 appears to provide a date in mid-May when declarant undertook to represent Mrs. Terra. The fact that any of the new firms were rendering service came to the notice of plaintiff when the federal lawsuit was filed end of June with the tender of the federal lawsuit.

20) Paragraph 8, on page 5, contains hearsay and purported facts without foundation and runs to contentions that are clearly disputed and substantially denied by the plaintiffs, but are no longer at issue, and the People believe are submitted for the inappropriate purpose of using such in the upcoming appeal.

21) In paragraph 9 and 10 the declarant simply manufactures and misstates facts . Declarant Garment was not present or involved when the parties entered into mediation nor during the many months it was conducted. It was the declarant's clients the individual defendants and not the Attorney General who sought the agreements of the parties and the Court to enter into court ordered mediation. As the record shows the Declarant chose not to debrief the Shefsky firm, which firm had represented his clients through the litigation during mediation, had he done so he would have known what actually occurred.. Clearly the Declarant Garment has no first hand knowledge of what the Shefsky firm advised or did. Also contrary to Garment's claim no papers were sealed in

mediation except mediation proposals. Also there were no secrets hidden as he suggests. Moreover, it was his clients that sought mediation. Claiming the process of mediation was wrongful conduct by others is simply, unfair and inaccurate. Declarant Garment is correct that it was his clients the individual defendants that made the requirement of releases for all the directors a part of any mediation discussion , his use of such as a claim that others sought such as a self serving benefit is erroneous and contrary to the terms all agreed to in starting mediation, and as set forth in the mediation order, that mediation efforts would not be used against anyone. In addition, the declaration also purports to argue that what was stated in mediation by Sidley & Austin is fact , it is not. B oth are hearsay, and not admissible.

22) The defendant directors claim in their filings that the People engaged in a wrongful act in maintaining a firm position in mediation asserting that to be a wrongful act. Interestingly in paragraph 10 Garment shows and admits by such that the defendants' counsel Sidley & Austin took a hard line negotiation position in mediation in opposition to that of the People of the State of Illinois, seeking that the plaintiffs simply dismiss their case. The defendant directors in theses filings tell a story , that in mediation, the plaintiffs and the Attorney General took aggressive positions and stuck with those positions. The defendant directors are complaining the plaintiffs did not agree in mediation simply to dismiss their complaints and the defendant directors thought they should prevail, but none of which makes any legal sense when placed in full context, Garment's statements are inaccurate and incomplete.

23) In paragraph 11 , 12 , 13 and 14, the declarant Garment asserts inaccurate hearsay about facts of which he does not have personal knowledge and the statements are made without foundation. Garment was not involved in the mediation process, and he is misstating the process and events. The Attorney General as a plaintiff in the matter clearly had a right to have a role, once mediation was started. The declaration in general and at paragraph 12 is made to manufacture a story in the

record that the Shefsky firm did not act as directed by the defendants and were effected by non-payment of fees. That story is not present in the facts of record, and the proofs are closed. Indeed the defendant directors vouched for all of the Shefsky firms services and fees. If these issues existed relative to the Shefsky services they were required to be raised in the case when that firms fees were presented to the court. These defendant directors owed fiduciary duties to question inappropriate services. They did not raise questions. The idea that the Shefsky firm compromised their representation, would surely be adamantly denied by the Shefsky firm, and was not observed by the People. The entire idea of the unpaid fees being an issue is belied by the defendant directors admission that while they apparently would not pay the Shefsky firm, they have purportedly paid current counsel $400,000 (See Garments Declaration at page 19), therefore any anxiety created in not paying the Shefsky firm was of defendant directors doing or did not exist at all. In the end, the only proper presumption flowing from the defendant directors conduct and actions prior to the proofs closing is that all of the Shefsky services were properly rendered.

24) In paragraph 17 the declarant Garment begins with a date of June 8 and makes hearsay statements about a number of people thoughts at that time. Declarant then mis-states facts by implying that thereafter the Attorney General circulated a document about Mr. Stebbins. In fact that is erroneous, as the record from July 2001 shows. The record shows the case was in litigation in January 2001, and certain issues were about to be subject to a hearing , when the individual defendants asked that the matter go to mediation. Weeks after mediation began the parties were far apart, the Sidley & Austin settlement demands referenced by Garment were not accepted by the plaintiffs and mediation seemed unlikely. As the Sidley firm had circulated materials urging its position, so to did the plaintiffs. At one point the Attorney General argued it had counter - arguments to much of the defendants claims stated by Sidley & Austin materials. The defendants asked the obvious, to explain. The further position of the People, was set forth in a draft amended complaint being prepared by the Attorney General. At the request of the parties the draft was

confidentially shared with the parties in March 2001 not June 2001 as Garment suggests. It was shared at the request of the parties including his own clients' counsel. Indeed as everyone then involved knows, by March 2001 the matters about Stebbins were of record in prior filings. The matters in the draft amended complaint in discussion in mediation were the issue of settlor intent and the conduct of Dan Terra, which was set forth in that draft amended complaint. Moreover after the defendants received the draft amended complaint mediation continued.

25) In paragraphs 18 and 19 the declarant states hearsay and explains that on June 13 , 2001 some information was given to the Shefsky firm about other counsel wishing to join the case . What the declarant does not provide is when the Shefsky law firm learned of these purported concerns and activity by three new law firms. The declarant does not explain why he did not ask the Shefsky firm to explain these purported matters and concerns, or to meet and discuss the case. Instead the new law firms rendered hundreds of thousands of dollars of time , trying to learn what the Shefsky firm already knew. What the declaration shows is that the involvement of the new attorneys was not disclosed to the plaintiffs until the filing of the federal lawsuit and that the new attorneys guessed at or worked with inaccurate facts without gaining the information from the Shefsky firm.

26) In paragraph 20 and 21 the declarant provides hearsay contentions and then inaccurately states an administrative subpoena was issued after June 14, 2001. The record herein shows the administrative subpoena was issued at the end of May 2001 and was complied with by June 15 , 2001. Moreover the declarant overstates the scope and effect of such a subpoena and misstates its manner of delivery. Moreover such a subpoena is a lawful and legal activity, the declarant provides no bases to suggest it was unlawful. That subpoena concerned Ms. Marshall and as this records shows most importantly at no time was Ms. Marshall advised that she would receive any consideration for a change of her position. Nor was there consideration to be given to her.

27) In paragraph 22 the declarant provides hearsay and misstates that the parties were acceding to the Attorney General. What in fact occurred was that the majority of the board reached compromised terms with the plaintiffs. Garment was not present at any mediation matter, he is merely speculating and is misstating what occurred.

28) In paragraph 27 the declarant provides self serving contentions and misstatements. The declarant erroneously states that through end of June 2001 that the defendant directors had experienced a "complete absence of opportunity ... to adduce the evidence of Dan Terra's actual intent with respect to the Foundation". By June 2001 the defendant directors had spent almost $500,000 in legal fees, if there were such facts to gather and present the prior nine months was clearly the time during which these defendant directors had every opportunity to gather them. Declarants claims of this evidence is disputed, and his statement his client had no opportunity to gather such is simply a misrepresentation to this court.

29) In paragraph 27 through 34 the declarant admits that either all of the attorney time through June 28, 2001 was done in this matter or in federal court matter and all either prior to being admitted pro hac vice. In addition, the declarant explains that the federal case was dismissed, and the matter was never refiled in state court (the newest lawsuit was filed after the consent decree was entered) . The fact is the only services by the five new law firms were the unsuccessful federal case, the unsuccessful motion for restraining order on June 29 and the unsuccessful Objections to the settlement. The record shows the actual filings in this court prior to the consent decree by the five new law firms, who now seek in excess of $600,000 is less than 50 pages, and involved no formal discovery activities.

30) In paragraph 36 the declarant makes hearsay statements and suggests facts not within his knowledge and not of record, and he misstates the settlement as entered to be the Attorney

General's proposal. Mr. Garment was not involved in those matters and clearly is unaware of what took place. The actual settlement was a compromise settlement far from the original proposal of the Attorney General. In fact in many respects it models a settlement proposed by Ms. Marshall in May 2001 before she had been served with the administrative subpoena.

31) In paragraph 40 the declarant makes the specious statement that Mr. Perkins declined to testify under oath. The declarant fails to explain he had no right at that time to take that deposition. Garment's clients had no pleadings on file, no answer , no cause of action , the case was the subject of a motion to enter an agreed settlement. The record shows there was no lawful basis to then be seeking to take depositions of opposing counsel. However, out of courtesy a meeting to discuss the facts was held attended by Mr. Perkins, although by then both Ms. Marshall and Mr. Stebbins had explained they acted of free will , received no promises and had not been coerced. (While Mr. Garment makes reference to his co-counsel Mr. Longwell being at that meeting , as the record reflects from filings made in July 2001 , Mr. Longwell attempted to report the statements made at that meeting, but in several instances he misstated what had been stated by Mr. Perkins and all of that is disputed hearsay).

32) In paragraphs 45 -48 declarant seeks to introduce hearsay and to argue new matters. It appears to be an admission that the defendant directors were not directing Shefsky & Froelich and implies by hearsay that when the directors did not agree with the decisions and advice of Shefsky & Froelich, the defendant directors rather than discuss the issues with the Shefsky firm, and redirect the efforts of their counsels, the defendant directors instead, simply decided to talk to new counsel and at new counsel's assessment replaced the old counsel and set upon a new approach in the matter and incurred large attorney fees learning what the Shefsky firm already knew.

33) These amended filings do make several key admissions of fact. The Declaration does show

and admit that much of the new firms services were done relative to matters in litigation in Illinois by attorneys without Illinois law licenses, critiquing efforts of Illinois counsel on Illinois litigation all prior to any of the several out of state law firms being admitted pro hac vice.

34) It has been explained in detail in this record that in doing trial preparation, an unrelated matter concerning Ms. Marshall was discovered and examined by the Attorney General. That matter was quickly resolved , no releases were needed , none were discussed or promised , and none were given. The attached Exhibit C , Bellows & Bellows time sheets which show and admit that the Bellows firm had several conversations with director Marshall on June 26 and June 27, 2001 and all prior to going to court on June 28, 2001 and all prior to the June 29, 2001 board meeting. The record does not contain the text of those discussions by Ms. Marshall with Bellows & Bellows counsel. The record made in July 2001 does contain the emphatic denial by Ms. Marshall which were taped and recorded at the June 29, 2002 board meeting, statements in which Ms. Marshall states that she was not intimidated, that she did not compromise her board duties for personal benefit or as part of settlement and that she was acting in the best interest of the Foundation.

35) Given that to date there is no detail in this record of the statements Ms. Marshall made to Bellows & Bellows in June 2001, common sense would suggest that those statements made by Ms. Marshall to the Bellows law firm counsel are not in conflict with what she stated on June 29, 2001. Indeed , if they had been in conflict, it would be completely frivolous for such to have remained undisclosed and not submitted in the filings made by the defendant directors as those filings have cost charity tens of thousands of dollars.

36) These most recent filings of defendant directors shows and admits that the defendant directors new law firms had interviewed Stephanie Marshall in June 2001 before the federal lawsuit was filed , and knowing her denial of self interest and intimidation still persisted in stating Ms. Marshall

voted to protect her own interest and that she received consideration in exchange for her vote, when they had no evidence of such.

37) The claims that the pressures on Stebbins were unlawful are by the real facts complete fabrication and the Garment declaration spin is based upon hearsay and inaccuracies. These most recent filings show and admit that this new counsel erroneously failed to know that it was the defendant directors who sought mediation and sought the releases for all directors. The most recent filings show that the new counsel erroneously thought the Stebbins issues were raised after mediation started , when in fact they were fully of record when the defendant directors suggested mediation and when they sought the releases for all directors, including releases for themselves.

38) By filing the declaration of Garment the defendant directors attempt to take advantage of the court's limited order and also hope that due to time and the complexity of this matter they can shade and confuse the truth. All these filings can be used for is to show admissions that the defendant directors hired new counsel without basis and without the slightest concern for costs.

39) The gist of what is stated in these recent filings is that the defendant directors did not like the outcome of the mediation they requested and hired new counsel to litigate and try to derail settlement they initiated once they were not getting their way. To support the excessive fees the defendant directors now want to claim that they disagreed with the position their original attorneys took. The defendant directors secretly hired new counsel during mediation to explore and prepare for trial, but object that while they prepared for trial, the plaintiff People likewise continued to prepare for trial. The defendants chose to change counsel and did not supervise an exchange of information. Defendant allowed new counsel to proceed without the facts or details known by the Shefsky firm. As Garment's declaration shows and admits, he did not understand that it was his clients that sought mediation and releases for all directors. As the record reflects the Stebbins

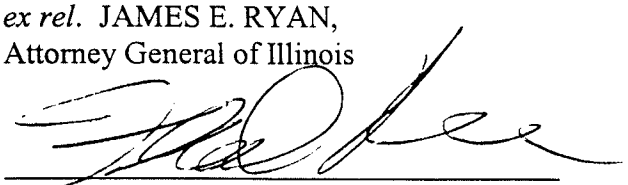
matters were all of record prior to mediation, there was nothing for Dr. Stebbins to hide by a settlement. The defendant directors' materials show they spoke with Ms. Marshall before any filings, and yet they proceeded with the filings claiming she had been coerced, when she stated freely and openly at the board meeting that she had not been coerced , that she chose to act of a free will and presumably so told Bellows & Bellows when they interviewed her before filing the lawsuits. (See Bellows time sheet June 26-27, 2001 , showing conversations with Ms. Marshall).

40) What these filings also shows is that the defendant directors sought mediation but had no intentions of compromise and though they recognized the Attorney General's position from the start of mediation was something they did not wish to agree to, they chose to keep discovery stayed and the parties in mediation for months , apparently while the defendants prepared their case without regard to cost. The defendant directors are trying to supplement this record with these impermissible filing and that is unfair and such must be stricken.

WHEREFORE the Plaintiff the People object and move to strike the post trial excessive additional filings of the defendant directors and specifically and including the affidavit of declarant Garment and the attachments thereto in their entirety for all of the foregoing reasons.

Respectfully submitted,

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN,
Attorney General of Illinois



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16di-003169

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts; and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	Judge Dorothy Kirie Kinnaird

ORDER AWARDING ATTORNEYS' FEES

This case is before the Court on the fee petitions of various Directors of the Terra Foundation. Those Directors are plaintiffs Dean L. Buntrock and Ronald Gidwitz, non-party Directors Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, and defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson. In total, fees in excess of $2,400,000 and costs in excess of $315,000 are sought herein.

EXHIBIT A

16di-003170

These figures do not include fees and costs of counsel for the Terra Foundation and they do not include the fees and costs in the amount of $468,376.17 which were previously awarded to counsel for defendants Terra, Tucker and Simpson.

The Court has received and reviewed Dean L. Buntrock and Ronald Gidwitz's Petition for Attorneys' Fees and Costs Pursuant to Consent Judgment and Order Entered July 26, 2001, the Supplemental Petition filed by those plaintiffs, the Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock, and the plaintiffs' Reply. Unredacted billing statements covering the period from September 18, 2000 through August 31, 2001 have also been reviewed.

Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall have filed their Petition for Reimbursement of Fees and Costs together with unredacted billing statements covering the period from January 26, 2001 through September 10, 2001. That Petition together with the Attorney General's Response to the Fee Petition Submitted by Attorneys for Dr. Stebbins and Dr. Marshall have been reviewed by the Court.

On behalf of defendants Alan Simpson, Judith Terra and Paul Hayes Tucker five additional fee petitions have been filed and reviewed. They are: 1) the Motion for Attorneys' Fees and Costs filed by Verner Liipfert, Bernhard, McPherson & Hand, Chartered; 2) an Amended Petition for Fees and Costs filed by Bellows and Bellows, P.C.; 3) the Motion for Attorney's Fees and Costs filed by Kellogg, Huber, Hanson, Todd & Evans, P.L.L.C.; 4) the Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses; and 5) the Petition for Fees and Expenses filed by Cummins & Cronin, LLC. The unredacted billing statements filed in support of these petitions cover the period from May 18, 2001 through August 31, 2001.

In connection with the defendant Directors' fee petitions, the Court has also received and the reviewed the Attorney General's Response to the Fee Petitions Submitted by Attorneys for Terra, Tucker and Simpson, the Terra Foundation's Motion to Reject any Fee Petitions Seeking Attorneys' Fees Not in Connection with this Lawsuit, the Reply Memorandum of Defendants Terra, Tucker and Simpson, and the Terra Foundation's Reply Memorandum in Support of its Motion to Reject. For the period from May 18, 2001 through June 29, 2001, the Court re-reviewed Shefsky & Froelich Ltd.'s Petition for Fees and Costs regarding communications between the departing Shefsky firm and the appearance of the Verner, Bellows and Kellogg firms.

In reviewing all of the pending fee petitions, the Court has reviewed all affidavits and exhibits submitted. The Court compared the fee requests herein with the Billing Statements Submitted to the Terra Foundation by Sidley Austin Brown & Wood, covering the period from September 21, 2000 through July 31, 2001, and with the Shefsky and Froelich bills covering the period October 8, 2000 through June 21, 2001. The Court also reviewed its notes on the history of this case, as well as pertinent documents from the court file. The Court entertained oral argument on the fee petitions on January 15, 2002, and reviewed and considered the proposed orders and/or proposed findings of fact submitted by parties.

On July 26, 2001, this Court entered a Consent Judgment and Order resolving all issues in this case with the exception of the award of attorneys' fees and costs. As part of the mediated settlement of this case the parties agreed and the Court ordered that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." This Court has determined that all of the petitions before the Court include requests for fees which were not incurred in connection with this lawsuit. Specifically, certain of the petitions

contain entries relating to a separate case filed in the U.S. District Court and to a Circuit Court of Cook Law Division case filed after this case was concluded. This Court has determined that it is not appropriate to award fees relating to those cases under the Consent Judgment and Order in this case. In regard to the Quinlan and Carroll invoices and the McDermott, Will & Emery invoices, this Court has been able to determine an amount to deduct for those related cases. In regard to the defendant Directors' attorneys' invoices, it is not possible to make such a determination.

This was an extremely complex and fiercely litigated case involving some novel issues. There was extensive motion practice and multiple appeals. Over thirty court sessions, many of them lengthy, were held prior to the entry of the Consent Judgment and Order. The more complex of the issues involved related to special litigation committees, attorney ethics and disqualification, museum ethics, breaches of fiduciary duties, and the Attorney General's responsibilities in regard to charitable trusts and not-for-profit corporations. Many experts were retained and their opinions differed. Much out-of-state law was supplied and argued.

In reviewing the fee petitions this Court has considered, among other things, the magnitude and complexity of the case, the novelty and importance of the legal issues involved, the benefits conferred, the number of hours expended, the manner and tasks in which the time was expended, by whom the time was expended, the hourly rate charged by each person for a given task, the time required by other attorneys in the community to perform tasks of a comparable nature, the hourly fee charged for similar services by other attorneys with similar skills and qualifications, the degree to which the tasks performed contributed to the result obtained, and whether the fees have been paid by the clients. The Court has taken note that in regard to the Quinlan & Carroll bills and the McDermott, Will & Emery bills, the Attorney General has not objected to the requested fees and costs. The Court has also noted

that the fee petitions of those firms are not inconsistent with the bills of Sidley and Austin submitted to, and presumably paid by, the Foundation. (This Court has not approved the bills of the Foundation's counsel).

Notwithstanding the lack of an objection from the Attorney General, this Court believes that certain of the fees and costs submitted by the Quinlan and McDermott firms should not be approved, particularly considering that charitable funds are involved here. [The Court agrees with current counsel for the Foundation that "(t)he Foundation exists to promote American art, not to fund litigation."] As to attorneys' time entries in the Quinlan & Carroll petition, these include multiple entries for duplicative and excessive billing for four partners (at their respective hourly rates) and for one associate (at a blended rate of $180), totaling $421,200. That figure includes a reduction of $4,700 in fees incurred after the entry of the Consent Judgment and Order which were reflected in the September 25, 2001 invoice. Finally, the Court has determined that $10,166.25 was billed in connection with the federal court litigation and that that amount should be excluded. As to costs, the Court has granted all costs with the exception of an expert witness fee reflected in the September 25, 2001 invoice and with the exception of all costs incurred for the public relations firm of Kemper Lesnik.

The McDermott Will & Emery fees are approved herein, eliminating the fees and costs for "Terra II" and $1,980.00 in fees for the federal action. The costs relating to "Terra I" are approved.

This Court is not able to adjudicate at this time the five additional fee petitions filed on behalf of defendants Terra, Tucker and Simpson. In order to do so, this Court needs to receive revised fee petitions from any of the five firms who may wish to provide them. The revised fee petitions should eliminate all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). The revised fee petitions should be supported by affidavits of counsel

and/or the defendant Directors which should include the following: 1) the dates counsel was retained; 2) the reason for the retention of the additional counsel; 3) if applicable, the dates counsel was discharged or withdrew and the reason for the discharge or withdrawal; 4) the dates and manner in which any counsel of record in this case was advised that additional counsel for defendants Terra, Tucker and Simpson had been retained; 5) the dates and manner of first communication with the firm of Shefsky and Froelich about additional representation for defendant Directors in this case; 6) the dates on which any parties to the mediated settlement were first advised that defendants Terra, Tucker and Simpson would be seeking fees pursuant to the Consent Judgment and Order for fees for any firm other than Shefsky and Froelich; 7) all attempts to avoid duplication of effort between former and new counsel; and 8) a statement as to when and how much of the attorneys' fees and costs set forth in the revised fee petitions have been paid to date. In regard to the Verner Liipfert firm, an explanation should be given of the $35,000 notation regarding Bellows and Bellows which appears on the summary of invoices and the $25,000 cost entry to Bellows and Bellows for professional services which appears in Invoice No. 183977.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit is granted.

2. Plaintiffs Dean L. Buntrock and Ronald Gidwitz are awarded attorneys' fees in the amount of $1,172,182.00 and costs in the amount of $162,768.65, for a total award of $1,334,950.65 .

3. Directors Dr. Theodore E. Stebbins and Dr. Stephanie Pace Marshall are awarded attorneys' fees in the amount of $35,026.25 and costs in the amount of $768.16, for a total award of $35,794.41.

4. Defendants Terra, Tucker and Simpson have 28 days to file revised fee petitions and supporting affidavits as set forth above. No additional briefing will be entertained.

5. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTERED

ENTER: MAR 13 2002

JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge Dorothy Kirie Kinnaird

March 13, 2002

05-1477

No. 01-3152

2756

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RECEIVED
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ATTORNEY GENERAL
CHARITABLE TRUST

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs-Appellees,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Defendants-Appellants,
-and-
NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants-Appellees.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor/Appellee,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Defendants-Appellants,
-and-
TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants-Appellees.

On Appeal From the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 00 CH 13859

Honorable Dorothy Kinnaird
Judge Presiding

MOTION TO EXTEND TIME TO FILE BRIEF AND ARGUMENT

EXHIBIT B

MOTION TO EXTEND TIME
TO FILE BRIEF AND ARGUMENT

NOW COME the defendants-appellants, JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, by and through counsel, CUMMINS & CRONIN, LLC and NOVOSELSKY LAW OFFICES, and respectfully request that this Honorable Court extend the time in which to file their brief and argument a period of 35 days, or to and including July 15, 2002, and in support attach the affidavit of David A. Novoselsky.

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and
ALAN K. SIMPSON, Defendants-Appellants

By: _____
One of Their Attorneys

ROBERT P. CUMMINS
CUMMINS & CRONIN, LLC
77 West Wacker Drive
Suite 4800
Chicago, IL 60601
Telephone: (312) 606-8605
Fax: (312) 578-1234

DAVID A. NOVOSELSKY
LESLIE J. ROSEN
NOVOSELSKY LAW OFFICES
120 North LaSalle Street
Suite 1400
Chicago, Illinois 60602
Telephone: (312) 346-8930
Fax: (312) 346-9453
Attorney I.D. No. 24578

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,
Plaintiffs-Appellees,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Defendants-Appellants,
-and-
NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants-Appellees.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor/Appellee,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Defendants-Appellants,
-and-
TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,
Defendants-Appellees.

On Appeal From the Circuit Court of Cook County, Illinois, County Department, Law Division, No. 00 CH 13859

Honorable Dorothy Kinnaird
Judge Presiding

AFFIDAVIT

AFFIDAVIT

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

DAVID A. NOVOSELSKY, being first duly sworn on oath deposes and says:

1. That I am an attorney licensed to practice law in the State of Illinois and have been retained to prepare defendants-appellants' briefs in this cause.

2. That my firm, in conjunction with plaintiffs' counsel, is in the process of compiling a Supplemental Record on Appeal which will include transcripts relative to this appeal and the plaintiffs' appeal as well as documents relative to the plaintiffs' appeal.

3. Although prior requests have been made for an extension of time in which to file the appellants' brief and argument, this request is made solely for the reasons stated and not to unduly delay the presentation of this appeal. Affiant therefore respectfully requests that this Court grant the extension of time to July 15, 2002.

FURTHER AFFIANT SAYETH NOT.

Subscribed and sworn to before me
this 10th day of June, 2002.

Notary Public

OFFICIAL SEAL
SHEILA E. MCDONELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-2-2004

Slip ID / Dates and Time / Posting Status / Description		Professional Activity Client Matter	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
280	TIME	MTW	1.00	240.00	240.00
6/25/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Prepare materials for federal filing and Pro Hac Vice Motion. (Federal)		Terra Litigation	0.00		
4385	TIME	LGB	5.50	350.00	1925.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conference call with K.C. Todd to confirm further facts in Affidavit and Petition.		Terra Litigation	0.00		
Confirm facts surrounding S. Marshall's alleged intimidation by Attorney General and to have IMSA's attorney contact me.					
54384	TIME	LGB	4.30	350.00	1505.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with client regarding facts concerning IMSA. Conversation with K.C. Todd regarding litigation goals. Conversation with L. Garment regarding representation of P. Tucker, J. Terra, A. Simpson, and Foundation.		Terra Litigation	0.00		
54383	TIME	LGB	4.20	350.00	1470.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Conversation with K.C. Todd regarding Judith Terra's Declaration; review and revise recent drafts of Affidavit and Memorandum. Confirm facts. Conversations with K.C. Todd, N. Gorsuch and J. Longwell regarding factual and legal issues.		Terra Litigation	0.00		
54287	TIME	MTW	6.00	240.00	1440.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		
Facilitate various federal court filings. Research issues related to Temporary Restraining Order Motion pursuant to local rules: service on A.G., restricted filing. (Federal)		Terra Litigation	0.00		
54272	TIME	JJB	0.80	325.00	260.00
6/26/01		GENERAL	0.00	T@1	
WIP		Terra litigation	0.00		

EXHIBIT C

ID ates and Time osting Status escription	Professional Activity Client Matter	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
onversations with L. Bellows and M. Wolf regarding procedural matters, federal ourt jurisdiction, pleading and local rules n Temporary Restraining Order. (Federal)	Terra Litigation	0.00		
295 TIME 6/27/01 WIP Prepare for filing of Complaint, Temporary Restraining Order and related pleadings. Telephone conversations and e-mails with DC counsel and paralegals regarding procedural matters and necessary filings. Research regarding miscellaneous issues related to filing and notice. (Federal)	MTW GENERAL Terra litigation Terra Litigation	7.50 0.00 0.00 0.00	240.00 T@1	1800.00
4286 TIME 6/27/01 WIP Conference with L. Bellows and M. Wolf re[illegible]ng handling of standing question at Te[illegible]rary Restraining Order hearing. (Federal)	CLG GENERAL Terra litigation Terra Litigation	0.20 0.00 0.00 0.00	205.00 T@1	41.00
54393 TIME 6/27/01 WIP Prepare pleadings for filing. Make copies, deliveries. (Federal)	LC GENERAL Terra litigation Terra Litigation	2.00 0.00 0.00 0.00	50.00 T@1	100.00
54283 TIME 6/27/01 WIP Conference with L. Bellows regarding relief and form of Temporary Restraining Order.	JJB GENERAL Terra litigation Terra Litigation	0.60 0.00 0.00 0.00	325.00 T@1	195.00
54387 TIME 6/27/01 WIP Review factual revisions to P. Tucker's Declaration. Conversation with counsel regarding Board. Call from S. Marshall to request that we shelter her from allegations in Declaration, which although true, might become fodder for future Crain's articles. Discuss lack of foundation for Attorney General's actions based on weak Affidavit of Jim Terra with	LGB GENERAL Terra litigation Terra Litigation	8.00 0.00 0.00 0.00	350.00 T@1	2800.00

ID ates and Time osting Status escription	Professional Activity Client Matter	Units DNB Time Est. Time Variance	Rate Rate Info Bill Status	Slip Value
C counsel.				
886 TIME /27/01 VIP Conversations with all counsel regarding retention, representation and parties. Review and revise Declaration and pleadings; review revisions and discuss with DC counsel. Review Chancery pleadings filed by Attorney General. Discuss same with DC counsel. Review pleadings filed by James Terra. Telephone call from S. Marshall to inquire regarding status and content of any statements in pleading which concern her or IMSA.	LGB GENERAL Terra litigation Terra Litigation	9.00 0.00 0.00 0.00	350.00 T@1	3150.00
334 TIME 6/27/01 WIP Rese ch choices for potential defendants in C laint and manner in which Office of Attorney General must be named when naming an individual government official.	LC GENERAL Terra litigation Terra Litigation	3.00 0.00 0.00 0.00	50.00 T@1	150.00
4263 TIME 6/27/01 WIP Collate/photocopy/fax legal documents to N. Gorsuch.	LC GENERAL Terra litigation Terra Litigation	2.00 0.00 0.00 0.00	50.00 T@1	100.00
4394 TIME 6/28/01 WIP Prepare documents for state court hearing	LC GENERAL Terra litigation Terra Litigation	4.00 0.00 0.00 0.00	50.00 T@1	200.00
56297 TIME 6/28/01 WIP Coordinate federal court filing, service. (Federal)	JJB GENERAL Terra litigation Terra Litigation	1.00 0.00 0.00 0.00	325.00 T@1	325.00
56308 TIME 6/28/01 WIP Finalize and file federal court documents. (Federal)	MTW GENERAL Terra litigation Terra Litigation	3.00 0.00 0.00 0.00	240.00 T@1	720.00

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, *et al.*, Plaintiffs, v. JUDITH TERRA, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff- Intervenor, v. JUDITH TERRA, *et al.*, Defendants.	)	

FILED
JUN 14 2002
DOROTHY BROWN
CLERK OF CIRCUIT COURT

NOTICE OF MOTION

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on JUNE 21, 2002 at 9:30 AM or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Dorothy Kinnaird in Room 2403, in the Circuit Court of Cook County, State of Illinois, and present the **ATTORNEY GENERAL'S OBJECTION TO THE POST TRIAL FURTHER SUBMISSIONS AND FILINGS OF DEFENDANT DIRECTORS AND MOTION TO STRIKE AND HOLD THE POST TRIAL FILINGS AND AFFIDAVITS SUBMITTED BY DEFENDANTS TERRA, TUCKER AND SIMPSON VOID AND A NULLITY**, a copy of which is hereby served upon you.

BY: FLOYD D. PERKINS
Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2533
TERRANOTOFMOTION051602/FDP/TH/cjw
05-1307

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,	)	
Plaintiff- Intervenor,	)	
vs.	)	
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Defendants.	)	

NOTICE OF FILING

TO: **SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that on June 14, 2002, I caused the attached **ATTORNEY GENERAL'S OBJECTION TO THE POST TRIAL FURTHER SUBMISSIONS AND FILINGS OF DEFENDANT DIRECTORS AND MOTION TO STRIKE AND HOLD THE POST TRIAL FILINGS AND AFFIDAVITS SUBMITTED BY DEFENDANTS TERRA, TUCKER AND SIMPSON VOID AND A NULLITY** to be filed with the Clerk of the Circuit Court Cook County, Illinois, Chancery Division.

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
MATTHEW D. SHAPIRO
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595

CERTIFICATE OF SERVICE

I, the undersigned, certify that I am an attorney, and that I served a copy of the foregoing Notice and the foregoing document upon the parties listed below by depositing a copy of same addressed to the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 14th day of June, 2002 before 5:00 p.m.

BY: Assistant Attorney General

FLOYD D. PERKINS #99000
THERESE HARRIS
Assistant Attorneys General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 3rd Floor
Chicago, Illinois 60601-3175
Telephone: (312) 814-2595
TERRANOTOFFILING051602/FDP/TH/cjw
05-1307

SERVICE LIST

Thomas R. Mulroy
Alan W. Nigorski
Mulroy, Scandaglia, Marrinson, Ryan
55 E. Monroe, Suite 3930
Chicago, IL 60603

David A. Novoselsky
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Suite 1400
Chicago, IL 60602

William R. Quinlan
James R. Carroll
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
Suite 2900
Chicago, IL 60602

William P. Schuman
McDermott, Will & Emery
227 W. Monroe
Chicago, IL 60606-5096

Joel J. Bellows
Bellows & Bellows, P.C.
79 W. Monroe Street, Suite 800
Chicago, IL 60603

K. Chris Todd
Neil M. Gorsuch
David E. Ross
John H. Longwell
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Leonard Garment
Lawrence Levinson
Verner, Lupfert, Bernhard, McPherson & Hand
901 - 15th Street, N.W., Suite 700
Washington, DC 20005

Robert P. Cummins
Cummins & Cronin, LLC.
77 W. Wacker Drive
Suite 4800
Chicago, IL 60601

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN BUNTROCK ET. AL Plaintiff

vs.

JUDITH TERRA, ET. AL DEFENDANTS

AND

PEOPLE of the STATE of IL Plaintiff

vs.

JUDITH TERRA ET. AL DEFENDANTS

No. 00 CH 13859

JUDGE KINNAIRD

ORDER

Coming upon the Attorney General's Motion & Objection to the Post Trial Submission of Defendant Directors & To Strike Affidavit of Leonard Garment and Defendant Directors having filed a Response thereto, the parties appearing of record, due notice having been served, the Court being advised of the Premises:

IT IS ORDERED:

A) The Court will consider the further Objections & Motion to Strike of the Attorney General & the further Response of the Defendant Directors and will rule on such as needed in its final Ruling on Fees.

B) No further filings will be considered

Atty. No.: 99000

Name: FLOYD PERKINS AAG

Atty. for: Plaintiff - PEOPLE

Address: 100 W RANDOLPH

City/State/Zip: CHGO IL 60601

Telephone: 312 814-3533

ENTER: ENTERED

JUN 21 2002

JUDGE

Judge DOROTHY KIRIE KINNAIRD - 270 Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

16di-003189

NOTICE OF ATTORNEY'S LIEN

TO:

Donald Ratner
Terra Museum of American Art
664 North Michigan Avenue
Chicago, IL 60611

Judith Terra
3623 N Street N.W.
Washington D.C. 20007

Paul Hayes Tucker
21 Monument Square
Charleston, MA 02129

Alan K. Simpson
1201 Sunshine
Cody, WY 82414

William R. Quinlan
James R. Carroll
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, 29th Floor
Chicago, IL 60602

Floyd D. Perkins
Barry S. Goldberg
Assistant Attorney General &
Bureau Chief of Charitable Trusts
100 W. Randolph Street, 3rd Floor
Chicago, IL 60601

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
SIDLEY, AUSTIN, BROWN & WOOD
Ten South Dearborn Street
Chicago, IL 60603

William Schuman
Debra Tucker
MCDERMOTT WILL & EMERY
227 West Monroe Street, 55th Floor
Chicago, IL 60606

Scott J. Szala
Mark M. Heatwole
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601

Eric D. Brandfonbrener
PERKINS COIE
35 W. Wacker Dr., Suite 3750
Chicago, IL 60601-1657

Leonard Garment
Lawrence Levinson
Verner, Liipfert, Bernard, McPherson
& Hand
901 15th Street, N.W., Suite 700
Washington, DC 20005

Chris K. Todd
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Thomas R. Mulroy, Jr.
Mulroy Scandaglia Marrison Ryan
55 East Monroe Street
Suite 3930
Chicago, IL 60603

PLEASE TAKE NOTICE that PAUL HAYES TUCKER, JUDITH TERRA, and ALAN K. SIMPSON (collectively, the "Clients") placed with Novoselsky Law Offices (the "Firm") a defense, claim, demand or cause of action in cases styled *Dean Buntrock, et al., v. Judith Terra, et al.*, No. 00 CH 13859, (Circuit Court of Cook County), *Paul Hayes Tucker, et al. v. Dean Buntrock, et al.*, No. 01 L 009112, (Circuit Court of Cook County), and Appeals Pending before the Appellate Court for the First District of Illinois, Nos. 1010034, 1021192 and 01-3152.

YOU ARE HEREBY NOTIFIED that the Clients entered into a contract with the Firm to pay the Firm as compensation for the Firm's services rendered and to be rendered in and about the prosecution of said defense, claim, demand or cause of action the sum equal to the hourly rates of attorney David A Novoselsky multiplied by the number of hours so expended. To date, such sum owed to the Firm is in excess of $62,500.00.

YOU ARE FURTHER NOTIFIED that by virtue of the Illinois Attorney's Lien Law, 770 ILCS 5/1, as amended, the Firm claims a Lien to the extent of its interest, as set forth above, in any claim or demand, which said Lien, by virtue of said law, attaches to any judgment entered or to be entered in such suit or to any money or property which may be recovered by the Clients as a result of the resolution of such suits, demands or causes of action from the service of this notice.

NOVOSELSKY LAW OFFICES

By: _____
David A. Novoselsky

CERTIFICATE OF SERVICE

I, David A. Novoselsky, an attorney, under penalty of perjury, state that on July 22, 2002, I served the foregoing Notice of Attorney's Lien upon the parties listed on the Service List by Certified U.S. Mail, proper postage paid.

_____
David A. Novoselsky

Subscribed and Sworn To
Before me this 22nd day of July, 2002

_____
Notary Public

OFFICIAL SEAL
SHEILA E. MC DONELL
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6-2-2004

F:\DOCS\DAN\DEFENSE\Terra.NOTICE OF ATTORNEYS LIEN.wpd

NOTICE OF ATTORNEY'S LIEN

TO:

Donald Ratner
Terra Museum of American Art
664 North Michigan Avenue
Chicago, IL 60611

Judith Terra
3623 N Street N.W.
Washington D.C. 20007

Paul Hayes Tucker
21 Monument Square
Charleston, MA 02129

Alan K. Simpson
1201 Sunshine
Cody, WY 82414

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James R. Carroll
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, 29th Floor
Chicago, IL 60602

Floyd D. Perkins
Barry S. Goldberg
Assistant Attorney General &
Bureau Chief of Charitable Trusts
100 W. Randolph Street, 3rd Floor
Chicago, IL 60601

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
SIDLEY, AUSTIN, BROWN & WOOD
Ten South Dearborn Street
Chicago, IL 60603

William Schuman
Debra Tucker
MCDERMOTT WILL & EMERY
227 West Monroe Street, 55th Floor
Chicago, IL 60606

Scott J. Szala
Mark M. Heatwole
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601

Eric D. Brandfonbrener
GRIPPO & ELDEN
227 West Monroe Street, Suite 3600
Chicago, IL 60606

Leonard Garment
Lawrence Levinson
Verner, Liipfert, Bernard, McPherson
& Hand
901 15th Street, N.W., Suite 700
Washington, DC 20005

Chris K. Todd
Kellogg, Huber, Hansen, Todd & Evans,
P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Thomas R. Mulroy, Jr.
Mulroy Scandaglia Marrison Ryan
55 East Monroe Street
Suite 3930
Chicago, IL 60603

PLEASE TAKE NOTICE that PAUL HAYES TUCKER, JUDITH TERRA, and ALAN K. SIMPSON (collectively, the "Clients") placed with Cummins & Cronin, LLC (the "Firm") a defense, claim, demand or cause of action in cases styled *Dean Buntrock, et al., v. Judith Terra, et al.*, No. 00 CH 13859, (Circuit Court of Cook County), *Paul Hayes Tucker, et al. v. Dean Buntrock, et al.*, No. 01 L 009112, (Circuit Court of Cook County), and Appeals Pending before the Appellate Court for the First District of Illinois, Nos. 1010034, 1021192 and 01-3152.

YOU ARE HEREBY NOTIFIED that the Clients entered into a contract with the Firm to pay the Firm as compensation for the Firm's services rendered and to be rendered in and about the prosecution of said defense, claim, demand or cause of action the sum equal to the hourly rates of attorneys Robert P. Cummins and Thomas C. Cronin multiplied by the number of hours so expended. To date, such sum owed to the Firm equals $154,552.66.

YOU ARE FURTHER NOTIFIED that by virtue of the Illinois Attorney's Lien Law, 770 ILCS 5/1, as amended, the Firm claims a Lien to the extent of its interest, as set forth above, in any claim or demand, which said Lien, by virtue of said law, attaches to any judgment entered or to be entered in such suit or to any money or property which may be recovered by the Clients as a result of the resolution of such suits, demands or causes of action from the service of this notice.

CUMMINS & CRONIN, LLC

By: _____
Robert P. Cummins

CERTIFICATE OF SERVICE

I, Thomas C. Cronin, an attorney, under penalty of perjury, state that on July 22, 2002, I served the foregoing Notice of Attorney's Lien upon the parties listed on the Service List by Certified U.S. Mail, proper postage paid.

_____
Thomas C. Cronin

Subscribed and Sworn To
Before me this 22nd day of July, 2002

_____
Notary Public

OFFICIAL SEAL
PATRICIA C CASTRO
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:08/08/04

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al., Plaintiff, v. JUDITH TERRA, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, et al., Defendants.	)	Case No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANTS

NOW COMES Movants, NOVOSELSKY LAW OFFICES and CUMMINS & CRONIN LLC , and respectfully request leave to withdraw as counsel of record for Defendants, JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts. In support of this request, Movants state as follows.

Professional differences have arisen between Defendants and Movants. As a result, Movants are no longer able to represent them in this matter.

WHEREFORE, Movants, NOVOSELSKY LAW OFFICES and CUMMINS & CRONIN LLC , respectfully request that this Honorable Court, pursuant to Illinois Supreme Court 13, grant them leave to withdraw as counsel for the above-named Defendants and for all other relief which this Court deems appropriate.

Respectfully submitted,

NOVOSELSKY LAW OFFICES and
CUMMINS & CRONIN LLC

By: _____
One of their Attorneys

David A. Novoselsky
NOVOSELSKY LAW OFFICES
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312) 346-8930
Attorney No. 24578

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN LLC
77 W. Wacker Dr., Suite 4800
Chicago, IL 60601
(312) 578-0500
Attorney No. 37288

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiff,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

FILED
JUL 23 2002
DOROTHY E. [illegible]
CLERK OF CIRCUIT COURT

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

NOTICE OF FILING

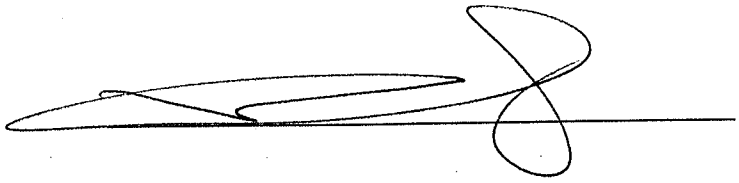
TO: See attached Service List

PLEASE TAKE NOTICE that on July 23, 2002, we filed with the Clerk of the Circuit Court of Cook County, County Department, Chancery Division, **MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANTS**, a true and accurate copy of which is attached hereto and served upon you.

David A. Novoselsky
NOVOSELSKY LAW OFFICES
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312) 346-8930
Attorney No. 24578

CERTIFICATE OF SERVICE

The undersigned attorney states that he caused a copy of the foregoing notice and motion to be served on the attorneys listed below by placing same in the U.S. mail with proper postage prepaid on July 23, 2002.



SERVICE LIST

Mr. William R. Quinlan
Mr. James R. Carroll
Quinlan & Carroll, Ltd.
30 North LaSalle St., 29th Floor
Chicago, IL 60602

Mr. William F. Conlon
Mr. Stephen C. Carlson
Ms. Susan A. Stone
Ms. Lori L. Roeser
Sidley Austin Brown & Wood
Ten South Dearborn Street
Chicago, IL 60603

Mr. Floyd D. Perkins
Mr. Barry S. Goldberg
Assistant Attorney General and
Bureau Chief of Charitable Trusts
100 West Randolph St., 3rd Floor
Chicago, IL 60601

Donald Ratner
Terra Museum of American Art
664 N. Michigan Ave.
Chicago, IL 60611

Paul Hayes Tucker
21 Monument Square
Charleston, MA 02129

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Mark M. Heatwole
Winston & Strawn
35 W. Wacker Dr.
Chicago, IL 60601

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Lawrence Levinson
Verner, Liipfert, Bernard, McPherson & Hand
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Washington, DC 20005

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Mulroy Scandaglia Marrison Ryan
55 E. Monroe St., Suite 3930
Chicago, IL 60603

Judith Terra
3623 N Street N.W.
Washington, D.C. 20007

Alan K. Simpson
1201 Sunshine
Cody, WY 82414

William Schuman
Debra Tucker
McDermott Will & Emery
227 W. Monroe St., 55th Floor
Chicago, IL 60606

Eric D. Brandfonbrener
Perkins Coie
35 W. Wacker Dr., Suite 3750
Chicago, IL 60601-1657

Chris K. Todd
Kellogg, Huber, Hansen, Todd & Evans
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

FILED
2002 AUG -6 PM 4:20
CLERK

CONSOLIDATED NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on ~~Wednesday~~ FRIDAY, August ~~14~~ 9th, 2002 at 10:00 a.m., we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2403, Richard J. Daley Center, Chicago, Illinois, and then and there present our consolidated Motion for Leave to Withdraw as Counsel for Plaintiffs, a copy of which is attached hereto and hereby served upon you.

Dated: August 6, 2002

One of the Attorneys for Plaintiffs

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
Firm ID No. 37288
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
(312) 578-0500

David A. Novoselsky
NOVOSELSKY LAW OFFICES
Firm I.D. No. 24578
120 North LaSalle, Suite 1400
Chicago, Illinois 60602
(312) 346-8930

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiff,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

FILED
JUL 2 5 2002
CLERK OF THE CIRCUIT COURT

Case No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANTS

NOW COMES Movants, NOVOSELSKY LAW OFFICES and CUMMINS & CRONIN LLC , and respectfully request leave to withdraw as counsel of record for Defendants, JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts. In support of this request, Movants state as follows.

Professional differences have arisen between Defendants and Movants. As a result, Movants are no longer able to represent them in this matter.

WHEREFORE, Movants, NOVOSELSKY LAW OFFICES and CUMMINS & CRONIN LLC , respectfully request that this Honorable Court, pursuant to Illinois Supreme Court 13, grant them leave to withdraw as counsel for the above-named Defendants and for all other relief which this Court deems appropriate.

Respectfully submitted,

NOVOSELSKY LAW OFFICES and
CUMMINS & CRONIN LLC

By: _____
One of their Attorneys

David A. Novoselsky
NOVOSELSKY LAW OFFICES
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312) 346-8930
Attorney No. 24578

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN LLC
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(312) 578-0500
Attorney No. 37288

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al., Plaintiff, v. JUDITH TERRA, et al., Defendants.	)	
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, et al., Defendants.	)	Case No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

FILED
JUL 23 2002
DOROTHY BROWN
CLERK OF CIRCUIT COURT

NOTICE OF FILING

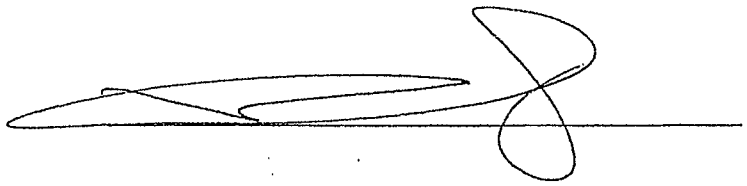
TO: See attached Service List

PLEASE TAKE NOTICE that on July 23, 2002, we filed with the Clerk of the Circuit Court of Cook County, County Department, Chancery Division, **MOTION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEFENDANTS**, a true and accurate copy of which is attached hereto and served upon you.

David A. Novoselsky
NOVOSELSKY LAW OFFICES
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312) 346-8930
Attorney No. 24578

CERTIFICATE OF SERVICE

The undersigned attorney states that he caused a copy of the foregoing notice and motion to be served on the attorneys listed below by placing same in the U.S. mail with proper postage prepaid on July 23, 2002.



SERVICE LIST

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Mr. Barry S. Goldberg
Assistant Attorney General and
Bureau Chief of Charitable Trusts
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Donald Ratner
Terra Museum of American Art
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Chicago, IL 60611

Paul Hayes Tucker
21 Monument Square
Charleston, MA 02129

Scott J. Szala
Mark M. Heatwole
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Washington, D.C. 20007

Alan K. Simpson
1201 Sunshine
Cody, WY 82414

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Debra Tucker
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Chicago, IL 60606

Eric D. Brandfonbrener
Perkins Coie
35 W. Wacker Dr., Suite 3750
Chicago, IL 60601-1657

Chris K. Todd
Kellogg, Huber, Hansen, Todd & Evans
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

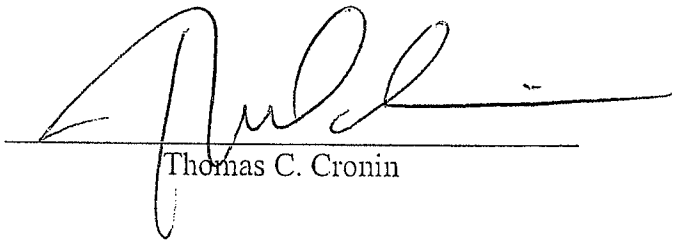
16di-003207

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copies of the foregoing Consolidated Notice of Motion and Motion for Leave to Withdraw as Counsel for Plaintiffs to be served on the parties listed below:

See Attached Service List

via facsimile and United States Mail on this 6th day of August 2002.



Thomas C. Cronin

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Mr. Barry S. Goldberg
Assistant Attorney General and
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Washington, D.C. 20007

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Washington, D.C. 20036

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Bantrack

v.

Terra et al

No. 00CH13859

ORDER

This matter coming on to be heard on the motion of Cummins & Cronin, LLC & of Novoselsky Law Office to withdraw,

The motion is granted. Terra et al shall have twenty one (21) days within which to retain successor counsel.

Atty. No.:

Name: Robert Cummins

Atty. for: Suite 4800

Address: 77 W. Wacker Dr

City/State/Zip: Chgo Ill

Telephone: (312) 578-0500

ENTERED

ENTER: AUG - 9 2002

JUDGE
DOROTHY KIRIE KINNAIRD - 278

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-200M-10/29/01(23080652)

16di-003211

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

FILED
OCT 11 2002
DOROTHY BROWN
CLERK OF CIRCUIT COURT

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

MOTION TO SET RULING

Cummins & Cronin, LLC ("Petitioner"), which has petitioned for an award of fees and expenses in the above-captioned matter, hereby files this Motion to Set Ruling. In support of this motion, Petitioner states as follows:

1. On September 17, 2001, Petitioner filed its motion for attorneys' fee and costs.

2. Pursuant to this Court's direction, Petitioner filed its revised petition on April 24, 2002.

3. On August 14, 2002, this Court granted Petitioner's motion for leave to withdraw as counsel for Ms. Terra and Messrs. Tucker and Simpson.

4. Petitioner respectfully requests that this Court set a ruling on Petitioner's petition for fees and expenses.

16di-003213

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FILED
OCT 11 2002
DOROTHY BROWN
CLERK OF CIRCUIT COURT

DEAN L. BUNTROCK, et al.,

Plaintiffs,

v.

JUDITH TERRA, et al.,

Defendants.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

v.

JUDITH TERRA, et al.,

Defendants.

No. 00 CH 13859
Hon. Dorothy Kirie Kinnaird

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Wednesday, October 16, 2002 at 10:00 a.m., we will appear before The Honorable Dorothy Kirie Kinnaird, or any other judge sitting in her stead, in Room 2403, Richard J. Daley Center, Chicago, Illinois, and then and there present our Motion To Set Ruling, a copy of which is hereby served upon you.

Dated: October 11, 2002

Petitioner

Robert P. Cummins
Thomas C. Cronin
Cummins & Cronin, LLC
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
(312) 578-0500

5. Counsel for Terra, Tucker and Simpson has indicated that he does not object to this motion.

For the foregoing reasons, Petitioner Cummins & Cronin, LLC hereby requests that this Court set a ruling on Petitioner's request for fees and expenses.

Dated: October 11, 2002

Respectfully submitted,

Cummins & Cronin, LLC,
Petitioner

By: _____
Thomas C. Cronin

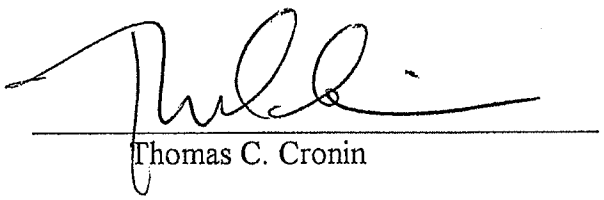
Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
77 West Wacker Drive
Suite 4800
Chicago, Illinois 60601
(312)558-0500

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copies of the foregoing Notice of Motion and Motion To Set Ruling to be served on the parties listed below:

See Attached Service List

via facsimile and United States Mail on this 11th day of October 2002.



Thomas C. Cronin

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Chicago, IL 60601

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Buntrock et al.

v.

Terra et al.

No. 00 CH 13859

ORDER

This matter coming on Cummins & Cronin, LLC's Motion to set Ruling, It is hereby Ordered:

Court sets Ruling for November 13, 2002 at 2:00 pm.

Atty. No.: 37288

Name: Thomas C. Cronin

Atty. for: Petitioner

Address: 77 W. Wacker #4800

City/State/Zip: Chicago IL 60601

Telephone: 312-578-0500

ENTERED

OCT 16 2002

ENTER:

JUDGE
DOROTHY KIRIE KINNAIRD - 276

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di 003219

CCG-N002-200M-10/29/01(25480692)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859 Honorable Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

FILED
DEC 19 2002
DOROTHY BROWN
CLERK OF CIRCUIT COURT

NOTICE OF MOTION

TO: See attached Service List

PLEASE TAKE NOTICE that on the 7th day of January, 2003 at 10:00am we shall appear before the Honorable Dorothy Kirie Kinnaird in Room 2403, or any judge sitting in her stead in the courtroom usually occupied by her at Richard J. Daley Center, Chicago, Illinois, and shall then and there present the attached **MOTION TO AUTHORIZE RELEASE OF DOCUMENTS FILED UNDER SEAL FOR INCLUSION IN RECORD ON APPEAL, TO DESIGNATE PREPARATION OF RECORD OF SEALED DOCUMENTS IN SEPARATE VOLUMES, AND TO SUPPLEMENT RECORD**, a copy of which is hereby served upon you.

Dated: December 19, 2002

Respectfully submitted,

One of the Attorneys for the Defendants

William R. Quinlan
James R. Carroll
Lisa M. Hegedus
Quinlan & Carroll, Ltd.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm I.D. No. 38600

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn on oath, deposes and states that she caused a true and correct copy of the foregoing **Notice of Motion** together with **Motion to Authorize Release of Documents Filed under Seal for Inclusion in Record on Appeal, to Designate Preparation of Record of Sealed Documents in Separate Volumes, and to Supplement Record** to be served upon the parties listed on the attached Service List as indicated on the Service List on December 19, 2002

SUBSCRIBED AND SWORN TO
before me this 19th day of December 2002

Notary Public

SERVICE LIST

VIA MESSENGER DELIVERY
Floyd D. Perkins
Therese Harris
Barry Goldberg
Assistant Attorney General & Bureau Chief
of Charitable Trusts
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VIA MESSENGER DELIVERY
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Sidley Austin Brown & Wood
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VIA FEDERAL EXPRESS
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VIA FEDERAL EXPRESS
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VIA MESSENGER DELIVERY
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VIA MESSENGER DELIVERY
David A. Novoselsky
Novoselsky Law Offices
120 N. LaSalle Street, Suite 1400
Chicago, IL 60602

Quinlan & Carroll

Writer's Direct Dial No.
(312) 917-8450
wquinlan@qclaw.com

Affiliates:
Edward D. Heffernan
Washington, D.C.

Hynes, Johnson & McNamara
Chicago, Illinois

December 20, 2002

VIA MESSENGER DELIVERY

The Honorable Dorothy Kirie Kinnaird
Circuit Court of Cook County, Chancery Division
Richard J. Daley Center, Room 2403
Chicago, IL 60602

Re: *Buntrock, et al. v. Terra, et al.*
Case No. 00 CH 13859

Dear Judge Kinnaird:

Enclosed please find a courtesy copy of Plaintiffs' Motion to Authorize Release of Documents Filed under Seal for Inclusion in Record on Appeal, to Designate Preparation of Record of Sealed Documents in Separate Volumes, and to Supplement Record. Also enclosed, for this Court's *in camera* review, please find a copy of the documents and pleadings that are currently not part of the circuit court file and/or were filed under seal and are subject of Plaintiffs' motion to supplement the record.

This motion is scheduled to be presented to the Court on Tuesday, January 7, 2003 at 10:00 a.m.

Very truly yours,

William R. Quinlan

WRQ:srs
Enclosures
cc: See attached Service List

16di-003225

SERVICE LIST

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Therese Harris
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of Charitable Trusts
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K. Chris Todd
Neil M. Gorsuch
John H. Longwell
Kellogg, Huber, Hansen, Todd &
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120 N. LaSalle Street, Suite 1400
Chicago, IL 60602

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859 Honorable Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

FILED
DEC 19 2002
DOROTHY KIRIE KINNAIRD
CLERK OF CIRCUIT COURT

MOTION TO AUTHORIZE RELEASE OF DOCUMENTS FILED UNDER SEAL FOR INCLUSION IN RECORD ON APPEAL, TO DESIGNATE PREPARATION OF RECORD OF SEALED DOCUMENTS IN SEPARATE VOLUMES, AND TO SUPPLEMENT RECORD

Plaintiffs Dean L. Buntrock and Ronald Gidwitz (collectively "Plaintiffs"), by and through their attorneys, Quinlan & Carroll, Ltd., hereby request that this Court enter an order that authorizes the release of documents filed under seal for inclusion in the record on appeal, designates that the sealed documents be prepared in separate volumes, and supplements the record to include documents not currently in the circuit court record. In further support of their motion, Plaintiffs state as follows:

1. Plaintiffs filed a notice of appeal from the Order of March 13, 2002 that relates to Plaintiffs' petition for fees and expenses. In accordance with the Illinois Supreme Court Rules, Plaintiffs requested that the circuit court prepare the record on appeal in this matter.

2. On or around September 12, 2002, Plaintiffs were notified that the circuit court clerk had completed the preparation of the record on appeal in this matter. Shortly thereafter, Plaintiffs obtained the record from the circuit court in preparation for filing it with the appellate court. After having the opportunity to review the record, Plaintiffs became aware that certain pleadings had not been included in the record.

3. In addition, Plaintiffs contacted the appellate court clerk with regard to the proper procedure for including documents in the record that were filed under seal in the circuit court. Specifically, the pleadings related to the petitions for attorneys' fees and expenses involved the filing under seal of various attorneys' invoices for fees and costs. In addition to filing the invoices under seal, this Court entered an order that provided that only certain parties were to be served with another party's redacted invoices. Copies of this Court's orders are attached as Exhibit 1.

4. The various invoices and petitions that were filed with the Court are all properly part of the record and to the extent that the documents were filed under seal, the circuit court clerk has advised Plaintiffs that an order from this Court is required to include the sealed documents in the record. In addition, because access to sealed documents was limited to only certain parties, the parties involved in this appeal should only have access to the sealed documents that they were properly served with and allowed access to in the circuit court. Thus, the circuit court clerk has advised that an order from this Court is necessary to designate the preparation of the record in separate volumes or in such a manner that will allow the appellate court to limit access to certain

documents to only those parties that had access to the documents in the circuit court. Specifically, upon an order from this Court, the circuit court will prepare different volumes of sealed documents and each party will only have access to those volumes containing documents that the parties had access to in the circuit court.

5. The following pleadings were filed under seal in the circuit court and are currently in the circuit court file in this matter:

a. Bellows and Bellows' Petition for Fees and Costs; and

b. Motion for Leave to Submit Fee Statements Under Seal for *in camera* Review of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker and Petition of Fees and Expenses submitted by Cummins & Cronin.

Although these documents were filed under seal, access to these documents was limited to the party filing the document, the circuit court, and the Attorney General. As to these documents, Plaintiffs request that these documents be released for inclusion in the record, designated as filed under seal, and prepared in a separate volume so that access to this volume may be limited to the Attorney General.[1]

6. The following document that was filed under seal under seal by counsel for the Terra Foundation is currently in the circuit court record and was made only available to the circuit court:

a. Billing statements submitted to the Terra Foundation for the Arts by Sidley Austin Brown & Wood.

---

[1] Although counsel for Judith Terra, Paul Hayes Tucker, and Alan K. Simpson had access to these documents before this Court, those parties are neither appellants nor appellees in Plaintiff's appeal.

As to that document, Plaintiffs request that it be released so that it may be included in the appellate court record, designated as filed under seal, and that it be prepared in a separate volume so that access to the document will be limited to counsel for the Terra Foundation.

7. In addition, certain documents were filed under seal but are currently not part of the circuit court file. Since these documents were initially filed under seal, a copy of these documents will be submitted for this Court's review *in camera*. Although these documents were filed under seal, all parties were served with these documents. Thus, as to the following documents, Plaintiffs request that the Court enter an order certifying that the following documents are true and correct, releasing these documents to be included in the record on appeal, and ordering that these documents be prepared in a separate volume:

a. Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock (filed November 20, 2001);

b. Attorney General's Response to the Fee Petitions Submitted by Attorneys for Dr. Stebbins and Dr. Marshall (filed November 20, 2001);

c. Attorney General's Response to the Fee Petitions Submitted by Attorneys for Defendants Terra, Tucker and Simpson (filed November 20, 2001); and

d. Reply Memorandum of Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson In Support of Their Petitions for Attorneys' Fees (filed December 10, 2001).

The Attorney General, the Terra Foundation, and Plaintiffs should be allowed access to the volume of the record containing the above documents.

8. In addition, Plaintiffs' invoices and statements submitted in support of their Petition and Supplemental Petitions for Attorneys' Fees and Costs Pursuant to Consent Judgment and Order entered July 26, 2001, are currently not included in the circuit court file and were filed under seal.

Plaintiffs hereby submit an unredacted copy of their invoices and a redacted copy of their invoices for this Court's *in camera* review. Plaintiffs request that this Court enter an order allowing the unredacted invoices to be added to the record on appeal, designating that the invoices are under seal, and specifically providing that the unredacted invoices be prepared in a separate volume with access to these invoices limited to the appellate court. As to the redacted invoices, Plaintiffs request that they also be added to the record on appeal, prepared in a separate volume, designated as filed under seal, and that access to the redacted invoices be limited to the Attorney General.

9. Finally, certain documents filed in the circuit court are currently not part of the circuit court file. Plaintiffs have submitted a copy of these documents for this Court's review *in camera*. Plaintiffs request that this Court enter an order certifying that the following documents are true and correct and ordering that such documents be included in the record on appeal:

a. Motion for Attorneys' Fees and Costs of Defendants Alan Simpson, Judith Terra, and Paul Hayes Tucker (filed by: Verner, Liipfert, Bernhard, McPherson & Hand on September 14, 2001);

b. Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker (filed by Kellogg Huber, Hansen, Todd & Evans on September 14, 2001);

c. Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses filed on September 17, 2001;

d. Circuit Court Order dated December 4, 2001;

e. Circuit Court Order dated December 14, 2001;

f. Circuit Court Order dated January 15, 2002;

g. Response of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson to Submission of Cases By the Attorney General Regarding Attorney's Fees (filed February 1, 2002);

h. Attorney General's Proposed Finding of Fact and Conclusions of Law Relative to the Fee Petitions of Defendants Terra, Tucker and Simpson; and

i. Attorney General's Emergency Motion to Strike and Deny the Letter/Motion of Defendant Directors to Strike, Proposed Finding of Fact and Conclusions of Law and File an Additional Brief.

10. Plaintiffs have attached a proposed order as Exhibit 2.

WHEREFORE, Plaintiffs respectfully request that this Court enter an order: (1) authorizing the release of sealed documents in the record on appeal; (2) authorizing the preparation of sealed documents in separate volumes; (3) limiting access of the volumes of sealed documents to parties who had access to the documents in the circuit court; (4) certifying that certain documents are true and accurate for inclusion in the record on appeal; and (5) entering any other relief that this Court deems fair and just.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Lisa M. Hegedus
Quinlan & Carroll, Ltd.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm I.D.: 38600

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

AGREED PROTECTIVE ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the Attorney General, the Terra Foundation for the Arts ("Foundation") and Plaintiffs Dean L. Buntrock and Ronald Gidwitz ("Plaintiffs") as follows:

1. In connection with the entry of the Consent Judgment and Order in this case ("Consent Decree"), Plaintiffs will file with the Court unredacted copies of attorneys' invoices ("Invoices") under seal and will serve a copy of said Invoices redacted for attorney client and work product privileged matters on the Attorney General and counsel for the Foundation.

2. The Invoices produced by the Plaintiffs in this case in their current form shall be marked with the legend "Confidential" and shall be treated as such.

3. The Attorney General, the Foundation and the Plaintiffs' and their attorneys, agents or assignees agree that the Invoices produced by the Plaintiffs in this case and information contained in said Invoices shall not be disclosed or used for any other purpose or used in any other litigation absent the written agreement of the producing parties or order of the Court.

4. Upon the final conclusion of this lawsuit, including any appeals, on 30 days written notice from the producing parties, all Invoices, all notes that contain or identify Confidential information from such Confidential documents and all copies thereof shall be destroyed or surrendered to the party that submitted said Invoice. If such Confidential documents are destroyed, counsel shall certify compliance with this paragraph to the party that submitted said Invoices.

5. The parties to this agreement may seek modification of this Order at any time, first by seeking the producing parties' consent, and absent consent, by application to the Court.

Dated:

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
OCT 1 - 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Judge

Prepared by:
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm ID 38600

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.* Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants.	)	

ORDER

This matter coming before the Court on status of various petitions for payment of attorneys' fees and costs, all parties being represented, it is hereby ORDERED THAT:

1. Any party seeking payment of attorneys' fees and costs shall submit an unredacted copy of their bills to the Court, under seal if the party desires, by October 3, 2001;

2. Any party seeking payment of attorneys' fees and costs shall also serve a copy of their bills redacted for attorney client and work product privileged matters on the Attorney General and counsel for the Foundation. Defendants Tucker, Terra and Simpson object to any review of bills by counsel for the Foundation.

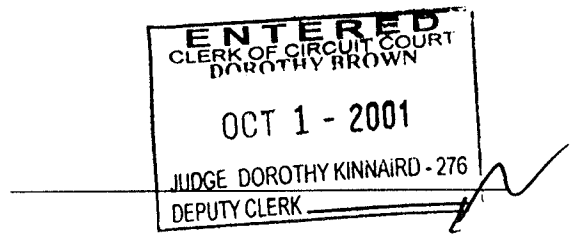
3. The Attorney General and counsel for the Foundation shall file a response, if any, to the petitions for payment of attorney fees and costs, under seal, by November 5, 2001, and serve a copy of the pertinent portions of their response on the appropriate interested party;

4. The appropriate interested party shall file a reply, if any, to the Attorney Generals' and Foundations' response by November 19, 2001.

5. This matter is set for hearing on December 19 at 11:00 a.m. without further notice.

Dated: October 1, 2001

ENTER:



Judge

Prepared by:
Quinlan & Carroll, Ltd.
30 North LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm ID 38600

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Bunthock et al

v.

Terra et al

No. 00CH 13859

ORDER

This matter coming on to be heard on Defendants' EMERGENCY Motion for Reconsideration, IT is hereby ordered that;

The motion for reconsideration is granted in part and setting [illegible] file any response to the pending fee petitions on behalf of the [illegible], [illegible] the Court makes no finding as to any alleged conflict; the Attorney General is hereby Granted until November 19, 2001 to respond to said fee petitions, and this matter is set for status at 10:30 a.m. on Friday, December 7, 2001 and any replies to the Attorney General's response to the fee petitions shall be filed by December 3, 2001.

Atty. No.:

Name: Cummins & Cronin

Atty. for: Defendants

Address: 77 W. Wacker Dr.

City/State/Zip: Chgo IL

Telephone: 312/578-0500

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
NOV 05 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

ENTER:

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	No. 00 CH 13859 Honorable Dorothy Kirie Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

ORDER

This matter, coming to be heard on Plaintiffs Dean L. Buntrock and Ronald Gidwitz' Motion to authorize Release of Documents Filed Under Seal for Inclusion in Record on Appeal, to Designate Preparation of Record of Sealed Documents in Separate Volumes, and to Supplement Record, due notice having been given, and the Court fully advised in the premises, it is hereby ordered as follows:

1. The following sealed documents currently in the circuit court file are to be released for inclusion in the record on appeal, designated as filed under seal, and prepared in a separate volume:

a. Bellows and Bellows' Petition for Fees and Costs; and

b. Motion for Leave to Submit Fee Statements Under Seal for *in camera* Review of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker and Petition of Fees and Expenses submitted by Cummins & Cronin.

Access to the above documents on appeal is to be limited to the Attorney General.

2. The following document is to be designated as filed under seal and prepared in a separate volume of the record on appeal:

a. Billing statements submitted to the Terra Foundation for the Arts by Sidley Austin Brown & Wood.

Access to the above document is to be limited to counsel for the Terra Foundation.

3. The following documents filed under seal in the circuit court are certified as true and correct and are to be released for inclusion in the record on appeal, designated as filed under seal, and prepared in a separate volume of sealed documents in the appellate court record:

a. Attorney General's Response to the Fee Petition Submitted by Attorneys for Ronald Gidwitz and Dean Buntrock (filed November 20, 2001);

b. Attorney General's Response to the Fee Petitions Submitted by Attorneys for Dr. Stebbins and Dr. Marshall (filed November 20, 2001);

c. Attorney General's Response to the Fee Petitions Submitted by Attorneys for Defendants Terra, Tucker and Simpson (filed November 20, 2001); and

d. Reply Memorandum of Defendants Judith Terra, Paul Hayes Tucker and Alan K. Simpson In Support of Their Petitions for Attorneys' Fees (filed December 10, 2001).

It is further ordered that access to the separate volume of the above documents be available to all parties to the appeal.

4. The court certifies that the following document is true and correct and orders that it be included in the record on appeal, designated as filed under seal, and prepared in a separate volume of sealed documents:

a. Plaintiffs' unredacted Attorneys' Invoices and Billing Statements submitted in support of their Petition and Supplemental Petition for Attorneys' Fees and Costs Pursuant to Consent Judgment and order entered July 26, 2001.

Access to the above document is limited to the appellate court only.

5. The Court certifies that the following document is true and correct and orders that it be included in the record on appeal, designated as filed under seal, and prepared in a separate volume:

a. Plaintiffs' redacted Attorneys' Invoices and Billing Statements submitted in support of their Petition and Supplemental Petition for Attorneys' Fees and Costs Pursuant to Consent Judgment and order entered July 26, 2001.

Access to the above document is limited to the Attorney General.

6. The Court certifies that the following documents are true and accurate and orders that they be added to the record on appeal:

a. Motion for Attorneys' Fees and Costs of Defendants Alan Simpson, Judith Terra, and Paul Hayes Tucker (filed by: Verner, Liipfert, Bernhard, McPherson & Hand on September 14, 2001);

b. Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker (filed by Kellogg Huber, Hansen, Todd & Evans on September 14, 2001);

c. Affidavit of David A. Novoselsky in Support of Petition for Fees and Expenses filed on September 17, 2001;

d. Circuit Court Order dated December 4, 2001;

e. Circuit Court Order dated December 14, 2001;

f. Circuit Court Order dated January 15, 2002;

g. Response of Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson to Submission of Cases By the Attorney General Regarding Attorney's Fees (filed February 1, 2001);

h. Attorney General's Proposed Finding of Fact and Conclusions of Law Relative to the Fee Petitions of Defendants Terra, Tucker and Simpson; and

i. Attorney General's Emergency Motion to Strike and Deny the Letter/Motion of Defendant Directors to Strike, Proposed Finding of Fact and Conclusions of Law and File an Additional Brief.

ENTERED:

_____

Judge

Prepared by:
William R. Quinlan
James R. Carroll
Lisa M. Hegedus
Quinlan & Carroll, Ltd.
30 N. LaSalle Street, Suite 2900
Chicago, IL 60602
(312) 263-0900
Firm I.D. No. 38600

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK and RONALD GIDWITZ, Directors of the Terra Foundation for the Arts,

Plaintiffs,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts, NAFTALI MICHAELI, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

(202) 326-7999 DAVID KOSS

Case No. 00 CH 13859

Judge Dorothy Kirie Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS, ex. rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervener,

v.

JUDITH TERRA, PAUL HAYES TUCKER, ALAN K. SIMPSON, Directors of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

ORDER AWARDING SUPPLEMENTAL ATTORNEYS' FEES

This case is before the Court on the revised fee petitions filed by four law firms on behalf of defendant Directors Judith Terra, Paul Hayes Tucker and Alan K. Simpson. The revised fee petitions were filed after this Court determined in its March 13, 2002 Order Awarding Attorneys Fees that it could not adjudicate five additional fee petitions filed on behalf of the defendant

Directors without additional information. (A copy of the March 13, 2002 Order Awarding Attorneys' Fees is attached hereto as Exhibit A.)

The four law firms which are seeking attorneys' fees are the Washington, D.C. firm of Verner, Liipfert, Bernhard, McPherson & Hand, Chartered, the Washington, D.C. firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., the Chicago firm of Bellows and Bellows, P.C., and the Chicago firm of Cummins and Cronin, LLC. No revised fee petition has been filed on behalf of the Novoselsky Law Offices, another Chicago firm which initially petitioned for fees herein.

The award of attorneys' fees in this case is being made pursuant to Paragraph 12 of the Consent Judgment and Order entered by this Court on July 26, 2001. That paragraph provides that "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation." In the Order Awarding Attorneys' Fees entered on March 13, 2002, this Court granted the Terra Foundation's Motion to Reject Any Fee Petitions Seeking Attorneys' Fees Not Incurred in Connection with this Lawsuit and directed counsel for the defendants Terra, Tucker and Simpson to file revised fee petitions which eliminated all billing entries and costs relating to the federal court case (No. 01 C 4976) and the Law Division action (01 L 9112). Each of the four law firms submitting revised fee petitions have recalculated their fees and expenses.

Counsel were also directed to provide the Court with affidavits covering eight categories of information needed by the Court to adjudicate the revised fee petitions. The Affidavit of Laurel G. Bellows in Support of the Bellows and Bellows' Second Amended Petition for Fees and Costs complies with that directive. The revised fee petitions of the Verner, Kellogg and Cummins firms rely in part upon the Declaration of Leonard Garment in Support of Revised Motion for Fees. The

16di-003246

Attorney General has filed a Motion to Strike which is primarily directed to the Garment Declaration.

This Court has carefully reviewed the Garment Declaration, the attachments thereto, and the Attorney General's Motion to Strike. The Court has determined that much of the Garment Declaration consists of hearsay statements and improper argument. The Declaration contains irrelevant assertions which are not responsive to this Court's inquiries relating to the fees sought herein. The Declaration is not an affidavit of counsel as specified in this Court's Order of March 13, 2002, and it complies with neither the Illinois Code of Civil Procedure nor the Supreme Court Rules. It is in large part an additional brief and argument, which was specifically prohibited in the Order of March 13, 2002. Accordingly, this Court is granting in part the Attorney General's Motion to Strike. Designated portions of the Garment Declaration, together with certain of the exhibits referred to therein, are stricken as hereinafter set forth.

Defendants Terra, Tucker and Simpson were originally represented in this case by the Chicago firm of Shefsky & Froelich Ltd. The two attorneys from that firm primarily responsible for the case were Brian C. Crowe and James D. Wilson. Their representation commenced on October 8, 2000 and concluded abruptly on June 29, 2001. For the work performed during that time period this Court previously awarded attorneys' fees in the amount of $450,800.00 and costs in the amount of $17,576.17, for a total award of $468,376.17.

The original counsel for defendants Terra, Tucker and Simpson requested that this Court refer all issues involved in this case to mediation. After this Court on February 5, 2001 appointed David C. Hilliard to mediate the dispute, it was understood that the primary focus of the parties and their counsel would be the mediation process. The Petition for Fees and Costs filed by

16di-003247

Shefsky & Froelich Ltd., as well as the time records of Sidley and Austin (counsel for the Terra Foundation), reflect that the individual Directors participated actively in the mediation process.

Most noteworthy, for purposes of the issues now before this Court, are the time entries from the months of May and June of 2001, which show numerous conferences between the Shefsky attorneys and the defendant Directors, particularly Mrs. Terra and Dr. Tucker. Of particular note is a May 14, 2001 time entry of Mr. Wilson which shows telephone conversations with Mrs. Terra and Dr. Tucker in which the words "tentative settlement agreement" are first used. Additional telephone conversations between Mr. Wilson and Mrs. Terra and Dr. Tucker are reflected in the time entries for each of the next four days, May 15th, 16th, 17th and 18th.

It is at that time, May 18, 2001, that the time records of the Verner firm show that Mr. Levinson of the Verner firm first met with defendant Naftali Michaeli and Mr. McPherson of the Verner firm first spoke with defendant Senator Simpson. (It is unclear to this Court whether Mr. Michaeli or Senator Simpson is the "advisor to Judith Terra" referred to in Paragraph 5 of Mr. Garment's Declaration.) Mrs. Terra first spoke with Mr. Garment of the Verner firm on June 7, 2001.

As the mediation process proceeded in Chicago with Shefsky & Froelich representing defendants Terra, Tucker and Simpson, and with Mrs. Terra and Dr. Tucker in regular contact with the Shefsky attorneys, the Verner firm in Washington commenced extensive work on the case. They contacted various local counsel, including an attorney by the name of Lee Freeman on June 8, 2001. Mr. Freeman, from the Chicago firm of Freeman, Freeman & Salzman P.C., spoke with Mr. Crowe of the Shefsky firm on June 12, 2001, according to the Shefsky Petition for Fees. Mr. Freeman apparently had no further involvement with the case, except to report back to

16di-003248

Mr. Levinson that Shefsky and Froelich was owed $500,000 and "would withdraw from the case if any co-counsel, or any new local counsel, were retained to help represent the Defendant Directors." (Garment Declaration, Paragraph 19)

No one from the Verner firm, however, made any attempt to contact the Shefsky firm about the work in Washington which was underway. The Shefsky firm continued to represent the defendant Directors in multiple court appearances before this Court in May and June of 2001 and in the extensive mediation proceedings. From May 20, 2001 (the first Shefsky billing date after Mr. Michaeli's and Senator Simpson's May 18, 2001 initial contact with the Verner firm) through June 29, 2001, the Shefsky firm recorded and was paid for $42,922.00 in attorneys' fees.

It appears from the Verner time records that it was not until June 14, 2001, that the Verner firm first made any contact with the Foundation's attorneys Sidley & Austin. By that time almost $10,000 in attorneys fees had been recorded by the Verner firm. (The time records of the Sidley attorneys, however, do not reflect any contacts by Mr. Garment and Mr. Levinson of the Verner firm in mid-June of 2001. Mr. Garment states in his Declaration that on June 14, 2001, he had an hour and a half conversation with Steven (sic) Carlson about the background of the case and the mediation process. Stephen Carlson's time entry for that day combines fifteen tasks for a total of 5.75 hours. No mention of Mr. Garment or the Verner firm is made. There is, however, one task that reads "t/c with consultant.")

Prior June 29, 2001, defendants Terra, Tucker and Simpson made no motion before this Court to substitute attorneys or to bring to this Court's attention any dissatisfaction which they may have had with their attorneys at the Shefsky firm. They continued in the mediation process while their attorneys in Washington continued doing work which was, for the most part,

16di-003249

unrelated to the mediation process. On June 22, 2001, the Verner firm in Washington enlisted the assistance of the Kellogg firm in Washington and the Bellows firm in Chicago. The fact that these three firms had been retained was not disclosed to the Shefsky firm or to this Court.

By the time the Verner firm was first contacted on May 18, 2001, it had been tentatively agreed in the mediation process that attorneys' fees in connection with this lawsuit would be paid by the Foundation. There is no indication in any of the materials before this Court that there was any discussion in the mediation proceedings that those fees would include fees for any counsel working behind the scenes and not of record in this case.

The fact that the Verner, Kellogg and Bellows firms were representing the defendant Directors first became known to all counsel of record in this case on June 28, 2001, when those firms went into the United District Court in Chicago in an attempt to obtain a restraining order to stop approval of the mediated settlement. It appears that it was not until the morning of the June 29th, the day a similar motion was made before this Court, that the Shefsky attorneys learned that they were being discharged and would be replaced by counsel who had been working for the defendant Directors for well over a month. The Bellows firm filed its appearance on June 29, 2001, and the Shefsky firm was granted leave to withdraw on July 2, 2001. On July 2, 2001, Leonard Garment of the Verner firm and K. Chris Todd and Neil M. Gorsuch of the Kellogg firm were admitted *pro hac vice*. The Bellows firm withdrew from this case on July 20, 2001, at which time the Cummins firm was granted leave to appear for defendants Terra, Tucker and Simpson.

The Verner firm is now seeking attorneys' fees and costs for the period of time commencing May 18, 2001 and ending July 27, 2001, the day after this Court entered the Consent

16di-003250

Judgment and Order. The Kellogg firm is seeking fees and costs for the period of time commencing June 22, 2001 and ending August 31,2001. The Bellows firm is seeking fees and costs for the period June 22, 2001 and ending April 19, 2002. (Most of the Bellows time billed after July of 2001 relates to preparation of the firm's fee petitions.) The Cummins firm is seeking fees and costs for the period of time commencing July 18, 2001 and ending July 26, 2001. The fees and costs now sought by law firms representing defendants Terra, Tucker and Simpson (in addition to the $458,376.17 already paid to the Shefsky firm) are as follows:

Firm	Amount of Fees	Amount of Costs	Total
Verner Liipfert	$134,224.50	$9,643.05	$143,867.55
Kellogg Huber	(not broken out)		$328,867.67
Bellows & Bellows	$68,373.50	$5,201.95	$73,575.45
Cummins & Cronin	$46,310.00	$4,103.31	$50,413.31
			$596,723.98

The Court has received and reviewed four amended fee petitions for Judith Terra, Paul Hayes Tucker and Alan K. Simpson. They are: 1) the Revised Petition for Fees and Expenses Pursuant to Court Order of March 13, 2002 filed by Cummins & Cronin; 2) the Revised Motion for Attorneys' Fees and Costs of Kellogg, Huber, Hansen, Todd & Evans, PLLC, by Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker in Response to Order of March 13, 2002; 3) the Revised Motion of Verner Liipfert Bernhard McPherson & Hand, Chartered, for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker in Response

16di-003251

to Order of March 13, 2002 with the Supplement to Revised Motion of Verner Liipfert Bernhard McPherson & Hand, Chartered, for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker in Response to Order of March 13, 2002 and; 4) Bellows and Bellows' Second Amended Petition for Fees and Costs.

In connection with the Defendant Directors' amended fee petitions, the Court has also received and reviewed the Terra Foundation's Objections to the Amended Fee Petitions; the Attorney General's Objection to the Post Trial Further Submissions and Filings of Defendant Directors and Motion to Strike and Hold the Post Trial Filings and Affidavits Submitted by Defendants Terra, Tucker and Simpson Void and a Nullity; and the Defendants' Objections to Motion by the Attorney General to Strike Defendants' Post-Trial Filings and Affidavits.

In its Order Awarding Attorneys' Fees entered on March 13, 2002, this Court noted that this was an extremely complex and fiercely litigated case involving some novel issues. On Page 4 of that Order, this Court identified some of those issues and further set forth the factors which the Court considered in awarding fees to plaintiffs' counsel and to counsel for Directors Stebbins and Marshall. The complexity of the issues in this case as well as the factors set forth on Page 4 were similarly considered by this Court in reviewing the fee petitions of the additional attorneys for Defendants Terra, Tucker and Simpson. (See copy of the March 13, 2002 Order Awarding Attorneys' Fees attached hereto as Exhibit A.)

In reviewing the fee petitions which are the subject of this Order Awarding Supplemental Attorneys Fees, this Court has also reviewed, and made comparisons with, the Quinlan and Carroll billing statements, the Shefsky and Froelich billing statements, the Sidley and Austin billing statements, and the McDermott, Will & Emery billing statements. The Court has also

16di-003252

considered its notes on the history of this case, as well as pertinent documents from the court file.

Finally, the Court has taken into account the contributions which the various counsel made to the litigation, their knowledge about the history of the case and the accuracy of their statements in court, and the amount of duplicative and excessive billing among counsel for the Defendant Directors as they and their associates conferred within their respective firms and among the respective firms.

The Court has also considered that the original counsel for Defendants Terra, Tucker and Simpson, the firm of Shefsky & Froelich Ltd., has already been awarded $468,376.17 in fees and costs from the Foundations's funds and that the Defendant Directors did not object to that fee award. Instead they secretly hired three additional firms, two from Washington, D.C., and one from Chicago, while the Shefsky firm continued to participate in the mediation process, which th Defendant Directors originally requested. (Defendant Directors elected during the course of case to pay $412,750.00 in fees to their additional counsel and not to pay the Shefsky firm

At no time prior to June 29, 2001, did the Defendant Directors either fire their bring to the Court's attention any dissatisfaction with their counsel. And they ap revealed to anyone during the mediation process that they would ultimately b fees for behind-the-scenes counsel.

It is with those considerations in mind that this Court herein a fee petitions. The Court is convinced that Defendants Terra, Tuck reasonable attorneys' fees for local counsel who were of recor including July 26, 2001, the date of the entry of the Conser the Bellows firm, the Court is awarding fees commenc

16di-003253

retained, since the Court considers that one week is a reasonable period of time for original and replacement counsel both to be involved in a case (even though they were not working together). In regard to the Cummins firm, the Court is awarding fees commencing on July 18, 2001, as requested, which is two days prior to that firm's appearance in the case.

The bulk of the time of the Bellows firm after July 26, 2001 relates to fee petition issues and is not awarded herein. The Court is awarding fees for the Bellows firm through July 20, 2001, the date of that firm's withdrawal. The Cummins firm is not seeking fees for any time after July 26, 2001.

The law firms of Bellows and Bellows, P.C., and Cummins & Cronin, LLC, are well known to this Court. The Court is familiar with the quality of their attorneys and their work product. Both firms enjoy excellent reputations. This Court is not questioning the affidavits of counsel from those firms and has not noted instances of the excessive and duplicative billing such as that referred to in this Court's Order of March 13, 2002. The billing rates of these two firms, while high, are not disproportionate to those of other counsel in this complex litigation.

Accordingly, the Bellows firm is being awarded all of its requested fees and costs from June 22, 2001 through and including July 20, 2001, with deletions made for entries relating to the federal court litigation. Those deletions are $5,972.50 in fees and $400.00 in costs in accordance with the Affidavit of Laurel G. Bellows.

In regard to the Revised Petition of the Cummins firm, the Court is awarding all of the requested fees and all of the costs with the exception of $538.50 in "filing fees". Under the "Disbursements" category the Cummins firm lists $770.50 in "filing fees". The electronic docket of the Clerk of the Court, however, shows that the only filing fees paid by the Cummins firm were

16di-003254

two counterclaim fees of $116.00 each, for a total of $232.00. Absent proof of payment of the higher amount, the Court has awarded that $232.00 in filing fees only.

Adjudication of the fees requested by counsel from Washington, D.C. has been much more problematic. This Court believes that such counsel, upon their retention by the Defendant Directors, should have promptly taken steps to communicate with local counsel, Shefsky and Froelich. This would have avoided counsel for the Defendant Directors working at cross purposes during the period of time prior to June 29, 2002. And it might have avoided certain misconceptions about the history of this case which Washington counsel expressed before this Court, some of which were included in the stricken portions of the Garment Declaration.

This Court cannot sanction such lack of communication among learned and experienced counsel. The time records of the Shefsky, Verner and Kellogg firms indicate that the Defendant Directors, particularly Mrs. Terra, were regularly communicating with attorneys at the respective firms while the Washington attorneys and the Shefsky firms worked for the Defendant Directors with different goals and objectives in mind. Washington counsel had to have known that their clients were continuing to communicate and work with the attorneys from Shefsky and Froelich. (In the days leading up to the June 28, 2001 motion made in the U.S. District Court, there were multiple conferences between the Shefsky attorneys and Mrs. Terra and Dr. Tucker.) Yet the Washington attorneys made no effort to bring to this Court's attention the dissatisfaction of the Defendant Directors with their local counsel and they made no effort to bring to the Court's attention their clients' desire to withdraw from the mediation process.

Adjudication of the fee petition filed by the Kellogg firm has been especially problematic. Contrary to this Court's Order of October 1, 2001, which required unredacted bills to be

16di-003255

submitted to the Court, the time records submitted in support of the Revised Motion of the Kellogg firm include redacted bills only. (No unredacted bills were submitted even after this Court discussed the issue with the Defendant Directors' new local counsel during the proceedings earlier this year relating to the entry of the Order to Supplement Record.) Furthermore, the Kellogg bills do not contain a recapitulation or summary page. This necessitated the creation of such a recapitulation in order for the Court to ascertain both the number of hours worked and the amount of fees billed by each of the attorneys for the Kellogg firm.

This Court is awarding no fees and costs for any time prior to the first appearance of Washington counsel before this Court on June 29, 2001, the day the Shefsky firm apparently learned that it was being discharged by the Defendant Directors. The fees and costs being awarded herein for the Washington firms cover the period of time from June 29, 2001 (even though the *pro hac vice* motions were not presented and granted until July 2, 2001) through July 26, 2001, the date of the Consent Judgment and Order.

In ascertaining what this Court considers to be "(r)easonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit" the Court took into account that at all times between June 29, 2001 and July 26, 2001, the Defendant Directors had at least three different law firms simultaneously representing them in this case. The time records of the various firms reflect many entries of lawyers within firms communicating with each other, lawyers between firms communicating, and lawyers reviewing each other's work. The Court has also noted the numerous instances where individual lawyers in the Washington firms billed an excessive number of hours in a day. For instance, there are twenty-six (26) entries in the Kellogg bills between June 29, 2001 and July 26, 2001 where individual Kellogg lawyers billed in excess

16di-003256

of twelve (12) hours in a single day. In some instances the billings for a single lawyer in a single day were far in excess of twelve (12) hours a day.

The calculation of the fees for the Verner and Kellogg firms has been determined by the Court as follows: 1) All fees and costs from June 29, 2001 through and including July 26, 2001 were totaled; 2) All Kellogg entries and related costs which were redacted or partially redacted were subtracted; 3) 35.8 hours were deducted from the Verner totals at a blended rate of $425.00 an hour; and 4) 232.75 hours were deducted from the Kellogg totals at a blended rate of $400.00 an hour. This has resulted in a total award for a period of time of less than a month of $72,641.05 for the Verner firm and $86,197.45 for the Kellogg firm. The total additional fees and costs awarded to Defendant Directors for the four law firms which represented them during that month amounts to $267,709.97. When added to the $468,376.17 already awarded to the Shefsky firm for their services rendered during almost nine (9) months, the total attorneys' fees and costs awarded to Defendants Terra, Tucker and Simpson in this litigation comes to $736,086.14.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. The Attorney General's Motion to Strike and Hold the Post Trial Filings and Affidavits Submitted by Defendants Terra, Tucker and Simpson Void and a Nullity is granted in part. Those sections of the Declaration of Leonard Garment (Exhibit A to the Revised Motion of the Verner firm), which sections are stricken on the attached copy of the Declaration, Exhibit B to this Order,

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were not considered by this Court and are hereby stricken, together with Exhibits C, D, E, F, H, and I, which are attached thereto and referenced therein.

2. Bellows and Bellows' Second Amended Petition for Fees and Costs is granted in part and denied in part and Bellows and Bellows, P.C., is awarded attorneys fees in the amount of $57,273.25 and costs in the amount of $1,723.41, for a total amount of $58,996.66.

3. The Revised Petition for Fees and Expenses Pursuant to Court Order of March 13, 2002, filed by Cummins & Cronin, LLC, is granted in part and denied in part and Cummins and Cronin, LLC, is awarded attorneys fees in the amount of $46,310.00 and costs in the amount of $3,564.81, for a total amount of $49,874.81.

4. The Revised Motion for Attorneys' Fees and Costs of Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker in Response to Order of March 13, 2002, filed by the Verner firm is granted in part and denied in part and Verner Liipfert Bernhard McPherson & Hand, Chartered, is awarded attorneys fees in the amount of $62,998.00 and costs in the amount of $9,643.05, for a total amount of $72,641.05.

5. The Revised Motion for Attorneys' Fees and Costs by Defendants Alan K. Simpson, Judith Terra, and Paul Hayes Tucker in Response to Order of March 13, 2002, filed by the Kellogg firm is granted in part and denied in part and Kellogg, Huber, Hansen, Todd & Evans, PLLC, is awarded attorneys fees in the amount of $75,082.50 and costs in the amount of $11,114.95, for a total amount of $86,197.45.

6. To the extent that there remains pending a Petition for Attorneys Fees on behalf of the Novoselsky Law Offices, that Petition is denied, no revised petition having been filed in compliance with this Court's Order of March 13, 2002.

7. The Terra Foundation for the Arts shall pay the aforestated fees and costs within 30 days of the date of this Order.

ENTERED

ENTER: MAY 15 2003

JUDGE
DOROTHY KIRIE KINNAIRD - 27B

Judge Dorothy Kirie Kinnaird

May 15, 2003

16di-003259

CUMMINS & CRONIN, LLC
ATTORNEYS AND COUNSELORS
77 WEST WACKER DRIVE
SUITE 4800
CHICAGO, ILLINOIS 60601
PHONE: (312) 578-0500
FAX: (312) 578-1234

ROBERT P. CUMMINS
rpc@cumminscronin.com

THOMAS C. CRONIN
tcc@cumminscronin.com

TELECOPIER TRANSMITTAL COVER SHEET

TO: Chris K. Todd
David Ross
Neal Gorsuch

TELECOPIER NO.: 202-326-7999

FROM: Robert P. Cummins

DATE: May 15, 2003

TIME: 11:47 am

CLIENT/MATTER NO.: 284

OPERATOR: jam

TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE:

Message: CONGRATULATIONS!!!!!

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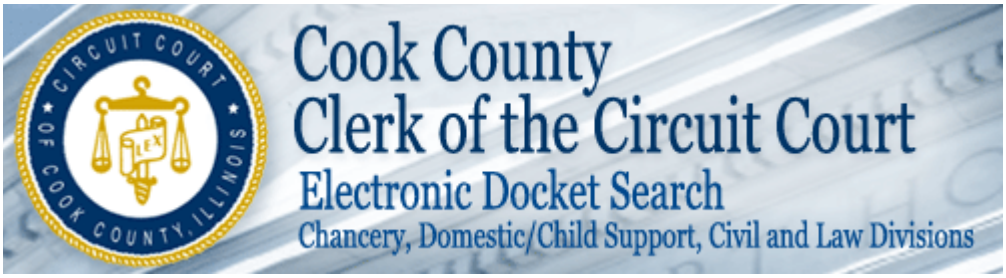

Case Information Summary for Case Number
2001-L-009112

Filing Date: 07/31/2001

Case Type: STATUTORY ACTION

Division: Law Division

District: First Municipal

Ad Damnum: $30001.00

Calendar: W

Party Information

Plaintiff(s)	Attorney(s)
TUCKER PAUL HAYES	CUMMINS ROBERT & DECKER W 190 S LASALLE #1200 CHICAGO IL, 60603 (312) 630-5300

Defendant(s)	Defendant Date of Service	Attorney(s)
BUNTROCK DEAN		QUINLAN & CRISHAM 30 N LASALLE #2900 CHICAGO IL, 60602 (312) 263-0900
DALEY MARGARET		QUINLAN & CRISHAM 30 N LASALLE #2900 CHICAGO IL, 60602 (312) 263-0900
DONNELLEY JAMES R		GRIPPO ELDEN LLC 111 SOUTH WACKER DR CHICAGO IL, 60606 (312) 704-7700
FIELD MARSHALL V		GRIPPO ELDEN LLC 111 SOUTH WACKER DR CHICAGO IL, 60606

	(312) 704-7700
GIDWITZ RONALD	QUINLAN & CRISHAM 30 N LASALLE #2900 CHICAGO IL, 60602 (312) 263-0900
HARTMAN TERRA	QUINLAN & CRISHAM 30 N LASALLE #2900 CHICAGO IL, 60602 (312) 263-0900
KREHBIEHL FREDERICK A	GRIPPO ELDEN LLC 111 SOUTH WACKER DR CHICAGO IL, 60606 (312) 704-7700
MARSHALL STEPHANIE PACE	MCDERMOTT WILL & EMLLP 227W MONROE CHICAGO IL, 60606 (312) 984-2096
PEOPLE STATE ILLINOIS	ATTORNEY GENERALS OFFICE 100 W RANDOLPH ST CHICAGO IL, 60601 (312) 814-3000
PERKINS FLOYD	ATTORNEY GENERALS OFFICE 100 W RANDOLPH ST CHICAGO IL, 60601 (312) 814-3000
RYAN JAMES E	ATTORNEY GENERALS OFFICE 100 W RANDOLPH ST CHICAGO IL, 60601 (312) 814-3000
SIDLEY AUSTIN	
STEBBINS THEODORE	MCDERMOTT WILL & EMLLP 227W MONROE CHICAGO IL, 60606 (312) 984-2096

TERRA FOUNDATION
ARTS

SIDLEY AUSTIN
BROWN&WOOD
ONE S DEARBORN
CHICAGO IL, 60603
(312) 853-7000

Case Activity

Activity Date: 07/31/2001 Participant: TUCKER PAUL HAYES

STATUTORY ACTION COMPLAINT FILED (JURY DEMAND)

Court Fee: 433.50
Ad Damnum Amount: 30001.00

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 07/31/2001 Participant: TUCKER PAUL HAYES

CASE SET ON STATUS CALL

Date: 11/28/2001
Court Time: 0930

Judge: GARDNER, SHELDON

Activity Date: 07/31/2001 Participant: TUCKER PAUL HAYES

CASE SET ON INDIVIDUAL CALENDAR

Activity Date: 08/13/2001 Participant: TUCKER PAUL HAYES

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/13/2001 Participant: TUCKER PAUL HAYES

NOTICE OF MOTION FILED

Date: 08/13/2001
Court Time: 0200

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/13/2001 Participant: TUCKER PAUL HAYES

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/13/2001 Participant: BUNTROCK DEAN

CONTINUANCE - ALLOWED -

Date: 09/13/2001 Judge: KOGAN RANDYE A

Court Time: 0200 Microfilm: LD000533080

Activity Date: 08/13/2001 Participant: TUCKER PAUL HAYES

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Date: 08/24/2001 Judge: KOGAN RANDYE A

Microfilm: LD000533080

Activity Date: 08/13/2001 Participant: BUNTROCK DEAN

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Date: 08/17/2001 Judge: KOGAN RANDYE A

Microfilm: LD000533080

Activity Date: 08/13/2001 Participant: BUNTROCK DEAN

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Date: 08/27/2001 Judge: KOGAN RANDYE A

Microfilm: LD000533080

Activity Date: 08/13/2001 Participant: BUNTROCK DEAN

EXECUTE OR PERFORM - ALLOWED -

Date: 09/06/2001 Judge: KOGAN RANDYE A

Microfilm: LD000533080

Activity Date: 08/13/2001 Participant: TERRA FOUNDATION

TRANSFER TO JUDGE WITHIN DIVISION

Judge: GARDNER, SHELDON

Microfilm: LD000532730

Activity Date: 08/13/2001 Participant: BUNTROCK DEAN

TRANSFER TO JUDGE WITHIN DIVISION

Judge: KOGAN RANDYE A

Microfilm: LD000532730

Activity Date: 08/13/2001 Participant: TUCKER PAUL HAYES

AMEND COMPLAINT OR PETITION - ALLOWED -

Judge: GARDNER, SHELDON

Microfilm: LD000532730

Activity Date: 08/17/2001 Participant: BUNTROCK DEAN L

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Court Fee: 317.50 Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: DALEY MARGARET

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: GIDWITZ RONALD

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: STEBBINS THEODORE

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Court Fee: 317.50 Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 08/17/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/17/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney:

SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 08/17/2001 Participant: BUNTROCK DEAN

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: GIDWITZ RONALD

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: DALEY MARGARET

CERTIFICATE FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

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Attorney: QUINLAN & CRISHAM

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Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

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Activity Date: 08/17/2001 Participant: BUNTROCK DEAN L

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: DALEY MARGARET

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Attorney: QUINLAN & CRISHAM

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Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: TERRA FOUNDATION ARTS

NOTICE OF MOTION FILED

Date: 09/13/2001
Court Time: 0200

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/17/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: GIDWITZ RONALD

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Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: DALEY MARGARET

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Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

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Activity Date: 08/17/2001 Participant: GIDWITZ RONALD

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Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: TERRA FOUNDATION ARTS

MOTION FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 08/17/2001 Participant: BUNTROCK DEAN L

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: DALEY MARGARET

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Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: GIDWITZ RONALD

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/17/2001 Participant: HARTMAN ARTHUR

MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/20/2001 Participant: TERRA FOUNGDATION ARTS

APPEARANCE FILED - FEE PAID -

Court Fee: 105.00

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/20/2001 Participant: PEOPLE STATE ILLINOIS

APPEARANCE FILED - NO FEE PAID -

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/20/2001 Participant: BUNTROCK DEN

CERTIFICATE FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/20/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/20/2001 Participant: RYAN JAMES E

EXHIBITS FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/20/2001 Participant: BUNTROCK DEN

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/20/2001 Participant: TERRA FOUNDATION ARTS

NOTICE OF FILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/20/2001 Participant: RYAN JAMES E

MOTION FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: RYAN JAMES E

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: PERKINS FLOYD

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: PERKINS FLOYD

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: RYAN JAMES E

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: TUCKER PAUL HAYES

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/23/2001 Participant: RYAN JAMES E

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: TUCKER PAUL HAYES

EXHIBITS FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 08/23/2001 Participant: TUCKER PAUL HAYES

NOTICE OF MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/23/2001 Participant: RYAN JAMES E

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 08/23/2001 Participant: TUCKER PAUL HAYES

MOTION FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 08/24/2001 Participant: MARSHALL STEPHANIE PAC

APPEARANCE FILED - FEE PAID -

Court Fee: 105.00

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 08/24/2001 Participant: TUCKER PAUL HAYES JUDI

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/24/2001 Participant: TUCKER PAUL HAYES JUDI

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/24/2001 Participant: TUCKER PAUL HAYES JUDI

NOTICE OF FILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/24/2001 Participant: TUCKER PAUL HAYES JUDI

OBJECTIONS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 08/24/2001 Participant: BUNTROCK

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Date: 08/31/2001 Judge: EVANS, TIMOTHY C.
Microfilm: LD000562019

Activity Date: 08/24/2001 Participant: TUCKER

FILE AMENDMENT OR ADDITIONAL OR AMENDED PLEADINGS - ALLOWED -

Date: 09/07/2001 Judge: EVANS, TIMOTHY C.
Microfilm: LD000562019

Activity Date: 08/24/2001 Participant: TUCKER

STRIKE OR WITHDRAW ANSWER OR APPEARANCE OR BOTH - CONTINUED -

Date: 09/13/2001 Judge: EVANS, TIMOTHY C.
Court Time: 0200 Microfilm: LD000562019

Activity Date: 08/27/2001 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/27/2001 Participant: PEOPLE STATE IL

CERTIFICATE OF MAILING FILED

Attorney: DARBO & VANDENBURGH

Activity Date: 08/27/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/27/2001 Participant: BUNTROCK DEAN

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/27/2001 Participant: TERRA FOUNDATION ARTS

ANSWER TO MOTION FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 08/27/2001 Participant: BUNTROCK DEAN

ANSWER TO MOTION FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/27/2001 Participant: PEOPLE STATE IL

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: DARBO & VANDENBURGH

Activity Date: 08/27/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/27/2001 Participant: PEOPLE STATE IL

NOTICE OF FILING FILED

Attorney:

DARBO &
VANDENBURGH

Activity Date: 08/31/2001 Participant: BUNTROCK DEAN

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: GIDWITZ RONALD

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: DALEY MARGARET

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: HARTMAN ARTHUR

CERTIFICATE OF MAILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: BUNTROCK DEAN L

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: DALEY MARGARET

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: GIDWITZ RONALD

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: HARTMAN ARTHUR

EXHIBITS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: TERRA FOUNDATION FOR

EXHIBITS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 08/31/2001 Participant: TERRA FOUNDATION FOR

ANSWER TO MOTION FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 08/31/2001 Participant: BUNTROCK DEAN

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: GIDWITZ RONALD

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: DALEY MARGARET

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: HARTMAN ARTHUR

NOTICE OF FILING FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: BUNTROCK DEAN L

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: DALEY MARGARET

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: GIDWITZ RONALD

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 08/31/2001 Participant: HARTMAN ARTHUR

OBJECTIONS FILED

Attorney: QUINLAN & CRISHAM

Activity Date: 09/04/2001 Participant: STEBBINS THEODORE

CERTIFICATE OF MAILING FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: MARSHALL STEPHANIE

CERTIFICATE OF MAILING FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: STEBBINS THEODORE

NOTICE OF MOTION FILED

Date: 09/17/2001
Court Time: 1000

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: MARSHALL STEPHANIE

NOTICE OF MOTION FILED

Date: 09/17/2001
Court Time: 1000

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: STEBBINS THEODORE

BRIEF FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: MARSHALL STEPHANIE

BRIEF FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: STEBBINS THEODORE

MOTION FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/04/2001 Participant: MARSHALL STEPHANIE

MOTION FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/10/2001 Participant: STEBBINS THEODORE

CERTIFICATE OF MAILING FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/10/2001 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/10/2001 Participant: TUCKER PAUL HAYES

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/10/2001 Participant: STEBBINS THEODORE

NOTICE OF MOTION FILED

Date: 09/17/2001
Court Time: 0930

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/10/2001 Participant: TUCKER PAUL HAYES

NOTICE OF FILING FILED

Attorney:

CUMMINS & CRONIN LLC

Activity Date: 09/10/2001 Participant: STEBBINS THEODORE

MOTION FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/10/2001 Participant: BUNTROCK DEAN

MOTION SCHEDULED

Date: 09/17/2001
Court Time: 0330

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 09/12/2001 Participant: DONNELLEY JAMES R

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Court Fee: 317.50 Attorney: GRIPPO ELDEN LLC

Activity Date: 09/12/2001 Participant: FIELD MARSHALL V

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/12/2001 Participant: KREHBIEHL FREDERICK A

APPEARANCE FILED - FEE PAID - (JURY DEMAND)

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/12/2001 Participant: DONNELLEY JAMES R

CERTIFICATE OF MAILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/12/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/12/2001 Participant: DONNELLEY JAMES R

NOTICE OF FILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/12/2001 Participant: TERRA FOUNDATION ARTS

MOTION FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/13/2001 Participant: DONNELLEY JAMES R

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/13/2001 Participant: FIELD MARSHALL V

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/13/2001 Participant: KREHBIEHL FREDERICK A

APPEARANCE FILED - NO FEE PAID - (JURY DEMAND)

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/13/2001 Participant: DONNELLEY JAMES R

CERTIFICATE OF MAILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/13/2001 Participant: DONNELLEY JAMES R

NOTICE OF FILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 09/17/2001 Participant: TUCKER PAUL HAYES

CERTIFICATE FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/17/2001 Participant: TUCKER PAUL HAYES

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/17/2001 Participant: TUCKER PAUL HAYES

AMENDED NOTICE FILED

Date: 09/17/2001
Court Time: 1000

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/17/2001 Participant: TUCKER PAUL HAYES

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/17/2001 Participant: BUNTROCK

FILE APPEARANCE OR JURY DEMAND, ANSWER OR PLEAD - ALLOWED -

Date: 10/17/2001

Judge: MULHERN, MARY A
Microfilm: LD000611067

Activity Date: 09/17/2001 Participant: TUCKER

MOTION TO - ALLOWED -

Judge: MULHERN, MARY A
Microfilm: LD000611066

Activity Date: 09/17/2001 Participant: TUCKER

EXECUTE OR PERFORM - ALLOWED -

Judge: MULHERN, MARY A
Microfilm: LD000611068

Activity Date: 09/17/2001 Participant: TUCKER PAUL HAYES

ORDER STRIKING MOTION FROM CALL - ALLOWED -

Judge: KOGAN RANDYE A
Microfilm: LD000612108

Activity Date: 09/17/2001 Participant: BUNTROCK

ORDER CASE TRANSFERRED FOR TRIAL TO CHANCERY DIVISION

Judge: MULHERN, MARY A
Microfilm: LD000611068

Activity Date: 09/18/2001 Participant: TERRA JUDITH

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/18/2001 Participant: TERRA JUDITH

EXHIBITS FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/18/2001 Participant: TERRA JUDITH

NOTICE OF MOTION FILED

Date: 09/20/2001
Court Time: 1100

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/18/2001 Participant: TERRA JUDITH

MOTION FILED

Attorney: CUMMINS & CRONIN LLC

Activity Date: 09/20/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/20/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 09/20/2001 Participant: TERRA FOUNDATION ARTS

ANSWER TO MOTION FILED

Attorney:

SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 10/24/2001 Participant: TERRA FOUNDATION ARTS

EXHIBITS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 10/24/2001 Participant: TERRA FOUNDATION ARTS

OBJECTIONS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 10/30/2001 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: CUMMINS & CRONIN
LLC

Activity Date: 10/30/2001 Participant: TERRA FOUNDATION ARTS

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 10/30/2001 Participant: TERRA FOUNDATION ARTS

ANSWER TO MOTION FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 10/30/2001 Participant: TUCKER PAUL HAYES

MEMORANDUM FILED

Attorney: CUMMINS & CRONIN
LLC

Activity Date: 10/30/2001 Participant: TUCKER PAUL HAYES

NOTICE OF FILING FILED

Attorney: CUMMINS & CRONIN
LLC

Activity Date: 01/07/2002 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 01/07/2002 Participant: TUCKER PAUL HAYES

MEMORANDUM IN SUPPORT OF MOTION FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 01/07/2002 Participant: TUCKER PAUL HAYES

NOTICE OF FILING FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 01/07/2002 Participant: TUCKER PAUL HAYES

MOTION TO DISMISS FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 01/18/2002 Participant: TUCKER PAUL HAYES

AFFIDAVIT FILED

Attorney: CUMMINS ROBERT & DECKER W

Activity Date: 02/01/2002 Participant: RYAN JAMES E

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: PERKINS FLOYD

CERTIFICATE OF MAILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: SIDLEY AUSTIN

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 02/01/2002 Participant: STEBBINS THEOBORE E DR

RESPONSE / REPLY - FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 02/01/2002 Participant: RYAN JAMES E

RESPONSE / REPLY - FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: PERKINS FLOYD

RESPONSE / REPLY - FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: SIDLEY AUSTIN

RESPONSE / REPLY - FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 02/01/2002 Participant: STEBBINS THEOBORE E DR

NOTICE OF FILING FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 02/01/2002 Participant: RYAN JAMES E

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: PERKINS FLOYD

NOTICE OF FILING FILED

Attorney: ATTORNEY GENERALS OFFICE

Activity Date: 02/01/2002 Participant: STEBBINS THEOBORE E DR

PROOF OF SERVICE FILED

Attorney: MCDERMOTT WILL & EMLLP

Activity Date: 02/08/2002 Participant: DONNELLEY JAMES R

CERTIFICATE OF MAILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/08/2002 Participant: MARSHALL FIELD V

CERTIFICATE OF MAILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/08/2002 Participant: KREHBIEL FREDERICK A

CERTIFICATE OF MAILING FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/08/2002 Participant: DONNELLEY JAMES R

RESPONSE / REPLY - FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/08/2002 Participant: MARSHALL FIELD V

RESPONSE / REPLY - FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/08/2002 Participant: KREHBIEL FREDERICK A

RESPONSE / REPLY - FILED

Attorney: GRIPPO ELDEN LLC

Activity Date: 02/20/2002 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 02/20/2002 Participant: TUCKER PAUL HAYES

NOTICE OF FILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 02/20/2002 Participant: TUCKER PAUL HAYES

MOTION TO DISMISS FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 02/25/2002 Participant: SIDLEY & AUSTIN

CERTIFICATE FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 02/25/2002 Participant: SIDLEY & AUSTIN

OBJECTIONS FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 03/27/2002 Participant: SIDLEY & AUSTIN

CERTIFICATE OF MAILING FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 03/27/2002 Participant: SIDLEY & AUSTIN

NOTICE OF MOTION FILED

Date: 03/29/2002
Court Time: 1000

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 03/27/2002 Participant: SIDLEY & AUSTIN

STIPULATION FILED

Attorney: SIDLEY AUSTIN
BROWN&WOOD

Activity Date: 03/27/2002 Participant: SIDLEY & AUSTIN

MOTION TO DISMISS FILED

Attorney: SIDLEY AUSTIN BROWN&WOOD

Activity Date: 03/28/2002 Participant: TUCKER

MOTION TO DISMISS FILED

Attorney: WINSTON & STRAWN LLP

Activity Date: 07/23/2002 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 07/23/2002 Participant: TUCKER PAUL HAYES

NOTICE OF FILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 07/23/2002 Participant: TUCKER PAUL HAYES

MOTION FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: TUCKER PAUL HAYES

CERTIFICATE OF MAILING FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: TUCKER PAUL HAYES

NOTICE OF MOTION FILED

Date: 08/14/2002

Court Time: 0915

Attorney: NOVOSELSKY DAVID A

Activity Date: 08/06/2002 Participant: TUCKER PAUL HAYES

MOTION FILED

Attorney: NOVOSELSKY DAVID A

Activity Date: 12/09/2003 Participant: TUCKER PAUL HAYES

CASE SET ON INDIVIDUAL CALENDAR

Microfilm: LD999999997

Activity Date: 07/11/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

Activity Date: 07/11/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

Activity Date: 07/11/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

Activity Date: 07/11/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

Activity Date: 07/12/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

Activity Date: 07/12/2005 Participant: TUCKER PAUL HAYES

RECEIPT FILED

Attorney: PRO SE

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If data does not appear in a specific field, we likely do not have the responsive data in our master database.

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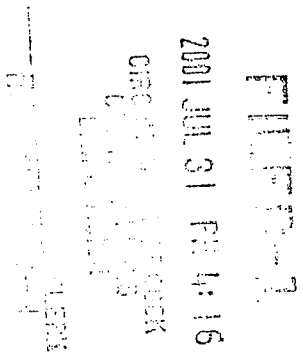
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	01L 009112 CALENDAR # STATUTORY ACTION
Plaintiffs,	)	No.
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD. D. PERKINS, Assistant Illinois Attorney General,	)	**JURY TRIAL DEMANDED**
Defendants.	)	



COMPLAINT AT LAW

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson complain of the Defendants Dean Buntrock and Ronald Gidwitz, James E. Ryan, Floyd D. Perkins, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, and the Terra Foundation for the Arts ("Foundation") as follows:

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Preliminary Statement

1. Through this action, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson seek to vindicate both the mission of the Foundation and the intent of its founder Daniel J. Terra. The plaintiffs complain that certain directors of the Foundation are irreconcilably conflicted and have willfully and wantonly breached their fiduciary obligations by pursuing a course of action antithetical to the best interests of the Foundation and inconsistent with both the purpose of the Foundation and the clearly expressed intentions of its founder. These breaches of fiduciary duty were aided by – and even induced by – the illegal conduct of the Illinois Attorney General and his assistant. Indeed, as we set out more fully below, the improvident conduct of the Attorney General not only induced breaches of fiduciary duty but constitutes an unlawful deprivation of the Foundation's property without due process of law and an unlawful deprivation of the Foundation's rights to freedom of speech. The Foundation's interests have been further compromised by the conflicted interests of several Directors and various counsel who purported to, but did not, represent and counsel the Foundation free of improper influence

2. The plaintiffs have been unlawfully denied the opportunity to bring these claims in other litigation. As a result, this case is filed to secure relief – a declaratory judgment, injunctive relief and damages – in order to halt the perversion of the Foundation's mission which has been the direct result of the defendants' conduct.

Nature of the Case

3. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts, by a conflicted majority, voted to accept a settlement of this litigation that would chain the Foundation to Chicago for 50 years and install a majority of Illinois residents on its

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Board. As the dissenting board members stated before the vote, this acquiescence to the extraordinary intrusions by the State of Illinois into the Foundation's affairs was *ultra vires* and an utter abdication of the Board's fiduciary responsibilities. Yet six board members, some with personal conflicts, none acting in the best interests of the Foundation, chose to vote in favor of a proposal that—if allowed to stand—will do violence to the clear vision of an American philanthropist and set a chilling precedent for all not-for-profit corporations.

4. The Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Yet six Board members voted to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the Foundation's charter and its founder's demonstrated intentions.

5. Earlier litigation and a mediation process compromised by conflicts of interest became a vehicle for a power grab by the Attorney General of the State of Illinois and Assistant Attorney General Floyd D. Perkins, who is charged with enforcing the State's charitable institution laws. Through threats of investigation and legal action—including the threat of suing pivotal board members - Perkins has used his official powers to compromise and conflict certain members of the Foundation's Board of Directors such that the Foundation's right of self-governance, its right to control its own assets, and its

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right to freedom of speech have been effectively nullified. The Attorney General's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens further to deprive Plaintiffs of (1) their freedom of speech, in violation of the First Amendment; (2) their property without due process of law, in violation of the Fourteenth Amendment; and (3) rights under the commerce and contracts clauses of the Constitution. Through this unlawful conduct, Mr. Perkins has also induced certain Board members to violate their fiduciary duties to the Foundation.

6. In approving a tainted mediation process, a conflicted a majority of the Board of Directors of the Foundation have violated their fiduciary duties to the Foundation and caused the Foundation to act *ultra vires*. Despite irreconcilable conflicts of interest and their consequent disqualification, directors Stephanie Pace Marshall and Theodore Stebbins have acted against the interest of the Foundations. By taking action incompatible with the Foundation's charter and wasting valuable assets and opportunities for the Foundation to carry out its mission, the Board members who approved the proposed settlement violated duties of obedience to the Foundation's purpose and best interests.

Parties

7. The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

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8. Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachusetts.

9. Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming. Senator Simpson also serves as Chairman of the Board of Trustees of the Buffalo Bill Historical Center in Cody, Wyoming, which maintains assets valued in excess of $350 million.

10. Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's widow, and a resident of Washington, D.C.

11. Dr. Stephanie Pace Marshall is the Foundation's Secretary and Treasurer and chairman of its finance and strategic planning committees. She is president of the Illinois Mathematics and Science Academy, and a resident of Illinois.

12. Dr. Theodore O. Stebbins is a Director of the Foundation and Chairman of the collections committee. He currently serves as curator of American art at the Fogg Museum at Harvard University and resides in Massachusetts.

13. Margaret Daley is a Director of the Foundation and Chairman of its education committee. She is a resident of Illinois.

14. Dean Buntrock is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

15. Ronald Gidwitz is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

16. James E. Ryan is the Attorney General of Illinois.

17. Floyd D. Perkins is Assistant Attorney General, Bureau of Charitable Trusts and Solicitations.

The History of the Terra Foundation

18. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. Born and educated in Philadelphia and a graduate of Pennsylvania State University, Mr. Terra maintained residences in Chicago and Washington, D.C. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to 1950. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

19. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Its purposes, according to its original Articles of Incorporation, were

> to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation (as filed Dec. 13, 1978).

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20. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He created a multimillion dollar museum facility on North Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Mr. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art. Today, the Foundation owns substantial property in the Village of Giverny.

21. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the North Michigan Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

22. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

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> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson and his long-time friend Peter Solmsson of the University of the Arts in Philadelphia, that he wanted his art to achieve the broadest possible impact on the public.

23. Between 1991 and 1993, Mr. Terra negotiated with the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City to form a strategic alliance that would pool the Foundation's collection with those of the other two institutions and move the emphasis of the Foundation's work from Chicago to Washington. Discussions broke down over issues relating to the Whitney Museum's control over the collection.

24. Between 1993 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized.

25. In 1996, the last year of his life, Mr. Terra focused intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect

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to draw plans and obtain zoning permits for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Phone lines, name plates, furniture and other items were purchased for the new property. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location, sometimes with his own handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

26. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable North Michigan Avenue museum site. Between 1996 and 1998, the Foundation was consumed with issues relating to Mr. Terra's estate.

The Board Fight Over the Future of the Foundation

27. Upon settlement of Mr. Terra's estate, the Board returned to consideration of a strategic plan for the Foundation. At a November 1998 meeting, Mr. Buntrock recommended that the Board form a Strategic Planning Committee to consider options for the future of the Foundation. Mr. Gidwitz was elected chairman of this committee.

28. Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard

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University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris; Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis Corporation.

29. Under Dr. Tucker's leadership, the Foundation continued active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. The Strategic Planning Committee met several times to consider options, with Mr. Gidwitz himself raising suggestions of building a new museum facility on a different site, affiliation with other museums, and closing the museum to focus on education efforts and building the collection.

30. In preparation for the Board's September 2000 annual meeting in France, Dr. Tucker encouraged members to focus on long-term planning options and circulate ideas they might have in advance of the meeting for the group to study and consider.

31. Dr. Tucker circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities

frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly, Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

32. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

The Ploy to Keep the Foundation in Chicago

33. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock filed a lawsuit alleging that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

34. In their lawsuit, Messrs. Gidwitz and Buntrock claimed, contrary to fact, that Mr. Terra intended that the Foundation would always remain in the Chicago area. The complaint quoted news reports from 1987, the time of the move from Evanston to North Michigan Avenue, in which Mr. Terra described his enthusiasm for the new location. The complaint did not refer to Mr. Terra's 1990 statement to the Board of Directors or to any of his subsequent discussions and plans relating to relocation of the Foundation to

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another city. It also did not mention the 1994 amendment to the charter which permitted the Foundation to operate museums and schools "both in the United States and abroad." Based on this misleading statement of Mr. Terra's intent, the defendants alleged that the Foundation's mission was to operate a "museum of American art . . . in the Chicago area to be held in trust for the benefit of the people of the State of Illinois."

35. Attorney General James Ryan and Floyd Perkins, an Assistant Attorney General, seized upon the turmoil of the Terra Foundation Board as an opportunity to assert State control over its assets. At the inception of the lawsuit, the Attorney General filed an intervenor complaint that simply borrowed the allegations of Messrs. Gidwitz and Buntrock. The complaint also reiterated the faulty premise -- based upon a demonstrably incorrect statement of Mr. Terra's intent -- that the Board of Directors were without authority to relocate the Foundation. The complaint sought a declaration, among other things, that "[t]he intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the Foundation intended and expected the Museum to remain in Chicagoland."

36. The Attorney General intervened expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an *ultra vires* act. As Assistant Attorney General Perkins has stated in an interview for that case, he believes it is his role as assistant attorney general to see that Illinois-based charitable institutions utilize their assets in Illinois. Mr. Perkins attempts to accomplish this by seeking installment of Illinois directors on the boards of such institutions and through other restrictions. He has employed this tactic successfully in other cases, for

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example, that of the Regenstein Foundation. Mr. Perkins acknowledges, however, that he does not have the authority to impose Illinois-related restrictions on institutions which were created to serve broader interests, such as national and international aid organizations, even though such institutions may be based in Illinois and subject to reporting and other statutory requirements of Illinois law.

37. As authority for his intervention in that lawsuit, Mr. Perkins relied on the Charitable Trust Act (760 ILCS 55/1 et seq. (1997)) and his "common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts." Whatever authority these sources of law may provide to the Attorney General, they do not permit any action to force a charitable trustee or Board member of a not-for-profit corporation to change the institution's fundamental purpose in a manner inconsistent with its charter or founder's intent. Nor do these authorities mandate that any charitable trust or not-for-profit corporation that is established in the State of Illinois must remain in Illinois, regardless of its purposes and founder's intent.

38. The propriety of the Attorney General's intervention and sole basis for authority in that case depended upon his claim that the Terra Foundation's purpose was to serve the people of Illinois, rather than a broader population. Like the other defendants, the Attorney General based this claim on selected statements of Mr. Terra to the press. A reasonable investigation of the facts would have revealed, however, that Mr. Terra did not intend that any of the assets of the Terra Foundation should be restricted geographically. Mr. Perkins did not conduct such an investigation before filing his initial complaint. For example, Mr. Perkins has admitted that when he filed that complaint he was unaware of Mr. Terra's 1994 amendment to the Articles of Incorporation of the

Foundation expressly stating that the Foundation's efforts shall include museums "both in the United States and abroad."

39. In January 2001, the Terra Foundation filed a motion for judgment on the pleadings, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead encouraged simply the best possible dissemination of art knowledge and appreciation among the public in the United States and abroad.

40. Although the true facts of Mr. Terra's intent were revealed early in litigation, and at the latest by the Foundation's motion for judgment on the pleadings, defendants and the Attorney General persisted in their efforts to capture the Foundation in Illinois. They were able to do so through a barrage of motions designed to delay the proceedings and deflect attention from the core issue of Mr. Terra's intent. Mr. Perkins and the other defendants first challenged the Board's choice of counsel and early decisions about directing and funding the litigation. Then, once the Board had selected an independent litigation committee of Dr. Stebbins and Amb. Andreani, Mr. Perkins and the other derfendants challenged Dr. Stebbins' ability to serve on this committee. These tactics had the desired effect of paralyzing the Board and placing Mr. Perkins and the other defendants in a strong position to make demands upon the Foundation, without regard to the merits of their lawsuits.

41. As the case proceeded to mediation, the Attorney General and Assistant Attorney General Perkins insinuated themselves into the process in an attempt to railroad its result. Mr. Perkins pursued the goal of capturing the Foundation's assets in Illinois despite the fact that he had no basis to assert that he was seeking to preserve Mr. Terra's intent.

42. In mediation, the Attorney General and Assistant Attorney General Perkins took several extraordinary positions that evidenced their recognition that Mr. Terra's intent was not to constrain the Foundation to Chicago. The Attorney General disagreed that the Board of Directors was governed in the use of the Foundation's funds solely by the Articles of Incorporation. He argued that those Articles were too broad to provide any meaningful purpose to the Foundation. Most strikingly, the Attorney General maintained that a not-for-profit corporation established for charitable purposes in a particular jurisdiction, simply by virtue of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population.

43. Without legal authority and in disregard of the facts regarding Mr. Terra's intent. Assistant Attorney General Perkins demanded throughout the mediation that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with the Art Institute of Chicago in which the Foundation would sell the North Michigan Avenue property to fund a new wing at the Art Institute.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois in perpetuity.

c. Maintain and exhibit its collection in the Chicago metropolitan area in perpetuity.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois.

44. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

45. Frustrated by the Board's resistance to his demands, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation. These tactics were directed in particular at two key swing directors, Drs. Stebbins and Marshall.

Attacks on Dr. Stebbins

46. Since his earliest involvement with the Terra Foundation, Dr. Stebbins had supported a comprehensive approach to strategic planning that included consideration of options outside of Illinois. In 1997, before Dr. Stebbins joined the Board, he headed an advisory committee that conducted a review and analysis of the collection and reported recommendations to the Board for the future. The committee consisted of Dr. Stebbins, then curator of American paintings at the Museum of Fine Arts in Boston, Professor John Wilmerding, former chairman of the art department at Princeton, and Charles Moffett, former deputy director of the National Gallery and director of the Phillips Collection in Washington. In its report to the Board in February 1997, the advisory committee concluded strongly that the present building in Chicago is inappropriate as a museum. The committee envisioned three alternative scenarios for the future, two of which involved discontinuing the Chicago presence by: (1) concentrating on French operations, with the establishment of a new Terra Center for American Art and American Studies in Paris, or (2) improving the collection and housing it another American city.

47. Dr. Stebbins joined the Board in April 1998. In Strategic Planning Committee

meetings until the outbreak of litigation, he continued to advocate consideration of options within and without Illinois. He was an especially strong advocate for the idea of maintaining a stand-alone museum.

48. When litigation began, Dr. Stebbins became a key figure in its conduct. Upon defendants' demand for an independent litigation committee, Dr. Stebbins and Amb. Jacques Andreani were chosen from among the non-party directors to oversee the litigation on behalf of the Foundation. Because Amb. Andreani was in France at the time, Dr. Stebbins effectively controlled the litigation committee.

49. Within three weeks of Dr. Stebbins' election to the litigation committee on November 30, 2000, Mr. Perkins filed a motion to remove Dr. Stebbins from the committee on the grounds of conflict of interest. On January 22, 2001, Mr. Perkins obtained a Court order to conduct special discovery focusing on Dr. Stebbins' conduct as a director. Within two weeks of that order — and less than two weeks before a scheduled evidentiary hearing focusing upon Dr. Stebbins' conduct — the Foundation entered into mediation. With challenges to his reputation and integrity having become the central focus of the litigation, Dr. Stebbins strongly advocated directing the Foundation into mediation.

50. On March 21, 2001, Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant for the first time. In a cover letter, Mr. Perkins stated that the document was a draft and was not being filed, but rather supplied to set forth issues to be discussed at settlement. The draft complaint named Dr. Stebbins as a new defendant and included specific charges of impropriety against him. The allegations included alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions.

The amended complaint also charged Stebbins with breaching the Code of Ethics for Professional Practices in Art Museums. The amended complaint was never filed.

51. Dr. Stebbins now knew that, if settlement was not reached, the litigation would resume, with his reputation and integrity once again the central focus, and he would become a defendant in the case.

52. On the same day that the draft complaint was distributed to counsel, the mediator circulated to the Board a revised mediation proposal, which had been formulated after reviewing the amended complaint and discussing this matter with the Attorney General. The proposal contained a requirement that the Foundation would maintain and exhibit its collection in perpetuity at the Art Institute of Chicago. According to the mediator, this provision resulted from the position of the Attorney General. Mr. Perkins had not participated in mediation sessions on March 5 and 6, but worked behind the scenes with the mediator to influence the course of mediation.

53. Dr. Stebbins, facing the threat of becoming a defendant in the lawsuit, now expressed his support for settlement. On April 2, 2001, he and Amb. Andreani prepared a letter to the mediator stating that "in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago." They enclosed a settlement proposal "follow[ing] the outline" of the March 21, 2001, proposal reflecting the Attorney General's positions.

Attacks on Dr. Marshall

54. Dr. Marshall joined the Board in 1998. Like Dr. Stebbins, Dr. Marshall held the view that the Terra Foundation was established for the broadest possible dissemination of American art. For example, at a May 10, 2000, meeting of the Strategic Planning

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Committee that Drs. Stebbins and Marshall attended, consensus was reached that the beneficiaries of the Foundation included the national and international public.

55. Late into the mediation process, Dr. Marshall remained a strong critic of the Attorney General's methods and proposals. In a May 20, 2001, letter to counsel for the Foundation and her fellow Board members she reported:

> [W]ith respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

56. In addition to serving on the Board, Dr. Marshall serves full-time as president of the Illinois Mathematics and Science Academy, a highly-regarded education institution that depends on public funding for the bulk of its operating budget and is currently in the midst of a significant capital campaign.

57. After a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins believed that he had been tricked into going along with mediation and had lost valuable time preparing for litigation. He began to investigate Dr. Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He considered these issues for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr. Perkins knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

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58. Mr. Perkins never informed Dr. Marshall or her counsel that the investigation had been concluded.

The Proposed Settlement and Board Approval

59. On June 29, 2001, the Board held a special meeting to consider the terms of a proposed settlement of this litigation. The settlement called for entry of a consent judgment and order implementing the Attorney General's goal of locking the Foundation in to the State of Illinois. In this regard, the proposed judgment requires:

a. For at least 50 years, the Foundation shall remain an Illinois corporation, with its principal office and corporate headquarters in Illinois;

b. For at least 50 years, the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago metropolitan area;

c. For at least 25 years, the Foundation will require that a majority of its Board positions be at all times held by residents of Illinois;

d. The Foundation shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

60. Dr. Marshall, the Foundation's Treasurer and Secretary, presided at the special meeting. Other directors present were: Mr. Gidwitz, Mr. Buntrock, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Mrs. Terra and Dr. Tucker.

61. Immediately prior to the vote, several Board members made personal statements. Mrs. Terra objected that "the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees."

> Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art . . . . [W]e will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of

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> Illinois to really come in and run our Foundation . . . telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most . . . outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation.

62. Dr. Tucker echoed Mrs. Terra's concerns. He stated that

> what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview. The invasion of its independence, its privacy, by . . . the Attorney General, I find repugnant. I find it detrimental and offensive.

63. At the recommendation of the Foundation's attorney, Drs. Stebbins and Marshall each addressed the issue of conflict of interest due to the Attorney General's conduct in the case. Dr. Marshall confirmed that "the Attorney General has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation," but insisted that the investigation "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation."

64. Dr. Stebbins first defended his "reputation, both as a scholar and as someone of complete integrity," and maintained that he had served on the Board "without any iota of a conflict of interest." He then stated that he "abhor[ed] the threatening tactics of the Attorney General." Dr. Stebbins also insisted that he was voting his "own conscience."

65. Upon the motion of Dr. Stebbins, the Board voted on whether to approve the proposed resolutions to amend the By-Laws and accept the settlement. Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Mr. Hartman, Dr. Marshall and Dr. Stebbins voted in favor. Mrs. Terra and Dr. Tucker voted against.

66. Members of the Board of Directors of the Terra Foundation have statutory and common law fiduciary duties to the Foundation. These duties include, but are not limited to, the duty of loyalty, which encompasses the duty to avoid conflicts of interest and to

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act in the best interests of the Foundation; the duty of obedience to purpose, which prohibits action contrary to the purposes for which Foundation was established; and the duty to use the Foundation's assets productively and not to waste Foundation assets.

67. At least two members of the Board who voted in favor of the proposed settlement were faced with a conflict of interest. Dr. Marshall expressly acknowledged that the Attorney General, the primary beneficiary of the settlement transaction, was conducting an investigation of the publicly-funded institution of which Dr. Marshall is president. Dr. Marshall reasonably could expect her vote on the settlement to influence the outcome of that investigation, either positively or negatively.

68. Dr. Stebbins also had strong personal incentives to support the settlement to the detriment of the Foundation. During the course of the litigation and corresponding public scrutiny of the Foundation's operations, he had faced charges of serious lapses of professional responsibility. In acknowledging his abhorrence of the Attorney General's tactics and vociferously defending his reputation and integrity immediately prior to the vote, Dr. Stebbins plainly identified his conflict of interest. If the mediation was unsuccessful, Dr. Stebbins would become a defendant in the case and face personal liability. Only through settlement could Dr. Stebbins hope to avoid more scrutiny which carried the threat of a potentially devastating effect on his career.

69. The Foundation's bylaws can be amended only "by a majority of the directors then in office and present" at the meeting at which the vote is taken. Because eight members of the Board were present at the June 29, 2001 meeting, the affirmative vote of five directors was required to approve the Proposed Settlement's many bylaw changes. Without the votes of Dr. Stebbins and Dr. Marshall, the Proposed Settlement garnered

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only four votes.

70. Each Board member who voted in favor of the settlement did so in violation of their fiduciary duty of obedience to the Foundation's purpose. Restricting the Foundation's art collection to isolation in Chicago for 50 years and installing a majority of Illinois residents on its Board is directly contrary to the Foundation's stated purpose in its Articles of Incorporation to "expand the artistic horizons of a growing art public" and to "operate museums and schools, both in the United States and abroad." Articles of Incorporation (Aug. 26, 1994) (emphasis added).

71. The Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry. Indeed, the problems of the 50-year lock-in and Illinois-majority provisions were identified by Dr. Marshall prior to her conflict of interest arising. In her letter of May 20, 2001, she stated that because of the Foundation's "intentional national and international outreach and presence," she did "not believe any specifically defined constituency should hold a reserved majority." Dr. Marshall acknowledged that a 50-year lock-in would be a relinquishment of the Board's power to govern the Foundation when she stated that "[a]fter the stipulated period, it is the Board of the Foundation that must make decisions regarding the Foundation's future."

72. Each Board member who voted in favor of the proposed settlement also violated a duty not to waste the Foundation's assets. By eliminating the possibility of merger or partnership with a non-Chicago institution, the Board accepted a undue limitation on its negotiating power. By limiting the field of competitors for the Terra relationship, the Board would waste all the benefits that would flow from that competition, and in

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particular the ability to secure the most attractive possible terms for the future and for the collection to have the greatest possible impact on the art world and public education.

73. The Foundation has benefited tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a major Parisian art museum. Yet the Board majority voted in favor of a settlement under which the Foundation would forfeit the benefit of such experts in favor of a board packed with individuals whose chief virtue is that they are residents of Illinois. By limiting the pool of talent from which the Board can recruit directors, the Board would waste its opportunity to secure the best and most experienced leadership.

74. Locking the Foundation into Chicago for 50 years or any other length of time and stacking the Board with Illinois residents dangerously compromises the Foundation's flexibility to fulfill its charter. There is absolutely no guarantee that the Chicago community will provide adequate support to the Foundation over such a long period of time. If the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract the maximum possible interest.

CLAIMS FOR RELIEF

Count I - Declaratory Relief

75. All foregoing paragraphs are incorporated herein by reference.

76. An actual and justiciable controversy exits between the parties as defined by 735 ILCS 5/2-701.

77. As directors of the Terra Foundation, Plaintiffs have donated their time, efforts and resources to accomplish the mission of the Foundation.

78. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

79. The conduct of the Defendants alleged herein has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

80. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count II - *Ultra Vires* Acts (805 ILCS 105/103.15)

81. All foregoing paragraphs are incorporated herein by reference.

82. The resolutions approved by six members of the Board of the Foundation on June 29, 2001, constitute acts of the Foundation taken in contravention of its Articles of Incorporation and By-Laws, and thus taken without lawful authority, capacity or power.

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83. The court should enjoin the doing of such acts in this proceeding pursuant to the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a).

Prayer for Relief

Plaintiffs request that this Court to enter judgment as follows:

(a) an Order enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation;

(b) Damages in an amount to be determined at trial;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Count III - Breach of Fiduciary Duty

84. All foregoing paragraphs are incorporated herein by reference.

85. A fiduciary relationship exists between the Foundation and the members of its Board of Directors. The Board's fiduciary duties include, without limitation, the duties of acting in good faith and with due regard for the Foundation's interest, of refraining from acting in a manner adverse to the Foundation's interest, of making full disclosure of all material information in their possession, of obedience to the Foundation's purposes as established by its Articles of Incorporation, of making productive use of the Foundation's assets and opportunities, and the duties of care, loyalty, fair dealing, and honesty.

86. The Defendant Board Members who voted in favor of the proposed settlement willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation.

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87. In addition, board members Stephanie Pace Marshall and Theodore Stebbins breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation.

88. As a direct and proximate result of these breaches of fiduciary duty, the plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count IV - Inducing Breach of Fiduciary Duty

89. All foregoing paragraphs are incorporated herein by reference.

90. As set forth above, the Defendant members of the Board who voted in favor of the proposed settlement of this litigation did so in violation of their fiduciary duties to the Foundation.

91. Attorney General Ryan and Assistant Attorney General Perkins colluded with these Board members in committing breach of their fiduciary duties, or otherwise induced or participated in such breach.

92. As a direct and proximate result of this conduct, Plaintiffs and the Foundation have suffered injury.

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Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Punitive damages;

(d) Such other relief as may be just and proper.

Count V - Deprivation Under Color of Law of Constitutional Rights (42 U.S.C. § 1983)

93. All foregoing paragraphs are incorporated herein by reference.

94. At all relevant times, Attorney General Ryan and Assistant Attorney General Perkins acted under color of law as Assistant Attorney General of the State of Illinois.

95. Mr. Perkins' conduct constitutes an unlawful deprivation of the Foundation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

96. The conduct of the Attorney General and Assistant Attorney General constitutes an unlawful deprivation of the Foundation's rights to freedom of speech under the First Amendment to the Constitution of the United States.

97. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful restraint by the State of Illinois on interstate commerce in violation of Art. I, § 8 of the Constitution of the United States.

98. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful impairment of the Foundation's contractual obligations in violation of Art. I, § 9 of the Constitution of the United States.

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99. The Attorney General and Assistant Attorney General engaged in such illegal conduct to the injury of Plaintiffs and the Foundation.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Jury Trial Requested

100. Plaintiffs request trial by jury.

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Dated: July 31, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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AUG 29 2001

August 27, 2001

VIA MESSENGER

Hon. Timothy C. Evans
Presiding Judge
Circuit Court of Cook County
Law Division
2005 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Tucker et. al. v. Buntrock, et al.*; 01 L 009112**
Motion for Transfer Based On Relatedness;
Hearing Set 9/13/2001 at 2:00 p.m.

Dear Judge Evans:

Enclosed please find a courtesy copy of the Reply in Support of Motion for Transfer Based on Case Filed in the Wrong Division and on Relatedness filed with the court today. The motion itself was provided to you last week under separate cover. This motion is set to be heard by you on September 13, 2001 at 2:00p.m.

Very truly yours,

William R. Quinlan

Enclosure

cc: Donna Stolar
All Counsel of Record (w/o enclosure)

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Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts

Plaintiffs,

v.

No. 01 L 009112
Judge Timothy C. Evans

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, AN Illinois Not-for-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Attorney General of Illinois

Defendants.

PLEADINGS INDEX

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12.	08/17/01	Notice of Motion
13.	08/17/01	Defendant Terra Foundation for the Arts' Motion to Transfer This Matter to the Presiding Judge of the Circuit Court of Cook County, Chancery Division, for Reassignment to Judge Dorothy Kirie Kinnaird
14.	08/17/01	Attorney General's Motion to Transfer this Matter to the Chancery Division and to Move to Consolidate this Case with a Related Prior Pending Matter in the Chancery Division
15.	08/23/01	Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading
16.	08/24/01	Order
17.	08/24/01	Transcript of Proceedings before Judge Evans
18.	08/27/01	Defendant Terra Foundation for the Arts' Reply in Support of its Motion to Transfer this Matter to the Presiding Judge of the Circuit Court of Cook County, Chancery Division, for Reassignment to Judge Dorothy Kirie Kinnaird
19.	08/27/01	Notice of Filing of Reply Memorandum in Support of Motion to Transfer to the Chancery Division
20.	08/27/01	Reply Memorandum in Support of Motion to Transfer to the Chancery Division
21.	08/27/01	Notice of Filing of Reply in Support of Motion for Transfer Based on Case Filed in the Wrong Division and on Relatedness
22.	08/27/01	Reply in Support of Motion for Transfer Based on Case Filed in the Wrong Division and On Relatedness

ORIGINAL

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

No. 01 L 009112

PROCEEDINGS AUGUST 13, 2001

McCORKLE COURT REPORTERS, INC.
CHICAGO, ILLINOIS - (312) 263-0052

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

APPEARANCES:

CUMMINS & CRONIN, by
MR. THOMAS C. CRONIN
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
(312)578-0500
-and-
DAVID A. NOVOSELSKY & ASSOCIATES, by
MR. DAVID A. NOVOSELSKY
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312)346-8930
On behalf of the Plaintiffs,

QUINLAN & CRISHAM, LTD., by
MR. WILLIAM R. QUINLAN and
MR. JAMES R. CARROLL
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312)263-0900
On behalf of the Defendants
Dean Buntrock, Ronald Gidwitz,
Margaret Daley and
Ambassador Hartman,

APPEARANCES CONTINUED:

SIDLEY, AUSTIN, BROWN & WOOD, by
MR. STEPHEN C. CARLSON
10 South Dearborn Street
Chicago, Illinois 60603
(312)853-7717

-and-

WINSTON & STRAWN, by
MR. SCOTT SZOLA and
MR. MARK M. HEATWOLE
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312)558-5137

On behalf of the Defendant
The Terra Foundation For The Arts,

OFFICE OF THE ATTORNEY GENERAL, by
MR. FLOYD D. PERKINS
100 West Randolph Street
Chicago, Illinois 60601
(312)814-2533

On behalf of the Defendants
James E. Ryan and Floyd D. Perkins.

MR. CARLSON: Your Honor, I am Steve Carlson from Sidley & Austin. I got these papers about two minutes before --

THE COURT: Let me ask you, can we stay off the record just a minute?

MR. CARLSON: Sure, absolutely.

(Discussion off the record.)

MR. QUINLAN: William R. Quinlan and James Carroll on behalf of certain defendants.

MR. CARLSON: Steve Carlson from Sidley, Austin I believe on behalf of The Terra Foundation.

THE COURT: And pro se, aren't you a party now?

MR. CARLSON: Maybe.

MR. NOVOSELSKY: You granted us leave to file.

THE COURT: Okay. Go ahead.

MR. SZOLA: Your Honor, Scott Szola of Winston & Strawn technically hasn't been served either yet, so we will be in the same position as Sidley & Austin.

MR. PERKINS: Floyd Perkins. I am a defendant pro se and Assistant Attorney General on behalf of the Attorney General of Illinois.

MR. HEATWOLE: Mark Heatwole, Winston & Strawn.

MR. NOVOSELSKY: I apologize, Judge.

THE COURT: He assumes everybody knows him, but give them your name.

MR. NOVOSELSKY: David Novoselsky and Tom Cronin for plaintiffs.

These are our motions. And I guess the first I would only ask Mr. Quinlan, certain defendants which one, Bill, so there is no question?

MR. QUINLAN: Well, if you want me to go through, I am representing Mr. Hartman, Mrs. Daley, Mr. Buntrock, Mr. Gidwitz. And we are not at the moment representing Miss Marshall or Mr. Stebbins.

MR. NOVOSELSKY: As a housekeeping matter, your Honor, we have --

THE COURT: Let me before we start indicate that this case having been set for 2:00 o'clock, as the parties came in, we have had informal discussions which precluded in opening we had as a remaining defendants' attorney came in since the shortage of notice, nobody was essentially late because everything was pretty much of emergency. And that's what we have talked.

A moment ago the attorneys, half a dozen

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Attorney General, Floyd Perkins. Judge, we object to venue here so anything -- if there is any kind of prejudice --

THE COURT: What are you worried about? I am sending it out sua spontae.

MR. PERKINS: I understand, Judge. I am just -- I don't want any rulings by the court --

THE COURT: Where do you want the venue, in Springfield?

MR. PERKINS: I just don't want any rulings by the court to be used as some prejudice.

THE COURT: Well, I thought everybody heard me since I raised it sua spontae. And I only did you for an afterthought; didn't I?

MR. CARLSON: You sure did, your Honor.

THE COURT: It doesn't make sense to be here. So if you want to argue, I can end up disagreeing. But I totally agree with you. Okay?

MR. PERKINS: Judge --

THE COURT: I think the whole principle of judicial economy and good sense is you put it all in one place. And I have always done that.

MR. NOVOSELSKY: Which, your Honor, we may find ourselves going back to square one in front of

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

THE COURT: I am not going to call it which I could do. I could do it. I just don't. I have the right to call it, and it is not ex parte. But I wouldn't do it.

If he has a problem with having this go, that's his problem. I don't see any problem in having it go there. And you would be a delight in my life. I would grow older with you all. But it would be the delight of my life. Sometime when all of you can get a new case from the beginning, it would be my pleasure to have you all here.

(Whereupon, further proceedings in said cause were adjourned sine die.)

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ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Bantrock, et al

NO. 01 L 009112

ORDER

This matter coming on to be heard upon plaintiffs' Emergency Motion for the Entry of Temporary Restraining Order, the Court being fully advised in the premises, [redacted] and the Court being advised that the Terra Foundation for the Arts has cancelled its Board of Directors meeting scheduled for August 14, 2001, IT IS HEREBY ORDERED THAT:

1) This matter is hereby transferred to Judge Timothy Evans, Presiding Judge of the Law Division, for the purpose of transferring said cause for reassignment;

2) The Motion for TRO is moot, and

3) Plaintiffs Motion for Leave to File a First Amended Complaint is entered and continued.

Atty No.

Name Stephen C. Carlson / Sidley Austin

Attorney for Terra Foundation

Address Bank One Plaza, 10 S. Dearborn

City / Zip Chicago, Ill 60603

Telephone (312) 853-7717

JUDGE SHELDON GARDNER

ENTER: AUG 13 2001 /ME/

CIRCUIT COURT - 1506

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS 1003339

CCG-N002-150M-11/30/00(1348065)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Plaintiffs, AUG [illegible] TUCKER, ET AL,	)	
v.	)	No. 01L-509[illegible]
DEAN BURTROCK, ET AL.	)	
Defendants,	)	

ORDER SETTING HEARING

This cause having come before the court on DEFENDANTS motion for REASSIGNMENT, due notice having been given and the court being fully advised in the premises, **IT IS HEREBY ORDERED:**

ANY MOTION & BRIEF AUG. 17, 2001

Any response to the motion shall be filed by AUG 24, 2001;

Any reply shall be filed by AUG 27, 2001 IF ANY;

The motion shall be heard on SEPT 13, 2001 at 2:00 P.M in Room 2001, Richard J. Daley Center before Judge EVANS;

As required by Cook County Circuit Court Rule 2.1(d), movant **must** provide the court with copies of all memoranda and relevant pleadings. These courtesy copies shall be delivered to Room 2005 chambers at least **five court days** prior to the hearing, SEPT 6, 2001; and

Pursuant to Rule 2.1(d), failure to file a supporting or answering memorandum shall not be deemed a waiver of the motion, or a withdrawal of the opposition thereto, but shall be deemed a waiver of the right to file the respective memorandum.

ENTER: JUDGE RANDYE A. KOGAN

AUG 13 2001

Circuit Court-1509

Atty No. [illegible]
Name [illegible]
Atty for [illegible]
Address [illegible]
City/Zip Chicago, IL 60602
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16di-003341

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts,; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD. D. PERKINS, Assistant Illinois Attorney General; WINSTON &STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

Judge Gardner

JURY TRIAL DEMANDED

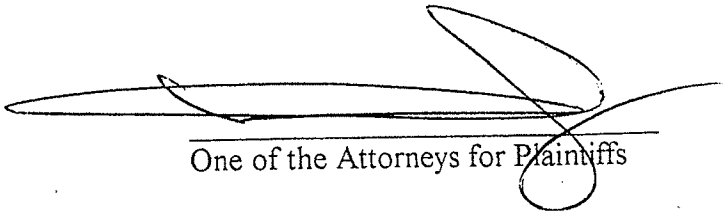
FILED
AUG 13 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

NOTICE OF EMERGENCY MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Monday, August 13, 2001 at 2:00 p.m., we will appear before The Honorable Sheldon Gardner, or any other judge sitting in her stead, in Room 2306, Richard J. Daley Center, Chicago, Illinois, and then and there present Plaintiffs' Emergency Motion for the Entry of a Temporary Restraining Order, a copy of which is attached hereto and hereby served upon you.

Dated: August 13, 2001



One of the Attorneys for Plaintiffs

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

Judge Gardner

JURY TRIAL DEMANDED

FILED
AUG 13 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

EMERGENCY MOTION FOR THE ENTRY OF
A TEMPORARY RESTRAINING ORDER

16di-003346

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson respectfully request that this Honorable Court enter a Temporary Restraining Order enjoining Defendants Dean Buntrock and Ronald Gidwitz, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, James R. Donnelley, Marshall Field V, Kathleen A. Forster, Robert S. Hamada, Frederick A. Krehbiel, individually and as Directors or purported Directors of the Terra Foundation for the Arts, the Terra Foundation for the Arts (the "Foundation"), Winston & Strawn and Sidley & Austin from doing any of the following acts or otherwise acting as follows for a period of ten days or until further order of this Court:

RELIEF REQUESTED

1. From holding a Meeting of the Board of Directors of the Terra Foundation for the Arts on August 14, 2001 or at any other time without prior notice to and the approval of this Court;

2. From approving the purported Minutes of the prior meetings of the Board of Directors of the Terra Foundation for the Arts as held on June 29, 2001 and August 1, 2001;

3. From "ratifying" or seeking to agree, vote, consent to, or otherwise "ratify" at the now-scheduled Meeting of the Board of Directors of the Terra Foundation for the Arts for August 14, 2001, or at any other time or in any other manner, the actions taken by the purported Board of Directors of the Terra Foundation for the Arts at a meeting held of said Board on August 1, 2001;

4. From "ratifying" or seeking to agree, vote, consent to, or otherwise "ratify" at the now-scheduled Meeting of the Board of Directors of the Terra Foundation for the

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Arts for August 14, 2001, or at any other time or in any other manner, the actions taken by the purported Board of Directors of the Terra Foundation for the Arts pursuant to "Resolutions adopted and authorizations" purportedly given at a meeting held of said Board on August 1, 2001;

5. From advancing or agreeing to advance any funds of the Terra Foundation for the Arts to Defendants or to counsel for Defendants for the defense of Defendants in the present case, or otherwise advance or agree to advance any funds of the Terra Foundation for the Arts to Defendants for the purpose of representing or advising Defendants;

6. From retaining, consulting with, or otherwise working with Defendants Sidley & Austin and Winston & Strawn as counsel for the Foundation or any other party in the present case, and from otherwise advancing or paying any further funds of the Terra Foundation for the Arts to said law firms;

7. From making or purporting to make any Committee Appointments, adopting any Banking Resolutions or otherwise acting to amend or modify any existing monetary or banking arrangements of the Terra Foundation for the Arts, cancelling any contracts, or approving any new contracts;

8. From adopting or purporting to adopt any "conformed by-laws," or other by-laws, and from amending any existing by-laws of the Terra Foundation; and

9. From paying, setting or agreeing to set any stipends for Directors of the Terra Foundation for the Arts.

ARGUMENT

In order to obtain a Temporary Restraining Order, the moving party must show this Court that there is no adequate remedy available at law, that in the absence of the

16di-003348

order restraining certain actions, the moving party will suffer irreparable harm, and that the moving party can demonstrate that there is a reasonable likelihood of a success on the merits of the underlying cause of action. *See Citizens Utilities Board v. O'Connor*, 116 Ill. App. 3d 369, 378, 451 N.E.2d 946 (2nd Dist. 1983). Plaintiffs respectfully submit that not only can they satisfy each and every one of these requirements, but further submit that the entry of an order enforcing the *status quo ante* is required in the interests of justice, in order to ensure the continuing viability of the Plaintiff Foundation which is presently not being adequately protected by any non-partisan representative, and that the entry of such an order is necessary to preserve the jurisdiction of this Court and the Constitutional rights of the Plaintiffs.

Background

Defendants' illegal 'takeover' of the Terra Foundation for the Arts had its genesis in a lawsuit filed by certain of the Defendant-Directors last year seeking to block the efforts of the majority of the Board of Directors to move ahead with the mission of the Foundation. These Defendants were later aided and abetted in their efforts by the Attorney General of the State of Illinois, who filed suit to assist them in frustrating and perverting the Foundation's mission.

The goal of these lawsuits was to transform the Terra Foundation from an institution intended by its Founder as a means to bring American Art to the attention of the citizens of the United States and the world into a purely local museum, serving Defendants' vision of confining the collection and the benefits of the Foundation to Illinois and "Chicagoland." In order to do so, they planned to remove the existing Board, drawn from the best possible sources throughout the United States and the rest of

the world, and replace it with one controlled by Illinois residents and subject to the rigorous control of the Attorney General of the State of Illinois.

The true mission of the Terra Foundation for the Arts, which Defendants determined to thrust aside by their actions, may be found in its Articles of Incorporation:

> "Build, erect, maintain, equip, manage, lease, and operate museums and schools, ***both in the United States and abroad***, and all components deemed advisable or necessary to provide space for these activities and exhibitions. (Articles of Incorporation, August 26, 1994, emphasis supplied.)

Defendants' newly-formulated mission was the antithesis of the true mission of the Foundation as set out above. The fact that the mission and purpose of the Foundation were never intended to be limited to a purely 'local' venue was overwhelmingly evident in the history of the Foundation and its collection.[1] Over the years that the Foundation had maintained its headquarters in Chicago, it also maintained substantial portions of its collection in other parts of the world including France. However, throughout its existence, public attendance at the principal location of the collection of American Art here in Chicago had been very poor. Indeed, it was estimated that the cost to the Foundation of maintaining the collection at the Michigan Avenue was $5,000 per visitor.

This concern had been expressed on numerous occasions by Ambassador Terra, the Founder and guiding spirit of the Foundation, before his death in 1996. Beginning in 1992, he moved a substantial portion of the collection that had been maintained at the original museum site in Evanston and later on Michigan Avenue in Chicago to a site in

---

[1]While the collection of American Art is perhaps the best known component of the Terra Foundation, it compromises 'only' $100 million in an endowment that also comprised $210 million in cash and securities, and millions in real property, including the Michigan Avenue museum site, all left to the Foundation upon Ambassador Terra's death in 1996.

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Giverny, France, the rural home of Claude Monet. In 1996, he purchased a building in Washington, D.C. to serve as an interim corporate headquarters for the Foundation and commissioned an architect to draw up plans and obtain a zoning permit for a new facility to house the collection and the Foundation headquarters in Washington. Only his sudden death in 1996 prevented him from completing his plans to move the Foundation and its collection to Washington.

The Foundation was consumed with resolving various issues relating to Ambassador Terra's estate between 1996 and 1998. Upon settlement of the Terra Estate issues in late 1998, the Board turned to consideration of a strategic plan for the future of the Foundation. Various options to deal with the continuing poor attendance and other issues were considered by the Board. Moving the Foundation was merely one idea out of many under consideration.

None of these proposals had passed the stage of suggestions when Defendants Gidwitz and Buntrock decided to file a lawsuit claiming that the other members of the Board had breached their fiduciary obligations to the Foundation merely by considering moving the collection from Chicago. Once these minority directors filed their lawsuit, the Attorney General of the State of Illinois intervened to assist them.

The thrust of these consolidated lawsuits was to prevent the Foundation from carrying out its mission as set forth above, and to change what had heretofore been a private foundation serving its mission throughout "the United States and abroad" to one which would restrict the Foundation to maintaining the collection (at the expense of the Foundation but without public funds) within Illinois and subject to the control and direction of the Attorney General of the State of Illinois. This new mission – and indeed

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what would be an entirely new Foundation – was to be created out of whole cloth by the actions filed by the dissident directors and the Attorney General.

To further this new mission and set up this new Foundation, Defendants needed time to gain control of the Board by coercing a majority of the remaining members of the Foundation's board into accepting the dissidents' goals. Thus, after they filed these lawsuits, and realizing that the existing Board did not intend to go along with their assault on the true mission of the Foundation, Defendants decided to avoid a prompt and just resolution of the case. They sought instead non-binding mediation of the claims raised in these lawsuits, convincing the Judge hearing those consolidated actions to stay the time in which any answers, cross or counterclaims were to be filed pending the resolution of that mediation. Defendants then engaged in a campaign to harass and intimidate the majority of the then-sitting Board that opposed their assault on the true mission of the Foundation.

As will be set forth in the evidence to be presented in the case now pending before this Court, the Defendants and their ally, the Attorney General, were successful in this outrageous campaign. They managed to create a series of conflicts and launched a barrage of threats and official "investigations"; and the Board was asked to vote on 'accepting' a settlement of the lawsuits only after a majority of the Board members were unable to carry out their fiduciary obligations as a result of this campaign of intimidation. The issue of settlement was also considered by the Board at a time when the Foundation itself was not represented by independent counsel nor a representative other than one disqualified by various conflicts from acting in the best interest of the Foundation.

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Having thus achieved their goal, Defendants asked the Court to enter a "Consent Decree" and dismiss the case.

The Consent Decree

The "Consent Judgment and Order" (attached as an Exhibit to this Emergency Motion) was entered on July 26, 2001. It was entered over the vigorous objections of Plaintiffs, who were not permitted to file their counterclaims, and, most importantly, was ostensibly entered as a "Consent Decree" without the consent of these Plaintiffs or a lawfully qualified quorum of the Board. The order was entered by the Court only after it specifically assured these Plaintiffs that nothing in the Order barred Plaintiffs from filing a separate lawsuit in place of the proposed cross and counterclaims or filing suit against anyone else for the actions that now give rise to the present litigation. (*See Buntrock v. Terra Foundation*, No. 00 CH 13859, Transcript of Proceedings Beginning at 4:30 p.m., July 24, 2001 at 133 ("The Court: You [to counsel for Paul Hayes Tucker, Judith Terra and Alan K. Simpson] are free to file whatever lawsuit you want against whoever and raise whatever allegations you want about that."))

The Meeting of August 1, 2001

On August 1, 2001, the Foundation's Board of Directors convened purportedly to implement the directives of the so-called "Consent Judgment and Order" entered by the Court on July 26, 2001. Even though the notice for this August 1, 2001 meeting was both procedurally and substantively defective and failed to comply with the requirements of the Foundation's bylaws, some members of the Foundation's Board – namely, directors Buntrock, Gidwitz, Arhweiler, Daley, Stebbins and Hartman – attempted to

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conduct business. Plaintiffs, directors Tucker, Terra and Simpson, objected to the transaction of any business at the August 1, 2001 meeting because of the procedural and substantive defects in the notice. The plaintiffs moved to adjourn the meeting. That motion was defeated.

During this improper August 1, 2001 Board meeting, the so-called "new board members" – defendants James R. Donnelley, Marshall Field V, Dr. Kathleen A. Forster, Robert S. Hamada and Frederick A. Krehbiel – were summarily "welcomed" to the Board of the Foundation, although the Record of that meeting establishes that they were not elected and no election of new members was held. Indeed, to date, the so-called new directors have *never* been elected to the Board.

The Agenda for the August 1, 2001 meeting states that these "new board members" were "elected June 29, 2001, effective as of July 26, 2001." However, despite the clear requirements of the "Consent Judgment and Order" no such election ever took place.

The "Consent Judgment and Order," entered by the Court on July 26, 2001, does not explicitly nor implicitly "validate" any action taken on June 29, 2001. It does not acknowledge that *any* election of these "new" Board members *had* already taken place. In fact, the order provides to the contrary:

> "The Foundation will add to its Board the following five Directors, each of whom ***shall be elected*** to serve an initial term of four years and be eligible for election to one additional four-year term."(Emphasis supplied.)

On August 1, 2001, misinterpreting the limited scope of the "Consent Judgment and Order" entered by the Court on July 26, 2001, Defendants began to act as if they constituted a lawful majority of the Board of the Foundation and as if they had been

given control of the Foundation by the Court. All that was entered on July 26, 2001 was a "Consent Judgment and Order." Plaintiffs did not consent to the entry of that order and are not bound by its terms.

At the conclusion of the mediation, certain of the parties decided to agree to "consent" to a "resolution" of the case which favored their position, and asked the Court to enter a Consent Decree and dismiss that case. That order was entered over the vigorous objections of these Plaintiffs, who pointed out, *inter alia*, that they had not "consented" to the "Consent Decree," and had been barred from filing the counterclaims and cross-claims that would have allowed that Court to protect the individual Plaintiffs and the Terra Foundation, its mission, and its considerable assets. The Court specifically assured these Plaintiffs that nothing in the Order barred Plaintiffs from filing a separate lawsuit in place of the proposed cross and counterclaims or filing suit against anyone else for the actions that now give rise to the present litigation. ((*See Buntrock v. Terra Foundation*, No. 00 CH 13859, Transcript of Proceedings Beginning at 4:30 p.m., July 24, 2001 at 133 ("The Court: You [to counsel for Paul Hayes Tucker, Judith Terra and Alan K. Simpson] are free to file whatever lawsuit you want against whoever and raise whatever allegations you want about that.")).

In short, the Court recognized that its order was not to be construed as binding on Plaintiffs nor barring them from filing this or any related lawsuit to vindicate their position and protect themselves and the Foundation. The so-called "Consent Judgment and Order" merely acknowledged the rights of the plaintiff-directors and the Attorney General to resolve their own "dispute" and to consent to drop their lawsuit against these Plaintiffs. Accordingly, the order is binding *only* as to the parties that consented.

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The Court in the prior case recognized that it had not "resolved" any issue of law or fact then before it, nor could it do so as part of a "Consent Decree" to which the defendants in the case before it had not only failed to consent to, but where they had not been allowed to file any responsive pleadings or cross and counter actions. Moreover, the Court declined to make any findings of law or fact when invited to do so, and simply dismissed the then pending lawsuit with a virtual invitation to these Plaintiffs to file this cause of action to resolve the issues that had been raised – but never addressed – in that case.

The Proposed August 14, 2001 Meeting

Defendants' recognition of this fatal flaw in their ongoing conduct is clear from the Agenda for the August 14th meeting. (See the Agenda for the August 14th meeting, attached as an Exhibit to this Motion.) This meeting was scheduled only after Plaintiffs filed the present cause of action and pointed out all of the defects in the actions of Defendants, both before and following the entry of the "Consent Judgement and Order" of July 26, 2001. Defendants hurriedly scheduled the August 14th meeting to attempt to correct their misconduct as reflected in the complaint.

The first item on the Agenda is "Ratification of Actions taken by the Board at August 1, 2001 Board Meeting. (Resolution Attached.)" The next item is the "Ratification of Actions taken by the Board, officers and agents of the Foundation pursuant to Resolutions adopted and authorizations given at August 1, 2001 Board Meeting. (Resolution Attached.)"

In other words, recognizing that there had been no election of Directors and/or Officers at the August 1, 2001 meeting of the Board, and as this failure was now the

subject of the present lawsuit, the Board (in a notice sent out by the non-elected "Chairman," Mr. Field) is attempting to retroactively "ratify" its actions carried out on a prior date by persons who were never elected to the Board. These individuals were never in a position to vote for or accept an office on the Board based on their non-election on August 1, 2001 or at any time before or after that date. They cannot be retroactively "elected." Neither may the Board now conduct business nor vote through the *fiat* of the very "non-elected" directors who have been acting without lawful authority since the non-election of Directors and Officers on August 1, 2001.

Of course, as neither Mr. Field nor any of the other "new" Directors were ever elected as a director or officer of the Terra Foundation for the Arts, all of the other actions taken on August 1, 2001 through their "votes" were ineffective. These actions surely cannot now be "ratified" by the votes of those individuals who are still neither officers nor directors of the Foundation.

Stated simply, Defendants cannot now attempt to "ratify" their prior actions in the absence of a valid election – or *any election at all* – on or before August 1, 2001. They cannot "amend" or adopt by-laws for a foundation through the votes of non-elected directors. Indeed, they cannot take any action whatsoever nor purport to act as the Board of the Foundation based on this rather fundamental – but just as fundamentally flawed – "oversight." Since they were never elected, they cannot "retroactively" attempt to "ratify" anything – they lack the power and authority to do anything for, on behalf of, or in the name of the Terra Foundation for the Arts.

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Why Injunctive Relief Is Required

What is presently before this Court reflects that there was no election of Directors or Officers of the Terra Foundation for the Arts on August 1, 2001. Plaintiffs have filed suit before this Court attacking the right of Defendants to serve in this capacity now or in the future, based on the issues raised in these pleadings. They have pointed out to this Court that the Plaintiffs and the Foundation are in danger of substantial harm if Defendants are permitted to act to frustrate the mission of the Foundation, and fear that Defendants continued and illegal "control" of the Foundation threatens its mission and its assets, both financial and the priceless works of American Art that Ambassador Terra labored to build and preserve for the world, not simply for the City of Chicago and the State of Illinois.

Facing this lawsuit, and realizing that they have miscarried their efforts to seize control of the Foundation, Defendants are now scrambling to try to correct the errors they committed before and, most significantly, after July 26, 2001. Having failed to hold a valid election of Directors and Officers on August 1, 2001, and as "new" directors have no standing to act absent such an election, they have scheduled the August 14th meeting to "ratify" their misconduct.

This Court must intervene and stop this imminent and grave threat of harm to the Plaintiffs, the Foundation, and its priceless and irreplaceable assets. Defendants propose to "ratify" their non-election by voting to retroactively correct these fatal defects. They propose to rewrite minutes of August 14, 2001, and to transform their non-election by this means. Once they do so, they will continue to act as if they were the duly-elected Board, enter into contracts, dispose of the property of this Foundation, and alter its

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mission, all without *ever* having been elected as Directors nor validly-selected as Officers!

This Court must restrain the August 14th meeting and restrain Defendants from taking the actions they propose as set forth in the Agenda. There is no adequate remedy at law that will suffice to protect Plaintiffs and the Foundation. If Defendants are allowed to meet, "ratify" their non-election, and then dispose of the assets of the Foundation and run its affairs as if they had been properly elected and were properly pursuing the proper mission of the Foundation, no amount of monetary damages will suffice to replace the irreplaceable core of American Art that is the heart of the Terra Foundation.

The irreparable harm that Plaintiffs and the Foundation will suffer if Defendants are allowed to "ratify" their existing misconduct and perpetuate their usurpation of the Foundation is equally evident. In addition to potential loss to the core collection, Defendants decisions regarding "contracts" and agreements to "loan" out the collection or to merge or otherwise dilute the value of the collection, without regard for the potential of a nationwide or worldwide venue for its display, would cause irreparable damage to the Foundation and its mission. Absent their lawful election and the opportunity for this Court to determine if Defendants conduct and intentions are consistent with the mission and governing documents of the Foundation, the potential for such harm cannot be calculated.

And, the fact that Plaintiffs have a likelihood of success on the merits is self-evident from the actions taken by Defendants in response to the filing of this lawsuit. Defendants were never elected to the Board of the Terra Foundation. They now propose

to retroactively "ratify" their non-election by a vote of these same non-elected Directors. They also propose to continue to act as if they were the duly-elected Board of the Foundation, and dispose of its assets and its funds despite their clear lack of the power and authority to do so because of the fatal flaw that underlies their position.

Finally, it should be noted that this Court can, and must, act to protect its own jurisdiction. Plaintiffs have filed a complaint seeking, *inter alia*, injunctive relief. Alerted to the illegality of their prior conduct, Defendants propose to hold a meeting to retroactively "ratify" that conduct. Plaintiffs respectfully submit that this Court must act to preserve the *status quo*, and restrain Defendants from acting to deny this Court the chance to consider the issues presented in this case and, after it has heard evidence to resolve this case on the merits.

CONCLUSION

For the foregoing reasons, Plaintiffs Paul Hayes Tucker, Judith Terra, Alan K. Simpson, and the Terra Foundation for the Arts, an Illinois Not-For-Profit corporation ("Foundation"), respectfully request that this Honorable Court enter a Temporary Restraining Order enjoining Defendants Dean Buntrock and Ronald Gidwitz, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, James R. Donnelley, Marshall Field V, Kathleen A. Forster, Robert S. Hamada, Frederick A. Krehbiel, individually and as Directors or purported Directors of the Terra Foundation for the Arts, the Terra Foundation for the Arts, Winston & Strawn and Sidley & Austin from doing any of the following acts or otherwise acting as follows for a period of ten days or until further order of this Court:

16di-003360

1. From holding a Meeting of the Board of Directors of the Terra Foundation for the Arts on August 14, 2001 or at any other time without prior notice to and the approval of this Court;

2. From approving the purported Minutes of the prior meetings of the Board of Directors of the Terra Foundation for the Arts as held on June 29, 2001 and August 1, 2001;

3. From "ratifying" or seeking to agree, vote, consent to, or otherwise "ratify" at the now-scheduled Meeting of the Board of Directors of the Terra Foundation for the Arts for August 14, 2001, or at any other time or in any other manner, the actions taken by the purported Board of Directors of the Terra Foundation for the Arts at a meeting held of said Board on August 1, 2001;

4. From "ratifying" or seeking to agree, vote, consent to, or otherwise "ratify" at the now-scheduled Meeting of the Board of Directors of the Terra Foundation for the Arts for August 14, 2001, or at any other time or in any other manner, the actions taken by the purported Board of Directors of the Terra Foundation for the Arts pursuant to "Resolution adopted and authorizations" purportedly given at a meeting held of said Board on August 1, 2001;

5. From advancing or agreeing to advance any funds of the Terra Foundation for the Arts to Defendants or to counsel for Defendants for the defense of Defendants in the present case, or otherwise advance or agree to advance any funds of the Terra Foundation for the Arts to Defendants for the purpose of representing or advising Defendants;

6. From retaining, consulting with, or otherwise working with Defendants Sidley& Austin and Winston & Strawn as counsel for the Foundation or any other party

in the present case, and from otherwise advancing or paying any further funds of the Terra Foundation for the Arts to said law firms;

7. From making or purporting to make any Committee Appointments, adopting any Banking Resolutions or otherwise acting to amend or modify any existing monetary or banking arrangements of the Terra Foundation for the Arts, cancelling any contracts, or approving any new contracts;

8. From adopting or purporting to adopt any "conformed by-laws", or other by-laws, and from amending any existing by-laws of the Terra Foundation for the Arts; and

9. From paying, setting or agreeing to set any stipends for Directors of the Terra Foundation for the Arts.

Plaintiffs also request such other relief as this Court shall deem just and appropriate.

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA, ALAN K. SIMPSON and THE TERRA FOUNDATION FOR THE ARTS

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Attorneys for Plaintiffs

By: _____
David A. Novoselsky
Attorney No. 24578

16di-003363

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts,; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD. D. PERKINS, Assistant Illinois Attorney General; WINSTON &STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership, Defendants.	No. 01 L 009112 Judge Gardner JURY TRIAL DEMANDED

VERIFICATION OF JUDITH TERRA

16di-003364

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the Emergency Motion for Entry of a Temporary Restraining Order are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

Judith Terra

Judith Terra

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

PLAINTIFF'S EXHIBIT
A
16di-003366

88236v2

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

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programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

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11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:35 A.M.

16di-003369

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd D. Perkins
Assistant Attorney General
State of Illinois
(Title)

Print Name: Floyd Perkins

Date: 7/6/01

16di-003371

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Pace Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-003373

TERRA FOUNDATION FOR THE ARTS

AGENDA

August 14, 2001
9:30 AM - 11:00 AM (Chicago Time)
Call –in # 1-800-261-3225, ID # - 628667#
International - 972-389-2700

I. CALL TO ORDER

II. ROLL CALL

III. APPROVAL OF MINUTES OF PRIOR BOARD MEETINGS (TAB 1)
June 29, 2001
August 1, 2001

IV. ACTION ITEMS (TAB 2)

A. Ratification of Actions taken by the Board at August 1, 2001 Board Meeting. (Resolution Attached)

B. Ratification of Actions taken by the Board, officers and agents of the Foundation pursuant to Resolutions adopted and authorizations given at August 1, 2001 Board Meeting. (Resolution Attached)

C. Advancement of Funds to Defendant Board Members in Tucker et al v. Buntrock et al, Circuit Court of Cook County, Illinois, No. 01L-009112 ("Tucker Litigation"). (Resolution Attached)

D. Approval of Sidley, Austin, Brown & Wood as counsel for the Foundation in the Tucker Litigation and authorization of Mr. Field to execute engagement letter.

E. Committee Appointments.

F. Cancellation of Dilenschneider Contract.

G. Banking Resolution (Resolution Attached)

V. INFORMATION ITEMS

A. By-laws

1. Conformed By-laws.

PLAINTIFF'S EXHIBIT B
tabbies
16di-003374

2. Amendments (to be considered at another meeting).

B. Director Stipends

VI. OLD BUSINESS/NEW BUSINESS

VII. ADJOURNMENT

CERTIFICATE OF SERVICE

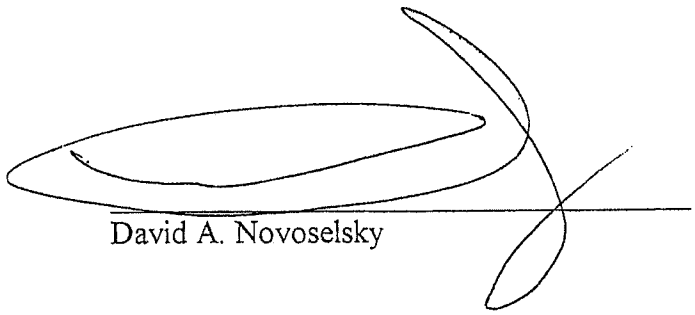
The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of Emergency Motion and Emergency Motion for Entry of a Temporary Restraining Order to be served on the parties listed below via hand delivery on this 13th day of August, 2001.

William R. Quinlan
James R. Carroll
John F. Kennedy
William J. Quinlan
QUINLAN & CRISHAM, LTD.
30 N. LaSalle Street, 29th Floor
Chicago, IL 60602

Floyd D. Perkins
Barry S. Goldberg
Assistant Attorney General &
Bureau Chief of Charitable Trusts
100 W. Randolph Street
3rd Floor
Chicago, IL 60601

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
SIDLEY AUSTIN BROWN & WOOD
Ten S. Dearborn Street
Chicago, IL 60603

Kimball R. Anderson
Mark M. Heatwole
WINSTON & STRAWN
35 West Wacker Drive
Chicago, IL 60601



David A. Novoselsky

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FILED-4
2001 AUG 13 PM 4:30
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
LAW CHANCERY DIV.
DOROTHY BROWN CLERK

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts,; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD. D. PERKINS, Assistant Illinois Attorney General; WINSTON &STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

Judge Gardner

JURY TRIAL DEMANDED

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on Monday, August 13, 2001, we shall file *instanter* Plaintiffs' First Amended Complaint At Law with the Circuit Court of Cook County, Illinois, at the Emergency Hearing scheduled for 2:00 p.m., August 13, 2001. A copy of such First Amended Complaint At Law is herewith served upon you.

Dated: August 13, 2001

Respectfully submitted:

PAUL HAYES TUCKER, ALAN K. SIMPSON, and JUDITH TERRA

By: _____
One of their Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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Defendants.

No. 01 L 009112

Judge Gardner

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT AT LAW

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson complain of the

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Defendants Dean Buntrock and Ronald Gidwitz, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, James R. Donnelley, Marshalll Field V, Kathleen A. Foster, Robert S. Hamada, Frederick A. Krehbiel, James E. Ryan, Floyd D. Perkins, the Terra Foundation for the Arts ("Foundation"), Winston & Strawn and Sidley & Austin as follows:

Preliminary Statement

1. Through this action, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson seek to vindicate both the mission of the Foundation and the intent of its founder Daniel J. Terra. The plaintiffs complain that certain directors of the Foundation are irreconcilably conflicted and have willfully and wantonly breached their fiduciary obligations by pursuing a course of action antithetical to the best interests of the Foundation and inconsistent with both the purpose of the Foundation and the clearly expressed intentions of its founder. These breaches of fiduciary duty were aided by – and even induced by – the illegal conduct of the Illinois Attorney General and his assistant. Indeed, as we set out more fully below, the improvident conduct of the Attorney General not only induced breaches of fiduciary duty but constitutes an unlawful deprivation of the Foundation's property without due process of law and an unlawful deprivation of the Foundation's rights to freedom of speech. The Foundation's interests have been further compromised by the conflicted interests of several Directors and various counsel who purported to, but did not, represent and counsel the Foundation free of improper influence

2. The plaintiffs have been unlawfully denied the opportunity to bring these claims in other litigation. As a result, this case is filed to secure relief – a declaratory judgment, injunctive relief and damages – in order to halt the perversion of the Foundation's

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mission which has been the direct result of the defendants' conduct.

Nature of the Case

3. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts, by a conflicted majority, voted to accept a settlement of this litigation that would chain the Foundation to Chicago for 50 years and install a majority of Illinois residents on its Board. As the dissenting board members stated before the vote, this acquiescence to the extraordinary intrusions by the State of Illinois into the Foundation's affairs was *ultra vires* and an utter abdication of the Board's fiduciary responsibilities. Yet six board members, some with personal conflicts, none acting in the best interests of the Foundation, chose to vote in favor of a proposal that—if allowed to stand—will do violence to the clear vision of an American philanthropist and set a chilling precedent for all not-for-profit corporations.

4. The Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Yet six Board members voted to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the Foundation's charter and its founder's demonstrated intentions.

5. Earlier litigation and a mediation process compromised by conflicts of interest became a vehicle for a power grab by the Attorney General of the State of Illinois and

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Assistant Attorney General Floyd D. Perkins, who is charged with enforcing the State's charitable institution laws. Through threats of investigation and legal action—including the threat of suing pivotal board members - Perkins has used his official powers to compromise and conflict certain members of the Foundation's Board of Directors such that the Foundation's right of self-governance, its right to control its own assets, and its right to freedom of speech have been effectively nullified. The Attorney General's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens further to deprive Plaintiffs of (1) their freedom of speech, in violation of the First Amendment; (2) their property without due process of law, in violation of the Fourteenth Amendment; and (3) rights under the commerce and contracts clauses of the Constitution. Through this unlawful conduct, Mr. Perkins has also induced certain Board members to violate their fiduciary duties to the Foundation.

6. In approving a tainted mediation process, a conflicted majority of the Board of Directors of the Foundation have violated their fiduciary duties to the Foundation and caused the Foundation to act *ultra vires*. Despite irreconcilable conflicts of interest and their consequent disqualification, directors Stephanie Pace Marshall and Theodore Stebbins have acted against the interest of the Foundations. By taking action incompatible with the Foundation's charter and wasting valuable assets and opportunities for the Foundation to carry out its mission, the Board members who approved the proposed settlement violated duties of obedience to the Foundation's purpose and best interests.

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Parties

7. The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

8. Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachusetts.

9. Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming. Senator Simpson also serves as Chairman of the Board of Trustees of the Buffalo Bill Historical Center in Cody, Wyoming, which maintains assets valued in excess of $350 million.

10. Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's widow, and a resident of Washington, D.C.

11. Dr. Stephanie Pace Marshall is the Foundation's Secretary and Treasurer and chairman of its finance and strategic planning committees. She is president of the Illinois Mathematics and Science Academy, and a resident of Illinois.

12. Dr. Theodore O. Stebbins is a Director of the Foundation and Chairman of the collections committee. He currently serves as curator of American art at the Fogg Museum at Harvard University and resides in Massachusetts.

13. Margaret Daley is a Director of the Foundation and Chairman of its education committee. She is a resident of Illinois.

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14. Dean Buntrock is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

15. Ronald Gidwitz is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

16. Arthur Hartman is a director of the Foundation.

17. James R. Donnelley is an individual residing in Illinois. He purports to be a new director of the Foundation.

18. Marshall Field V is an individual who, on information and belief, resides in Illinois. He purports to be a new director and Chairman of the Foundation.

19. Dr. Kathleen A. Foster is an individual who, on information and belief, resides in Illinois. She purports to be a new director of the Foundation.

20. Robert S. Hamada is an individual residing in Illinois. He purports to be a new director of the Foundation.

21. Frederick A. Krehbiel is an individual residing in Illinois. He purports to be a new director of the Foundatoin.

22. James E. Ryan is the Attorney General of Illinois.

23. Floyd D. Perkins is Assistant Attorney General, Bureau of Charitable Trusts and Solicitations.

24. Winston & Strawn is, on information and belief, an Illinois partnership organized to engage in the practice of law. Winston & Strawn is counsel to the Foundation and at least some of its directors.

25. Sidley & Austin is, on information and belief, an Illinois partnership organized to engage in the practice of law. Sidley & Austin is counsel to Foundation and at least some

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of its directors.

The History of the Terra Foundation

26. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. Born and educated in Philadelphia and a graduate of Pennsylvania State University, Mr. Terra maintained residences in Chicago and Washington, D.C. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to 1950. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

27. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Its purposes, according to its original Articles of Incorporation, were

> to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation (as filed Dec. 13, 1978).

28. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He created a multimillion dollar museum facility on North Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural

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development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Mr. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art. Today, the Foundation owns substantial property in the Village of Giverny.

29. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the North Michigan Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

30. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson and his long-time friend Peter Solmsson of the University of the Arts in Philadelphia, that he wanted his art to achieve the broadest

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possible impact on the public.

31. Between 1991 and 1993, Mr. Terra negotiated with the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City to form a strategic alliance that would pool the Foundation's collection with those of the other two institutions and move the emphasis of the Foundation's work from Chicago to Washington. Discussions broke down over issues relating to the Whitney Museum's control over the collection.

32. Between 1993 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized.

33. In 1996, the last year of his life, Mr. Terra focused intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect to draw plans and obtain zoning permits for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Phone lines, name plates, furniture and other items were purchased for the new property. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location,

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sometimes with his own handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

34. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable North Michigan Avenue museum site. Between 1996 and 1998, the Foundation was consumed with issues relating to Mr. Terra's estate.

The Board Fight Over the Future of the Foundation

35. Upon settlement of Mr. Terra's estate, the Board returned to consideration of a strategic plan for the Foundation. At a November 1998 meeting, Mr. Buntrock recommended that the Board form a Strategic Planning Committee to consider options for the future of the Foundation. Mr. Gidwitz was elected chairman of this committee.

36. Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris;

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Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis Corporation.

37. Under Dr. Tucker's leadership, the Foundation continued active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. The Strategic Planning Committee met several times to consider options, with Mr. Gidwitz himself raising suggestions of building a new museum facility on a different site, affiliation with other museums, and closing the museum to focus on education efforts and building the collection.

38. In preparation for the Board's September 2000 annual meeting in France, Dr. Tucker encouraged members to focus on long-term planning options and circulate ideas they might have in advance of the meeting for the group to study and consider.

39. Dr. Tucker circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly,

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Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

40. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

The Ploy to Keep the Foundation in Chicago

41. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock filed a lawsuit alleging that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

42. In their lawsuit, Messrs. Gidwitz and Buntrock claimed, contrary to fact, that Mr. Terra intended that the Foundation would always remain in the Chicago area. The complaint quoted news reports from 1987, the time of the move from Evanston to North Michigan Avenue, in which Mr. Terra described his enthusiasm for the new location. The complaint did not refer to Mr. Terra's 1990 statement to the Board of Directors or to any of his subsequent discussions and plans relating to relocation of the Foundation to another city. It also did not mention the 1994 amendment to the charter which permitted the Foundation to operate museums and schools "both in the United States and abroad." Based on this misleading statement of Mr. Terra's intent, the defendants alleged that the Foundation's mission was to operate a "museum of American art . . . in the Chicago area to be held in trust for the benefit of the people of the State of Illinois."

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43. Attorney General James Ryan and Floyd Perkins, an Assistant Attorney General, seized upon the turmoil of the Terra Foundation Board as an opportunity to assert State control over its assets. At the inception of the lawsuit, the Attorney General filed an intervenor complaint that simply borrowed the allegations of Messrs. Gidwitz and Buntrock. The complaint also reiterated the faulty premise -- based upon a demonstrably incorrect statement of Mr. Terra's intent -- that the Board of Directors were without authority to relocate the Foundation. The complaint sought a declaration, among other things, that "[t]he intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the Foundation intended and expected the Museum to remain in Chicagoland."

44. The Attorney General intervened expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an *ultra vires* act. As Assistant Attorney General Perkins has stated in an interview, he believes it is his role as assistant attorney general to see that Illinois-based charitable institutions utilize their assets in Illinois. Mr. Perkins attempts to accomplish this by seeking installment of Illinois directors on the boards of such institutions and through other restrictions. He has employed this tactic successfully in other cases, for example, that of the Regenstein Foundation. Mr. Perkins acknowledges, however, that he does not have the authority to impose Illinois-related restrictions on institutions which were created to serve broader interests, such as national and international aid organizations, even though such institutions may be based in Illinois and subject to reporting and other statutory requirements of Illinois law.

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45. As authority for his intervention in that lawsuit, Mr. Perkins relied on the Charitable Trust Act (760 ILCS 55/1 *et seq.* (1997)) and his "common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts." Whatever authority these sources of law may provide to the Attorney General, they do not permit any action to force a charitable trustee or Board member of a not-for-profit corporation to change the institution's fundamental purpose in a manner inconsistent with its charter or founder's intent. Nor do these authorities mandate that any charitable trust or not-for-profit corporation that is established in the State of Illinois must remain in Illinois, regardless of its purposes and founder's intent.

46. The propriety of the Attorney General's intervention and sole basis for authority in that case depended upon his claim that the Terra Foundation's purpose was to serve the people of Illinois, rather than a broader population. Like the other defendants, the Attorney General based this claim on selected statements of Mr. Terra to the press. A reasonable investigation of the facts would have revealed, however, that Mr. Terra did not intend that any of the assets of the Terra Foundation should be restricted geographically. Mr. Perkins did not conduct such an investigation before filing his initial complaint. For example, Mr. Perkins has admitted that when he filed that complaint he was unaware of Mr. Terra's 1994 amendment to the Articles of Incorporation of the Foundation expressly stating that the Foundation's efforts shall include museums "both in the United States and abroad."

47. In January 2001, the Terra Foundation filed a motion for judgment on the pleadings, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead

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encouraged simply the best possible dissemination of art knowledge and appreciation among the public in the United States and abroad.

48. Although the true facts of Mr. Terra's intent were revealed early in litigation, and at the latest by the Foundation's motion for judgment on the pleadings, defendants and the Attorney General persisted in their efforts to capture the Foundation in Illinois. They were able to do so through a barrage of motions designed to delay the proceedings and deflect attention from the core issue of Mr. Terra's intent. Mr. Perkins and the other defendants first challenged the Board's choice of counsel and early decisions about directing and funding the litigation. Then, once the Board had selected an independent litigation committee of Dr. Stebbins and Amb. Andreani, Mr. Perkins and the other derfendants challenged Dr. Stebbins' ability to serve on this committee. These tactics had the desired effect of paralyzing the Board and placing Mr. Perkins and the other defendants in a strong position to make demands upon the Foundation, without regard to the merits of their lawsuits.

49. As the case proceeded to mediation, the Attorney General and Assistant Attorney General Perkins insinuated themselves into the process in an attempt to railroad its result. Mr. Perkins pursued the goal of capturing the Foundation's assets in Illinois despite the fact that he had no basis to assert that he was seeking to preserve Mr. Terra's intent.

50. In mediation, the Attorney General and Assistant Attorney General Perkins took several extraordinary positions that evidenced their recognition that Mr. Terra's intent was not to constrain the Foundation to Chicago. The Attorney General disagreed that the Board of Directors was governed in the use of the Foundation's funds solely by the Articles of Incorporation. He argued that those Articles were too broad to provide any

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meaningful purpose to the Foundation. Most strikingly, the Attorney General maintained that a not-for-profit corporation established for charitable purposes in a particular jurisdiction, simply by virtue of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population.

51. Without legal authority and in disregard of the facts regarding Mr. Terra's intent, Assistant Attorney General Perkins demanded throughout the mediation that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with the Art Institute of Chicago in which the Foundation would sell the North Michigan Avenue property to fund a new wing at the Art Institute.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois in perpetuity.

c. Maintain and exhibit its collection in the Chicago metropolitan area in perpetuity.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois.

52. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

53. Frustrated by the Board's resistance to his demands, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation.

These tactics were directed in particular at two key swing directors, Drs. Stebbins and Marshall.

Attacks on Dr. Stebbins

54. Since his earliest involvement with the Terra Foundation, Dr. Stebbins had supported a comprehensive approach to strategic planning that included consideration of options outside of Illinois. In 1997, before Dr. Stebbins joined the Board, he headed an advisory committee that conducted a review and analysis of the collection and reported recommendations to the Board for the future. The committee consisted of Dr. Stebbins, then curator of American paintings at the Museum of Fine Arts in Boston, Professor John Wilmerding, former chairman of the art department at Princeton, and Charles Moffett, former deputy director of the National Gallery and director of the Phillips Collection in Washington. In its report to the Board in February 1997, the advisory committee concluded strongly that the present building in Chicago is inappropriate as a museum. The committee envisioned three alternative scenarios for the future, two of which involved discontinuing the Chicago presence by: (1) concentrating on French operations, with the establishment of a new Terra Center for American Art and American Studies in Paris, or (2) improving the collection and housing it another American city.

55. Dr. Stebbins joined the Board in April 1998. In Strategic Planning Committee meetings until the outbreak of litigation, he continued to advocate consideration of options within and without Illinois. He was an especially strong advocate for the idea of maintaining a stand-alone museum.

56. When litigation began, Dr. Stebbins became a key figure in its conduct. Upon defendants' demand for an independent litigation committee, Dr. Stebbins and Amb.

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Jacques Andreani were chosen from among the non-party directors to oversee the litigation on behalf of the Foundation. Because Amb. Andreani was in France at the time, Dr. Stebbins effectively controlled the litigation committee.

57. Within three weeks of Dr. Stebbins' election to the litigation committee on November 30, 2000, Mr. Perkins filed a motion to remove Dr. Stebbins from the committee on the grounds of conflict of interest. On January 22, 2001, Mr. Perkins obtained a Court order to conduct special discovery focusing on Dr. Stebbins' conduct as a director. Within two weeks of that order — and less than two weeks before a scheduled evidentiary hearing focusing upon Dr. Stebbins' conduct — the Foundation entered into mediation. With challenges to his reputation and integrity having become the central focus of the litigation, Dr. Stebbins strongly advocated directing the Foundation into mediation.

58. On March 21, 2001, Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant for the first time. In a cover letter, Mr. Perkins stated that the document was a draft and was not being filed, but rather supplied to set forth issues to be discussed at settlement. The draft complaint named Dr. Stebbins as a new defendant and included specific charges of impropriety against him. The allegations included alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions. The amended complaint also charged Stebbins with breaching the Code of Ethics for Professional Practices in Art Museums. The amended complaint was never filed.

59. Dr. Stebbins now knew that, if settlement was not reached, the litigation would resume, with his reputation and integrity once again the central focus, and he would become a defendant in the case.

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60. On the same day that the draft complaint was distributed to counsel, the mediator circulated to the Board a revised mediation proposal, which had been formulated after reviewing the amended complaint and discussing this matter with the Attorney General. The proposal contained a requirement that the Foundation would maintain and exhibit its collection in perpetuity at the Art Institute of Chicago. According to the mediator, this provision resulted from the position of the Attorney General. Mr. Perkins had not participated in mediation sessions on March 5 and 6, but worked behind the scenes with the mediator to influence the course of mediation.

61. Dr. Stebbins, facing the threat of becoming a defendant in the lawsuit, now expressed his support for settlement. On April 2, 2001, he and Amb. Andreani prepared a letter to the mediator stating that "in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago." They enclosed a settlement proposal "follow[ing] the outline" of the March 21, 2001, proposal reflecting the Attorney General's positions.

Attacks on Dr. Marshall

62. Dr. Marshall joined the Board in 1998. Like Dr. Stebbins, Dr. Marshall held the view that the Terra Foundation was established for the broadest possible dissemination of American art. For example, at a May 10, 2000, meeting of the Strategic Planning Committee that Drs. Stebbins and Marshall attended, consensus was reached that the beneficiaries of the Foundation included the national and international public.

63. Late into the mediation process, Dr. Marshall remained a strong critic of the Attorney General's methods and proposals. In a May 20, 2001, letter to counsel for the Foundation and her fellow Board members she reported:

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> [W]ith respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

64. In addition to serving on the Board, Dr. Marshall serves full-time as president of the Illinois Mathematics and Science Academy, a highly-regarded education institution that depends on public funding for the bulk of its operating budget and is currently in the midst of a significant capital campaign.

65. After a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins believed that he had been tricked into going along with mediation and had lost valuable time preparing for litigation. He began to investigate Dr. Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins purportedly developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He considered these issues for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr. Perkins knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

66. Mr. Perkins never informed Dr. Marshall or her counsel that the investigation had been concluded.

The Proposed Settlement and Board Approval

67. On June 29, 2001, the Board held a special meeting to consider the terms of a proposed settlement of this litigation. The settlement called for entry of a consent

16di-003400

judgment and order implementing the Attorney General's goal of locking the Foundation in to the State of Illinois. In this regard, the proposed judgment requires:

a. For at least 50 years, the Foundation shall remain an Illinois corporation, with its principal office and corporate headquarters in Illinois;

b. For at least 50 years, the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago metropolitan area;

c. For at least 25 years, the Foundation will require that a majority of its Board positions be at all times held by residents of Illinois;

d. The Foundation shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

68. Dr. Marshall, the Foundation's Treasurer and Secretary, presided at the special meeting. Other directors present were: Mr. Gidwitz, Mr. Buntrock, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Mrs. Terra and Dr. Tucker.

69. Immediately prior to the vote, several Board members made personal statements. Mrs. Terra objected that "the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees."

> Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art . . . . [W]e will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of Illinois to really come in and run our Foundation . . . telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most . . . outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation.

70. Dr. Tucker echoed Mrs. Terra's concerns. He stated that

> what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview.

16di-003401

> The invasion of its independence, its privacy, by ... the Attorney General, I find repugnant. I find it detrimental and offensive.

71. At the recommendation of the Foundation's attorney, Drs. Stebbins and Marshall each addressed the issue of conflict of interest due to the Attorney General's conduct in the case. Dr. Marshall confirmed that "the Attorney General has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation," but insisted that the investigation "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation."

72. Dr. Stebbins first defended his "reputation, both as a scholar and as someone of complete integrity," and maintained that he had served on the Board "without any iota of a conflict of interest." He then stated that he "abhor[ed] the threatening tactics of the Attorney General." Dr. Stebbins also insisted that he was voting his "own conscience."

73. Upon the motion of Dr. Stebbins, the Board voted on whether to approve the proposed resolutions to amend the By-Laws and accept the settlement. Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Mr. Hartman, Dr. Marshall and Dr. Stebbins voted in favor. Mrs. Terra and Dr. Tucker voted against.

74. Members of the Board of Directors of the Terra Foundation have statutory and common law fiduciary duties to the Foundation. These duties include, but are not limited to, the duty of loyalty, which encompasses the duty to avoid conflicts of interest and to act in the best interests of the Foundation; the duty of obedience to purpose, which prohibits action contrary to the purposes for which Foundation was established; and the duty to use the Foundation's assets productively and not to waste Foundation assets.

75. At least two members of the Board who voted in favor of the proposed settlement were faced with a conflict of interest. Dr. Marshall expressly acknowledged that the

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Attorney General, the primary beneficiary of the settlement transaction, was conducting an investigation of the publicly-funded institution of which Dr. Marshall is president. Dr. Marshall reasonably could expect her vote on the settlement to influence the outcome of that investigation, either positively or negatively.

76. Dr. Stebbins also had strong personal incentives to support the settlement to the detriment of the Foundation. During the course of the litigation and corresponding public scrutiny of the Foundation's operations, he had faced charges of serious lapses of professional responsibility. In acknowledging his abhorrence of the Attorney General's tactics and vociferously defending his reputation and integrity immediately prior to the vote, Dr. Stebbins plainly identified his conflict of interest. If the mediation was unsuccessful, Dr. Stebbins would become a defendant in the case and face personal liability. Only through settlement could Dr. Stebbins hope to avoid more scrutiny which carried the threat of a potentially devastating effect on his career.

77. The Foundation's bylaws can be amended only "by a majority of the directors then in office and present" at the meeting at which the vote is taken. Because eight members of the Board were present at the June 29, 2001 meeting, the affirmative vote of five directors was required to approve the Proposed Settlement's many bylaw changes. Without the votes of Dr. Stebbins and Dr. Marshall, the Proposed Settlement garnered only four votes.

78. Each Board member who voted in favor of the settlement did so in violation of their fiduciary duty of obedience to the Foundation's purpose. Restricting the Foundation's art collection to isolation in Chicago for 50 years and installing a majority of Illinois residents on its Board is directly contrary to the Foundation's stated purpose in

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its Articles of Incorporation to "expand the artistic horizons of a growing art public" and to "operate museums and schools, both in the ***United States and abroad***." Articles of Incorporation (Aug. 26, 1994) (emphasis added).

79. The Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry. Indeed, the problems of the 50-year lock-in and Illinois-majority provisions were identified by Dr. Marshall prior to her conflict of interest arising. In her letter of May 20, 2001, she stated that because of the Foundation's "intentional national and international outreach and presence," she did "not believe any specifically defined constituency should hold a reserved majority." Dr. Marshall acknowledged that a 50-year lock-in would be a relinquishment of the Board's power to govern the Foundation when she stated that "[a]fter the stipulated period, it is the ***Board of the Foundation*** that must make decisions regarding the Foundation's future."

80. Each Board member who voted in favor of the proposed settlement also violated a duty not to waste the Foundation's assets. By eliminating the possibility of merger or partnership with a non-Chicago institution, the Board accepted a undue limitation on its negotiating power. By limiting the field of competitors for the Terra relationship, the Board would waste all the benefits that would flow from that competition, and in particular the ability to secure the most attractive possible terms for the future and for the collection to have the greatest possible impact on the art world and public education.

81. The Foundation has benefited tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a

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major Parisian art museum. Yet the Board majority voted in favor of a settlement under which the Foundation would forfeit the benefit of such experts in favor of a board packed with individuals whose chief virtue is that they are residents of Illinois. By limiting the pool of talent from which the Board can recruit directors, the Board would waste its opportunity to secure the best and most experienced leadership.

82. Locking the Foundation into Chicago for 50 years or any other length of time and stacking the Board with Illinois residents dangerously compromises the Foundation's flexibility to fulfill its charter. There is absolutely no guarantee that the Chicago community will provide adequate support to the Foundation over such a long period of time. If the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract the maximum possible interest.

The August 1, 2001 Board Meeting and the So-Called "New Board Members"

83. On August 1, 2001, the Foundation's Board of Directors convened a meeting purportedly to implement the directives of the so-called "Consent Judgment and Order" erroneously entered by the Court on July 26, 2001. Even though the notice for this August 1, 2001 was both procedurally and substantively defective and failed to comply with the requirements of the Foundation's bylaws, members of the Foundation's Board – namely, directors Buntrock, Gidwitz, Arhweiler, Daley, Stebbins and Hartman – attempted to conduct business. The plaintiffs, directors Tucker, Terra and Simpson, objected to the transaction of any business at the August 1, 2001 because of the procedural and substantive defects in the notice. The plaintiffs moved to adjourn the meeting. That motion was defeated. As hereinafter alleged, the law firms representing the Foundation allowed this improper meeting to be conducted despite serious and on-

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going conflicts of interest.

84. During this improper August 1, 2001 Board meeting, the so-called "new board members" – defendants James R. Donnelley, Marshall Field V, Dr. Kathleen A. Foster, Robert s. Hamada and Frederick A. Krehbiel – were summarily "welcomed" to the Board of the Foundation. Indeed, these purportedly "new directors" were never properly elected to the Board. The Agenda for the August 1, 2001 meeting states that these "new board members" were "elected June 29, 2001, effective as of July 26, 2001." No such election ever took place. Even the "Consent Judgment and Order," entered by the Court on July 26, 2001, states, "The Foundation will add to its Board the following five Directors, each of whom ***shall be elected*** to serve an initial term of four years and be eligible for election to one additional four-year term."

85. Because defendants James R. Donnelley, Marshall Field V, Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel were not properly elected to the Board in compliance with the Consent Judgment and Order and the Foundation's bylaws, these individuals are not, in fact, directors and should therefore exercise none of the duties and obligations of directors. At least two these "new" directors have even been elected officers of the Foundation. Such election is without effect when these purported officers were not even properly elected directors in the first place.[1] Indeed, the performance of duties reserved solely for directors by these five individuals constitutes illegal and *ultra vires* conduct on the part of both the Foundation and the defendant directors who improperly convened and continued the August 1, 2001 meeting.

86. The failure of the Board and its directors to properly elect the so-called "new

[1] As a result, any action taken by these "officers" – including the issuance of a notice for a Board meeting – is also void and without effect.

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directors" renders all action taken by the Board at its August 1, 2001 void. Declaratory relief setting forth the failure of the Board and the defendant directors to properly elect the so-called "new directors" is therefore appropriate. In addition, the Foundation and the plaintiff directors have been injured and continue to be injured by the improper exercise of authority by the so-called "new" directors. By these "new directors" exercising authority and casting votes on the Foundation's board without having been properly elected, the Foundation acts without any legitimate authority while the plaintiffs' lawful participation as directors and/or officers of the Foundation's board has been improperly restricted.

The Debilitating Conflicts of the Foundation's Law Firms

87. Throughout this fight over the future of Daniel Terra's vision, the Foundation has been represented by two law firms, Winston & Strawn and Sidley & Austin. Despite the obligations imposed by the Illinois Rules of Professional Conduct regarding conflicts, these two firms have engaged in the Foundation's representation – and have continued with that representation – despite obvious and foreseeable actual and potential conflicts of interest.

88. Specifically, Winston & Strawn continues to engage in the concurrent, adverse representation of the Foundation and at least one of the defendant directors. Winston & Strawn has continued this hopelessly conflicted representation under the misguided theory that it acts only as "corporate" counsel for the Foundation and has played no role in the litigation between the Foundation and its director client. Such a theory is belied by the facts which plainly demonstrate that Winston & Strawn has provided – and continues to provide – substantive legal counsel to the Foundation on matters directly related to

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litigation tactics and outcomes. As a result, Winston & Strawn has breached its fiduciary obligations to the Foundation and its directors and has violated the Illinois Rules of Professional Conduct.

89. Sidley & Austin has engaged in similar conduct. Specifically, Sidley & Austin has been accused – by two defendant directors in this litigation – of breaching its responsibilities to the Foundation throughout the underlying fight over the Foundation's future. Indeed, the defendant directors have even submitted an expert affidavit that concludes that Sidley & Austin is unable to provide the Foundation with independent professional advice given its conflicts of interest. Sidley & Austin has even undertook the representation of one of the directors – defendant Stebbins – just after Floyd Perkins and the Attorney General circulated allegations against that director making it perfectly clear that the Foundation and Stebbins were directly adverse. Despite such an obvious and foreseeable conflict, Sidley & Austin represented director Stebbins, provided him with counsel and, on his behalf, informed the other parties that director Stebbins would not submit for an interview regarding the allegations of Perkins and the Attorney General. At the time Sidley & Austin refused to submit Stebbins for an interview, Sidley & Austin knew that submitting for such an interview was in the best interests of the Foundation.

90. Both Winston & Strawn and Sidley & Austin have compounded their breaches of fiduciary duty and violations of applicable ethical rules by continuing to represent the Foundation despite unresolved conflicts of interest. Indeed, Winston & Strawn and Sidley & Austin have pursued their own interests at the expense of the Foundation by failing to challenge the other firm's representation of the Foundation in the face of such obvious and debilitating conflicts. On at least two occasions, counsel for the plaintiffs

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has written to Sidley & Austin and Winston & Strawn requesting information regarding the law firms' adverse, concurrent representation of the both the Foundation and one or more of its directors. Sidley & Austin and Winston & Strawn have refused to provide any information.

91. In seeking to represent the Foundation, Winston & Strawn and Sidley & Austin were obligated to competently pursue the Foundation's interests free of any conflicts as mandated by their fiduciary obligations and applicable provisions of the Illinois Rules of Professional Conduct. Winston & Strawn and Sidley & Austin have breached their fiduciary duties and obligations and violated the Illinois Rules of Professional Conduct in at least the following respects:

a. By Engaging in Conflicts of Interest in Violation of Rule 1.7

Winston & Strawn's and Sidley & Austin's concurrent representation of individual board members whose conduct was alleged to be in conflict with the interests of the Foundation place these firms in a position whereby their representation of the Foundation was materially limited by the obligations to such board members and by their own interests in seeking to maintain their relationship as counsel to both the Foundation and the individual board members; and

b. By Failing to Competently and Diligently Represent the Foundation's Interests in Violation of Rules 1.1, 1.3 and 1.4

Winston & Strawn and Sidley & Austin knew that serious allegations of breaches of fiduciary duty were asserted against one or more board members; Winston & Strawn and Sidley & Austin knew that allegations of their own conflicts had not been fully developed, investigated and resolved; Winston & Strawn and Sidley & Austin knew that at a critical stage in the mediation process potential conflicted interests of the designated

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mediator warranted evaluation, discussion and, as necessary, appropriate remedial action; and Winston & Strawn and Sidley & Austin knew that each of the above circumstances as well as the improvident intervention of the Attorney General warranted competent, diligent and thorough discussion and evaluation by independent counsel. Nonetheless, both Winston and Sidley failed to advise the Foundation to seek such independent advice.

92. The inaction and conduct of Winston & Strawn and Sidley & Austin have compromised the interests of the Foundation as well as the interests of the plaintiffs and have directly and proximately caused damage and injury including but not limited to the imposition of legal fees and expenses all of which could have been avoided had the Foundation had the benefit of unconflicted independent counsel.

93. The actions and conduct of Winston & Strawn and Sidley & Austin continue to cause damage and injury to the plaintiffs in that they are aiding and abetting further and continuing actions of the defendant directors as herein alleged.

CLAIMS FOR RELIEF

Count I - Declaratory Relief

94. All foregoing paragraphs are incorporated herein by reference.

95. An actual and justiciable controversy exits between the parties as defined by 735 ILCS 5/2-701.

96. As directors of the Terra Foundation, Plaintiffs have donated their time, efforts and resources to accomplish the mission of the Foundation.

97. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

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98. The conduct of the Defendants alleged herein has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

99. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count II - Declaratory and Injunctive Relief

100. All foregoing paragraphs are incorporated herein by reference.

101. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, in compliance with its bylaws and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

102. The conduct of Defendants alleged herein – specifically, the exercise of authority reserved solely for directors by defendants James R. Donnelley, Marshall Field V,

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Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel when these individual have not been properly elected members of the Foundation's board -- has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

103. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that defendants James R. Donnelley, Marshall Field V, Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel have not been properly elected as members of the Foundation's board in compliance with the Consent Judgment and Order and with the Foundation's bylaws; that any such exercise of authority by these defendants, having failed to become duly elected directors of the Foundation is void, without any effect and inconsistent with the governing rules of the Foundation;

(b) Injunctive relief to prevent these so-called new directors from taking any action purportedly on behalf of the Foundation when these individuals have not been properly elected to the Board and, as a result, should exercise no authority whatsoever over the Foundation;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Such other relief as may be just and proper.

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Count III - Declaratory Relief

104. All foregoing paragraphs are incorporated herein by reference.

105. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, in compliance with its bylaws and to ensure that the Terra Foundation secure competent legal counsel free from any conflicts of interest as mandated by Illinois Rules of Professional Conduct.

106. The conduct of Defendants alleged herein – specifically, the concurrent, adverse representation of the Foundation and at least some of its directors by Winston & Strawn and Sidley & Austin -- has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad. In addition, the conduct of Winston & Strawn and Sidley & Austin in furthering their own interests in derogation of their obligations to the Foundation should disqualify these firms from any further representation of the Foundation or its directors.

107. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the representation of the Foundation by Winston & Strawn and Sidley & Austin is, and has been, tainted by conflicts of interest in violation of Winston & Strawn's and Sidley & Austin's fiduciary duties and is inconsistent with applicable provisions of the Illinois Rules of Professional Conduct; and that, as a result of such obvious and foreseeable conflicts of interest, Winston & Strawn and

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Sidley & Austin are disqualified from any further representation of the Foundation or its directors in this litigation

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred; and

(c) Such other relief as may be just and proper.

Count IV - *Ultra Vires* Acts (805 ILCS 105/103.15)

108. All foregoing paragraphs are incorporated herein by reference.

109. The resolutions approved by six members of the Board of the Foundation on June 29, 2001, constitute acts of the Foundation taken in contravention of its Articles of Incorporation and By-Laws, and thus taken without lawful authority, capacity or power.

110. The court should enjoin the doing of such acts in this proceeding pursuant to the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a).

Prayer for Relief

Plaintiffs request that this Court to enter judgment as follows:

(a) An Order enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation;

(b) Damages in an amount to be determined at trial;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Count V - Breach of Fiduciary Duty

111. All foregoing paragraphs are incorporated herein by reference.

112. A fiduciary relationship exists between the Foundation and the members of its

Board of Directors. The Board's fiduciary duties include, without limitation, the duties of acting in good faith and with due regard for the Foundation's interest, of refraining from acting in a manner adverse to the Foundation's interest, of making full disclosure of all material information in their possession, of obedience to the Foundation's purposes as established by its Articles of Incorporation, of making productive use of the Foundation's assets and opportunities, and the duties of care, loyalty, fair dealing, and honesty.

113. The Defendant Board Members who voted in favor of the proposed settlement willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation.

114. In addition, board members Stephanie Pace Marshall and Theodore Stebbins breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation.

115. As a direct and proximate result of these breaches of fiduciary duty, the plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count VI - Inducing Breach of Fiduciary Duty

116. All foregoing paragraphs are incorporated herein by reference.

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117. As set forth above, the Defendant members of the Board who voted in favor of the proposed settlement of this litigation did so in violation of their fiduciary duties to the Foundation.

118. Attorney General Ryan and Assistant Attorney General Perkins colluded with these Board members in committing breach of their fiduciary duties, or otherwise induced or participated in such breach.

119. As a direct and proximate result of this conduct, Plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Punitive damages;

(d) Such other relief as may be just and proper.

Count VII - Deprivation Under Color of Law of Constitutional Rights (42 U.S.C. § 1983)

120. All foregoing paragraphs are incorporated herein by reference.

121. At all relevant times, Attorney General Ryan and Assistant Attorney General Perkins acted under color of law as Assistant Attorney General of the State of Illinois.

122. Mr. Perkins' conduct constitutes an unlawful deprivation of the Foundation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

123. The conduct of the Attorney General and Assistant Attorney General constitutes

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an unlawful deprivation of the Foundation's rights to freedom of speech under the First Amendment to the Constitution of the United States.

124. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful restraint by the State of Illinois on interstate commerce in violation of Art. I, § 8 of the Constitution of the United States.

125. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful impairment of the Foundation's contractual obligations in violation of Art. I, § 9 of the Constitution of the United States.

126. The Attorney General and Assistant Attorney General engaged in such illegal conduct to the injury of Plaintiffs and the Foundation.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Jury Trial Requested

127. Plaintiffs request trial by jury.

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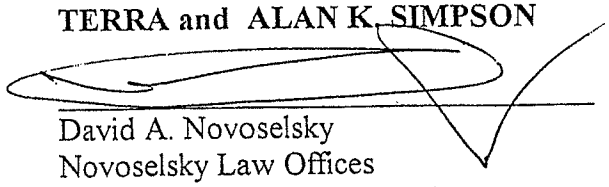
Dated: August 13, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON



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Attorneys for Plaintiffs

16di-003418

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of Filing and First Amended Complaint At Law to be served on the parties listed below via hand delivery on this 13th day of August, 2001.

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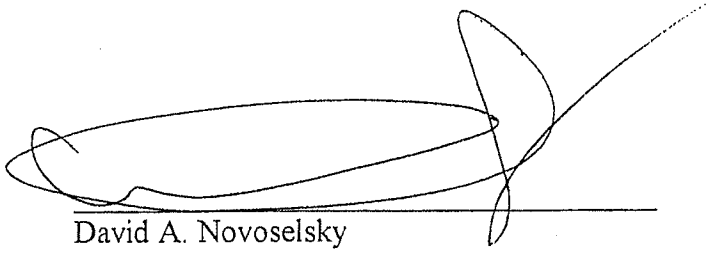

David A. Novoselsky

1900 - Appearance & Jury Demand
1900 - Appearance Only
Appearance

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COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PAUL HAYES TUCKET, et al.,

plaintiff

v.

DEAN BUNTROCK, et al.,

defendant

No. 01 L 9112

*APPEARANCE AND JURY DEMAND

The undersigned, as attorney, enters the appearance of the defendant Theodore Stebbins

*Defendant demands trial by jury.

Debra J Tucker

William P. Schuman
Debra Tucker
Name McDermott, Will & Emery
Attorney for Defendant Theodore Stebbins
Address 227 West Monroe Street
City Chicago
Telephone 312/372-2000
Insurance Company
Atty No. 90539

*Strike demand for trial by jury if not applicable.

I certifiy that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Debra J Tucker
Attorney for Defendant
Theodore Stebbins

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-003421

SERVICE LIST

Paul Hayes Tucket, et al. v. Dean Buntrock, et al.
01 L 9112

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A

ORIGINAL

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

No. 01 L 009112

PROCEEDINGS AUGUST 13, 2001

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

APPEARANCES:

CUMMINS & CRONIN, by
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(312)578-0500

-and-

DAVID A. NOVOSELSKY & ASSOCIATES, by
MR. DAVID A. NOVOSELSKY
120 North LaSalle Street, Suite 1400
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(312)346-8930

On behalf of the Plaintiffs,

QUINLAN & CRISHAM, LTD., by
MR. WILLIAM R. QUINLAN and
MR. JAMES R. CARROLL
30 North LaSalle Street, Suite 2900
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(312)263-0900

On behalf of the Defendants
Dean Buntrock, Ronald Gidwitz,
Margaret Daley and
Ambassador Hartman,

APPEARANCES CONTINUED:

SIDLEY, AUSTIN, BROWN & WOOD, by
MR. STEPHEN C. CARLSON
10 South Dearborn Street
Chicago, Illinois 60603
(312)853-7717

-and-

WINSTON & STRAWN, by
MR. SCOTT SZOLA and
MR. MARK M. HEATWOLE
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312)558-5137

On behalf of the Defendant
The Terra Foundation For The Arts,

OFFICE OF THE ATTORNEY GENERAL, by
MR. FLOYD D. PERKINS
100 West Randolph Street
Chicago, Illinois 60601
(312)814-2533

On behalf of the Defendants
James E. Ryan and Floyd D. Perkins.

MR. CARLSON: Your Honor, I am Steve Carlson from Sidley & Austin. I got these papers about two minutes before --

THE COURT: Let me ask you, can we stay off the record just a minute?

MR. CARLSON: Sure, absolutely.

(Discussion off the record.)

MR. QUINLAN: William R. Quinlan and James Carroll on behalf of certain defendants.

MR. CARLSON: Steve Carlson from Sidley, Austin I believe on behalf of The Terra Foundation.

THE COURT: And pro se, aren't you a party now?

MR. CARLSON: Maybe.

MR. NOVOSELSKY: You granted us leave to file.

THE COURT: Okay. Go ahead.

MR. SZOLA: Your Honor, Scott Szola of Winston & Strawn technically hasn't been served either yet, so we will be in the same position as Sidley & Austin.

MR. PERKINS: Floyd Perkins. I am a defendant pro se and Assistant Attorney General on behalf of the Attorney General of Illinois.

MR. HEATWOLE: Mark Heatwole, Winston & Strawn.

MR. NOVOSELSKY: I apologize, Judge.

THE COURT: He assumes everybody knows him, but give them your name.

MR. NOVOSELSKY: David Novoselsky and Tom Cronin for plaintiffs.

These are our motions. And I guess the first I would only ask Mr. Quinlan, certain defendants which one, Bill, so there is no question?

MR. QUINLAN: Well, if you want me to go through, I am representing Mr. Hartman, Mrs. Daley, Mr. Buntrock, Mr. Gidwitz. And we are not at the moment representing Miss Marshall or Mr. Stebbins.

MR. NOVOSELSKY: As a housekeeping matter, your Honor, we have --

THE COURT: Let me before we start indicate that this case having been set for 2:00 o'clock, as the parties came in, we have had informal discussions which precluded in opening we had as a remaining defendants' attorney came in since the shortage of notice, nobody was essentially late because everything was pretty much of emergency. And that's what we have talked.

A moment ago the attorneys, half a dozen

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Attorney General, Floyd Perkins. Judge, we object to venue here so anything -- if there is any kind of prejudice --

THE COURT: What are you worried about? I am sending it out sua spontae.

MR. PERKINS: I understand, Judge. I am just -- I don't want any rulings by the court --

THE COURT: Where do you want the venue, in Springfield?

MR. PERKINS: I just don't want any rulings by the court to be used as some prejudice.

THE COURT: Well, I thought everybody heard me since I raised it sua spontae. And I only did you for an afterthought; didn't I?

MR. CARLSON: You sure did, your Honor.

THE COURT: It doesn't make sense to be here. So if you want to argue, I can end up disagreeing. But I totally agree with you. Okay?

MR. PERKINS: Judge --

THE COURT: I think the whole principle of judicial economy and good sense is you put it all in one place. And I have always done that.

MR. NOVOSELSKY: Which, your Honor, we may find ourselves going back to square one in front of

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

THE COURT: I am not going to call it which I could do. I could do it. I just don't. I have the right to call it, and it is not ex parte. But I wouldn't do it.

If he has a problem with having this go, that's his problem. I don't see any problem in having it go there. And you would be a delight in my life. I would grow older with you all. But it would be the delight of my life. Sometime when all of you can get a new case from the beginning, it would be my pleasure to have you all here.

(Whereupon, further proceedings in said cause were adjourned sine die.)

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, *et al.*,	)	
	)	
Plaintiffs,	)	**No. 01 L 009112**
	)	
v.	)	
	)	
DEAN BUNTROCK, *et al.*,	)	
	)	
Defendants.	)	

***APPEARANCE AND JURY DEMAND**

The undersigned, as attorney, enters the appearance of the defendants:

DEAN L. BUNTROCK, MARGARET DALEY, RONALD GIDWITZ and ARTHUR HARTMAN

*Defendants demand trial by jury.

*Strike demand for trial by jury if not applicable.

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the court to be in default for failure to plead.

James R. Carroll, Attorney for
above-named Defendants

William R. Quinlan
James R. Carroll
Quinlan & Crisham, Ltd.
30 N. LaSalle St., Suite 2900
Chicago, IL 60602
312-263-0900
#33745

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, *et al.*,	)	
	)	
Plaintiffs,	)	**No. 01 L 009112**
	)	
v.	)	
	)	
DEAN BUNTROCK, *et al.*,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on August 17, 2001, we filed with the Clerk of the Circuit Court of Cook County, Law Division, certain defendants' **Appearance and Jury Demand** a copy of which is attached and hereby served upon you.

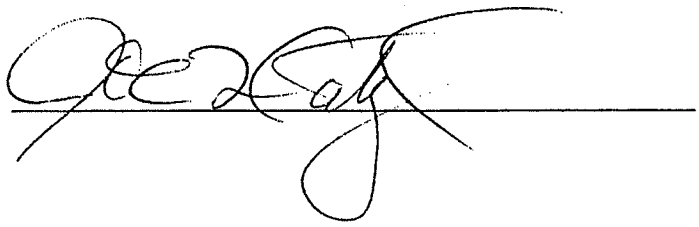
Respectfully submitted,

By: _____

Counsel for Dean Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman
William R. Quinlan
James R. Carroll
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 33745

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and Correct Copies of the Attached **Notice of Filing** and **Appearance and Jury Demand**, to be served on August 17, 2001 in the manner listed on the attached service list.



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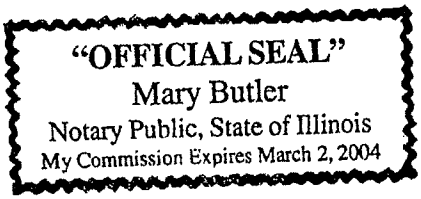
NOTARY PUBLIC



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16di-003442

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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Chicago, IL 60606

16di-003443

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on August 17, 2001, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **Motion for Transfer Based on Case Filed in the Wrong**

Division and on Relatedness , a copy of which is attached and hereby served upon you.

Respectfully submitted,

By: _____

Counsel for Dean Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman
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CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and Correct Copies of the Attached **Notice of Filing** and **Motion for Transfer Based on Case Filed in the Wrong Division and on Relatedness,** to be served on August 17, 2001 in the manner listed on the attached service list.

SUBSCRIBED AND SWORN to before me this 17th day of August, 2001.

NOTARY PUBLIC

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Mary Butler
Notary Public, State of Illinois
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16di-003447

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	Before Presiding Judge Evans for Reassignment
Defendants.	)	

MOTION FOR TRANSFER BASED ON CASE FILED IN THE WRONG DIVISION AND ON RELATEDNESS

Defendants Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Crisham, Ltd., and Theodore Stebbins, by and through his

attorneys, McDermott Will & Emery, hereby move that this action, which was improperly filed in the Law Division, be transferred to the Chancery Division for reassignment. In further support of their motion Buntrock, Daley, Gidwitz, Hartman, and Stebbins, state as follows:

INTRODUCTION

1. As set forth in detail below, the current case *Tucker, et al. v. Buntrock, et al.*, 01 L 9112 ("*Terra II*"), filed in the Law Division, is simply an attempt by three former defendants who are unhappy with the settlement reached in *Buntrock, et al. v. Terra, et al.*, 00 CH 13859, ("*Terra I*"), to challenge that settlement agreement in another forum. However, it cannot be reasonably disputed that the issues raised by *Terra II* has been fully considered and decided in *Terra I*. Because *Terra II* is based on the settlement reached in *Terra I* – a settlement that Judge Kinnaird expressly reserved jurisdiction to enforce — this case should be transferred to the Chancery Division and to Judge Kinnaird. Moreover, Judge Kinnaird is familiar with the issues involved, as well as the likely applicability of res judicata and/or collateral estoppel, so that it is appropriate to transfer this matter to the Chancery Division for reassignment to Judge Kinnaird.

2. General Order 1.3(c) of the Cook County Circuit Court General Orders establishes that upon a determination by a judge assigned to an action that such action has been filed in the wrong division, that action shall be transferred to this Court for the purpose of transferring the action to the Presiding Judge of the proper division. Indeed, Judge Sheldon Gardner has already determined that *Terra II* should be transferred to this Court for transfer to the Chancery Division for reassignment to Judge Kinnaird. (See Order of August 13, 2001, attached hereto as Exhibit A.) Accordingly, defendants respectfully request that this Court, pursuant to Cook County Circuit Court General Order 1.3(c), transfer *Terra II* to the Chancery Division for reassignment

16di-003451

to Judge Kinnaird.

3. In addition, General Order 1.3(d) provides that a judge assigned to an action may transfer that action to this Court for purpose of transfer to another division to further the "convenience of the parties and witnesses and for the more efficient disposition of litigation." *See* General Order 1.3(d). Here, Judge Gardner, recognizing the complexity and relatedness of the issues involved in *Terra I* and *Terra II* and Judge Kinnaird's familiarity with such issues, has clearly indicated that transfer to the Chancery Division and reassignment to Judge Kinnaird will promote judicial economy. (*See* August 13, 2001 Transcript of Proceedings attached hereto as Exhibit B.) Thus, transfer to the Chancery Division for reassignment to Judge Kinnaird is consistent with General Order 1.3(d).

Terra I

4. In September, 2000 Buntrock and Gidwitz (the "Original Plaintiffs") filed an action in the Circuit Court of Cook County, Chancery Division, captioned *Buntrock and Gidwitz v. Terra, et al.*, 00 CH 13859. That case was assigned to the Honorable Dorothy Kirie Kinnaird.

5. The Original Plaintiffs from *Terra I* are directors of the Terra Foundation for the Arts ("Terra" or the "Foundation"), an Illinois not-for-profit corporation. The Original Plaintiffs brought an action seeking declaratory, injunctive and other relief to protect the Foundation from, *inter alia*, breaches of fiduciary duties by certain directors of the Foundation, namely, Judith Terra, Paul Tucker and Alan Simpson. Significantly, the individual defendants from *Terra I* are now the plaintiffs in the current matter, *Terra II*.

6. Within days of the filing of *Terra I*, the Illinois Attorney General intervened as a party plaintiff to protect the interests of the People of the State of Illinois as the beneficiaries of

the Foundation.

7. The Foundation was established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit an extensive collection of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate a museum in the Chicago area . The Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art. At issue in *Terra I* was the attempt by Simpson, Tucker, and Terra to close the museum in Chicago and move the Foundation, an Illinois charitable trust, out of Illinois.

8. Throughout the pendency of *Terra I* before Judge Kinnaird, from September, 2000 to July 2001, an extraordinary number of substantive motions were filed and decided in this matter. Judge Kinnaird heard no less than 30 motions, including 10 motions for injunctive relief. Accordingly, Judge Kinnaird became familiar with the numerous legal and factual issues raised in *Terra I* and now raised in *Terra II*.

9. After months of litigation, the complexity and volatility of the case motivated all the parties, particularly the current *Terra II* plaintiffs, to agree to participate in mediation. On February 5, 2001, Judge Kinnaird entered an agreed order submitting this case to mediation. The mediation process continued for over four months and resulted in a mediated settlement on June 29, 2001.

Settlement of Terra I

10. The settlement agreement was presented to Judge Kinnaird and, on July 26, 2001, Judge Kinnaird signed and entered a Consent Decree dismissing the original action pursuant to settlement. A copy of the July 26, 2001 Consent Decree is attached hereto as Exhibit C.)

Significantly, the defendants in *Terra I* — now the plaintiffs in *Terra II* — disagreed with the settlement reached by the majority of the Board of the Foundation and, as discussed below, undertook various measures, such as filing a new action and objecting to the Consent Decree, to prevent the approval of the settlement by the Foundation and entry of the Consent Decree by Judge Kinnaird. It is the dissatisfaction of these three Board members with the settlement that prompted the filing of *Terra II*. Indeed, *Terra II* is simply an effort to "undo" the valid settlement reached by the Foundation and approved by Judge Kinnaird in *Terra I*.

11. Specifically, on June 28, 2001, Terra, Tucker and Simpson attempted to prevent a vote by the Foundation's Board of Directors on the settlement by filing an action in Federal Court, captioned *Terra, et al. v. Floyd Perkins*, 01 CV 4976. Notably, the federal action was filed on the eve of the board meeting at which the settlement was scheduled to be approved. The Federal Court, Judge Elaine E. Bucklo presiding, dismissed that action the same day. In a twelve- page opinion, Judge Bucklo held that, *inter alia*, the Federal Court lacked jurisdiction to hear Terra, Tucker and Simpson's claims and that they lacked standing to bring these claims. (A copy of Judge Bucklo's Opinion is attached as Exhibit D.)

12. After their first attempt to block the settlement failed, on June 29, 2001, Terra, Tucker and Simpson renewed their efforts before Judge Kinnaird. This second attempt — seeking an injunction to stop the June 29 meeting — was likewise to no avail. Judge Kinnaird denied their motion for TRO and allowed the June 29, 2001 meeting to proceed. Later, on July 29, 2001, the Board voted by a vote of 6 - 2 to adopt the settlement. The lone dissenters were Tucker and Terra — the plaintiffs in *Terra II*.

13. In an abundance of caution and fairness to Terra, Tucker and Simpson, Judge

Kinnaird allowed the filing of Objections, by the *Terra II* plaintiffs, to the proposed Consent Decree and set the matter for hearing on July 24, 2001. The matter was extensively briefed and, in addition, on July 24, 2001, Judge Kinnaird heard over 5 hours of argument from the parties.

14. After thoroughly considering all arguments, on July 26, 2001, Judge Kinnaird signed and entered the Consent Decree dismissing this case in its entirety. (Exhibit C.)

Jurisdiction to Enforce Settlement Reserved by Judge Kinnaird

15. As part of the Consent Decree, Judge Kinnaird expressly reserved jurisdiction to enforce the Consent Decree and to award attorneys' fees. The issue of attorneys' fees remains pending before the Court. Indeed, Terra, Tucker and Simpson's former counsel have submitted a fee petition to the Court, which is set for presentment on September 20, 2001. Thus, *Terra I* is still ongoing until that issue is resolved.

16. The present complaint in *Terra II* (and proposed first amended complaint at law) seeks declaratory and injunctive relief as well as damages and fees. The present allegations brought by Terra, Tucker and Simpson begin and end with the original litigation. The allegations relate to defendants' conduct during the original litigation, *Terra I*, and the terms of the Consent Decree approved by Judge Kinnaird in *Terra I*. They also allege that Judge Kinnaird has "unlawfully denied" them the opportunity to bring their claims in the original litigation. (Complaint at Law at p.2 and proposed First Amended Complaint, p.2.)

17. The parties to the present litigation are exactly the same as those in the original litigation, with the addition of all the members of the Foundation's Board of Directors, including the five newly-elected directors of the Foundation (elected pursuant to the Settlement) as defendants, as well as the addition of two law firms as defendants that represented the

Foundation during the *Terra I*.[1] Thus, the claims asserted in this lawsuit are inextricably intertwined with the claims over which Judge Kinnaird has expressly reserved jurisdiction. In fact, *Terra II* is not only related to *Terra I*, it is in fact and substance the same case.

ARGUMENT

18. Cook County Circuit Court General Order No. 1.3(c) provides for the procedure to be followed when an action has been filed in the wrong division. General Order No. 1.3(c) requires:

> Any action assigned to a judge that is determined by that judge, whether by suggestion of the parties or otherwise, to have been filed or to be pending in the wrong department, division, district or section of the Circuit Court of Cook County, shall be transferred to the Presiding Judge of the division or district in which it is pending for the purpose of transferring the action to the Presiding Judge of the proper division or district or for reassignment to the proper section.

Here, the Court assigned to hear *Terra II* has already determined that this matter be transferred to this Court for reassignment. (See Judge Gardner's Order, Exhibit A.)

19. On August 13, 2001, — two weeks after the filing of *Terra II* — plaintiffs attempted to bring an emergency motion for temporary restraining order before Judge Gardner. That plaintiffs sought injunctive relief (which further illustrated that this matter should have been filed in Chancery and should now be transferred to the Chancery Division, the appropriate forum

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[1] In fact, even the addition of the two law firms as defendants is based on issues already decided by Judge Kinnaird and the Appellate Court, First District. Specifically, in *Terra I* the Original Plaintiffs alleged a conflict of interest on behalf of the law firm representing the Foundation. Judge Kinnaird, after substantial briefing and argument, found that there was no conflict of interest that prevented one of the law firms from representing the Foundation. The Appellate Court denied the Original Plaintiff's appeal and the Supreme Court denied the petition for leave to appeal filed by the Original Plaintiffs. Here, the plaintiffs of *Terra II* are attempting to use the conflict already rejected by Judge Kinnaird, the Appellate Court, and the Supreme Court, to state a cause of action against the law firms.

for such injunctive actions) is yet another factor that supports defendants' motion for transfer. In fact, Judge Gardner expressly found that the action should be transferred back to Judge Kinnaird in the Chancery Division, inviting the parties to quote him on that point. (See Exhibit B, p.13.) Therefore, pursuant to General Order No. 1.3(c), where a judge assigned to a case, as here, Judge Gardner, has determined that the case has been filed in the wrong division, the matter shall be transferred to this Court for reassignment to the Chief Judge of the Chancery Division.

20. Additionally, however, in light of the clear relatedness between *Terra I* and *Terra II*, transfer to the Chancery Division is warranted. Cook County Circuit Court General Order No. 1.3(d) also provides that:

> For the convenience of parties and witnesses and for the more efficient disposition of litigation, a judge, upon motion of any party may transfer any action pending before that judge to the Presiding Judge of the division or district for the purpose of transferring the action to any other department, division or district.

As recognized by Judge Gardner, it would be totally inefficient for any new judge to undertake the monumental task of gaining familiarity with the record from the original litigation. (Exhibit B, *e.g.*, p.12.) The present claims are so intertwined with the original litigation that it would not be possible for a judge to consider the current claims without reviewing and considering the entire history of the litigation before Judge Kinnaird. Thus, transfer to the Chancery Division for reassignment will further promote judicial economy.

21. Moreover, the claims presently being couched as a "Complaint at Law" are really nothing more than a reiteration of the various motions and arguments presented and rejected by the Federal Court, as well as the chancery claims presented to Judge Kinnaird. Judge Kinnaird is the judge best able to address these claims as she has already considered these

arguments and is intimately familiar with the facts leading up to these claims. For these additional reasons, this matter should be transferred and reassigned to Judge Kinnaird.

22. Finally, notwithstanding the relatedness between *Terra I* and *Terra II*, the allegations at issue in *Terra II* are more appropriate for a chancellor sitting in equity. The complaint filed in *Terra II* consist of five counts. The proposed first amended complaint consists of seven counts. Those counts seek declaratory and injunctive relief. Even the causes of action which do not expressly request injunctive relief are directed at stopping allegedly wrongful behavior. Moreover, the TRO filed by the plaintiffs before Judge Gardner demonstrates that the plaintiffs' real aim is equitable relief. Cook County Court General Order No. 1.2(b)(1) describes the types of cases heard by the Chancery Court as follows:

> . . . class actions, mortgage foreclosures, arbitration, **injunctions, temporary restraining orders . . . declaratory judgments** . . . declarations concerning or construction of wills (other than during the period of an estate administration), the appointment of trustees . . . receiverships . . . or other proceedings under the Corporations and Partnership Act . . .

(emphasis added). Clearly, the relief sought in plaintiffs' complaint are encompassed by the Chancery Court's purview under General Order No. 1.2(b)(1).

CONCLUSION

For all of these reasons, the Original Plaintiffs and Defendants Daley, Hartman, and Stebbins respectfully request that this Court transfer this case to the Presiding Judge of the Chancery Division for reassignment.

Dated: August 17, 2001

Respectfully Submitted,

DEAN L. BUNTROCK, MARGARET DALEY, RONALD GIDWITZ and ARTHUR HARTMAN

By: _____
One of Their Attorneys

William R. Quinlan
James R. Carroll
Lisa M. Hegedus
Jasmine de la Torre
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 33745

Respectfully Submitted,

THEODORE STEBBINS

By: _____
One of His Attorneys

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Debra Tucker
MCDERMOTT WILL & EMERY
227 West Monroe Street
Chicago, IL 60606
(312) 372-2000

Doc:180578

A

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Bantrock, et al

NO. 01 L 009112

ORDER

This matter coming on to be heard upon plaintiffs' Emergency Motion for the Entry of Temporary Restraining Order, the Court being fully advised in the premises, [redacted] and the Court being advised that the Terra Foundation for the Arts is cancelled its Board of Directors meeting scheduled for August 14, 2001, IT IS HEREBY ORDERED THAT:

1) This matter is hereby transferred to Judge Timothy Evans, Presiding Judge of the Law Division, for the purpose of transferring said cause for reassignment consideration of;

2) The Motion for TRO is moot and

3) Plaintiffs Motion for Leave to File a First Amended Complaint is entered and continued.

Atty No.

Name Stephen C. Carlson / Sidley Austin

Attorney for Terra Foundation

Address Bank One Plaza, 10 S. Dearborn

City / Zip Chicago, Ill 60603

Telephone (312) 853-7717

JUDGE SHELDON GARDNER

ENTER: AUG 13 2001 /ME/

CIRCUIT COURT - 1506

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

B

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

No. 01 L 009112

PROCEEDINGS AUGUST 13, 2001

16di-003463

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

16di-003464

APPEARANCES:

CUMMINS & CRONIN, by
MR. THOMAS C. CRONIN
77 West Wacker Drive, Suite 4800
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(312)578-0500

-and-

DAVID A. NOVOSELSKY & ASSOCIATES, by
MR. DAVID A. NOVOSELSKY
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
(312)346-8930

On behalf of the Plaintiffs,

QUINLAN & CRISHAM, LTD., by
MR. WILLIAM R. QUINLAN and
MR. JAMES R. CARROLL
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312)263-0900

On behalf of the Defendants
Dean Buntrock, Ronald Gidwitz,
Margaret Daley and
Ambassador Hartman,

16di-003465

APPEARANCES CONTINUED:

SIDLEY, AUSTIN, BROWN & WOOD, by
MR. STEPHEN C. CARLSON
10 South Dearborn Street
Chicago, Illinois 60603
(312)853-7717

-and-

WINSTON & STRAWN, by
MR. SCOTT SZOLA and
MR. MARK M. HEATWOLE
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312)558-5137

On behalf of the Defendant
The Terra Foundation For The Arts,

OFFICE OF THE ATTORNEY GENERAL, by
MR. FLOYD D. PERKINS
100 West Randolph Street
Chicago, Illinois 60601
(312)814-2533

On behalf of the Defendants
James E. Ryan and Floyd D. Perkins.

MR. CARLSON: Your Honor, I am Steve Carlson from Sidley & Austin. I got these papers about two minutes before --

THE COURT: Let me ask you, can we stay off the record just a minute?

MR. CARLSON: Sure, absolutely.

(Discussion off the record.)

MR. QUINLAN: William R. Quinlan and James Carroll on behalf of certain defendants.

MR. CARLSON: Steve Carlson from Sidley, Austin I believe on behalf of The Terra Foundation.

THE COURT: And pro se, aren't you a party now?

MR. CARLSON: Maybe.

MR. NOVOSELSKY: You granted us leave to file.

THE COURT: Okay. Go ahead.

MR. SZOLA: Your Honor, Scott Szola of Winston & Strawn technically hasn't been served either yet, so we will be in the same position as Sidley & Austin.

MR. PERKINS: Floyd Perkins. I am a defendant pro se and Assistant Attorney General on behalf of the Attorney General of Illinois.

MR. HEATWOLE: Mark Heatwole, Winston & Strawn.

MR. NOVOSELSKY: I apologize, Judge.

THE COURT: He assumes everybody knows him, but give them your name.

MR. NOVOSELSKY: David Novoselsky and Tom Cronin for plaintiffs.

These are our motions. And I guess the first I would only ask Mr. Quinlan, certain defendants which one, Bill, so there is no question?

MR. QUINLAN: Well, if you want me to go through, I am representing Mr. Hartman, Mrs. Daley, Mr. Buntrock, Mr. Gidwitz. And we are not at the moment representing Miss Marshall or Mr. Stebbins.

MR. NOVOSELSKY: As a housekeeping matter, your Honor, we have --

THE COURT: Let me before we start indicate that this case having been set for 2:00 o'clock, as the parties came in, we have had informal discussions which precluded in opening we had as a remaining defendants' attorney came in since the shortage of notice, nobody was essentially late because everything was pretty much of emergency. And that's what we have talked.

A moment ago the attorneys, half a dozen

16di-003468

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Attorney General, Floyd Perkins. Judge, we object to venue here so anything -- if there is any kind of prejudice --

THE COURT: What are you worried about? I am sending it out sua spontae.

MR. PERKINS: I understand, Judge. I am just -- I don't want any rulings by the court --

THE COURT: Where do you want the venue, in Springfield?

MR. PERKINS: I just don't want any rulings by the court to be used as some prejudice.

THE COURT: Well, I thought everybody heard me since I raised it sua spontae. And I only did you for an afterthought; didn't I?

MR. CARLSON: You sure did, your Honor.

THE COURT: It doesn't make sense to be here. So if you want to argue, I can end up disagreeing. But I totally agree with you. Okay?

MR. PERKINS: Judge --

THE COURT: I think the whole principle of judicial economy and good sense is you put it all in one place. And I have always done that.

MR. NOVOSELSKY: Which, your Honor, we may find ourselves going back to square one in front of

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

THE COURT: I am not going to call it which I could do. I could do it. I just don't. I have the right to call it, and it is not ex parte. But I wouldn't do it.

If he has a problem with having this go, that's his problem. I don't see any problem in having it go there. And you would be a delight in my life. I would grow older with you all. But it would be the delight of my life. Sometime when all of you can get a new case from the beginning, it would be my pleasure to have you all here.

(Whereupon, further proceedings in said cause were adjourned sine die.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DuPAGE)

Patricia L. Wangler, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

Patricia L Wangler

Certified Shorthand Reporter

SUBSCRIBED AND SWORN TO
before me this 17th day
of August 2001.

OFFICIAL SEAL
DOROTHY CALLAHAN
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 29,2004

Dorothy Callahan

Notary Public

C

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

16di-003479

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-003480

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kinnaird 9:05 A.M.

16di-003482

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/2/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date:_____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By:_____

Its_____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____
Assistant Attorney General (Title)
State of Illinois

Print Name: _____

Date: _____
7/6/01

16di-003484

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

16di-003485

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-003486

D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation, PAUL HAYES TUCKER, Director, Chairman, and President, the Terra Foundation for the Arts, ALAN K. SIMPSON, Director, the Terra Foundation for the Arts, and JUDITH TERRA, Director, the Terra Foundation for the Arts,

Plaintiffs,

vs.

FLOYD D. PERKINS, in his official capacity as Assistant Attorney General, State of Illinois,

Defendant.

No. 01 C 4976

MEMORANDUM OPINION AND ORDER

Plaintiffs, The Terra Foundation for the Arts, Paul Hayes Tucker, Alan K. Simpson, and Judith Terra, the latter three all directors of the Terra Foundation, have sued Floyd D. Perkins, an Assistant Attorney General for the State of Illinois who is charged with enforcing the State's charitable institution laws, alleging that Mr. Perkins violated their federal constitutional rights to due process and freedom of speech by intimidating two other Terra Foundation directors who, as a result of the intimidation,[1] are

[1] Dr. Stephanie Marshall is head of the Illinois Mathematics and Science Academy, an elite but public high school in Illinois. The other director in question, Dr. Theodore Stebbins, is curator of the Fogg Museum at Harvard University and has no ties to public institutions in Illinois but was allegedly intimidated by proposed

about to vote to substantially change the by-laws of the Terra Foundation and take other acts that will force the Terra Foundation to keep its valuable art collection in Illinois for many years. Plaintiffs seek a temporary restraining order that would prevent either the vote that is expected to take place tomorrow, June 29, 2001, from taking place, or would prevent the two allegedly intimidated directors from taking part in that vote. Plaintiffs have not sued the two directors.[3] Plaintiffs nevertheless say that an injunction against the Attorney General will prevent either any vote from taking place or the two directors' participation in that vote on the ground that because of the intimidation the two directors have become de facto agents of the Attorney General. They argue therefore that an injunction against the defendant will be binding on the directors.

There are at least two problems with plaintiffs' attempted resolution of their conflict in this court. First, there is an ongoing lawsuit (two actually) presently pending in the Circuit Court of Cook County in which the present plaintiffs are defendants

---

charges of conflict of interest in an amended complaint drafted but never filed by the State of Illinois in related state litigation.

[3] Plaintiffs did offer to add them as defendants but the addition of Dr. Marshall would almost certainly prevent diversity jurisdiction, alleged presently, and unless they are state actors, could not form a basis for subject matter jurisdiction under 28 U.S.C. § 1343(a)(3), the second basis on which plaintiffs allege subject matter jurisdiction. *See* 42 U.S.C. § 1983. Whether they can plausibly be considered to be acting under color of state law is discussed further in this opinion.

16di-003489

and involving the same subject matter raised in their federal court complaint. It is actually a proposed resolution of those lawsuits through a settlement which is expected to be voted on tomorrow that plaintiffs seek to stop. Plaintiffs say that neither the Rooker-Feldman doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), nor the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit this court from acting so long as it acts before the anticipated consent decree is entered in state court, but assuming that is so, principles of comity and federalism call for abstention where the issues raised can be litigated in the ongoing state action and where action by the federal court would interfere in the state proceeding.

The State of Illinois, representing Mr. Perkins, invokes *Younger v. Harris*, 401 U.S. 37 (1971), in support of abstention. *Younger* holds that federal courts cannot enjoin ongoing state criminal proceedings unless extraordinary circumstances are present. In a companion case, *Samuels v. Mackell*, 401 U.S. 66 (1971), the Court applied a similar result to actions for declaratory judgment because they would also interfere with state prosecutions. *Younger* has been extended widely, including to civil contexts. For example, the State of Illinois likens this case to *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (*Younger* abstention appropriate when the relief sought by the federal plaintiff was an

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injunction against the party that had prevailed in state court to prevent it from executing its judgment prior to an appeal to a state appellate court). That case is not precisely on point because there, judgment had been entered, whereas in the case before me the goal is to prevent judgment from being entered. However, judgment need not have been entered for *Younger* abstention to be appropriate.

The Seventh Circuit states that abstention is appropriate "if the impacted state proceedings satisfy the following requirements: (1) the judicial or judicial-in-nature state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges." *AFSCME v. Tristano*, 898 F.2d 1302, 1305 (7th Cir. 1990). These requirements are satisfied here. The state court proceedings are obviously judicial. The State of Illinois has set forth what it believes to be, and what I agree are, important state interests in its ability to regulate charitable institutions. It is not necessary that I endorse the policy adopted by the state to recognize that the interests it invokes are important. Finally, there was - and as far as I know still is - ample opportunity to raise any constitutional challenges in the state court proceedings.

The plaintiffs respond that section 1983 provides an exception to the usual application of *Younger* because federal protection is

16di-003491

needed in such cases to vindicate plaintiffs' rights against state abuses. This is not in general true. For example, in *Simpson v. Rowan*, 73 F.3d 134, 138 (7th Cir. 1995), the court affirmed the use of *Younger* abstention in a § 1983 case seeking civil relief for constitutional violations of a man convicted of a crime; *accord State of Indiana v. Haws*, 131 F.3d 1205, 1210 (7th Cir. 1997)(quoting from *Barichello v. McDonald*, 98 F.3d 948, 954 (7th Cir. 1996): "*Younger* has 'come to mean that absent unusual circumstances, a federal court must refrain from entertaining injunctive relief which might interfere with the ... judicial process of state courts ....'"). Section 1983 is not a magic key into federal court, especially when, as here, there is ample opportunity to litigate the constitutional issues in state court. Moreover, there is no reason to think that the plaintiffs require the special protections of federal court even though the state is a party to the state court action. The only basis that the plaintiffs give for thinking there may be a problem with the state court is that the very able state court judge is elected. That is not a reason to think that she cannot fairly resolve charges of misconduct made against the state and its officers, such as Mr. Perkins.

Even if I were not to abstain, however, I could not grant the temporary restraining order sought by the plaintiffs. In the first place, plaintiffs do not appear to have standing. In order for a

16di-003492

party to bring suit in federal court, three constitutional requirements under Article III must be met: "(1) the party must have personally suffered an actual or threatened injury caused by the defendant's illegal conduct; (2) the injury must be fairly traceable to the challenged conduct; and (3) the injury must be one that is likely to be redressed by a favorable decision." *United Transp. v. Surface Transp. Board*, 183 F.3d 606, 611 n.2 (7th Cir. 1999). In this case, the last requirement is missing.

The only defendant named is Mr. Perkins. It would do no good to enjoin him from interfering in Board business or intimidating the directors with respect to the meeting at question. The State of Illinois says that he is in Canada, and does not even know that he has been sued. As the State says, with respect to his involvement, tomorrow is the best time to hold the meeting.

The plaintiffs really want me to enjoin Drs. Marshall and Crabbins from voting or coming to the meeting, but they are not defendants. If they were named, however, they could not be sued under section 1983, the basis for my jurisdiction. The plaintiffs suggest that they can be enjoined as persons acting "in consort" with the defendant, or as his agents. But they offer no authority that persons who have been intimidated or influenced by a state actor are acting in consort with them or as agents of those who intimidate them, or indeed that they could be named as section 1983 defendants at all. That section requires state action. And that

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is hard to show.

The Supreme Court has articulated several tests for when private action is state action: the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). Of these, only the "joint action" and "state compulsion" tests are worth considering. The tests are fact-specific. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir. 1990).

The "joint action" theory, articulated in cases like *Dennis v. Sparks*, 449 U.S. 24, 27 (1980), says that a private defendant acts under color of state law when he is "a willful participant in joint action with the State or its agents." A charge of joint action amounts to alleging "some agreement between private and public actors to violate plaintiff's constitutional rights." *Cunningham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991) (citing *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) ("To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown."]). "A requirement of the joint action charge therefore is that both public and private

16di-003494

actors share a common, unconstitutional goal." *Id.* If the directors in question are unwillingly intimidated, however, they are not willful joint actors who share Mr. Perkin's hypothetically unconstitutional goals. *See Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985).

I suppose one could be an unwilling co-conspirator, but what is alleged here is not that Drs. Marshall and Stebbins share any unconstitutional goals or have conspired, however unwillingly, to deprive the plaintiffs of their rights, but that they were somehow coerced into changing their votes on the settlement, basically to get Mr. Perkins off their backs, which change will have the effect of furthering Mr. Perkin's unconstitutional goals. That is not what is required.

But the situation for the plaintiffs is worse than this analysis suggests. "To state a § 1983 claim against a private actor, plaintiffs must show that the defendant invoked state authority in such a way that the defendant should be considered a state actor." *Davis v. Union National Bank*, 46 F.3d 24, 25 (7th Cir. 1994). For example in *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir. 1986), the court held that a private person became a state actor for purposes of the state action requirement when he repossessed collateral on the strength of an ex parte order issued by a court. The ex parte order instructed the sheriff to assist the private person if need be to

16di-003495

carry out the order. In that case it was not necessary to call the sheriff. The court held that "[t]he fact that the sheriff remained in the background and hence could not be joined as a defendant does not deprive Carpenter Cook's action in enforcing a judicial order of its character as state action." *Id.* at 1346. Here, it would not be possible to say that Drs. Marshall and Stebbins invoked the power of the Illinois Attorney General's office, which remains in the background: they are not argued to invoke any power; they have no court or administrative order to carry out, and they could not call in Mr. Perkins to back them up if they wanted to, which, the plaintiffs argue, they do not.

The plaintiffs' best shot is the "state compulsion" test, under which a § 1983 claim may be stated "when the state has so implicated itself in the defendant's action that the state has in effect compelled the action." *Starnes v. Capital Cities Media, Inc.*, 39 F.3d 1394, 1396 (7th Cir. 1994). This test originated in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170 (1970). There the Court held that a "state is responsible for the [unconstitutional] act of a private party when the state, by its law, has compelled the act." 'When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it.'" *Id.* (citation omitted). However the command has to involve action under color of some "statute, ordinance, regulation, custom, or usage, of a

16di-003496

State," in the language of § 1983 itself. *Id.*

The actions challenged here are not analogous to the facts in *Adickes*, where a white woman was denied restaurant service (and subsequently arrested for vagrancy) because she was in the company of African-Americans. The Supreme Court held that it would satisfy state action if she showed that she was refused service by the defendant restaurant as the result of a state enforced custom compelling segregation of the races in Mississippi restaurants. *Adickes*, 398 U.S. at 171. In this case, there are two actions alleged to force the directors to change their votes. One is proposing to name Dr. Stebbins as a defendant in a lawsuit. The other is investigating Dr. Marshall's school. These are both official practices, but in the first place, neither of these involve a "command." They do not require the conduct they are supposed to induce - that these directors change their votes. The difference between inducement and requirement is a matter of degree, but not every incentive and disincentive is coercive. For example, in *Mendoza v. United Farm Workers Organizing Committee*, 497 F.2d 311, 312 (9th Cir. 1974) (per curiam), the court rejected the idea that a union shop agreement that grows out of the "normal give and take of collective bargaining and labor-management relations," is coercive, although anyone must recognize that it involves various threats and unwelcome inducements. It might be different if Mr. Perkins had held a gun to the heads of Drs.

16di-003497

Marshall and Stebbins, but all he did was to name one in a proposed amendment to a lawsuit and allegedly investigate the school of another.

Moreover, the conduct being induced (a changed vote) is not itself unlawful, unlike the racial discrimination involved in *Adickes*. Essentially the plaintiffs argue that Mr. Perkins used his undoubtedly legitimate authority to name Dr. Stebbins in a complaint and to investigate Dr. Marshall's school in order to get them to do something lawful, which the plaintiffs argue will have unfortunate effects. If the directors had just changed their minds, the plaintiffs would just have to live with it. What difference, as far as their status as potential § 1983 defendants goes, does it make if they changed their votes because of the inducements by Mr. Perkins? Even if Mr. Perkin's intentions were to violate the plaintiffs' constitutional rights by getting these directors to vote to approve the settlement, the plaintiffs do not explain, either with authority or with logic, how the directors can be charged with violating the plaintiffs' rights even under compulsion if they do what they had a lawful right to do in any event.

Since enjoining Mr. Perkins would be pointless, and Drs. Marshall and Stebbins are not state actors and cannot be sued under Section 1983, there is no relief that I can give that would redress plaintiffs' complaint. They lack standing. I abstain in any event. The plaintiffs' motion for a temporary restraining order

16di-003498

must therefore be denied. The action is dismissed.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: June 28, 2001

16di-003499

[illegible] is denied. The action is dismissed.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: June 28, 2001

16di-003500

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,

Defendants.

AUG 20 2001

Case No. 01 L 009112

Hon. Timothy C. Evans

NOTICE OF MOTION

PLEASE TAKE NOTICE that on Thursday, September 13, 2001 at 2:00 p.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Timothy C. Evans in Courtroom 2001 at The Daley Center, Randolph and Dearborn Streets, Chicago, Illinois, and then and there present DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD, a copy of which is hereby served upon you.

Dated: August 17, 2001

Respectfully Submitted,

By: Stephen C. Carl
One of the Attorneys for Defendant

16di-003502

The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
312/853-7000
Firm ID No. 38315

CERTIFICATE OF SERVICE

I, Stephen C. Carlson, one of the attorneys for Defendant Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached NOTICE OF MOTION to be served upon the following counsel by messenger deliver:

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William P. Schuman
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227 West Monroe
Chicago, Illinois 60606-5096

and by facsimile and Federal Express to:

K. Chris Todd
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David E. Ross
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on this 17th day of August, 2001.

Stephen C. Carlson

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August 20, 2001

VIA FEDERAL EXPRESS

K. Chris Todd, Esq.
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Re: Tucker v. Buntrock

Dear Colleagues:

I am enclosing copies of two motions to transfer filed on behalf of several of the board members and the Attorney General. Let's discuss after you have had an opportunity to review these filings.

Very truly yours,

Robert P. Cummins

RPC/pw
Enclosures

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,

Defendants.

AUG 20 2001

Case No. 01 L 009112

Hon. Timothy C. Evans

DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD

Defendant the Terra Foundation for the Arts (the "Foundation"), an Illinois Not-For-Profit Corporation, by its attorneys, Sidley Austin Brown & Wood, hereby moves this Court to enter an order transferring this matter to the Circuit Court of Cook County, Illinois, Chancery Division, pursuant to General Orders 1.2 and 1.3 of the Circuit Court of Cook County. In support of this motion, the Foundation states as follows:

1. Having failed in their multiple attempts before the Chancery Court to upset an agreed settlement that they do not personally support, Plaintiffs' current action in Law Division represents nothing more than their attempt to seek out another judge in another division who they think may be more sympathetic to their claims. On three separate occasions over the past month and a half, the Plaintiffs have been given the opportunity to present their arguments to block the settlement and resulting Consent Judgment (which was entered on July 26, 2001 after extensive consideration of the same matters alleged here by Judge Dorothy Kirie Kinnaird on June 29, July 2 and July 24). Yet, on each occasion, Judge Kinnaird, who has presided over the Buntrock v. Terra litigation, Case No. 00 CH 13859 (Circuit Court, Cook County, Illinois), since its inception over 10 months ago, has found that the Plaintiffs' allegations lacked merit. In a blatant attempt to shop for a new judge, Plaintiffs then presented precisely the same allegations that they raised in front of Judge Kinnaird in their current Complaint in the Law Division in the guise of a new case, Case No. 01 L 009112.

2. On August 13, 2001, at a hearing on Plaintiffs' "Emergency Motion for the Entry of a Temporary Restraining Order," Judge Sheldon Gardner, to whom the case had been assigned, sua sponte and upon oral motion of the Foundation transferred the case to the Presiding Judge of the Law Division for consideration of whether this matter should be transferred to the Chancery Court, indicating on the record that he believed that this matter should be before Judge Kinnaird. Given that Plaintiffs seek relief that is most appropriately granted by the Chancery Court, and that Plaintiffs' claims in this Court mirror those already presented to Judge Kinnaird, this Court should transfer Plaintiffs' claims to the Presiding Judge of the Chancery Division for subsequent reassignment to Judge Dorothy Kirie Kinnaird.

I. Plaintiffs' Suit Must be Transferred because it Seeks Remedies Properly Considered by the Chancery Division.

3. Transfer to the Chancery Division is mandated by the remedies Plaintiffs seek and the General Orders of the Circuit Court of Cook County. In seeking to undo the settlement agreement embodied in the Consent Judgment, Plaintiffs ask this Court for declaratory and injunctive relief. Yet, General Order 1.2(2.1)(b)(1) of the Circuit Court of Cook County expressly provides that:

> The General Chancery Section hears actions and proceedings, regardless of the amount of the claim, concerning ... injunctions, temporary restraining orders . . . declaratory judgments, . . . and all other actions or proceedings formerly cognizable in courts of Chancery not otherwise provided for.

See General Order 1.2(2.1)(b)(1) (emphasis added); see also Baal v. McDonald's Corp., 97 Ill. App. 3d 495, 501, 422 N.E.2d 1166, 1172 (1st Dist. 1981) ("In general, injunctions rest on the authority of *courts of equity* to restrain persons within their limits of jurisdiction from doing inequitable acts to the wrong and injury of others.")(emphasis added); Brooks v. LaSalle National Bank, 11 Ill. App. 3d 791, 801, 298 N.E.2d 262, 269 (1st Dist. 1973) (the granting of injunctive relief "resides in the sound discretion of the *chancellor*.")(emphasis added).

4. Given this mandate of the General Orders regarding the types of cases properly presented to the Chancery Division, it is clear that Plaintiffs have filed this action in the wrong division. Under General Order 1.3(c):

> Any action assigned to a judge that is determined by that judge, whether by the suggestion of the parties or otherwise, to have been filed or to be pending in the wrong department, division, district or section of the Circuit Court of Cook County, shall be transferred to the Presiding Judge of the division or district in which it is pending for the purpose of transferring the action to the Presiding Judge of the proper division or district, or for reassignment to the proper section.

See General Order 1.3(c) (emphasis added). Judge Gardner clearly recognized the requirements

of General Order 1.3(c), and immediately transferred this matter to this Court for consideration of reassignment. Because Plaintiffs' filing of this action in the Law Division completely ignores the mandate of General Order 1.2(2.1)(b)(1), this cause must be transferred to the Chancery Division under the requirements of General Orders 1.2(2.1)(b)(1) and 1.3(c).[1]

II. Transfer of this Case to the Chancery Division would allow for Reassignment of the Matter to Judge Kinnaird, Whose Lengthy Involvement with and Consideration of the Legal and Factual Claims Made by the Plaintiffs Would Foster the Most Efficient Disposition of this Litigation.

Transfer of this matter to the Presiding Judge of the Chancery Division would also allow for subsequent reassignment of this case to Judge Kinnaird in the Chancery Division. In addition to the mandatory transfer rules of General Order 1.3(c), General Order 1.3(d) provides for transfer of matters to other divisions when such an action would further "the more efficient disposition of litigation." See General Order 1.3(d). Here, Judge Kinnaird's extensive involvement with the case giving rise to the Consent Judgment and her exhaustive consideration of the exact claims Plaintiffs now present necessitate transfer of this matter to the Chancery Division for reassignment to Judge Kinnaird.

5. Since Messrs. Buntrock and Gidwitz, two members of the Foundation's Board of Directors, filed a lawsuit against the Foundation, the three Plaintiffs in this case, and an unrelated third party in September 2000, Judge Kinnaird has presided over all aspects of that litigation. Over the past 10 months, Judge Kinnaird has become intimately familiar with both the law and the facts related to this case, having first presided over four months of contentious motion practice followed by five months of mediation sessions aimed at reaching an agreement

[1] Any attempt by Plaintiffs to point to their "jury demand" as a reason for this Court to deny transfer to the Chancery Division is unavailing. The Supreme Court of Illinois has recently noted, "Conferring

that would result in the dismissal of the Buntrock lawsuit. These mediation sessions eventually led to the entry of a Consent Judgment and Order on July 26, 2001.

6. In the process of entering this Consent Judgment, Judge Kinnaird also became intimately familiar with the claims Plaintiffs have made in the lawsuit they now seek to present in the Law Division. Plaintiffs first sought to block the settlement through presentation of a Motion for Temporary Restraining Order on June 29. After hearing argument on this matter at a hearing on the same day, Judge Kinnaird rejected Plaintiffs' motion for TRO and permitted the Foundation to hold its properly noticed and convened Board meeting at which the settlement was approved.

7. Three days later, on July 2, Judge Kinnaird again heard argument from the Plaintiffs that the settlement should be blocked, at which time the Plaintiffs filed a Motion for Leave to File Written Objections and for an Evidentiary Hearing on the Proposed Settlement. However, the Judge again rejected Plaintiffs' attempts to upset the settlement based upon their personal dislike for its terms. In denying Plaintiffs' motion, Judge Kinnaird noted that "You know, you've come into court and you've filed a number of things, and they sound very, very dramatic. But I don't see anything here supported by affidavit. I don't see anything here supportive of any substance." Tr. of Proceedings, 7/2/01, p.85. However, Judge Kinnaird did permit any party to file a written objection supported by affidavits after a motion for entry of the Consent Judgment was formally presented.

8. Plaintiffs then got their third "bite of the apple" in late July after the Foundation filed its Motion for Entry of the Consent Judgment and Order. On July 19th and July

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jurisdiction in chancery is not excluding trial by jury." Martin v. Heinold Commodities, Inc., 163 Ill. 2d

16di-003511

20th, the Plaintiffs filed exhaustive pleadings objecting to the settlement, and seeking not only to state various counterclaims against the individuals they have now sued in this action, but also seeking to conduct limited discovery. After having reviewed all of the pleadings, exhibits, and cases submitted by the Plaintiffs, as well as the responses to these pleadings – a process that required the judge to "devote her whole weekend" to reviewing the literally hundreds of pages of documents – Judge Kinnaird then heard five hours of argument on July 24, 2001 concerning the very matters Plaintiffs now attempt to place before this Court. At the end of that hearing, Judge Kinnaird rejected Plaintiffs' unfounded attacks on the settlement for a third time and entered the Consent Judgment embodying the terms of the settlement.

9. Now, having had their exhaustive arguments repeatedly rejected in the Chancery Court, Plaintiffs seek to present these same claims and arguments in a new division. An examination of the Complaint Plaintiffs filed in the Law Division makes clear that all of the allegations and underlying facts are nothing more than matters that have been previously alleged and argued, and are an integral part of the proceedings before Judge Kinnaird in Chancery. See, e.g., ¶ 1 of Plaintiffs' Complaint (stating that the directors who voted for the settlement had engaged in "a course of action antithetical to the best interests of the Foundation"), ¶ 6 (alleging a "tainted mediation process"), ¶ 43 (attacking the Attorney General's role in the mediation process), ¶ 70 (alleging that each director who voted in favor of the settlement breached their fiduciary duty to the Foundation), ¶ 80 (seeking "a declaration that the settlement is unlawful"), ¶83 (stating that the court "should enjoin" the directors' approval of the settlement as *ultra vires*). Given Judge Kinnaird's extensive knowledge of and dealings with these claims and the facts surrounding them, that the Court-ordered mediation took place in the case pending in front

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33, 71, 643 N.E.2d 734, 752 (1994) (quoting Gage v. Ewing, 107 Ill. 11, 15 (1883)).

16di-003512

of her, and that the Consent Judgment embodying the settlement was entered by her, judicial economy and fundamental fairness require transfer of this case to the Presiding Judge of the Chancery Court for subsequent transfer to Judge Kinnaird under General Order 1.3(d).

CONCLUSION

10. The fact that Plaintiffs are now attempting to present their thoroughly considered and repeatedly rejected claims in another division and to suggest that they are somehow presenting a Law Division case is further proof that their present suit is nothing more than a transparent attempt to shop for a division and a judge that they think might be more amenable to their claims. Having failed in their numerous and exhaustive attempts to present their claims to the judge most intimately involved with the Buntrock litigation and designated under the General Orders of the Circuit Court of Cook County as the proper forum in which to present their claims for equitable relief, Plaintiffs now attempt to breath new life into their tired and groundless arguments in the Law Division. Given the Chancery Division's designation as the proper forum in which to seek injunctive and declaratory relief, Judge Kinnaird's understanding of and experience with the facts and law surrounding Plaintiffs' claims, and the fact that the "claims" are an attack upon the settlement reached in the case in front of her and embodied in an Order entered by her, this case should be immediately transferred to the Chancery Division for reassignment to Judge Kinnaird .

WHEREFORE, defendant Terra Foundation for the Arts respectfully requests that this Court enter an order transferring this cause to the Presiding Judge of the Chancery Division for reassignment to Judge Dorothy Kirie Kinnaird.

Dated: August 17, 2001

Respectfully Submitted,

By: Stephen C. Carlson
One of the Attorneys for Defendant
The Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori LePar Roeser
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 S. Dearborn Street
Chicago, IL 60603
312/853-7000
Firm ID No. 38315

16di-003514

CERTIFICATE OF SERVICE

I, Stephen C. Carlson, one of the attorneys for Defendant Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached DEFENDANT TERRA FOUNDATION FOR THE ARTS' MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD to be served upon the following counsel by messenger deliver:

William R. Quinlan
James R. Carroll
John F. Kennedy
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Suite 2900
Chicago, IL 60602

Floyd Perkins
Bureau of Charitable Trusts & Solicitations
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Chicago, IL 60601

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Novoselsky Law Offices
120 North LaSalle Street
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Chicago, Illinois 60602

William P. Schuman
McDermott, Will & Emery
227 West Monroe
Chicago, Illinois 60606-5096

and by facsimile and Federal Express to:

K. Chris Todd
Neil M. Gorsuch
David E. Ross
John H. Longwell
Jide O. Nzelibe
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& Evans PLLC
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
fax: (202) 326-7999

Leonard Garment
Lawrence Levinson
Verner, Lipfert, Bernhard, McPherson & Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005
fax: (202) 371-6279

on this 17th day of August, 2001.

Stephen C. Carlson

16di-003516

RPC
TCC
FILE
DOCKETED
COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et. al,	)	
Plaintiffs,	)	**No. 01 L 009112**
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et. al,	)	

ATTORNEY GENERAL'S MOTION TO TRANSFER THIS MATTER TO THE CHANCERY DIVISION AND TO MOVE TO CONSOLIDATE THIS CASE WITH A RELATED PRIOR PENDING MATTER PENDING IN THE CHANCERY DIVISION

NOW COMES the Defendant JAMES E. RYAN, Attorney General of Illinois in his official capacity only on behalf of the PEOPLE OF THE STATE OF ILLINOIS by his undersigned Assistants and moves that this matter be transferred out of the Law Division and to the Chancery Division of this Circuit Court, and that this matter be transferred , assigned and consolidated with a prior pending related matter there in Chancery now pending before Judge Dorothy Kirie Kinnaird and in support states:

1) The Plaintiffs Paul Tucker, Alan Simpson and Judith Tucker on July 31, 2001 filed the original complaint in this matter and on August 13, 2001 filed an amended complaint. The differences between said complaints have no impact upon this motion.

2) The complaints themselves are lengthy meandering diatribes devoid of fact and replete with unsupported conclusions. While both complaints repeatedly state intimidation and unlawful acts occurred, the complaints are devoid of requisite specificity and simply lack facts sufficient to support said conclusions. The linchpin contention upon which all of Plaintiffs' claims are based is plaintiffs' repeated unsubstantiated assertion that Assistant Attorney

16di-003517

General Floyd Perkins acted "unlawfully" in another action which purportedly caused certain of the Defendants to enter into a court mediated settlement under purported intimidation (duress). Plaintiffs' multiple claims and counts relying thereon state that such makes a Chancery Court Consent Decree recently entered in another matter, which considered these very same claims by the Plaintiffs , an "unlawful" Consent Decree subject to being declared null and void.

3) In fact, the complaints show no facts to support claims of duress, coercion or unlawful acts. Plaintiffs complaint in sum absurdly claims that Assistant Attorney General Floyd Perkins acted unlawfully, by filing a lawsuit which plaintiff agreed to attempt to resolve in mediation; by engaging in an agreed court ordered mediation process by and with the express agreement of these Plaintiffs that mediation take place; by taking a bottom line legal position in mediation; and by investigating and preparing the case he was litigating.

4) The plaintiff by hyperbolic reasoning without legal basis declare these lawful acts by Perkins to be "unlawful", and then lifting themselves up upon their own bootstraps, imagine and assert others were intimidated into the settlement, despite the fact that those purportedly intimidated denied they had been coerced. A review of the complaints show no facts are plead showing "unlawful" conduct , intimidation, coercion or duress occurred. The multiple counts in the complaints are all premised upon these erroneous contentions and thus no cause of action is stated. However, both the original and amended complaint seek Declaratory and Injunctive Relief . General Order No. 1.2 of the General Orders of the Circuit Court of Cook County provides that matters seeking Injunctive Relief and Declaratory Relief are to be filed in the Chancery Division and not the Law Division. While it is clear the complaints fail to state causes of action, they are styled seeking equitable relief and declaratory relief and they are to be filed and heard in the Chancery Division under General Order 1.2.

5) Illinois Supreme Court Rule 21 establishes the authority for the Circuit Court's General Orders. General Order 1.2 is an established and well understood rule in the Circuit Court of Cook County that matters seeking Declaratory and Injunctive must be heard in Chancery. The process is well established, it provides an orderly method for the presiding judge to administer the assignment of cases, there is no basis for this matter not to be so assigned , and there is no basis to allow it to remain anywhere else. Moreover it is a rule of court. Instructive as to the force of law to be afforded the Court's rules is the Illinois Supreme Court's holding in **Bright v. Dicke** 166 Ill. 2d 204; 652 N.E.2d 275, 278 (1995) in which the Illinois Supreme court states: "The rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written."

6) The Plaintiffs complaints tenders erroneous conclusions while failing to plead facts, but it also fails to follow the rules of court requiring the attachment of documents upon which a claim is founded. The complaints fail to conform to Illinois Code of Civil Procedure rule 5/2-606 (735 ILCS 5/2-606), which requires a pleader to attach as an Exhibit each and every document a claim or defense is founded upon. Plaintiffs' complaints are founded upon many documents , but none are attached. The complaints raise issues as to corporate by-laws, corporate articles of incorporation, settlement agreements, consent decree, complaints in other lawsuits, draft complaints , and various other documents . Contrary to rule 5/2-606 plaintiffs failed to attach any of these documents as Exhibits to the complaints.

7) Had plaintiffs attached the exhibits required by Rule 5/2-606, they would show that the matter filed herein, is related to two earlier filed cases now pending in the Chancery Division before

the Honorable Judge Dorothy Kirie Kinnaird. Those cases being People v Judith Terra et. al. And Buntrock vs. Terra , et. al. Case No. 00CH 13859 pending in the Circuit Court of Cook County, Chancery Division before the Honorable Judge Dorothy Kirie Kinnaird. Indeed, these very Plaintiffs' former legal counsel in that matter have just filed in the past two weeks an attorney fee petition in the matter before Judge Kinnaird seeking over $460,000 from the Defendant Terra Foundation to pay the Plaintiffs' legal bills for services rendered to them in those matters and specifically related to their participation in the agreed mediation which they complained of herein .

8) Moreover, the Plaintiffs' filed the very same matters /claims found in these complaints in Objections in the case before Judge Kinnaird. Judge Kinnaird denied the Objections and entered the mediation settlement Consent Decree which plaintiffs herein call unlawful and seek to have declared null and void..

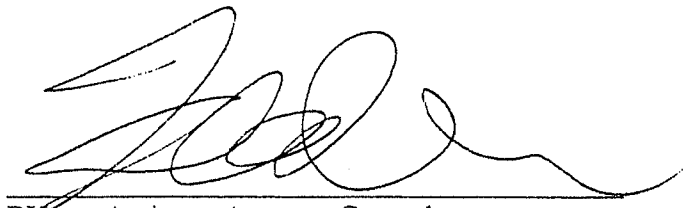
9) It is a well established principle of judicial economy that related matters be consolidated , and by tradition the later filed matter is consolidated before the judge hearing the earlier dated case. Plaintiffs failure to comply with Procedural Rule 5/2-606 and make the needed document exhibits to the complaints herein , along with Plaintiffs' unusual filing of the subject complaints in the Law Division when such is clearly a Chancery matter was no innocent slip or mistake. Rather it was a transparent attempt to avoid having this matter transferred to and consolidated with the above Chancery matter still pending before Judge Kinnaird. Matters Judge Kinnaird has been dealing with for almost a year, from which she knows the falsity of the plaintiffs' contentions and has already ruled that the plaintiffs' contentions herein are without merit. A copy of plaintiffs' Objection filed in the case being heard by Judge Kinnaird is attached as Exhibit A. A comparison of the Objections to the allegations of the complaints herein shows they are the same.

10) The matter now pending before Judge Kinnaird involves her review of the services and resulting attorney fees for many parties including the plaintiffs, and the legal services of Defendant Sidley & Austin to the Terra Foundation, as well as, services of counsel to several of the other Defendant directors, all of which will be paid by the Illinois charity the Defendant Terra Foundation herein. The review of those fees by Judge Kinnaird would of necessity require that the issue raised herein be factored into determining the results obtained by those services and the proper fee amount. Indeed, were the Plaintiffs' claims true, which they are not, they would likely impact all further determinations on the proper amount of fees to be paid by the Terra Foundation, which is a matter before Judge Kinnaird, and all of which concerns services and conduct in the litigation and mediation Plaintiffs reference in the instant action. In fact, under the Consent Decree which Plaintiffs failed to attach, the fees are being reviewed by the court and all will be paid by the Terra Foundation, said fees are reported to exceed $ 3 million in total. Therefore this matter as a matter of judicial economy and in keeping with well established judicial administrative principles ought to be heard by Judge Kinnaird combined with her review of those fees. A true copy of the Consent Decree is attached hereto as Exhibit B.

11) Millions of dollars of public charitable funds are being sought in legal fees relative to the litigation settled in the matter before Judge Kinnaird. Significant fees were incurred in an **agreed** mediation process, that these Plaintiffs requested and agreed to, and only after other board members did not fully agree with their position did they assert the Objections and claims as related in the complaints. The Plaintiffs and their claims are best and properly judged by the court that participated and ordered the mediation .

Wherefore the Attorney General moves and prays that the court enter an order transferring the subject matter to the Chancery Division and that said matter be order and consolidated with the actions now still pending before Judge Kinnaird as set forth above.

Respectfully submitted,
THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JAMES E. RYAN, Attorney General of Illinois



BY: Assistant Attorney General

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation.

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Exhibit B

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-003524

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

16di-003525

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kinie Kinnaird 9:35 A.M.

16di-003526

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

16di-003527

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date:_____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By:_____

Its_____

Print Name: _____

Date: _____

Attorney General of Illinois

By: Floyd Perkins
Assistant Attorney General (Title)
State of Illinois

Print Name: _____

Date: Floyd Perkins
7/6/01

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Pace Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-003530

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et. al,	)	
Plaintiffs,	)	**No. 01 L 009112**
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et. al,	)	

CERTIFICATE OF SERVICE

TO: SEE ATTACHED SERVICE LIST

I, the undersigned, certify that I am an attorney, and that I served a copy of the attached **Attorney General's Motion to Transfer this Matter to the Chancery Division and to Move to Consolidate this Case with a Related Prior Pending Matter Pending in the Chancery Division** upon the parties listed above by depositing a copy of same addressed to the foregoing in the U.S. Mail at 100 West Randolph Street, Chicago, Illinois, this 17TH day of August, 2001 before 5:00 p.m.

BY: _____
THERESE HARRIS
Assistant Attorney General

THERESE HARRIS #99000
Assistant Attorney General
Charitable Trusts and Solicitations Bureau
100 West Randolph Street, 11th Fl.
Chicago, Illinois 60601-3175
(312) 814-3942

NOTE A COPY OF THIS NOTICE & THE MOTION WERE ALSO FAXED TO ALL ON SERVICE LIST ON 8/17/01

SERVICE LIST

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William R. Quinlan
James R. Carroll
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Sidley Austin Brown & Wood
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Chicago, Illinois 60603

Mark M. Heatwole
Scott J. Szala
Winston & Strawn
35 West Wacker Drive
Chicago, Illinois 60601

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

FILED-2
2001 AUG 23 PM 1:25
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
LAW DIVISION
CLERK
DOROTHY BROWN

EMERGENCY MOTION TO STRIKE APPEARANCE AND TO STRIKE UNAUTHORIZED PLEADING

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson, duly elected members of the Board of the Terra Foundation for the Arts, move this Honorable Court for the entry of an order 1) striking the attempted appearance of the defendant law firm Sidley Austin Brown & Wood on behalf of the Terra Foundation and 2) striking an unauthorized pleading allegedly presented on behalf of the Terra Foundation by the defendant law firm Sidley Austin Brown & Wood.

* * *

In support of the foregoing motion, plaintiffs assert as follows:

1. On August 13, 2001 incident to proceedings before the Honorable Sheldon Gardner, plaintiffs presented their emergency motion for the entry of a temporary restraining order. (*See* Exhibit A.)

2. Incident to the hearing before Judge Gardner on August 13, plaintiffs filed their First Amended Complaint at Law. (*See* Exhibit B.)[1]

3. On August 17 the defendant law firm Sidley Austin Brown & Wood presented what purports to be a motion of the Terra Foundation to transfer. (See attached as Exhibit D.)

---

[1]*See* transcript of proceedings (attached as Exhibit C) at page 5, lines 10-16.

4. On August 20 the defendant Sidley Austin Brown & Wood filed and served a purported appearance of that defendant law firm on behalf of the Terra Foundation for the Arts. (*See* Exhibit E.)

5. The defendant Sidley Austin Brown & Wood is not authorized to represent the Terra Foundation for the Arts and that matter is addressed in the attached correspondence. (*See* Group Exhibit F.)

6. Notwithstanding their status as a defendant; notwithstanding the fact that neither the Terra Foundation nor any other person, firm or entity can lawfully retain the defendant Sidley Austin Brown & Wood to represent the Terra Foundation; and notwithstanding that law firm's manifestly conflicted position; it has attempted to usurp the role of counsel for the Foundation.

Summary of Argument

Based upon the foregoing and as reflected by the attached exhibits, Sidley Austin Brown & Wood's filing should be stricken and their attempted appearance on behalf of the Foundation should be rejected as both unauthorized and in derogation of applicable Illinois Supreme Court Rules of Professional Conduct. Beyond that, Sidley's suggestion that it has been properly retained by Marshall Field (who has no authority to do so) is a direct repudiation of counsel's representation to Judge Gardner at the August 13, 2001 Emergency Hearing. (*See* Exhibit C.)

Sidley's attempt to represent the Foundation violates the understanding reached with Judge Gardner on August 13, 2001 and is precluded by their conflicted role, including *inter alia*, their rule as a defendant in this litigation.

Incident to the August 13 filing of the amended complaint which names Sidley as a defendant and outlines their conflicted posture (Exhibit B, see paragraphs 87-93, pages 27-30), plaintiffs pursued their emergency motion for temporary restraining order (Exhibit A).

The catalyst for the emergency hearing on the temporary restraining order was the notice of a proposed board meeting on August 14 as reflected by the proposed agenda for that meeting (Exhibit G). It was contemplated that the Board would ratify certain earlier actions taken at a meeting on August 1, 2001 (Exhibit G, item IV.A) and would also consider "Approval of Sidley, Austin, Brown & Wood as counsel for the Foundation in the Tucker Litigation and authorization of Mr. Field to execute engagement letter." (Exhibit G, item IV.D)

The specific relief sought by our motion for temporary restraining order included the following prohibition:

> From retaining, consulting with, or otherwise working with Defendants Sidley & Austin and Winston & Strawn as counsel for the Foundation or any other party in the present case, and from otherwise advancing or paying any further funds of the Terra Foundation for the Arts to said law firms; (Exhibit A, paragraph 6, pages 16 and 17.)

At the hearing before Judge Gardner, defendants' counsel, including representatives of Sidley & Austin, told the Court that the proposed August 14 meeting would be cancelled and that no action would be taken by the Foundation's board without proper and lawful notice. Plaintiffs reserved their right to pursue their temporary restraining order. It was because of the specific representations to Judge Gardner that plaintiffs did not press the motion for temporary restraining order on August 13 and the matter was deemed moot.

We respectfully submit that the undisputed facts demonstrate that Sidley's attempted usurpation of the role as counsel for the Terra Foundation is a manifest violation of the applicable Rules of Professional Conduct. More critically, the fact that Mr. Marshall Field and Sidley have now circumvented the representations made to Judge Gardner on August 13 is nothing less than contumacious conduct warranting the requested relief, i.e., striking their appearance and striking their unauthorized pleading allegedly filed on behalf of the Foundation.

August 23, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al.,
Plaintiffs

v.

Dean Buntrock et al.
Defendants

NO. 01 L 009112

ORDER

THIS MATTER COMING BEFORE THE COURT ON PLAINTIFF'S EMERGENCY MOTION TO STRIKE APPEARANCE AND TO STRIKE UNAUTHORIZED PLEADING, [redacted], THE COURT BEING FULLY ADVISED IN ITS PREMISES, IT IS HEREBY ORDERED THAT:

1. DEFENDANTS SHALL FILE ANY RESPONSE TO THE MOTION BY AUGUST 31, 2001,
2. PLAINTIFFS SHALL FILE ANY REPLY TO THE DEFENDANTS RESPONSE BY SEPTEMBER 7, 2001,
3. THIS MATTER IS SET FOR HEARING AT 2:00 PM ON SEPTEMBER 13, 2001 WITHOUT FURTHER NOTICE

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CLERK OF CIRCUIT COURT
DOROTHY BROWN
AUG 24 2001
JUDGE TIMOTHY C. EVANS # 1592
DEPUTY CLERK

ENTER: _____ **Judge** _____ **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-11/30/00(13480655)

16di-003539

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STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; et al.,
Plaintiffs

-vs-

No. 01 L 009112

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; et al.,
Defendants.

Record of proceedings before the Honorable TIMOTHY C. EVANS, Judge of the Circuit Court of Cook County, Illinois, commencing at 2:30 o'clock p.m. on the 24th day of August, A.D. 2001.

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on behalf of the Defendants Dean Buntrock, Ronald Gidwitz, Margaret Daley, and Arthur Hartman;

McDERMOTT, WILL & EMERY by
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on behalf of the Defendants James E. Ryan and Floyd D. Perkins;

WINSTON & STRAWN by
MR. SCOTT SZALA
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on behalf of the Defendant Winston & Strawn;

SIDLEY, AUSTIN, BROWN & WOOD by
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on behalf of the Defendants Terra Foundation and Sidley & Austin.

THE COURT: Tucker versus Terra Foundation.

MR. CUMMINS: Good afternoon, Your Honor.

THE COURT: Good afternoon. Let me ask all of you to identify yourselves for the record. Let me start to my left with Mr. Novoselsky and we'll swing right across.

MR. NOVOSELSKY: Good afternoon, Your Honor. David Novoselsky on behalf of the plaintiffs.

MR. CUMMINS: Robert Cummins on behalf of the plaintiffs, Your Honor.

MR. GRAY: Jeffery Gray, Assistant Attorney General, on behalf of Floyd Perkins and James Ryan.

MR. CONLON: Good afternoon, Your Honor. Bill Conlon on behalf of the Terra Foundation.

MR. SZALA: Good afternoon, Your Honor. Scott Szala on behalf of the proposed named defendant Winston & Strawn.

THE COURT: Okay.

MR. SCHUMAN: Good afternoon, Your Honor. William Schuman on behalf of two of the individual defendants, Dr. Theodore Stebbins and Dr. Stephanie Pace Marshall.

MR. CARROLL: Good afternoon, Your Honor. James Carroll and Cheryl Niro on behalf of four of the

individual defendants, Buntrock, Gidwitz, Hartman, and Daley.

MS. NIRO: Good afternoon, Your Honor.

THE COURT: Good afternoon. Ms. Niro, it's good to see you.

Well, Counsels, I have several matters before us. Let's start first I have a matter which has been entitled "Emergency Motion to Strike Appearance and Strike Unauthorized Pleading."

Is there a response to that?

MR. CONLON: There is not, Your Honor. We just got that late yesterday evening. So I'm prepared to respond orally, although if Your Honor wants to take the matter under advisement, I would ask for some time to submit a written response.

THE COURT: Let's address first what the emergency is. Brother lawyer indicated that he has not filed a written response and I take it from his comments he'd like to have an opportunity to file a written response.

Is there any objection to counsel having an opportunity to file a written response to the emergency motion?

MR. CUMMINS: No, Judge, as long as it's done on

some timely basis.

I would find it -- I do find it somewhat anomalous that Mr. Conlon would suggest that he's here on behalf of the Terra Foundation, which is precisely the issue that is presented. The representations that were made to Judge Gardner, as reflected in our papers, and Mr. Novoselsky was in attendance -- I was out of town at the time -- the representations made to Judge Sheldon Gardner presented to our Emergency Motion for a Temporary Restraining Order was to the effect that the Board would take no action, which we sought to enjoin, including, but not limited to, the authorization for Mr. Field, who we respectfully submit is not an appropriately designated Board member, to proceed with the hiring of Sidley & Austin, a defendant in this litigation, to represent the Terra Foundation. So those representations were made.

THE COURT: I need to interrupt you just one second.

MR. CUMMINS: Sure.

THE COURT: I'm just trying to make it possible for you to make your presentation all at one time rather than twice.

MR. CUMMINS: All right, Judge. You know, it was probably unnecessary to make that pitch.

THE COURT: It was a nice try.

MR. CONLON: Your Honor, could I respond to that pitch, though, for just a moment?

THE COURT: Before you do, let me just ask you to tell me how much time would you need to respond in writing to the motion itself?

MR. CONLON: Your Honor, we'd like seven days.

Your Honor, let me add to that. I'm happy to have some argument before Your Honor because I think Your Honor could simply decide that this is premature because I think it very much is. I would like to respond as to what the representations were that were made before Judge Gardner and, indeed, invite Your Honor to read the transcript that Mr. Cummins and Mr. Novoselsky have attached to their pleadings. I'm happy to visit with the Court this afternoon. I think you could dispose of this. But if Your Honor has any --

THE COURT: It's nice of you to offer, but I've had a chance to review some of these pleadings and I must say that my colleagues who have had a chance to review some of this have not found that it was all

that crystal clear.

MR. CONLON: That's fine.

THE COURT: So I'll give you the seven days that you are asking for and I'll give opposing counsel seven days to reply if they choose to.

I note that apparently the 13th has already been a date set for another aspect of this case.

MR. CONLON: It's the transfer motion, Your Honor.

THE COURT: The transfer motion. We could set all of this on the same date, if you'd like.

MR. CUMMINS: That would be great, Judge.

MR. NOVOSELSKY: Judge, I'd only ask --

THE COURT: Is it at 2:00 that day or is it at 10:00?

MR. CONLON: I don't recall, Your Honor.

MR. CARROLL: I believe it's at 2:00.

MS. NIRO: I thought so, too.

THE COURT: I'd rather set it for the afternoon when we have more time to deal with it.

MR. SCHUMAN: It is 2:00.

MR. CARROLL: 2:00, Your Honor. That's what I have down.

MR. NOVOSELSKY: Judge, so we're clear, and while

I'm the last person to object to collegiality, if you look at the transcript, and I was present. Counsel wasn't.

MR. CONLON: That's correct.

MR. NOVOSELSKY: We had a TRO. Mr. Quinlan suggested, with the agreement of other counsel, that it was moot because the meeting would not proceed and no action would be taken. I don't want to find myself agreeing on behalf of my clients to give them the opportunity to file something in writing and then come back here some days later to find out that still more has been done ostensibly by the Foundation on behalf of the Foundation while these matters are pending.

Nor do I want our acquiescence to what I consider a courtesy to other counsel to be taken as a green light to continue to do what we believe happened here. Which is after we were specifically told that this meeting would not go forward, and that we were not waiving a position, we now find ourself in a position where Mr. Field has taken it upon himself to act as if he is a Board member and that he is empowered apparently with or without a meeting of the Board to hire this firm which was an agenda item

which we tried to block before it happened.

Now we're in a position of where I guess one of the arguments is going to be the TRO is moot because it's already happened.

So, again, I don't want to be rude, but I don't want to find myself in a position of saying, well, they agreed to give us seven days to respond and in the interim, something takes place.

THE COURT: Well, let me just say to all of you, I have had an opportunity to take a look at Judge Gardner's transfer order and I took a look at a portion of what he had to say which was attached to one of these documents. I was just looking.

MR. CUMMINS: Yes, sir.

MR. CONLON: I think it's Exhibit C, Your Honor, if I recall correctly. I think that's it.

MR. CUMMINS: It is, indeed, Exhibit C.

THE COURT: And so I want to assure you I've had a chance to read what was attached under Exhibit C. So there's no reason to repeat all that. I've seen it. But I do think it's best to argue this once.

MR. CUMMINS: Yes, sir.

THE COURT: Rather than having you do it many times.

MR. CARROLL: Just quickly in response to Mr. Novoselsky, Your Honor. At the time we were in front of Judge Gardner, they were represented by -- Sidley & Austin was representing the Foundation at that point in time and there was no objection in court at that time to Sidley and Austin's representation.

MR. CUMMINS: Not in this litigation, Judge.

MR. CARROLL: So it's somewhat vague, I guess, at this point to when they should have made the objection. They didn't at that time.

THE COURT: Well, it must be altogether obvious that there are different points of view here.

MR. CARROLL: Exactly.

MR. NOVOSELSKY: As I said, Your Honor, that's what happens when collegiality rears its head. We did object. Judge Gardner, if you look -- if you look, went off the record. So I guess in the future we won't go off the record anymore.

THE COURT: I have no doubt that all of you will govern yourselves as your reputations have been long established, above board, and you will carry out your responsibilities as officers of this Court. I don't expect anybody to take advantage of the intervening

time. This time is set aside just for pleadings so that everybody knows exactly what everybody else's position is. That's all.

MR. CUMMINS: We'll file our reply by the 7th, Judge, and it's going to be set then -- all of this will be set for hearing at 2:00 on the 13th?

THE COURT: The 13th at 2:00.

MR. CONLON: Your Honor, I will respond in writing, if I may, to comments made by Mr. Novoselsky and Mr. Cummins at that time.

THE COURT: You may.

MR. CONLON: Thank you.

THE COURT: Let me ask you to do this, one of you. Can I call on one of you to give me a copy of everything that's filed by --

MR. CUMMINS: Yes, sir. I'll do that.

THE COURT: -- whatever the last day was. Was it the 7th?

MR. CUMMINS: Yes, sir.

THE COURT: Okay. The 7th is a Friday. If I could get it by that day, then I could have a chance to read everything before we convene.

MR. CUMMINS: We'll make sure you get it, Judge.

MR. CONLON: You're talking about the motions

that out of this proceeding today?

THE COURT: Yes.

MR. CONLON: Yes. We're happy to do that, Your Honor.

THE COURT: Let me wish everybody a wonderful weekend. I look forward to hearing more about this great case.

(Whereupon, the further proceedings in this cause were continued to 2:00 o'clock p.m. on the 13th day of September, A.D. 2001.)

* * * * *

STATE OF ILLINOIS)
) ss:
COUNTY OF DuPAGE)

LAURA L. KOOY, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County;

That she reported in shorthand and thereafter transcribed the foregoing proceedings;

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause before the Honorable TIMOTHY C. EVANS, Judge of the Circuit Court of Cook County.

Witness my official signature and seal as Notary Public in and for DuPage County, Illinois, on this 27th day of August, A.D. 2001.

Laura L. Kooy

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AUG 28 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	Judge Timothy C. Evans
Defendants.	)	

DEFENDANT TERRA FOUNDATION FOR THE ARTS' REPLY IN SUPPORT OF ITS MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD

Defendant Terra Foundation for the Arts (the "Foundation"), an Illinois Not-For-Profit Corporation, by its attorneys, Sidley Austin Brown & Wood, respectfully submits its reply in further support of its motion to transfer this matter to the Circuit Court of Cook County, Illinois, Chancery Division, pursuant to General Orders 1.2 and 1.3 of the Circuit Court of Cook County.

INTRODUCTION

Plaintiffs' "objection" to transfer of this case fundamentally misstates the law and facts of this case. While supposedly asking this Court to examine the substance, and not simply the appearance of the matter, it is the Plaintiffs who attempt to divert this Court's attention from the true nature of their claim and the legal principles and factual realities governing this action. Despite their assertions to the contrary, Plaintiffs' current action in Law Division represents nothing more than a transparent repackaging of precisely the same claims and allegations they presented to (and which were repeatedly rejected by) Judge Kinnaird in the Chancery Division. In addition, while the Plaintiffs point to their appeal of the Consent Judgment, the terms of that document, and the authority of the Law and Chancery courts as reasons why this case should not be transferred, none of these arguments can overcome the express terms of General Orders 1.2 and 1.3 of the Circuit Court of Cook County and the intimate familiarity that Judge Kinnaird has with the legal and factual claims Plaintiffs seek to present in this action. For all of these reasons, and the further reasons set forth below, this Court should immediately transfer this action to the Presiding Judge of Chancery Division for reassignment to Judge Kinnaird for consolidation with Chancery Case No. 00 CH 13859 over which she has presided for almost a year.

I. Transfer is Required by the Remedies Plaintiffs Seek.

Plaintiffs have not and cannot present this Court with any reason to ignore the fact that their suit seeks remedies most properly considered by the Chancery Division, and their argument concerning the authority of Law and Chancery Division courts in no way demonstrates that this case should not be transferred. While pointing to some general language concerning judicial authority in the Circuit Courts, Plaintiffs' lawsuit and Plaintiffs' subsequent arguments against transfer ignore the fact that the General Orders of the Circuit Court of Cook County

expressly establish a distinction between the types of actions generally heard in the different divisions of the Circuit Court of Cook County. In this case, the declaratory judgment and injunctive remedies that Plaintiffs seek are the types of claims properly presented in the Chancery Court, thereby necessitating a transfer of this action under the requirements of General Order 1.3(c). See General Orders 1.2(2.1)(b)(1) and 1.3(c).

Nothing in Plaintiffs' opposition brief suggests a contrary result. Indeed, the weakness of Plaintiffs' argument is revealed by what they resort to citing as legal authority – potential future rule changes and a civil cover sheet. (Plaintffs' Brief, p. 10-11). Obviously, these are a far cry from binding legal precedent. Moreover, despite Plaintiffs' suggestions to the contrary, Chancery Courts possess jurisdiction to hear law claims and hold jury trials. See Martin v. Heinold Commodities, Inc., 163 Ill. 2d 33, 71, 643 N.E.2d 734, 752 (1994) ("Conferring jurisdiction in chancery is not excluding trial by jury.") (citation omitted). However, the fact remains that no jury trial or new court ruling are needed here, given that Plaintiffs' claims have already been ruled on by Judge Kinnaird in the Chancery Division. Plaintiffs' present action represents nothing more than an attempt to get another bite at the apple before a different trier of fact.

In recognizing the true nature of Plaintiffs' claims and the requirements of these General Orders, Judge Gardner noted that "this case [should] go back [to Judge Kinnaird]. And you can quote me." See 8/13/01 Tr. of Proceedings, p.13, attached hereto as Exhibit A. In light of these General Orders and Judge Gardner's appropriate assessment of this action, this cause must be transferred to the Chancery Division.

II. Transfer is Required by the Principles of Judicial Economy and Efficient Disposition of Litigation.

Plaintiffs' objection to transfer also intentionally mischaracterizes the proceedings before Judge Kinnaird in an attempt to ignore the extensive involvement that Judge Kinnaird has had with the Buntrock v. Terra litigation (Case No. 00 CH 13859 (Circuit Court, Cook County, Illinois)) that gave rise to their current suit and her exhaustive consideration of the exact claims Plaintiffs now seek to present in Law Division.

A. Judge Kinnaird Considered and Resolved the Same Arguments Plaintiffs are Trying to Recycle in this Lawsuit.

It is Plaintiffs who are being disingenuous when they state that Judge Kinnaird did not consider or resolve any of the issues they seek to present in this case. While Plaintiffs correctly note that they are not parties to the Consent Judgment, this fact in no way minimizes Judge Kinnaird's involvement with and exhaustive consideration of the precise claims which Plaintiffs allege in their Complaint. Plaintiffs here were defendants in the proceedings before Judge Kinnaird, requested that that matter be mediated, and actively participated in the mediation which culminated in the entry of the Consent Judgment. Plaintiffs now seek to challenge the Consent Judgment entered by Judge Kinnaird merely because they do not happen to like the fact that they were outvoted by a majority of the Board of Directors in determining whether the Terra Foundation should agree to the entry of the Consent Judgment.

In the month leading up to entry of the Consent Judgment, Plaintiffs repeatedly tried (and failed) to undermine an agreed settlement reached by a majority of the Foundation's Board of Directors. On June 29, July 2 and July 26, Plaintiffs presented their arguments to Judge Kinnaird for why this settlement should not be approved. At each hearing, Judge Kinnaird rejected Plaintiffs' baseless and unfounded attacks upon the settlement. Judge Kinnaird

considered hundreds of pages of pleadings and exhibits filed by Plaintiffs and devoted approximately eight hours of court time over three separate court hearings to Plaintiffs' objections. Judge Kinnaird was not a "mere scrivener" mechanically and unthinkingly "recording the private agreement of the parties," as Plaintiffs suggest. (Plaintiffs' Brief at p. 5). To the contrary, Judge Kinnaird exhaustively examined and ruled on the very challenges to the Consent Judgment which Plaintiffs now recycle in their Law Division Complaint.

Indeed, for Plaintiffs to contend that Judge Kinnaird "resolved nothing" and that she made no findings with respect to their objections to the Consent Judgment (Plaintiffs' Brief at p. 9, fn. 18) is disingenuous to the extreme. As Plaintiffs are well aware, Judge Kinnaird indicated that she spent an entire weekend reading the Plaintiffs' pleadings, attachments, and cases. (See 6/24/01 Tr. of Proceedings, p. 123, attached hereto as Exhibit B). After a five hour hearing, Judge Kinnaird indicated "I have found nothing in these papers that have been cited by the objectors that should cause me not to approve this settlement. I really don't see it as a close call . . ." (6/24/01 Tr. of Proceedings, p. 124). With respect to Plaintiffs' claim that two Board members had been intimidated into agreeing to the settlement, Judge Kinnaird ruled with regard to Dr. Marshall that "this was not a lady who was being intimidated by anybody," and further ruled with regard to Dr. Stebbins that "I also did not feel that there was intimidation of Dr. Stebbins in this case. And I just simply don't see it." (6/24/01 Tr. of Proceedings, p. 126-27). With respect to the Plaintiffs' claims that the settlement somehow violated or interfered with the Foundation's mission, Judge Kinnaird stated "I do not see this settlement, as the objectors have said as being antithetical . . . to the Foundation's purposes. . . This Foundation is going to be able to pretty much operate the way that it has. It will be able to conduct its mission of providing education and art throughout the world . . ." (6/24/01 Tr. of Proceedings, p. 127). In short,

16di-003561

Judge Kinnaird made detailed and explicit findings, which Plaintiffs are now trying to get overturned in their Law Division lawsuit. It is not the case, as Plaintiffs suggest, that Judge Kinnaird failed to resolve these issues – rather, Judge Kinnaird resolved them against the Plaintiffs.

B. The fact that Plaintiffs have Filed an Appeal does not give them the Right to Further Multiply Proceedings by Filing a "Sideways Appeal" in Law Division.

Plaintiffs' claim that their appeal of Judge Kinnaird's entry of the Consent Judgment now prevents this case from being transferred back to the judge who is most intimately familiar with both the facts and law underlying their claim is similarly incorrect. The mere fact that an appeal has been filed does not give Plaintiffs carte blanche to bring duplicative proceedings in Law Division. As Plaintiffs themselves admit in their objection to transfer, "the filing of a notice of appeal . . . does not deprive the trial court of all jurisdiction over a case. The notice of appeal only restrains the trial court from changing or modifying the injunction order, or from taking any other action which would interfere with appellate review of that order." (Plaintiffs' Brief at p. 4, fn. 6, quoting In re Parentage of Melton, 321 Ill. App. 3d 823, 827 (1st Dist. 2001)). In this case, Judge Kinnaird has specifically retained jurisdiction to address matters related to fees and to enforce the Consent Judgment. See Consent Judgement at p. 4 ("The Court retains jurisdiction over the action and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the consideration and effectuation of this Consent Judgment And Order.")

Even more tellingly, Plaintiffs admit that the proper place to have their objections to the entry of the Consent Judgment heard is before the Appellate Court. As Plaintiffs themselves state, "Until such time as that appeal has been disposed of, the case 'pends' before

that Court and that Court only." (Plaintiffs' Brief at p. 4). Accordingly, Plaintiffs cannot now re-litigate the same issues in front of another trial court judge at the Circuit Court level. Plaintiffs are in essence trying to take two appeals at once: one appeal to the Appellate Court and one "sideways" appeal to a Law Division judge. Indeed, at the same time they are appealing Judge Kinnaird's ruling to the Illinois Appellate Court seeking to vacate the entry of the Consent Judgment, Plaintiffs are also attempting to prosecute a Law Division suit seeking precisely the same remedy – i.e. vacating the entry of the Consent Judgment. Such gamesmanship should not be tolerated.[1]

C. Judge Kinnaird Did Not Authorize, and Defendants Did Not Acquiesce In, Plaintiffs' Attempt to Recycle the Same Arguments Rejected by Judge Kinnaird.

In a last-gasp attempt to avoid having this case transferred back to Judge Kinnaird, Plaintiffs attempt to argue that Judge Kinnaird somehow authorized their forum-shopping in Law Division, and that the Defendants somehow "acquiesced" to this. Nothing could be further from the truth. Judge Kinnaird denied Plaintiffs the right to file a counterclaim, and ruled that that denial was without prejudice to their trying to state, if they could, any valid causes of action in a separate lawsuit.[2] However, at the same time Judge Kinnaird stated that the proposed counterclaim attacking the Consent Judgment had "a lot of defects to it" and explicitly "question[ed] whether valid causes of action . . . are . . . alleged in these counterclaim." (6/24/01 Tr. of Proceedings, p. 129). At no time did Judge Kinnaird ever endorse the notion of Plaintiffs filing the exact same rejected attacks on the Consent Judgment as a new lawsuit in front of a different judge, and at no time did the Defendants ever "acquiesce" in this. In short, the

[1] Given this strategy, it is ironic that the Plaintiffs would attempt to claim that it is the Defendants who seek to "have their cake and eat it too."

[2] At the time Judge Kinnaird made her ruling, she was aware that the Plaintiffs were trying to assert a Section 1983 claim against the Attorney General in federal court.

multiplying of proceedings and the "sideways appeal" which Plaintiffs are now pursuing is gamesmanship of their own devising, without any judicial approval or acquiescence by other parties.[3]

CONCLUSION

Plaintiffs' attempt to portray their Law Division case as an "independent" action that cannot be transferred back to the Chancery Division for reassignment to Judge Kinnaird fails legally, factually and logically. Plaintiffs' Law Division suit is nothing more than a transparent attempt to seek out another judge in another division who they feel may be more sympathetic to the claims that were previously rejected by Judge Kinnaird. Despite their arguments to the contrary, Plaintiffs cannot avoid the express requirements of General Orders 1.2 and 1.3. The Chancery Division is the appropriate forum in which to seek the injunctive and declaratory remedies Plaintiffs desire, Judge Kinnaird has an intimate familiarity with the facts and law governing Plaintiffs' claims that will lead to the most efficient disposition of their claims, and all of these claims involve the validity of the Consent Judgment Judge Kinnaird herself entered. All of these factors mandate immediate transfer of this action to the Chancery Division for reassignment to Judge Kinnaird for consolidation with Case No. 00 CH 13859.

Dated: August 27, 2001

Respectfully Submitted,

By: _____
One of the Attorneys for Defendant
The Terra Foundation for the Arts

[3] Moreover, the notion of "acquiescence" is a red herring. If the Plaintiffs disagreed with Judge Kinnaird's ruling, their only option was to appeal the matter to the Illinois Appellate Court. Plaintiffs cannot ignore Illinois rules of appellate procedure even if another party acquiesced in such an action (which, in this case, the Defendants did not do).

16di-003564

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16di-003565

A

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

PROCEEDINGS AUGUST 13, 2001

McCORKLE COURT REPORTERS, INC.
CHICAGO, ILLINOIS - (312) 263-0052 16di-003567

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

16di-003568

APPEARANCES:

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-and-

DAVID A. NOVOSELSKY & ASSOCIATES, by
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On behalf of the Plaintiffs,

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MR. JAMES R. CARROLL
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On behalf of the Defendants
Dean Buntrock, Ronald Gidwitz,
Margaret Daley and
Ambassador Hartman,

16di-003569

APPEARANCES CONTINUED:

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(312)853-7717

-and-

WINSTON & STRAWN, by
MR. SCOTT SZOLA and
MR. MARK M. HEATWOLE
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312)558-5137

On behalf of the Defendant
The Terra Foundation For The Arts,

OFFICE OF THE ATTORNEY GENERAL, by
MR. FLOYD D. PERKINS
100 West Randolph Street
Chicago, Illinois 60601
(312)814-2533

On behalf of the Defendants
James E. Ryan and Floyd D. Perkins.

MR. CARLSON: Your Honor, I am Steve Carlson from Sidley & Austin. I got these papers about two minutes before --

THE COURT: Let me ask you, can we stay off the record just a minute?

MR. CARLSON: Sure, absolutely.

(Discussion off the record.)

MR. QUINLAN: William R. Quinlan and James Carroll on behalf of certain defendants.

MR. CARLSON: Steve Carlson from Sidley, Austin I believe on behalf of The Terra Foundation.

THE COURT: And pro se, aren't you a party now?

MR. CARLSON: Maybe.

MR. NOVOSELSKY: You granted us leave to file.

THE COURT: Okay. Go ahead.

MR. SZOLA: Your Honor, Scott Szola of Winston & Strawn technically hasn't been served either yet, so we will be in the same position as Sidley & Austin.

MR. PERKINS: Floyd Perkins. I am a defendant pro se and Assistant Attorney General on behalf of the Attorney General of Illinois.

MR. HEATWOLE: Mark Heatwole, Winston & Strawn.

MR. NOVOSELSKY: I apologize, Judge.

THE COURT: He assumes everybody knows him, but give them your name.

MR. NOVOSELSKY: David Novoselsky and Tom Cronin for plaintiffs.

These are our motions. And I guess the first I would only ask Mr. Quinlan, certain defendants which one, Bill, so there is no question?

MR. QUINLAN: Well, if you want me to go through, I am representing Mr. Hartman, Mrs. Daley, Mr. Buntrock, Mr. Gidwitz. And we are not at the moment representing Miss Marshall or Mr. Stebbins.

MR. NOVOSELSKY: As a housekeeping matter, your Honor, we have --

THE COURT: Let me before we start indicate that this case having been set for 2:00 o'clock, as the parties came in, we have had informal discussions which precluded in opening we had as a remaining defendants' attorney came in since the shortage of notice, nobody was essentially late because everything was pretty much of emergency. And that's what we have talked.

A moment ago the attorneys, half a dozen

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Attorney General, Floyd Perkins. Judge, we object to venue here so anything -- if there is any kind of prejudice --

THE COURT: What are you worried about? I am sending it out sua spontae.

MR. PERKINS: I understand, Judge. I am just -- I don't want any rulings by the court --

THE COURT: Where do you want the venue, in Springfield?

MR. PERKINS: I just don't want any rulings by the court to be used as some prejudice.

THE COURT: Well, I thought everybody heard me since I raised it sua spontae. And I only did you for an afterthought; didn't I?

MR. CARLSON: You sure did, your Honor.

THE COURT: It doesn't make sense to be here. So if you want to argue, I can end up disagreeing. But I totally agree with you. Okay?

MR. PERKINS: Judge --

THE COURT: I think the whole principle of judicial economy and good sense is you put it all in one place. And I have always done that.

MR. NOVOSELSKY: Which, your Honor, we may find ourselves going back to square one in front of

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

THE COURT: I am not going to call it which I could do. I could do it. I just don't. I have the right to call it, and it is not ex parte. But I wouldn't do it.

If he has a problem with having this go, that's his problem. I don't see any problem in having it go there. And you would be a delight in my life. I would grow older with you all. But it would be the delight of my life. Sometime when all of you can get a new case from the beginning, it would be my pleasure to have you all here.

(Whereupon, further proceedings in said cause were adjourned sine die.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DuPAGE)

Patricia L. Wangler, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

Patricia L Wangler

Certified Shorthand Reporter

SUBSCRIBED AND SWORN TO
before me this 17th day
of August 2001.

OFFICIAL SEAL
DOROTHY CALLAHAN
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 29,2004

Dorothy Callahan

Notary Public

B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

DEAN BUNTROCK,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	00 CH 13859
	)	
TERRA MUSEUM,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DOROTHY KINNAIRD, Judge of said court, on the 24th day of July, 2001.

APPEARANCES: MESSRS: JAMES CARROLL, JOHN F. KENNEDY and WILLIAM R. QUINLAN, on behalf of Plaintiffs;

MESSRS: FLOYD PERKINS and THOMAS IOPPOLO, Assistant Attorney Generals.

MISS SUSAN STONE, on behalf of the Terra Foundation;

MESSRA: ROBERT CUMMINS and CHRIS TODD, on behalf of Defendants.

Josephine Raines
Official Court Reporter
Circuit Court of Cook County
County Department-Chancery Division

THE CLERK: Buntrock versus Terra, 00 CH 13859.

THE COURT: The attorneys planning to address the Court, please step up. Identify yourselves for the court reporter. I'd like to start first with plaintiff's counsel.

MR. CARROLL: Good afternoon, your Honor. James Carroll on behalf of Plaintiffs.

MR. KENNEDY: Good afternoon. John F. Kennedy on behalf of Plaintiffs.

MR. QUINLAN: Good afternoon, your Honor. William R. Quinlan on behalf of Plaintiffs.

MR. IOPPOLO: On behalf of the State of Illinois Thomas Ioppolo from the Attorney General's office. And Mr. Perkins will be here momentarily.

MISS STONE: Good afternoon, your Honor. Susan Stone, S-T-O-N-E, from Sidley Austin Brown & Wood on behalf of the Terra Foundation for the Arts.

MR. CUMMINS: Robert Cummins and Chris Todd for the defendants, your Honor.

THE COURT: I'm certain this is going to be a long afternoon. I don't want everybody to be uncomfortable. So you are welcome to sit at counsel

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table.

I have pretty much an order of proceeding I'd like to go through today. I want to go through, first of all, the pleadings that I have received to make sure that I have everything. And I am also going to want to go through the proposed consent decree. I have a lot of questions. I was just presented with the decree just a few minutes before you were here the last time. I didn't have the opportunity to analyze it, but I would have liked to before July 2nd. So I have many of my own questions.

And then we have to get to the issues that are up today which are issues that are presented by the objectors.

If you can find yourselves comfortable places at counsel table. If you want to take a few moments to unshuffle and set up the way you want. It's going to be really long and you're going to be really tired very soon.

MR. CUMMINS: Your Honor, I do have one preliminary matter once we get through what you wanted to go through in terms of housekeeping, I'd like to address that. It may shorten the proceedings.

THE COURT: What kind of matter?

MR. CUMMINS: Well your Honor, we believe in the interest of justice and consistent with the record that is now before the Court, that particularly given our pending motion for discovery, that this hearing ought to be adjourned until we get that discovery accomplished.

THE COURT: I understand what you're about to say, but you're miles ahead of me. That's down here at the bottom of the pile. And I've got to do it in order or I'm going to lose track of it.

MR. CUMMINS: If I may though I'd be happy to explain in short terms how we might get there.

MISS STONE: Another housekeeping matter, your Honor. When you're done making it clear for the record what you've received, and after you' ve asked whatever questions you want to ask about the proposed consent judgment, I do believe it would be appropriate at that time to allow the Foundation to go first, since it is our motion.

THE COURT: Everybody just make yourselves comfortable. I'd like main counsel at counsel table. I'm sorry we don't have a large enough

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courtoom. I'm sorry we don't have enough chairs. There may be some in the conference, if anybody wants to pull one out.

MR. IOPPOLO: Mr. Perkins is here now.

THE COURT: Mr. Perkins, it's going to be a long afternoon. They may be pulling some chairs out of the conference room. I'm sure you don't want to stand.

When this case was last in front of me, July 2nd, it was in front of me for status to find out whether or not the mediation that had been progressing for approximately four months had concluded.

About twenty five minutes before court was to open I received the one page letter from Mr. Hilliard saying that there had been a mediated agreement. And just a couple of moments before court was to start I received from the Foundation a proposed consent judgment and order. And at that time it was not signed by anybody. There was no indication that it was in final form. And there was no motion being made to approve it.

We had an extended proceeding because there were objections that were being raised before the

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court. And those objections were being presented by counsel from Washington as well as the law firm of Bellows and Bellows.

The Court heard those objections and at the end of the day determined that the orderly way to go about this was a formal motion from someone, which turned out to be the Foundation, to approve a settlement agreement, and an opportunity to respond to those objections.

I set a briefing schedule. And this matter was then set for today for me to determine whether or not there needs to be any kind of an evidentiary hearing, or whether we can go ahead and consider the approval of the proposed consent decree.

Since you were all here the last time I have received a number of things. And many of those documents have either been presented to the Court in sealed envelopes or filed with the clerk under seal. And we need to clear that up before we start and do anything here.

I want to go document by document and talk about unsealing as much as we possibly can because I'm not quite sure what's filed under seal and what

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the exhibits under seal. But after you ruled the brief was not treated under seal. And your Honor, our position is none of this should be under seal.

THE COURT: I understand. We're going to try to unseal everything that can possibly be unsealed today.

The objections of Judity Terra, Paul Tucker and Alan Simpson have been filed with the clerk. They're public?

MR. CUMMINS: Yes, your Honor.

THE COURT: Now we've got the 35 exhibits to the objections. I'd like to go through them one by one. Does everybody have them with them? That's the second document that I got.

The Board minutes from April 25th of 1990. That's some of the most interesting reading I've ever had. Any reason why we can't have that in the court record?

MR. CUMMINS: No.

THE COURT: As far as the Foundation is concerned?

MISS STONE: No, your Honor, there is no reason why it cannot be.

THE COURT: The Planning Committee meeting of

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MR. PERKINS: Except for the accuracy, no problem Judge.

THE COURT: And number 8 I have a little problem with. It's a letter from James Collins who had been the attorney of the Foundation from Bell Boyd to Dan Terra. That is a December 6th, 1989 letter. It's kind of old and everything. But is this attorney client privilege, is this something we should be concerned about here? On behalf of the Foundation, Miss Stone?

MISS STONE: It obviously raises an issue, your Honor, of attorney client privilege, which of course the Foundation does not waive.

I am not precisely clear how it was that the individual defendants came in possession of this. They may indeed have come into possession of this by virtually their role as directors of the Foundation. I don't believe any particular individual director can however waive a right of privilege which the Foundation as a corporate entity possesses.

THE COURT: This says confidential in big letters up on the top. And it looks like it was written by the attorney for the Foundation to the

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chairman of the Foundation in his capacity as chairman. It really doesn't have a lot of exciting stuff. A lot of this stuff is old or whatever, but still I think we probably should keep this sealed under attorney client privilege, unless Mr. Cummins you want to convince me otherwise.

MR. CUMMINS: I don't know that anyone can assert that it's been protected as privilege. I do see it says confidential, but the subject matter and the substance in this letter has been argued back and forth in all kinds of papers well before I arrived at the scene of this accident.

So I don't see any reason that it ought to be kept confidential. And I don't think that there is any serious compromise of any interest as a result of its publication.

It clearly reflects the intention of Mr. Terra is clearly inconsistent with the position of the AGA and the Foundation at the present time.

MR. PERKINS: Judge, I have to object.

MR. CUMMINS: Well the AGA doesn't have any position to object.

MISS STONE: Your Honor, again on behalf of the

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Foundation the Foundation does assert attorney client privilege over any communications going either way from an attorney for the Foundation, which Mr. Collins was at this point in time, to Mr. Terra who was then chairman of the Terra Museum.

THE COURT: I don't want to get hung up on this letter forever. Mr. Cummins, how did you all get this?

MR. CUMMINS: I can't answer that question, Judge. I'll find out. One of the preliminary things I was going to address, and I am relying largely on papers that were previously filed by Mr. Quinlan on behalf of his clients Buntrock and Gidwitz. I'm going to object to anything Sidley and Austin does in this case today because based upon the assertions of Mr. Quinlan and his clients they are conflicted in this proceeding. That is one of the reasons we want to adjourn it. We believe Winston and Strawn is conflicted, We believe Sidley is conflicted. And we think that these are serious issues that have to be addressed by the Court as a premise to this entire proceeding.

I just want to make that of record.

THE COURT: It's on the record. And to the extent it's an objection, it's going to be overruled.

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We have been through the Sidley issue so many times I don't even want to think about it. The Appellate Court reviewed it. I know that Mr. Quinlan probably totally agrees with you generally on the whole subject matter, but maybe today he disagrees.

But Sidley is here, they are representing the Foundation and they have not been removed and I don't see a conflict so let's just move on.

I'm going to keep this letter, it really doesn't do much. I've read it all, I'm going to keep it sealed for now. If you want to come in later and have it unsealed. If you concede that this was somehow in the public domain, attached to a pleading, that somewhere along the line the attorney client privilege got waived we'll open it up. For those of you who have not seen this letter, it's really nothing heavy anyway.

The next thing, Exhibits 9, 10,11, 12, 13 are all documents that relate to Dan Terra: intent. They were declarations filed in Federal Court. They should all be unsealed.

Fourteen I want to unseal. That's a mailing address announcement. The Simpson declaration in Federal Court is 15. That should be unsealed.

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Now we have the documents in mediation. And I want to keep those sealed at this point. They are the Attorney General's draft terms, that's number 16. The modification, I've read all of these by the way. Number 17, the second modified red line version. That should stay sealed.

Number 18, that's the letter from Mr. Stebbins to Collins. I don't see any reason not to have that one unsealed. Does anybody think that that one should stay sealed? Okay, that one is unsealed.

Mr. Tucker's affidavit in Chancery, which is number 19, is unsealed.

Strategic planning minutes of May 10th, with the same caveat, I don't think those have ever been approved, but I think they should be unsealed.

Number 21 Miss Marshall's correspondence about mediation, her position, I think that should remain sealed.

Twenty two, unseal.

Twenty three, AG's first amended complaint in Chancery. I want to keep that one sealed. That was never filed. And there is no issue that it was circulated. We're going to unseal the fax

transmission, 24, but not the document itself. I don't see that it's going to serve any purpose.

Number 25 is going to stay sealed. Once again, that's a document from mediation.

MISS STONE: I believe it's also attorney client privilege. It's from Mr. Stebbins to Mr. Carlson and myself in our capacity as Foundation counsel.

THE COURT: Thank you.Number 26, a transcript of the Board meeting conference call. Now that's the one that I got first. That's the one that I read. I just want to clear up one other thing here. I got this transcript and I read it over this weekend. I marked it all up. Then yesterday I got the tape and so I listened to the tape with the transcript. And I caught at least one big thing that kind of jumped out at me.

And so I had my paralegal call Miss Stone today to verify that was not Mr. Stebbins talking. I'm on the version of the transcript that was attached to the objectors' exhibits. I'm on the version of the transcript that was pages 18 and 19. Where it says male voice and it's Dr. Stebbins, Dr. Stebbins again and the part where he presumably

said I want protection. Well when I read it that wasn't Mr. Stebbins's voice at all. And I went back and compared voices and spent a lot of time with the tape and realized that was Mr. Gidwitz talking.

Again I realize after I had done all of this and after a telephone call had been made to Sidley that there was another version of this whole thing. Remember Sidley was supposed to give me at the time you gave me the motion to approve the settlement agreement you were suppoed to give me the transcript. I never got that transcript.

MISS STONE: It is attached to the brief we filed yesterday. We apologize we did not get it to you sooner. I have an additional copy.

THE COURT: I saw it just within the last half hour attached to your thing yesterday. And I didn't realize the two versions were different.

MISS STONE: We made it available to all counsel.

THE COURT: Does everybody agree that the version that is attached to the Sidley papers is the correct version?

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MR. CUMMINS: I know it's different in that respect. I noticed that myself. I haven't heard the tape, Judge. I'll take your word for it.

THE COURT: It's definately different. And I figured out without knowing about the other transcript it's Mr. Gidwitz.

MR. TODD: Your Honor, that portion of it you're absolutely correct.

THE COURT: So I don't see any reason why that can't be unsealed. We are dealing with Exhibit 26 now, the transcript.

Moving on down, the motion for--number 27 unsealed.

Twenty eight unsealed.

Twenty nine unsealed.

Thirty unsealed.

Mr. Perkin's letter, 31, is sealed. That relates to the mediation.

The Tribune article on the Ragenstein Settlement, unsealed.

And the last three letters, 33, 34 and 35, unsealed.

The objector has leave at the close of today to file the unsealed exhibits with the clerk as a

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separate document.

The next thing that I received were documents that came in yesterday. And they are the Terra Foundation's objections. And I should mention for the record that the original objections that were filed in this case were 28 pages long. And I thank the counsel for the Terra Foundation. You are the only counsel that complied with this Court's standing order of the15 page limit on all filings.

MISS STONE: If you're right, you can be brief, your Honor.

THE COURT: And I appreciate that very much. There were no separate set of exhibits from the Terra Foundation.

MISS STONE: That is correct, your Honor. We did submit under seal, and I presume you would have one unsealed, the transcript of the Board meeting, the correct version.

THE COURT: I didn't get that. It should be unsealed. There is no reason for it to be sealed.

MISS STONE: And we did attach a few pages of the transcript from the last hearing.

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THE COURT: Right, and that wasn't sealed So your documents were not sealed, is that correct?

MISS STONE: Our brief was not sealed. We have now, today, filed an unsealed version of the transcript of the Board meeting on June 29th.

THE COURT: All right, because what I got was this sealed document here.

MISS STONE: That is the transcript.

THE COURT: That is the transcript. Okay, I thought that was an extra copy of your reply. It doesn't say it on the outside. It says on the outside--now I'm reading it correct, it is the transcript. So there is no reason to file this with the clerk.

MISS STONE: We did file it in an unsealed version with the clerk of the court.

THE COURT: Diane, this is not to be sealed. Take it out of the envelope and refile it. Consider it filed.

MISS STONE: Thank you.

THE COURT: The Quinlan documents that came in yesterday from the plaintiff, in that regard we have a motion for leave to file in excess of 15 pages. And they have a document which is 25 pages

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long with exhibits. And attached thereto are Exhibits (a) through (L), and I'd like to go through them one by one.

The first set of them are the documents we spoke about the other day, relate to the documents, about appointing a mediator and those names. I have no problem if you unseal that provided that you take out all the other names with the exception of Mr. Hilliard in that last paragraph. I just don't want to have all these other names about proposed mediators out there.

The letter from Mr. Crow, which is Exhibit (b) unsealed taking out the other three names and leave Mr. Hilliard's name in. That's the important thing there.

MISS STONE: I'm sorry, your Honor, just for clarification, the previous indication about what could be unsealed with the deletion of other names would be Exhibit (b)?

THE COURT: No, the first one is Exhibit (a) unseal that, but in the last paragraph take out all the other names with the exception of Mr. Hilliard. Does that make sense?

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MISS STONE: Yes. Would that also be true with (b)?

THE COURT: (B) we're going to take off all the names except Mr. Hilliard.

Exhibit (c) can be unsealed. Exhibit (d) is unsealed. (e) is unsealed. (f) is unsealed, (g) unsealed.

(H) that's the correct transcript, or the correct transcript that was filed already. That's unsealed..

The proposed consent judgment (i) is unsealed. (j) is unsealed, (k) is unsealed. And as far as I'm concerned (L) should be unsealed.

So the only thing in this whole group of stuff that should be sealed are the other mediators names, proposed mediators names. The rest of it is all open.

MISS STONE: Your Honor, may I just have one moment to closely study (L) which is the communication from the Foundation's attorney to members of the Board?

THE COURT: It's the conflict policy.

MISS STONE: I understand the conflict policy

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itself is probably an appropriate matter of open communication. I'm just merely pausing a moment to read the memorandum itself.

THE COURT: Sure. Take your time.

MISS STONE: Just as long as it appears, your Honor, the Foundation is in no way generally waiving the attorney client privilege, we will not object.

THE COURT: Fine, Leave that one unsealed. Now I have the People's response. Mr. Perkins outdid everybody with 45 pages coming in yesterday. And we don't have, I think, a leave to file, separate motion for leave to file on Mr. Perkins' one. And I have the various exhibits to Mr. Perkins. And a couple of these I am really looking for some guidance here as to what to do.

So let's go from the beginning. As far as I'm concerned the tapes can be a public record. I don't have a problem with the tapes. Does anyone have a problem with the tape?

MR. CUMMINS: No, Judge.

THE COURT: Well right now it's back in my tape machine and I will be giving it to the clerk. And it will go down to the clerk's office today. But we will unseal that.

The defendant's counsel's letters regarding the mediators I would just simply say the same thing. I would say, and once again this is Mr. Perkins, so you're going to be in charge of your own exhibits. Did you file this all under seal?

MR. PERKINS: Yes.

THE COURT: Okay, well most of it is going to come unsealed. The letters, take out all the other names and take out all the resumes of the other people. And that's on your Exhibit (b).

I've gone ahead and tabbed all of these. And I realize your versions, counsel, are probably like mine and they are not tabbed. So if I'm going too fast and you're trying to find these just tell me to slow down.

James Terra's affidavit, unsealed. James Terra's lawsuit, unsealed. Daniel Terra's Will, I assume that's public because it's been filed. That's unsealed.

Okay, what are we going to do with this tax return?

MISS STONE: Could you give me a moment, your Honor.

THE COURT: That's Exhibit (f).

MISS STONE: Your Honor, we obviously as counsel for the Foundation did not represent the deceased, Daniel Terra, nor do we represent his estate, nor do we represent his executor James Terra. However, none of those individuals are in court today. I imagine that if they were here they would argue that indeed there is some confidentiality which adheres to the IRS tax return.

THE COURT: How did they get it?

MISS STONE: I'm not sure, your Honor. I believe it was the AG that filed this.

THE COURT: Oh the AG got it, I'm sorry. How did you get it?

MR. PERKINS: Judge, we have been participating in the estate of Dan Terra since it initially started. This is part of the closing report of the estate.

THE COURT: Is it filed with the clerk of the court?

MR. PERKINS: I don't believe it is, Judge.

THE COURT: Does anybody think this should even be in our record as far as the public record?

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MR. PERKINS: There's no privilege attached to it, but it should remain sealed.

THE COURT: Anybody want this public? Okay, I'm going to leave it sealed unless there is some reason to make it public.

What about the balance sheet of the Terra Foundation as of June 30th, 2000? Is that a secret?

MR. PERKINS: It's a public record in our files, Judge.

THE COURT: Okay, it's unsealed. Professor Broday's article is unsealed, the statement of trust, if anybody really wants to read it, is unsealed. Dr. Tucker's May 24th letter, let me get to that one. That's a mediation letter, is it not, we're going to keep that one sealed.

(K) keep that one sealed. That's the letter, that's the thing from the mediator, is it not, his draft after the first settlement. So keep that one sealed.

(L) Dr. Marshall's May 20th letter.

MISS STONE: Mediation.

THE COURT: Keep that one sealed. (M) the June 19th settlement agreement. That one was already

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unsealed.

(M) The Foundation's financial records. Are those also you got from your file, Mr. Perkins, that's a public record? Anybody can go to your office and find out?

MR. PERKINS: All but one page.

THE COURT: Which one page can the public not find out?

MR. PERKINS: I believe it says draft on this.

THE COURT: Endowment income?

MR. PERKINS: Endowment income.

MISS STONE: Your Honor, on behalf of the Foundation I have not had a chance to consult with any representative of the Foundation to verify what the Attorney General is saying with respect to the public nature of these documents.

They were initially filed under seal. I didn't realize that today we would be engaging in this unsealing process. If we could with respect just to this document and also the other document.

THE COURT: The June 30th balance sheet?

MISS STONE: If I could have a moment to consult with the client and report back to your Honor within

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a day or two.

THE COURT: I don't have any problem. Just make it before Thursday if we're going to unseal it. I assume that there is not going to be a problem about unsealing them. I hope you give me an order saying they're going to be unsealed. If they are going to remain sealed, you better give them notice and tell them why.

That is exhibit (M) we were just talking about. Dr. Marshall's June 5th letter remains sealed. Exhibit (P) remains sealed.

And what do we do with the 1989 Foundation letter to Mr. Perkins? Have you all looked at that thing? That's got all kinds of stuff in it.

MISS STONE: Your Honor, it was a confidential communication between the Foundation and Mr. Perkins. At the time, it was drafted back in 1989, the draftor of the letter comtemplated that it would be used for litigation purposes.

I think that it is stamped confidential. Quite frankly I have not gone through it on a line by line basis to find out what would be objectionable from an unsealing point of view because it was

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under seal. And again I wasn't aware that your Honor was going to engage in this analysis today. I would also like leave to consider this and report back by Thursday.

THE COURT: Okay I don't have a problem with that. But this one I think probably should be unsealed. But I don't know. I mean there's a lot of stuff in here. Mr. Cummins, what about this letter?

MR. CUMMINS: We think it ought to be a part of the public record, Judge. In fact with respect to some of the other exhibits that you tentatively identified as remaining under seal we would like to address those. Because we're going to ask you to reconsider on some of them, particularly given the narration of facts that is set forth in Mr. Perkins' submission. He lays all kinds of stuff out about who said what to whom in these proceedings that were supposed to be confidential.

I think the whole question of confidentiality has been rendered moot.

THE COURT: Well Mr. Perkins' brief is not being filed under seal, is it?

MR. PERKINS: It was originally, Judge, because

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of the nature of what we put in there in light of mentioning things that occurred in mediation. We took the safe road and filed it under seal. We would like to have it released. We are not asking that it remain under seal, but that's to be decided.

THE COURT: Let me just check from everybody. Plaintiffs, how do you feel about the Attorney General's brief being under seal or not under seal?

MR. QUINLAN: I guess our position would be it's pretty hard to have a brief that's under seal.

MISS STONE: I would agree with that as a general proposition. I would note that at points in his brief the Attorney General sees fit to describe some of the details of his inquiry into the Illinois Math and Science Academy. Again, I don't represent that Academy. I don't represent Dr. Marshall in his capacity of president of that academy.

I would note it would not be at all surprising if the Academy feels there is some privacy concerns or confidentiality concerns which are raised by

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that filing. I don't have any standing to raise those, but I bring that to your attention as an officer of the Court.

THE COURT: Okay and I know you all want everything unsealed.

MR. CUMMINS: Yes, your Honor. One other thing maybe I should fall on my sword for this one. I did not perceive that the objections fell technically within the purview of your 15 page limitation.

I would like leave to file the extended documents nunc pro tunc.

THE COURT: Okay, you have leave to do that. I am concerned and I was concerned about the Illinois Math and Science Adademy allegations and the things that are in the Attorney General document. I'm going to keep the Attorney General's brief sealed for now. And maybe most if not all of it can be released. It was hard enough getting through it, because when I say 45 pages it's not even the normal type and the normal spacing. It's much much longer. It will take us much much longer here to identify what should come out and what should not. And I don't think we should take that time today. Leave

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that one under seal. That is all of the documents that I want to talk about as being sealed or not sealed. Do you want to be heard on objections to those?

MR. CUMMINS: Judge, we will, for example the first amended complaint of the Attorney General was circulated to a lot of folks. It is not subject to any consept of confidentiality that I'm aware of. And that is an example of one of the documents that should not be subject to any protection.

Let me say this, I want to argue strenuously why this document in particular is the predicate for our, among other things, request for discovery and our predicate for suggesting that there are conflicts that have not been addressed with this Court as yet.

So there is just no legitimate bases for contending that this document should be protected and confidential.

THE COURT: Miss Stone, do you want to be heard on that one? I'm concerned about Dr. Stebbins. I'm concerned that there are allegations that the Attorney General decided to put on paper but decided not to file. And they have never been filed.

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And what purpose would there be to have this public now?

MISS STONE: I couldn't say it any better, your Honor. This is a matter involving a Board member. This pleading, proposed pleading, was not actually filed. We don't know if it would meet the strictures of Rule 137.

The Attorney General, for whatever reason, chose not to file it. It's really a question of whether at this late date, this 11th hour we are in the process of trying to get the Court to enter an agreed settlement, whether something which has once been contemplated by one party in the thick of litigation should now be made part of the official record.

THE COURT: Does the plaintiff have any position on the filing of that document?

MR. QUINLAN: Your Honor, our position would be similar in that generally that document would probably be public. In this instance Miss Stone makes a good point, there are allegations in there that may not be --if this proceeds we can revisit the issue at that time. I do agree there are some

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interests that perhaps don't need to be invaded.

MR. PERKINS: Your Honor, your February 5th order said that communication with regard to mediation purposes remain private, private among the parties. That was the document that was sent to the lawyers. It is a transmittal letter. It makes clear it is in regards to settlement. It was transmitted in mediation. To suggest there are certain theories,set forth in our response, is thoughtless.

In addition the reason it wasn't filed we were in the middle of mediation, your Honor. We were not allowed to file any additional pleadings. It was the hope of the parties it would be settled and not be employed in litigation. So it was sent in the communicated position with regard to what we were alleging with regard to certain issues. And it was part of the settlement.

THE COURT: Mr. Cummins, I just need to understand this. There have been a lot of reputations of prominent people in this case, not the least of which is your client, that have been brought shall we say brought into question, perhaps wrongfully, in this case.

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And is there any reason to add more to that? It is stipulated that, it's an agreement here that while the case was in mediation the Illinois Attorney General prepared the document and circulated it among counsel. And that document contained some allegations about one of the other directors on this Foundation. And sought to add him as a party defendant, it was not done. Isn't that enough?

You've all seen it. I've seen it. You can argue from it all you want to argue from it, but do we have anything else put out there?

MR. CUMMINS: Here's theproblem. Number 1) it is our position that was nothing but a litigation ploy to force Dr. Stebbins to take a position that he didn't intend to take, or want to take. And that remains subject to him being cross examined I would respectfully suggest.

Let me make one other point, Judge. Those allegations go right to the issue of his disinterestedness or lack thereof. That's the conflict, putting aside coersion and all this other stuff. That's right at the heart of why this gentleman could not legitimately vote on this proposed settlement.

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And what we have here is another problem. When you directed that Dr. Marshall and Dr. Stebbins and Mr. Perkins might be available to be interviewed after these issues came up. it was at your suggestion. When my colleagues attempted to pursue that Sidley and Austin stepped in on behalf of Dr. Stebbins and said he ain't going to be interviewed.

THE COURT: I requested that Mr. Perkins meet with you all. I don't think I said anything about the other two.

MR. CUMMINS: Okay. If I've overstated it, I apologize. The point is this, we now have Sidley and Austin wearing the hat of the Terra Foundation. We have Sidley and Austin wearing the hat of Dr. Stebbins' lawyer with respect to these issues of conflict. This is among the issues, we think, are critical to your fair and adequate review of this proceeding.

So it's important for us, and we're going to argue, you know the essence of the allegations involving Stebbins was the following. He used confidential information, this is the allegation, I assume the Attorney General didn't do this in bad faith. He alleges that Dr. Stebbins used

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confidential information of the Terra Foundation to the advantage of some other foundation incident to other--

MISS STONE: I'm sorry, I don't--

MR. CUMMINS: Excuse me, Miss Stone, may I finish? May I finish, Judge?

THE COURT: To ahead.

MR. CUMMINS: The allegation is, and I'm not buying into this stuff necessarily.

THE COURT: Then why are you saying it?

MR. CUMMINS: Because, Judge--

THE COURT: We have had it here before in a little bit more oblique nature on the motion to disqualify Dr. Stebbins from the special litigation. And none of that has been presented. If you look at the complaint the Attorney General wants to file, the complaint seeks Dr. Stebbins removal, that's what it does. Nothing else. It seeks the removal of Mrs. Terra, Dr. Tucker, the amended complaint. It seeks his removal as a Board member.

MR. CUMMINS: Your Honor, I--

MR. QUINLAN: Your Honor, I object to any discussion whatsoever. If there's going to be any

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discussion, this ought to be in chambers, your Honor.

MR. CUMMINS: Well your Honor, here's the problem. According to the Attorney General there is a significant public interest here. Now we want to say don't let the public know about what the attorney general has done, but what they allege.

THE COURT: They have not filed it, and it is not a public pleading. I don't know whether or not it was in final form. I don't know whether or not Mr. Perkins has decided to file it. I don't know whether at the end of the day Mr. Perkins thought there was any merit to it.

MR. CUMMINS: Well, your Honor--

MISS STONE: I don't mean to interrupt counsel I'm just curious, are we arguing about whether or not this document should be unsealed?

THE COURT: He would like to have it unsealed. I'll let you argue about that issue. But at this point I am going to keep the documents sealed.

MISS STONE: With respect to Sidley and Austin's role, your Honor, we are here, as we've always been, representing the Foundation. We do not represent Dr. Stebbins personally, we do not represent Dr. Marshall personally. We represent the directors of

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the Foundation.

THE COURT: Let's get to the proposed consent decree, because I have quite a few questions about that. Do you want me to sign my name to the piece of paper that is entitled consent judgment and order, is that correct?

MISS STONE: That's correct, your Honor.

THE COURT: And attached thereto the resolutions, or would it just be the consent judgment?

MISS STONE: I do not believe the resolutions are themselves part of the consent judgment order. I believe only Exhibit (a) which is the press release.

THE COURT: Okay, I am going to retain jurisdiction to enforce this. And one of the reasons that I'm asking all these questions is because I need to have a clear understanding of what this consent judgment does and doesn't do. In the event that I sign it I need to know how to interpret it in the future. And I have recently gotten a consent judgment back from 1975 that was done by four to five predecessors ago who was handeling this calendar.

And sometimes these transcripts of these

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proceedings and what the parties were thinking about at the time these consent judgments were entered into is very important for future people in order to interpret any problems that may come up.

Now I know that when this case was sent to mediation by agreement of the parties there were some motions pending, not the least of which was a motion to remove Dr. Stebbins from the special litigation committee. There was a motion to appoint a receiver for the foundation. I believe that there was also a motion for judgment on the pleadings pending, but I'm not certain, from the Foundation.

So in the preamble here you have the Terra Foundation having moved to dismiss those counts. Did I not rule on those two? Didn't I deny that motion to dismiss?

MISS STONE: You did, your Honor, that's an accurate representation of the history of the case.

THE COURT: It sounds like that's the pending motion and it hasn't been decided and there was a pending motion to dismiss those two counts.

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MISS STONE: I believe, your Honor, if you feel it's more appropriate, more accurate to say the Terra Foundation for the Arts having moved for judgment on the pleadings, we can simply keep a list of all those suggested changes or revisions, and if necessary we believe as a matter of corporate law we need to take that back to the Board and resecure a vote, we can do that.

I believe that that sort of administrative modification would fall within the purview of what the Court authorized Miss Marshall to do when they authorized her to sign it.

THE COURT: When I read that it sounded like an unresolved motion to dismiss, that's the one that I did resolve. It's the motion for judgment on the pleadings that I didn't. I went back to my pleadings file and I'm pretty sure that one was done.

MR. CUMMINS: Simpson filed a 2-619 motion.

MR. CARROLL: There was a motion pending besides the Foundation's motion.

THE COURT: So I'm going to ask counsel, counsel is going to have to make that paragraph accurate as to what exactly was pending at the time we went into

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mediation.

MR. CUMMINS: And of course we filed an answer and--

THE COURT: You filed a motion for leave to file.

MR. CUMMINS: I did that, your Honor, in deference to your direction. We don't think the motion is appropriate.

THE COURT: Okay.

MISS STONE: Your Honor, that does not accurately reflect what the state of the record was at the time the Board voted on. The motion for leave to file a counterclaim had not been made at that point.

THE COURT: Okay. This may open a whole new hornet's nest, but is there any problem with the defendants filing their answer, just their answer, not the counterclaim?

MR.QUINLAN: Yes.

THE COURT: What?

MR. QUINLAN: First of all you have a motion on file, which is a motion for judgment on the pleadings and several defendants have joined that. They have to withdraw that motion before--

MR. CUMMINS: Withdrawn.

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MR. QUINLAN: Well, you have to ask leave to do that, sir. And first of all we're not there.

THE COURT: So are you saying there was a formal joinder by the defendants in the Foundations' motion for judgment on the pleadings?

MR. KENNEDY: Correct. And there is a motion to dismiss by defendant Simpson.

THE COURT: My problem with the intro paragraph was that it reflected a motion that had already been adjudicated and did not reflect it was pending at the time you went into mediation.

MR. QUINLAN: There is another issue here too, the motion to accept the consent decree and accept the agreement. That's the first issue you have to address, if you address that and you rule in our favor there is nothing left to consider.

THE COURT: That's what I'm getting to next. Let's just assume I just decided I was going to sign this piece of paper and you have your consent judgment, I'm not quite sure what you have because this does not do anything with the cause of action against Mr. Michaeli. Mr. Michaeli was sued in the plaintiff's case. This releases officers, directors,

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agents or employees of the Foundation. Plaintiffs plead that he was a friend of Mrs. Terra and had no fficial position. This doesn't release him.

MR. QUINLAN: It does because it would dismiss our cause of action. He is only answering as a defendant, your Honor. Paragraph 13 dismisses these actions with prejudice. So that action would be dismissed against him. He suffers no harm. He is released. There is nothing that he stands in jeopardy of so that there is no interest that he has.

THE COURT: So it's dismissing everything you have, it's gone as of the date I sign this, including Mr. Michaeli's cause of action.'

MR. QUINLAN: Yes.

THE COURT: Okay, how can I say in the first paragraph, parties having reached an agreement? You don't define the parties. And as I understand the parties to this case they include Judith Terra and Alan Simpson and Dr. Tucker and they haven't agreed to anything.

MISS STONE: That is an important issue, your Honor. I think parties here refers to parties to this agreement not the totality of all the parties.

THE COURT: You need to say that. If you listen

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to that tape, do you remember that motion that Miss Marshall wouldn't vote for on the tape that went on and on and on? That was all about this issue too. This document as it's written doesn't even reflect what happened in that meeting.

MISS STONE: That's not correct, your Honor. The attempt to change, articulated by Mr. Stebbins which Dr. Marshall did not support was the idea of somehow forcing the individual defendants to release their right. Well the individual defendants have chosen not to join in the settlement agreement, that's their legal right. They cannot be forced to relinquish whatever legal rights they may have.

So the language that was not added was to say that the Plaintiff Directors hreby release everybody and the Foundation and the individual defendants hereby releast everybody.

That was the change Dr. Stebbins was suggesting. It was denied. I do believe for clarification purposes though, your Honor, it would be helpful to amend this to say the parties rather than hereto, it would be wise to say the parties to this agreement.

THE COURT: Could you say the plaintiffs, the Attorney General and the Foundation having reached

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an agreement. And then in paragraph 2 where it says the parties desire, and it says the parties hereto, make it clear who they are that's desiring to settle it.

MR. CUMMINS: Judge, can I just raise a question. I think that these matters that you are addressing are substantive in nature. It cannot be that this Board dealt with these issues in arriving, even assuming arguendo, you give any credence to that vote, this Board didn't have these things in mind, and I'm sure there's more questions.

THE COURT: I don't think that's a substantive thing. I did it for clarification.

MISS STONE: It is clarification. And it was particularly and vigorously debated at the meeting. And there was not a consensus by six directors to force somehow, even if they could, the individuals to give up any rights.

THE COURT: I do have a substantive one coming up. This one I don't consider substantive. There is one that may cause a little bit more problem.

Paragraph 3 of the consent decree the last phrase where it says which shall be available to the

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Attorney General. They're available for the Attorney General anyway, aren't they? It's not changing anything is it, Mr. Perkins or Miss Stone?

MISS STONE: I think you have to read the sentence in its totality. They're saying for 50 years the Foundation shall also maintain not only its principal office, but its books and records.

THE COURT: Which shall be available to the Attorney General, that was the which part that I just wanted to ask. Are there books and records available to the Attorney General anyway?

MISS STONE: There are right now. What this in effect does is precludes the Foundation from moving books and records to let's say Washington, D.C. for 50 years.

MR. CUMMINS: I don't know, Judge. The folks contemplated when they drafted this was what if this Foundation runs out of money. What kind of an order is this? What kind of a decree is this that some entity has to be in existence for 50 years. God forbid if something untoward happens. This provision doesn't make any sense to me.

MISS STONE: I think it's safe to say we can

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leave that argument for another day, your Honor. I understand your Honor is seeking clarification for certain paragraphs.

THE COURT: Paragraph 14. I don't have any problem with the first sentence. But why should I sign my name to that second sentence? If you all agree that the only thing you're going to say is this release, Exhibit (a), the directors all agree that that's what they're going to do and they're not going to talk to anybody, that's fine. But why should I order that? Is there any reason that one can't be changed to say that the plaintiff Directors, Attorney General and Foundation have agreed that no other public statement?

Here's my problem. You're setting me up for contempt proceedings if you all talk to people. And I don't want to sign an order that says you can't talk to people.

MISS STONE: I appreciate the Court's perspective on that. I think there are two points that have to be made. First we are here merely trying to communicate to you what the will of the majority of the Board is. I do believe that a majority of the Board believes

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as do the other settling parties, that it would be in the interest of everyone to finally put this to an end.

As you know, the reputation of this Foundation as well as the reputation of certain individuals, has been tarnished in this litigation. I dare say there are reporters in the courtroom today, as there have been in prior instances, and so I believe that the people who entered into this agreement were trying to get to put some teeth into this.

The second point. This is really not very different from what your Honor has done in the past. In the past you have entered orders saying there should be no public statements made about mediation.

THE COURT: That's all, period. You all went into mediation. I talked to all counsel. You all came up with that idea, let's keep the mediation confidential. And you all gave me an order by agreement of everybody to keep the mediation confidential.

But this, you don't want the agents, the employees of the Foundation to talk even about the

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litigation?

MISS STONE: I think the sentiment here, your Honor, and again it was shared by the various people who are advocates of this agreement, is that enough is enough. It was time to put this litigation behind the Foundation and allow the Foundation to get back to the business of art appreciation rather than the slings and arrows of litigations and PR battles.

And I believe that that was something that the Board members desired. Do I know to what degree of intensity they would want to adhere to that? I don't. I don't think there was extensive debate about this particular sentence at the Board meeting, your Honor.

MR. CUMMINS: As a matter of fact it was not extensive debate it wasn't discussed. Read the transcript.

THE COURT: I have.

MR. CUMMINS: Well Judge, this is a provision that no Board has passed on. And quite aside from the fact that I just want it clear that our defendants intend to say whatever they have to say

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to protect their interests.

THE COURT: I understand, your defendants are going to say whatever they have to say and we have a First Amendment and they can do that. This is really directed to them. They made an agreement. This document was circulated well in advance of the Board meeting. They all had it in front of them. Everybody was talking at the Board meeting about they had the right copy, the documents were in front of them.

Everybody had that. And I assume that was all part of what everybody anticipated was going to be approved.

MISS STONE: It was circulated to all of the directors. Your Honor, I would think if anything the individual defendants would revel in the fact that the Foundation is agreeing to be quiet on this and the settling parties are agreeing to be quiet on this. The individual defendants can speak at length to the press about this if they so chose. They are not in any way bound by this or gagged by this.

Again your Honor, I think this is really not

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too different from what parties do from time to time at the culmination of litigatinn where they say let's let bygones be bygones. We'll agree to keep this confidential and not talk about this ad nausaem with the press. Let's move on.

If your Honor is uncomfortable with this provision, we can communicate that back to the Board and the Board will pass it without that sentence being included.

THE COURT: You can all agree not to say something if you want to. That's all up to you. I have a problem ordering that no other public statement should be made by any of you, including the Attorney General. He might agree not to say anything, but why should I order him?

MR. QUINLAN: We find ourselves in a difficult position. I think that is what everybody agreed on. I do think if there is a problem with your Honor siging this order. But the intent is not to say anything about this lawsuit now. Whether it's 20 years from now or 15 years from now that's up to them. It's an agreement.

MISS STONE: Your Honor, you will do what you

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abviously think is advisable. I do believe as a corporate law matter it would be necessary for us, as Foundation's counsel, to go back to the Board with whatever revisions your Honor would insist on. I don't think I can unilaterally say oh, yes the Board is in favor of this settlement agreement modified. That would have to be put back to a Board vote.

I'm not saying that's impossible. I'm just pointing out a practicality.

MR. QUINLAN: Your Honor, the only thing I disagree on is Miss Stone's indication she thinks she has to go back to the Board. This is an interpretation of the law. I don't think it has anything to do with going back to the Board. Everybody has agreed. We still agree. That has not changed.

But the point is I don't think we need to go any further. Your Honor has expressed your opinion. I frankly have, I think everybody has a problem with how you would enforce in the future. What we're saying is at least for ten years we'd have a mutual agreement that this is going to be our press statement. This is going to be our statement and that's it.

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THE COURT: Then why can't that last two sentences be changed to a combined sentence that says the plaintiff directors, the Attorney General and the Foundation agree to the mutually accepted press release attached as Exhibit (a). And agree that no other public statement shall be made. I mean that's real simple. Think about it.

MISS STONE: I think that's a good solution, your Honor. I don't think that will require further Board action.

THE COURT: Okay, those were the first set of questions I have. I have a lot of questions about what this consent decree means, about what the Foundation can do and not do world wide, United States wide, or whatever. But my goal is also not to wipe out my court reporter. So I'm going to ask if you want to take a break right now or do you want to go for about another fifteen minutes?

THE COURT REPORTER: Another fifteen minutes is okay.

THE COURT: Okay.

MR. CUMMINS: Your Honor, in making your comments is it correct for me to assume that you have not made any determination as to whether or not the

16di-003633

underlying vote is valid?

THE COURT: No. I've read everything that you've written. In fact I've read every exhibit. I can't say that I have read absolutely every word of everything they have given. But I have read everything that you have done.

MR. CUMMINS: That's all that's necessary.

THE COURT: And I am willing to hear whatever argument you want to make. And I have not made up my mind. But I do have a lot of questions. And the answers to these questions have to do with whether or not I am going to sign my name or not. So I need to get the answers to some of these questions.

MR. CUMMINS: Thank you.

THE COURT: The directors, Section 2 (b) of the resolution, if you look at the Board resolution. Section 2 (b) says that the class one directors may not stand for reelection at any time. And they use the word there may not stand for election at any time.

The consent decree, paragaph 8, says will not stand for reelection. I'm signing my name to

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the consent decree, if I approve your motion. So I'm siging it it says will not stand for reelection. Is that clear that that means election at any time? As opposed to reelection at the end of their term? Boards have people go off. They go off for six years or whatever and they come back.

And is the idea that the entirety of the 11 people that are on this Board will never come back for election at any time?

MISS STONE: I believe that is the intent of the majority of the directors of the Foundation.

THE COURT: So you don't see that as inconsistent with the resolution. Should we make paragraph 8, if it needs to be signed, consistent with the resolution? Which says may not stand for election at any time.

MISS STONE: Yes, your Honor.

THE COURT: Okay. That one is changed. That will clear things up. Who is in the best position to give me a little bit of information about the issues of the five proposed new directors? Would that be Miss Stone? Would that be Mr. Quinlan? Who knows something, just tell me something about

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each one of these five individuals?

MR. CUMMINS: Would this include their political affiliation?

THE COURT: No. I don't want to tell you which ones I don't know who they are because it sounds like I don't know a lot of people. But I just want to know who these people are. Tell me who they all are.

MISS STONE: Sure. Your Honor, on behalf of the Foundation it probably is appropriate for us to give you a quick overview of these various individuals. This was a very much compromised slate. I do not claim to know any of these individuals' backround in great detail.

My partner Mr. Sabel, corporate law partner is with us today especially assisting us with corporate law matters. I think he is more intimately familiary. With the Court's indulgence I would like to ask him give that.

THE COURT: Sure. Would you just state you name and spell your last name for the court reporter.

MR. SABL : Sure it's Charlie Sabl.

THE COURT: Tell me who each of these five are.

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MR. SABL: Mr. James Donnelley is a retired executive of the R.R. Donnelley Company. He is active currently in personal investing and has been active in a number of charitable activies in the Chicago area.

Again I would point out that resumes for these individuals were circulated to the Board members in advance of the meeting.

Marshall Field, V has been active in a number of charitable organizations. He used to be the chairman of Field Enterprises and Communications had a media firm headquarters in Chicago, which was subsequently sold. He also has been active in quite a number of charitable organizations in the Chicago area, past chairman of the Board of the Art Institute of Chicago.

Dr. Kathleen Foster is a professor at Indiana University in Bloomington in art. My understanding is she is or has great familiarity with the Foundation.

THE COURT: She's a resident of Indiana?

MR. SABL: Yes, she is. And she has consulted with the Foundation on art matters in the past. And has a good knowledge with respect to the collection

16di-003637

of the collection the Foundation has.

Professor Robert Hamada is the outgoing Dean of the University of Chicago graduate school of business.

Frederick Krehbiel, I believe his title is president, I think he's chairman and chief executive officer of Molex, which is an electrical components company, headquarters in Chicago area. And he also has been very active in arts organizations and other charitable activities in the Chicago area and elsewhere.

THE COURT: Dr. Foster is the only one not from Illinois?

MR. SABL: That is correct, your Honor.

THE COURT: Thank you. If you would go please to page 2 of the resolution the Board passed. The Board has passed a resolution that has changed Article 3 of its by-laws, sections 2 and 8. And those have to do with the Board and their tenure and their terms and vacancies.

Now do I understand correctly that these five we just talked about are going to be called class 2 directors. And they are going to hold office, if this is approved, starting August 1st

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of this year until September of next year. And then they each get one four-year term more, is that correct?

MR. SABL: Your Honor, they would be elected now for a four-year term so they would serve without coming up for reelection until the annual meeting of 2005.

THE COURT: So they're on until 2005. And then we have some class 1 Board members. This gets a little confusing because we have the pre 2002 class 1 members and the post ones. So I'm talking about the post 2002 class 1 and class 3 members. They're going to get staggered terms. There's going to be one term that ends in 02, one in 04, one in 05 and one in 06.

And my question is on the post 2002 class 1 members and class 3 directors, how long do they get to sit? Do they get two full terms after they're, like the class 1 people, end in the year 2003. Do they get two full terms after that, or are they only eligible for one full term?

MR. SABL: They're eligible for 8 years, your Honor, which means they might be elected for a term

16di-003639

which is of a class that goes longer but would have to agree to resign before that to comply with this agreement. To stagger the Board you actually have to divide the directors and the class.

And I believe that the mediation contemplated that there would be a limit on any director serving for more than 8 years. For that reason you would have to have either some directors leave before the end of the terms.

So if a director was elected for 3 years and and director elected for three and could be elected for another 4 year term and at that point would only serve one year thereafter.

THE COURT: I just want to make it clear because believe it or not this issue comes up in the future. The provision of this decree that says the limit, the term limit is 8 years, that supercedes anything else as far as class. I just want to make sure that's clear, and that's it.

MISS STONE: Yes, your Honor.

THE COURT: Okay. Now there were no amendments made to Article 1 of the by-laws, am I correct? You only amended Article 111. And it might help if you look at the objections that have been filed by

16di-003640

the objectors. And you have the restated by-laws in there. That's Exhibit 6. And you've got Article 1. The purposes of the Foundation. That has not changed, has it?

MISS STONE: That's correct. It remains the broadly stated, general purpose that brings it within the 501 (c) 3 characterization. And includes for illustrative purposes only the various purposes that are set forth there.

THE COURT: So it is still the purpose of this Foundation to operate museums and schools both in the United States and Abroad?

MISS STONE: Correct, your Honor. That is still the purpose and that is precisely why with explicit clarity the Attorney General acknowledges this proposed consent decree, consent judgment, that the Foundation has the right to conduct all of its activities in Giverny, France.

That is also why it is specifically spelled out in the proposed consent decree thatthe Terra Foundation gets to loan its works of art, or exhibit, or for scholarly use, not limited to the United States, not limited to Chicago.

16di-003641

THE COURT: Originally, when the original complaints were filed these restated by-laws I don't believe were referred to in the original complaint. It was the original by-laws that were referred to, is that correct?

MR. SABL: That is correct, your Honor.

THE COURT: And we all can agree that the original Articles of Incorporation and the original by-laws of this Foundation never mentioned where the museum was going to be, is that correct? There is no where in there. Can everybody agree to that? Or do we have to pull those out? I couldn't find it anywhere. It doesn't say Chicago, it doesn't say Chicagoland, it doesn't say the world, it doesn't say the United States. It doesn't say.

We have a separate lawsuit pending in another calendar in this court where we have James Terra saying as one of the incorporators they meant to put the phrase in in the Chicagoland area or in the State of Illinois. That was never put in there.

Then in 1994 when Mr. Terra, Dan Terra, was

16di-003642

still alive the by-laws were amended and the Articles of Incorporation were amended and the words were added, among other things, operate museums and schools both in the United States and Abroad. Can we all agree to that? Those have been the two changes.

MR. PERKINS: Just so that we can be very clear if one were to look at that, that was changed to provide for illustrative purposes only. If one looks at the difference between the original by-laws and the 1994 version, after the very first sentence the new version says for illustrative purposes only and it goes on and explains. I'm not sure what it all means in the sense that both of them start out with the very same first sentence, and both of them say it's exclusively charitable. The first one has a whole bunch of specific remarks, the original has specific remarks about what it can do.

The 1994 one says illustrative purposes only. I'm not sure we're saying there is a big difference there but there is a difference.

THE COURT: But at no time has there been anything in the by-laws or articles of incorporation

16di-003643

that specifically Illinois, Chicago, anything like that. The only thing that has ever been put in is operate museums and schools both in the United States and Abroad. And that is not changing by this consent decree.

So now I need to figure out what this means. If you could please turn to Exhibit 9 of the objectors' exhibits, which is the declaration of Dr. Tucker in regard to the Temporary Restraining Order.

Please turn to page 3, the last sentence: Examples of major, non Chicago projects include the recent award of a $500,000.00 grant to a New York production company for a documentry on American Art. Now I'm going to the top of page 4 and the sponsership for the research for the Huntington Museum and Gardens in Pasadena, California.

Is there anything in this consent decree, or this proposed judgment that would prevent the Foundation from continuing to do that? That kine of activity.

MISS STONE: Absolutely not, your Honor.

16di-003644

That's a very important point. The consent decree, consent judgment states that the Foundation shall conduct its affairs in accordance with its articles and by-laws, including promoting American Art in the U.S. and Abroad.

It further states it is the Foundation, not the Attorney General, the Foundation who remains free to determine how best to achieve its goals including where and to whom to make grants.

THE COURT: So the answer is there is nothing--just for the record I want to make sure in the future if this consent decree is approved that there aren't going to be a whole bunch of issues, that this Board can pretty much continue to operate the way it has operated as far as its charitable grants and its activities.

MISS STONE: I'd like to state for the record the Foundation has retained through this proposed consent judgment a broad aray of rights. It is the broad awray of rights, and now with the force of a court order, if you approve it, and it has the Attorney General's specific adherence and acknowledgment of. In may ways it garners freedom or confirmation

16di-003645

of the freedon and independence of this Foundation. It says the Foundation can make grants wherever it wants, conduct operations wherever it wants, although for 50 years it must of course keep its main headquarter books and records, principal office here in the Chicagoland area..

It says it may acquire works of art. It may exhibit and loan anywhere its works of art, including but not limited to Giverny.

It particularly enshrines the protection of the museum in Giverny. This Foundation has preserved for itself a very broad power and freedom, through this proposed consent judgment.

THE COURT: Let's go to the declaration of Peter Solmssen, Exhibit 10. There were some discussions Mr. Somnssen had with Dan Terra the year before Mr. Terra died. There was discussion about the Foundation and the University of Arts doing some things together and making a three million dollar grant to the university.

Is that the kind of thing that could still be done with other universities outside the Chicago area? I'm on the objection 11. It starts

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at the bottom of the page, paragraph 6 going on to the next page.

MISS STONE: The Foundation can engage in the purchase of real estate outside of the Chicagoland area. The Foundation can make grants outside of the Chicagoland area.

Your Honor, for the record, it might be helpful not only to have me as Foundation counsel attest to this, I think it would be very worthwhile to have the Attorney General stand up and also signify his agreement to this as well.

THE COURT: Well Mr. Perkins is being very silent. And when Mr. Perkins is silent I'm taking that as he's agreeing because if he doesn't agree he always tells us.

MR. PERKINS: That's correct, Judge.

MISS STONE: For the purposes of the record, for the purposes of conflicts which may arise in the next decade or two decades, would we have Mr. Perkins stand up and say that he agrees that this Foundation may make grants outside of Chicago.

THE COURT: I think he's saying that. He'll tell us if he disagrees.

16di-003647

I have one last, and this one really intrigues me, it is Exhibit 19 of the affidavit of Dr. Tucker in support of the objections. He's talking on the bottom of the second page, these pages are not numbered, paragraph 5, he's talking about the way the Guggenheim Museum had some exhibit space in Berlin and it supplied members a limited amount of its collection to other mussums.

I'm sorry, where is Bilbao?

MISS STONE: Spain, your Honor.

THE COURT: Can this Foundation purchase real estate elsewhere, loan its collection elsewhere, portions of it, as long as the main portion of the collection is based here?

There could be many museums. Everyone keeps throwing out the four hundred fifty million dollar figure that's been in the pleadings here. If funds are available, can the museums in Chicago and France need not be the only museums in this Foundation?

MISS STONE: That's correct, your Honor. And the consent judgment specifically states, while stating that the Foundation shall for fifty years retain and exhibit the Terra collection of American

16di-003648

Arts either by itself or through partnership arrangements with other institutions in the Chicago metropolitan area, the document also goes on to say that the Foundation shall continue to be able to carry out the act of promoting American art in the U.S. and Abroad and it remains free to determine how best to achieve its goals. That it can manage the collection as it deems appropriate, including providing art for display in Giverny and for special exhibits, programs and scholarly use, to make loans from the collection. So it can indeed loan its art work to other institutions.

THE COURT: I'm going to give the court reporter a break. I'm willing to go as late as you want to go to hear whatever it is that anybody wants to hear. I have to let the court reporter leave at 4:30. So during this break I would appreciate it if someone makes arrangements for a late court reporter.

My next set of questions is going to be talking about the role of the directors that are currently on this Board and what their role can be and not be in the future.

Then I'm pretty much done with my list. I'm

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going to also just take a look at this to make sure I hit all the things that were of most concern to me. And then I want to hear about the objections after I talk a little bit about these directors when I come back.

I'm going to give the court reporter a break. Is ten minutes enough? Who's going to take the responsibility to try to get a late reporter? Mr. Kennedy?

(At which time in the Proceedings a short recess was had.)

THE COURT: I understand we will have a court reporter here at four thirty.

MR. KENNEDY: Yes, Judge.

THE COURT: So we will take a brief break at four thirty to make that switch.

One of the things that disturbed me about the consent decree is the loss of some of these very very fine people to this Board. And I know that Miss Stone will be the first to jump up and say what I think about it or don't think about it isn't important, it's the business judgment of the Board and they all mediated and they decided that

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this is the way it's going to be.

We have some individuals on this Board who have served a very-very long time, the longest being Arthur Hartman, former Ambassador to France and Helene Ahrweiler. I am disturbed about the loss of all of what we have referred to here as the independent Board members in particular to this Foundation. In addition to Ambassador Hartman and Ahriweiler, Mrs. Daley , Stephanie Pace Marshall, Dr. Stebbins and Ambassador Andreani.

Apparently the Board decided in the mediation process that everybody was going to have to go. And that would be at the end of one year, Everybody would serve and then at the end of one year they would all go.

I want to pursue this issue a little more based on the wording here. May Foundations and corporations and not for profit organizations as we know invite people to come back and participate in other capacities. Some Boards have things like Fellows Boards, they have individuals that help raise money. They invite non board members to serve on the committees or to serve as advisors.

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And I want to make sure there isn't anyone that this consent decree that is being tendered to the Court who is saying this consent decree precludes any of these fine eleven individuals from participating in the future in the activities of the Foundation provided that they do not participate as a member of the Board of Directors.

MISS STONE: Your Honor, you are absolutely right that these eleven individuals have worked long and hard for this Foundation, some of them for a number of years. And it is a loss that they have decided collectively to leave the Board after one year.

Your Honor has correctly predicted what at least some of my argument would be. This is a matter particularly within the purview of the Board. This is an exercise of the business judgment of directors which should not be second guessed by me, by the objectors, by your Honor.

This was, without in any way delving into the mediation process, because I don't think it is appropriate that individuals are now seeking to use a confidential mediation process to further

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litigation ends. So I don't want to delve into the intricacies of this, but suffice it to say in mediation the composition of the Board was an issue that was discussed at length.

There were various proposals floated. This finally was a proposal that would allow the Board to enter into a resolution which would put an end to protracted, devisive, distractive litigation.

Your Honor is absolutely right that there is no prohibition whatsoever on any of these fine individuals from coming back and being affiliated with the Terra Foundation in some other way, either as an interested patron, as an honorary, non voting Board member, as a member of some sort of advisory committee, there is no prohibition on that.

Indeed it would be my hope that once the dust is settled and once emotions cool and with the passage of time that the newly constituted Board might indeed see fit to see if it could interest some of these fine individuals to once again devote some of their energies in a non voting capacity to the Terra Foundation.

THE COURT: There is also one other capacity

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that I was thinking about also. In all the materials that I've read there have been discussions over the years about partnering with other institutions. Some of the proposals in the materials have talked about institutions such as a university or the Art Institute, or the Museum of Contempory Art that might be partners with, in the future, here in this area.

And that if such a partnership were established it might be that certain representatives of the Foundation would also be asked to sit on the Boards of Directors of that organization that you're partnering with.

My question is does anything preclude any of these individuals from being the designated representative of the Foundation in that kind of a partnership arrangement, as long as they're not Board members?

MISS STONE: I don't think anything would prevent any of these fine individuals from being emmisaries to any other institution, to be ambassadors of good will for the Terra Foundation.

THE COURT: To be the Foundation's representative

16di-003654

on a partnership Board.

MISS STONE: That's correct, your Honor. May I also add, your Honor, when I make the point that we should not engage now in second guessing, it is important to recognize that this was an unusual mediation. This was not a mediation where it was only counsel for the parties that were involved. The individual directors themselves actively participated in a myriad of mediation sessions. So they all had the right to weigh in on this issue. They all did. The issue was vigorously debated and this was the final consensus resolution of those parties that were free to enter into this proposed settlement.

THE COURT: Anybody else want to be heard? Is there any disagreement that all of the eleven Board members who will be leaving the Board in the year 2002 continue to be active participants in the activities of this Foundation, with the exception that they cannot hold seats on the Board of directors, but they can do almost anything else that the Board would direct them to do.

MR. QUINLAN: There is no prohibition of them doing any of those things.

16di-003655

THE COURT: Okay, now we have a multitude of objections. And I spent my whole weekend going through them. I've read them, even the back sides of all your 35 exhibits.

So Mr. Cummins, I don't know how you intend to proceed today. I want to hold off your counter-claim business until the end. I would assume the first thing you need to talk about, or you want to talk about, is discovery. You can't do anything without discovery. Is that correct?

MISS STONE: Again, just as an order of procedure I do think it's more appropriate , since we are moving for the entry of a consent judgment here to be heard on the issue.

THE COURT: Just one second. You wanted to talk about discovery, and you also want to talk about, or do you not, about the burden of proof?

MR. CUMMINS: Yes.

THE COURT: And you believe that the burden of proof is on them, right?

MR. CUMMINS: Manifestly.

THE COURT: Without any question.

MR. CUMMINS: Not a doubt at all.

16di-003656

THE COURT: It sounds like they should go first. What do you think?

MR. CUMMINS: Yeah, absolutely. There seems to be a suggestion in the record that we consider to be a grossly inappropriate statement, that it somehow gives this Foundation all of the rights and privileges it once maintained.

Well, that's clearly not the case. As a matter of fact if you take a look at this consent judgment and decree, Terra's collection of American Art will never exhibited for fifty years any place other than Chicago.

That means concepts that were discussed that would really give some value and benefit, not only to the collection, but to those who are interested in the collection, things like common territorial management, that can't be done.

To suggest on the record, oh gee, this is just great and just like apple pie and motherhood and the Foundation can proceed without any limitation is just simply dead wrong, Judge.

THE COURT: I'm trying to figure out what--I went through all of your objections, if what you

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want to talk about is one portion of your objections, I'll be glad to. But if you want to talk about response to my questions about what they can do and what they can't do. Identify certain things, other than picking up and moving the entire collection out of Illinois, what is it that you are saying they are not going to be able to do?

MR. CUMMINS: If you can tell me what paragraph 5 means, I'd like to be enlightened. It states for at least 50 years from the entry of the order the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago Metropolitan area. That means it ain't going to be exhibited any place else.

And if that's not a major inhibition on the value of this collection and on the goals and intentions of Mr. Terra when he created this Foundation, nothing could be more inconsistent with his intentions. Nothing could be more inconsistent.

THE COURT: Let me just ask them to answer that, as to what you believe that that means. Shall we define the Terra Collection of American Art and what that means?

16di-003658

MISS STONE: Your Honor, I would be happy to answer the question, and I will do so. I think I need to clarify at the beginning that we certainly disagree over the burden of proof.

It is clear here, under Illinois law, there is a presumptively valid settlement agreement. They are now seeking to upset the settlement agreement which they don't agree with, arguing that it should be set aside for some sort of supposed duress or coersion.

The law makes it quite clear that they have to meet a very high burden of proof and they must show by clear and convincing evidence that there was some sort of wrongful or illegal act which completely destroyed the free will of the individuals who are alleged to have been coerced, Dr. Stebbins and Mrs. Marshall.

And we would submit, your Honor, they simply cannot or have not met this very high showing.

There is a reason why the law requires such a high showing. First of all the law favors compromise and resolution and it gives presumptive validity when parties are able to finally resolve

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their differences and come to a meeting of the minds.

In addition, allegations of these sorts, coercion, intimindation, selling out your vote, are very serious, very pernicious accusations. And if you're going to make these allegations the law says you better have the goods to back them up. That is why the burden is so high.

And your Honor, we think it's quite telling that they are trying in essence shirk their burden rather than embraceing it, rather than saying yes, we recognize we have a very high standard and by golly we can meet it, they are trying to divert this Court by citing to a clearly inapplicable class action cases, which have no bearing here.

We are not in a class action context, your Honor. We are not in a fairness hearing where we have to protect absentee class members.

We have a situation where eleven Board members have come together and debated this for months and months. And the collective will of the Board is to have this agreement approved.

Now to answer counsel's question more specifically. Your Honor, you cannot pick out bits and pieces of

16di-003660

of this consent judgment and read them in isolation. To do so really violates the entire spirit, meaning and language of the consent judgment.

Reading the consent judgment in its totality what does it do? First of all it does obligate the Foundation to maintain its principle office and books and records in Illinois for fifty year. It does require that a majority of the directors be residents of Illinois for 25 years, with an exception for the first year, or it does need to be a majority, it could be fifty fifty.

What else this consent decree does, it preserves and formally recognizes essential freedoms for the Foundation. I would like to enumerate those. And they are contained in paragraph 5 and in other places in the proposed consent judgment.

Number 1) it states the Foundation has the right to conduct its affairs in accordance with its articles and by-laws, including promoting American Arts through the U.S. and Abroad.

Number 2) it states that the Foundation, not a regulator, not disgruntled Board members of whatever stripe, but the Foundation has the right to determine

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for itself how to best achieve its goals.

3) it preserves for the Foundation the freedom to make grants wherever and to whomever it so chooses.

4) it give the Foundation the right to manage its own collection as it pleases. Again, without interference from outside forces.

Number 5) it give the Foundation the right to make loans, to acquire works and to deassess works as it sees fit.

Number 6) it specifically give the Foundation the right ti display art in Giverny and elsewhere in the world in connection with special exhibits or loans for scholarly use.

Number 7) it give the Foundation the right and freedom to conduct its activities at its museum in Giverny. And that freedom the AG is specifically acknowledging and agreeing to in this consent judgment.

Your Honor, I think you have to put the individual defendant's challenge in perspective. These individual defendants have determined that it is not, in their judgment, in their best judgment to enter into this agreement.

As named parties to this lawsuit they have every

16di-003662

right to say this agreement is not for us and we don't want to participate. They have also exercised their rights as directors to say in their judgment this agreement is not in the best interest of the Foundation. They have every right to do that, your Honor. There may be others in this courtroom who agree with them personally, that this is not a good deal for the Foundation.

The point, your Honor, is that these individual directors cannot now come in and try to run rough shot over the considered judgment, an exercise of business judgment by other directors of the Foundation. That is not their right.

THE COURT: The Terra Collection, can you define it.

MISS STONE: It is a collection of arts that is now currently in existence at both the Terra Museum here in Chicago and the museum in Giverny. And it is that collection as it ebbs and flows over the years.

THE COURT: And this consent decree allows the Foundation to set up museums worldwide if it wants to and display portions--portions, what about

16di-003663

all of the collection? Can they move the whole thing to Giverny?

MISS STONE: No, I don't think that would be appropriate for the first 50 years. They cannot leave, take everything lot stock and barrel and move it outside of Chicago. But it can conduct freely its activities in Giverny, France and that includes a very big risk loan program from the collection, which is predominately displayed in Chicago, but which is also displayed in Giverny.

THE COURT: How big is the collection right now. I know it's a fluid thing. I know it is somewhere in these papers and I remember reading it. It's hundreds of paintings, is it not?

MISS STONE: It is hundreds. I believe it is roughly in the neighborhood of 800, though I am seeking guidance from an officer of the Foundation, who is not in this agreement.

THE COURT: So about 800 or so pieces of art.

MISS STONE: That is correct.

THE COURT: And as long as there is a place to house it and take care of it here in the State of Illinois and bring it back to, could it loan fifty

16di-003664

percent of the collection to other museums at certain times as long as everybody new at the Foundation stays here? The Foundation is a lot more than just the art collection. So as long as it stays here fifty percent of it could be elsewhere.

MISS STONE: Your Honor, it's very difficult to get into a finely calibrated parsing of how many can cross the state border and how many cannot. I think the spirit and intent of this agreement is that for 50 years the collection, the bulk of the collection should remain, should be made available for viewing here.

But at the same time works of art from that collection can be shown elsewhere, they can be housed elsewhere, can be exhibited elsewhere and can be loaned elsewhere, but the bulk of the collection should remain here.

As your Honor points out, it is not just art that this Foundation is about. It is also about education, educational programs can take place elsewhere. This Foundation is also about grant making to encourage scholarships in American art.

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THE COURT: So I take it that this means, as I read it, means a large portion of the collection could go like, you know we get the Monet exhibition here or Renior or something here, a large portion of it could be a moving collection and go to museums all over the world. And I would assume even as much as a half as long as its coming back here.

There is nothing in this one way or the other. I mean this is open to interpretation in the future, is it not?

MR. PERKINS: From the Attorney General's standpoint we think of it as based here. Based here doesn't mean it's always here. It means it's loaned out from here. It could be on the road for years.

Many times museums trade pieces. Terra might be exhibiting pieces from other Museums. The Attorney General of Illinois recognizes that. There may be at some times only a little bit will physically be in Illinois at a point in time, the Board deciding that it had five exhibits across the world.

We are not saying that it is prohibited from

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doing that. We are saying however it's based here. It's under the control of the Board here. And we leave it to the Board to work under that direction. These remarks are here. I can't speak for what a Board will do down the road. It is our hope that they will make appropriate decisions.

The whole agreement was premised on the idea that this Board will go forth and do what it thinks it can under the articles and under the terms of this agreement to act pretty freely without much interference from the State.

THE COURT: Leave it to the Board to make that decision is that you're saying, Mr. Perkins. So it's really up to the Board to make those decisions. And I would assume that this matter would only come back to this Court or some future Court sitting here, if something really outrageous happened.

In other words, if 80 percent of the collection got put under some kind of agreement for 40 years outside of the State of Illinois, something that was clearly a violation of this agreement. Other than that we're not doing things very much different than what was done before. The Foundation

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can pretty much run its affairs the way it has.

MISS STONE: That's true. It's a very important and I think it t's up one of the main arguments that the objectors are making. They are arguing that this consent decree is, to use their word, antithetical to the mission of the Foundation.

What is the mission of the Foundation? The mission of the Foundation is very broadly stated charitable and educational purposes, including illustrative purposes such things as promoting appreciation of American art to the growing art public, running museums and schools both in the U.S. and Abroad.

Entering into this consent decree is not antithetical to that. This consent decree allows the museum in Giverny, it allows the loaning of art through the U.S. and abroad.

What would be antithetical is if we came in with a consent decree saying we are going to burn the paintings. This is not antithetical. This is something under the descretion and the purview of the Board of Directors in its exercise and use of business judgment.

THE COURT: What about the argument that has been

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made by the defendants that by not being free to partner, and I assume that means like a permanent patnership, with out of state organizations, that the Foundation has lost its bidding position, lost its bargaining chips. It's essentially saying we are stuck here in Illinois so we didn't get the best deal.

MISS STONE: That is certainly a consideration for this Board. That was certainly a consideration that prompted this Board during this litigation to vigorously oppose what the Foundation perceived what the Attorney General was trying to do. However that is one consideration that the Board members have struggled with.

Another consideration the Board members have struggled with is the hemorrhaging of money to pay lawyers in this case. You merely need to look around this courtroom today to get some sort of idea of what this litigation is costing this Foundation.

Another consideration is the tarnishing of the Foundation's reputation from being in the newspaper every day.

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Another consideration is the distraction of the folks from matters of art to matters of litigation. These are all matters which the Board of Directors have weighed. And each of them have weighed them in different manners, and each of them assessed different values to these considerations. I may come out differently on that question, Judge. You may come out differently. We are not elected directors of this Board.

And what the individual defendants fail to recognize is that it doesn't have to be coercion, it doesn't have to be fraud, it doesn't have to be someone selling out their vote to come out in a different place, to come to an alternative conclusion at the end of the day.

It could be that individual directors acted honestly, acting legitmately, acting in good faith simply come to a different conclusion, just as Mrs. Terra and Dr. Tucker and Mr. Simpson did.

It doesn't have to be that Dr. Stebbins and Dr. Marshall sold out their soul to get this deal done.

THE COURT: Does the Foundation want to say

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anything else in support of the approval.

MISS STONE: Yes, we would, your Honor.

MR. CUMMINS: Judge, there has been a long soliloquy here. May I just observe something?

THE COURT: Yes, sir.

MR. CUMMINS: What has just been discussed is absolutely contradicted by the plain language. I asked a simple question. I said this language says the Terra Collection of American Art shall be exhibited in the Chicago Metropolitan area.

And if you don't think, Judge, that two years from now if we get another Attorney General who decides that sending fifty percent of the art to Courtney for two years violates this agreement then you're going to have people coming in here.

They better change the language of paragraph 5.

THE COURT: I don't think sending fifty percent of this collection violates this agreement.

MR. CUMMINS: Well then let's say that.

THE COURT: Attorney General, do you think sending fifty percent of the collection to Courtney for two years, knowing it's going to come back here violates this agreement?

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MR. PERKINS: I don't think so, Judge.

MR. CUMMINS: How many permeations do we have to go through to clarify this agreement?

THE COURT: That's what you have--that's why I'm having this on-the-record discussion to interpret some of these issues today. I don't see this as a oppresive seeking or keeping of this art as set forth in the objections.

MR. CUMMINS: If you don't interpret the language literally I guess that's right, Judge. But the language ought to be clarified, in the consent judgment.

THE COURT: The parties have agreed to this. Tell me if I'm wrong, the Attorney General, the plaintiffs and the Foundation, the ones that have agreed to this are saying on the record that this doesn't mean that even the bulk of the collection has to at all times stay in the State of Illinois physically for the next 50 years.

MISS STONE: That's correct, your Honor. That's why it says we can manage the collection, loan the collection, exhibit the collection.

MR. QUINLAN: Your Honor, we believe it has to be

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based in Chicago, the books and records here. It is an Illinois Corporation, subject to the laws in Illinois. That means it can't close the foundation here. It can't close the exhibit here. Can't close the museum and have nothing of the art to be shown. So when you say exhibits the art must be exhibited here.

But it is clear that every museum that operates here in the State of Illinois sends their art around the world to different places on a variety of different occasions. We surely are not suggesting that doesn't happen. It is not our agenda to prohibit that.

THE COURT: Is there another example, Mr. Cummins, you're concerned about.

MR. CUMMINS: Judge, I wasn't in the room with these folks, but I would have given them Miranda warnings not to execute the document that has this kind of literal, express prohibition because we can sit here all day and suggest well they can do this and they can do that.

But you asked a pointed question, what about moving the whole exhibit to France for a period of

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time. Oh, can't do that, that wouldn't be right. You suggested, well there is this inhibition with respect to partnering with outstanding museums, the Courtney and the Whitney. Oh, can't do that.

Now I can't believe that somebody is going to stand up here and try to defend this language and say its literal meaning is meaningless. And that's exactly what we're hearing.

THE COURT: I believe that what was agreed to here, maybe I'm wrong, but I'm interpreting this as if I'm being asked to sign it is that this pretty much means that this collection can be operated in the way it always has been with the exception that the entirety of the collection cannot permanently be moved out of the state and housed out of the state.

MR. CUMMINS: Why don't we say that then?

MISS STONE: That is correct, your Honor. And in addition there is the residency requirement as well.

Your Honor, the objectors keep saying why don't we day this, why don't we say this. What I would say in response is why don't they read the entire document. They like to focus again only on one

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sentence in the top of paragraph 5. I would say read the entirety of paragraph 5. I would say read paragraph 4. I would ssy read the other paragraphs in this document, which do indeed preserve the fundamental freedoms and independence for this Foundation and for the Terra Museum.

MR. QUINLAN: Your Honor, I will say we are the parties who participated in this very hearing that took place at the time that this was adopted. They never raised any questions. They never suggested there was anything wrong with the terms. They never suggested they didn't understand the terms. They voted no. But they participated. They were there. That's all you're entitled to get.

They participated. They didn't have a problem with what was said and they voted no, never suggesting anything else.

THE COURT: These questions were not raised at the Board meeting.

MR. QUINLAN: Not by them. Nobody had any kind of disagreement as to what was intended. Surely we all have given you our consensus here. Everybody is in agreement on our side in terms of what we

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believes this means. It reads as it reads. It's a clear document.

That's the reason you retain jurisdiction. It's this Court who makes those interpretations. It is this Court that consistently rules in a way that furthers the interest of the parties in the sense of what was intended and what was meant.

Sure we can read this in a lot of different ways, we can rewrite it in suggested different ways. Their people never suggested that. Their people did not do any of those kind of things and merely chose to go against it. They chose not to participate in the agreement.

THE COURT: Let me hear from Mr. Perkins on this and then we can move on and Miss Stone can finish and then we can hear from the objectors.

MR. PERKINS: Judge, with regard to everything that has been said about this equitably will be handled, how this collection will be managed, how it will be based here, I think the Court has made remarks that reflect our belief of what is going to happen in the future. It will be based it. It will move around. The majority of the collection could be gone at one point in time based on what

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what would be reasonable accomodations as to how the art world deals with this kind of art.

In addition these terms didn't come about in a vacuum, even though they weren't discussed at a particular Board meeting. There have been long mediation sessions. There have been discussions among counsel as to issues with regard to whether about the language, what was going to be the restrictions, whether it was going to be in perpetuity or fifty years issue, the very language that we're looking at.

This doesn't come about in one day. This has been discussed over several months time period with people working on that language to try to make it clear that the Foundation would be free to operate as it had operated in the past with its collection with the least restrictions, but for what we placed here that basically it's based here in Chicago for fifty years, hopefully forever.

That was the spirit on which this was put together. It's an equitable consideration. This Court retains jurisdiction. If it comes back before this Court your Honor, or those who come after your Honor, and we have this record now.

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That makes clear what the Attorney General believes it to mean, what the plaintiffs believe it to mean, what the Foundation expects it to mean.

But at this point we are pretty clear that this Foundation is free to do what it's been doing up to this point in time.

THE COURT: And you're not going to be looking over its shoulder and second guessing its decision about loaning its collection around the world, unless you see shuttered its museum here and there is no place for it to come back to, right?

MR. PERKINS: Your Honor, there are 25,000 charities in Illinois and we're very busy. We're hoping the new Board will take care of this. We don't have any intention of monitering this.

THE COURT: Miss Stone, did you have anything else you want to say in support? I know you said you don't think it's your burden.

MISS STONE: Yes. I understand, but in light of the objections I do feel we need to have the opportunity to make a few statements for the record.

First, your Honor, it is important to acknowledge what is not in dispute here. It is not disputed that

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corporate formalities were adhered to, that notice was given, that the meeting was properly conducted, a forum was present, debate was held the proposed langague was distributed to all directors beforehand. Any director who wanted to make him or herself available to participate in the meeting was there and had an opportunity to vote. A vote was held.

And six to two, the majority of the Board said they wanted to do this. Now in light of this actual presumtively valid agreement, between the Foundation the Attorney General and the plaintiffs, the defendants are now trying to upset the agreement by mounting a variety of scattershot or arguments. And I would like to have the opportunity to address each of these because they're serious charges which have been made against some individual directors that require response.

I know your Honor has read her papers, I know you're very diligent about that. But I do need to address this.

First, with regard to the coercion argument. What the objectors would have to prove by clear and convincing evidence is that the Attorney General took

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took some unlawful action, which as a matter of fact caused Dr. Stebbins and Dr. Marshall to lose their free will, to become mere handmaidens of the Attorney General, to vote his bidding.

They have not come up with anything near the required evidence to meet this burden. Not even close.

As a general proposition, your Honor, there is nothing wrong in and of itself with any party, that would include the Attorney General, deciding to add additional parties to their pleadings.

Now the Foundation has always denied that there was any merit whatsoever to any proposed claim against Dr. Stebbins. The Foundation would have moved to dismiss it or Dr. Stebbins' own attorney would have done that. But in and of itself that was not an action by the Attorney General.

The defendants would have to show that that action in and of itself was done to intimidate rather than for some other reason.

Also as a general proposition there is nothing in and of itself wrong with the Attorney General deciding to issue an administrative subpoena

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to some entity . Again the Attorney General decided there is no basis for any further investigation into the Illinois Academy. But again it's the defendants that would have to show that there was no good faith basis for Mr. Perkins' actions and that he was doing this just to intimidate Dr. Marshall.

That is not all they would have to show. Here is where they really fall down on the task. They have to show that in fact Dr. Stebbins and Dr. Marshall's will was overcome. And there is just no there there to paraphrase Yogi Berra. They just don't have the goods.

First of all, they point to the fact that Dr. Marshall and Dr. Stebbins voted in favor of the settlement. That in and of itself is not illegal, it's not unlawful. The objectors don't challenge the votes of Mrs. Daley or Hartman. There is nothing in and of itself wrong with voting yes instead of no. And there could be many reasons why a director would decide it makes sense to resolve this litigation and get back to the business of promoting art appreciation.

THE COURT: Excuse me one moment. You keep saying

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that they haven't shown. Well part of what they want to be able to do is be able to show . And part of what they want to be able to do is get discovery. And you have said they haven't shown that the Attorney General didn't have a good faith basis for looking into Illinois Science and Math Academy. They haven't shown anything else. Well, how can they show, if they don't get discovery?

MISS STONE: Well I think there are really two questions you have to ask yourself , your Honor. Have they even made the threshhold showing necessary to reopen this case at this point in the face of an agreed settlement and take us off on another whirlwind of discovery.

And the second question you have to ask is what would the possible outcome of that be? What could they possibly hope to achieve by that?

You have the Attorney General who sat for an interview for two and a half hours answering questions. You have Dr. Stebbins and Dr. Marshall who gave testimony who made statements at the Board meeting that specifically addresses that issue. They said we voted our conscience. We were not coerced. They addressed this question.

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We indicated to counsel , that although your Honor had not ordered Dr. Stebbins and Dr. Marshall to sit for depositions yet, counsel should be aware that Dr. Stebbins would give the same testimony at a deposition that he gave at the Board meeting. So what would you end up with at the end of the day?

We go through this discovery and once again you have a situation where you have Dr. Stebbins and Dr. Marshall saying we vehemently deny that we sold out the Foundation. We're insulted by that accusation. We voted our conscience. And you have Dr. Tucker saying well I don't really believe them. That's not enough to meet a clear and convincing burden.

So what are we doing? It would be an exercise in futility.

THE COURT: During the mediation process the six independent Board members, and by that I mean everybody but the two plaintiffs and the three main defendants, were represented by counsel?

MISS STONE: By the Foundation's counsel.

THE COURT: Okay. They all had an opportunity to

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talk to at any time, to write letters to you, to send proposals, to discuss with you any problems or any reservations that they had?

MISS STONE: Correct.

THE COURT: And at the time of the meeting, if I remember correctly from listening to the tape and reading it, you were present with Miss Marshall in the room throughout the whole meeting which she chaired?

MISS STONE: Correct.

THE COURT: Who was with Dr. Stebbins?

MISS STONE: Dr. Stebbins was calling in, I believe.

THE COURT: He was calling in from Boston and he was by himself?

MISS STONE: I can't recall, but I believe that's correct, your Honor.

THE COURT: But I take it that--

MISS STONE: Mr. Carlson was present at the Foundation headquarters and several of the directors were persent there.

THE COURT: You had plenty of opportunity to discuss with Dr. Stebbins before and after the entire issue of he didn't need to vote for this?

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MISS STONE: You're right. Your Honor, without in any way waiving attorney client privilege, your Honor should assume that all of the directors when represented were advised of their fiduciary duties.

THE COURT: I know that they were advised at the meeting. I know that they were specifically told by Mr. Heatwall (phonetic spelling) if I remember that one correctly, that even though they had made this agreement at the mediation session, if they didn't feel that they could vote it freely and in light of everything else, they should abstain or vote no.

MISS STONE: Correct.

THE COURT: I'm sorry, I interrupted you, You were talking about --

MISS STONE: I was talking about what they would need to prove and what they're pointing to to try to support their coercion case, or their speculative coercion case.

They try to make the argument that Dr. Stebbins and Dr. Marshall flipped, as they so ineloquently phrase it. Your Honor, that ignores the fact

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the reality that Dr. Stebbins and Dr. Marshall have always been on the Board. Both sides of this battle of the Foundation have tried at certain times to adopt, in particular Dr. Marshall. And she has resisted those efforts.

At the Board meeting Dr. Stebbins in particular talked about how there were many matters he disagreed with Dr. Tucker about, including the location of the museum.

THE COURT: Isn't he the one who said when he got to the meeting on September 25th that he thought that everybody should resign?

MISS STONE: Correct.

THE COURT: And that he always believed that the collection and the Foundation should stay im Chicago?

MISS STONE: Yes. And he is an art historian who has reasons to believe it would be most advantageous for the collection to be coupled with the collection here in Chicago.

In addition Dr. Marshall has always been neutral. in fact your Honor at one hearing you yourself remarked that after reading the minutes you thought she was the most neutral of anyone.

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THE COURT: I wanted her on the special litigation committee.

MISS STONE: I understand.

THE COURT: She didn't want to be on it.

MISS STONE: That is correct. So what are they left with in the face of these, this history of neutrality and independence by those two directors?

On the face of their statements, which we read to you last time, which everybody quoted in the briefs, and I'll not read them again to you, but which you know where they said we're voting our conscience, we're voting freely, we are not voting for any extraneous reasons, we are not selling out to this Foundation. We are adhering to our fiduciary duty and this is how we vote.

What are they left with in the face of that? They are left with one or two affidavits from Dr. Tucker. He says you know I don't have a good feeling about that. I just don't really believe them. And he doesn't even really come out and say they sold out. They sold this Foundation down the river. He doesn't go that far. He talks about how it was inconsistent with prior positions. But

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even if he believes that, that is still only his subjective belief. And that comes no where near clear and convincing evidence, affirmative concrete evidence, that they have to present.

And I think it bears saying, your Honor, fundamentally what is being portrayed by the objectors, this notion that Dr. Stebbins and Dr. Marshall could somehow be brow beaten, intimidated, cowed, cowerd to use their word, by the Attorney General. These people are, as your Honor as remarked in the past, very intelligent, well educated, sophisicated people who had the benefit of counsel throughout this process. Dr. Stebbins is a Harvard educated lawyer, not that that means anything in and of itself, who is affiliated with the --Dr. Marshall is a PHD, president of an academy. To think that they would somehow be brow beaten by some assistant attorney general is really--with all due respect to Mr. Perkins, but it's really an insult to their integrity and to their reputation in the community to indicate that they could so easily be bought.

And your Honor, I think in essence what it boils down to is you've got Dr. Tucker and Mrs. Terra and

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Senator Simpson saying, don't believe them, they sold out, they're lying, they're trying to cover up, believe us. That's not enough. Further discovery will not help them prove their case. And I think we should put an end to it.

Let me address a few other allegations they they're making as a way to try to upset this settlement agreement. They use this notion of conflict of interest, which is really I think an inappropriate notion here.

THE COURT: Did you get their latest filing? It came about a half hour before, it's a seven page document and they address the conflict again in that. And I didn't mention that I received that. And I did review that.

MISS STONE: I don't believe they had leave to file that brief. We weren't expecting that brief. We did try to review it quickly and I will try to respond to that as well.

In support of their conflict of interest argument they are saying that somehow that Dr. Stebbins and Dr. Marshall shouldn't have voted because they were conflicted. But the Illinois Not for Profit Corporation Act has a very specific

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section dealing with conflict of interest. It specifically addresses this. And it says how do you know if there is a conflict? You look to see whether the director who is voting is a direct or indirect party to the transaction at issue, that's being discussed.

And it's clear they are not direct parties. They didn't sign in their individual capacity this consent decree. They weren't individually named in this litigation. So they weren't parties direct. And they are not indirect parties because Illinois Not For Profit Corporation Act says you have to have a material, financial interest in the proposed transaction. You have to have an interest in the other entity that's a party to the transaction, in order to have this indirect conflict.

THE COURT: They say as a matter of law that's wrong, in their response.

MISS STONE: They do two things. First they cite to inapplicable For Profit Corporation law. That's not relevant here. And I think they sort of acknowledge that in their reply brief when they

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say well let's look at the Illinois Not For Profit Corporation Act if we've got to, but we can stretch the meaning of that, we can sort of pervert the language of the statute to try to wiggle out case in there. Well they are really stretching it beyond all appropriate bounds.

If you were to accept their argument, any settlement would be up for grabs and no one could vote on it because in very many litigation cases involving corporations there are potential claims against various directors that are floating out there.

So their argument, an incredibly over passive argument would be to lead to very difficult and illogical consequences. And it's just not the plain language of the statute.

So we would argue that they are citing you inapplicable law or misciting and misapplying the governing law.

The fact is here that there was no conflict of interest thatDr. Stebbins or Dr. Marshall had.

Their next challenge, your Honor, is to the allegedly improper actions of the Attorney General.

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And what's wrong with their analysis here is that they go so far then they stop. They miss a crucial step. They say the Attorney General acted improperly therefore this agreement has to be vitiated.

Well under the law of coercion what the Attorney General allegedly did had to have had an actual affect on Dr. Stebbins and Dr. Marshall. It had to have actually overcome their free will.

You've heard them on the tape now, your Honor, you've read the transcript. Their free will was not overcome. In fact at the 11th hour at the meeting itself Dr. Marshall said, well if you all make this new contemplated change to this resolution I'm not going to vote for this. The deal of off. You need my vote and I am not going to go along with that and this whole thing might blow up. See you later and we're back in litigation.

She was not acting like a cowed intimidated victim who was fearful of the Attorney General. She was exercising her free will vigorously, the way she always did.

In fact if you, without getting into the details of mediation, if your Honor will look at

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some of the letters presented to your Honor, you will see that many of Dr. Marshall's proposals were in fact incorporated in the final end product. He was a vigorous campaigner, a vigorous participant in this debate, so was Dr. Stebbins. They were not intimidated, quaking victims here of the Attorney General.

Finally, your Honor, I have already alluded somewhat to why their antithetical argument to the best interest of the Foundation argument doesn't wash.

What they have really done here is fail to recognize that other directors can act in good faith and can come to an opposite conclusion.

I think the central irony in the case--well there are several--one is it seems to be only the Foundation who is always coming before you and saying you know what, allow the Foundation to be a Foundation, respect our integrity, respect our independence. Don't allow yourself to be used by disgruntled detractors on either side of the political fence here to use you. Let the will of the majority speak for this Foundation and respect that.

There is an irony that Mr. Buntfock and

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Mr. Gidvitz have reaped and sowed they are not reaping through this attack from the objectors.

There is another irony here, your Honor. The irony is that maybe it would have been better from the objectors' perspective if this thing had been a trust. This is not a trust despite what the Attorney General says, and despite what the Attorney General says as recently as yesterday afternoon in his filing, this is not a public charitable trust, whatever that term supposedly means.

This is, Dan Terra, if he had set up a trust to exhibit art in Washington, D.C., New York, Boston and Chicago for time immemorial that may have been better from the perspective of the objectors. But he did not do that. What he did he set up a not for profit corporation that had a Board of Directors. He set up a charter and said this is your broad mission, this is your broad constitution. You as directors are now impowered to make decisions about what is in the best interest of this Foundation going forward.

And therefore the directors can, in their

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wisdon, in their exercise of best judgment, decide what is in the best interest of the Foundation. It is not imperative, it is not absolute, it is not a mandate from a grantor of some trust that this art be shown in D.C., or New York. The Board of Directors has this degree of independence.

I think in conclusion, your Honor, I would simply say this is a case, really these are two cases against the Foundation which have been pending now for about ten months. We've been through five months of mediation. It has been a very expensive process for the Foundation. The majority of the directors have spoken. They want to put an end to this. They think this is indeed in the best interest of the Foundation. The Board has spoken. The Board should be heeded.

MR. QUINLAN. Your Honor, just a couple of things. I think what we have here is a premature attack on the consent decree by the objectors. First of all we're here today to ask your Honor to sign that consent decree. And what's at issue here in your signing the consent decree is whether or not this is an agreement of the parties and the terms are properly reflected in the agreement.

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It's undisputed the parties have entered into this and these terms are the terms that were intended.

THE COURT: You lost me for a second. You say it's premature. Are you saying the procedure is it should be signed?

MR. QUINLAN: Yes.

THE COURT: The case should be dismissed, they should be denied discovery, they should be denied leave to file any pleadings, case is over. We have a consent decree. And then what is the next step?

MR. QUINLAN: The next step would be a 2-1401 to challenge the consent decree, your Honor, on the basis that coercion took place. I think what counsel has demonstrated here is there is no basis even for that allegation of coercion.

What we're talking about here really is a presentation to you a settlement. And that settlement whether the Court should sign that settlement or enter the order only requires a determination by you as to whether or not this is an agreement and whether or not this reflects the terms of the agreement.

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THE COURT: Where do you come up with this 2-1401? And the reason that I ask that is I looked at all their cases and they're pretty much class action type things. And they're pretty much situation where, you know, you've got one of these public hearings like we have all the time to approve a class settlement. And it's a totally different thing.

I'm looking at the cases that you've cited, or that the Foundation has cited in its brief about the clear and convincing standard. One is a marriage case and some other issues. I'm looking for something where you got any of these cases, any of them, deal with court ordered mediation, or a mediation of case and someone is coming in and challenging that mediated settlement.

MR. QUINLAN: It really doesn't make any difference, for your purposes here, whether it's a mediated settlement or not. The issue is it's a settlement. Let's assume we didn't mediate but we said your Honor, would you delay this case for a couple of weeks, we believe we can work this out.

THE COURT: Okay, and we've got a settlement. You come and you've got a settlement.

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MR. QUINLAN: We come in and present it. And there are people who say, wait a minute, wait a minute, that's not the settlement. That's what they might be saying. But they are not saying that here. They're saying they don't like the settlement, that they don't want the settlement, they don't believe the settlement is proper. That's not a challenge.

They're saying the Attorney General, by his actions, coerced them. That's only a challenge to the consent decree after it has been entered.

THE COURT: Okay, but see you're talking about a settlement where everybody settled. We're talking about a situation here that is somewhat different. These folks aren't settling. They are not part of the settlement.

MR. CUMMINS: It is also a derivative case and they ought to address that.

MR. QUINLAN: It is not derivative at all. We sue under the provisions of 103.15 (a). I'd advise you to read our pleadings that we did file.

THE COURT : I just reread today your complaint and you don't say it's derivative. And I reread the

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Attorney General's complaint today because I was trying to go back in history.

MR. QUINLAN: And he doesn't say it's derivative. We have our standing and he has his own standing by statute.

THE COURT: Would you then be saying you had the settlement and I signed the consent decree and it's done, and this case is dismissed, they're going to come back and file a 2-1401. Now what standing do they have to come back in and file a 2-1401?

MR. QUINLAN: That's a good question. I don't know if they have any standing here at all. But that's not my problem. That's their problem.

The real issue here today is this is the same as if it were a divorce decree. They had a divorce decree and came in here and both of the parties to the divorce decree asked you to sign it. You don't hold a fairness hearing. You don't hold an evidentiary hearing. You sign it.

This is the agreement. Is there any question that this is the agreement, or is there any question that these are the terms? No. That is what's to be signed. It is not a derivative action,

16di-003699

this is not a class action.

If your Honor read the statement by Judge Posner in the Mars case there is a total difference between class actions and --Judge Posner says look, the normal thing is you look at this and you say did the parties agree to this. Okay, that's what it is. We don't look any further.

The only reason we look further in a class action is because those parties are only represented by an attorney whose maybe interest is not the same as the real parties in interest here, who are not present.

THE COURT: We need to do a reporter switch here.

(At which time in the Proceedings another reporter reported the remaining proceedings for this day.)

16di-003700

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, Josephine Raines, an Official Court Reporter for the Circuit Court of Cook County, County Department-Chancery Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause. that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable DOROTHY KINNAIRD, Judge of said court.

Josephine Raines
Official Court Reporter
License 084-001740

Dated this 3rd day
of July, 2001

16di-003701

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

I, the Honorable DOROTHY KINNAIRD, Judge of the Circuit Court of Cook County, presiding judge at the hearing of the aforementioned cause, do hereby certify that the above and foregoing is a true and correct Report of Proceedings had at the said hearing.

AND, FORASMUCH, THEREFORE, as the matters and things hereinbefore set forth do not otherwise fully appear of record, and attorney for the _____ tenders this Report of Proceedings and prays that the same may be signed and sealed by the judge of this court pursuant to the statute in such case made and provided.

WHICH IS ACCORDINGLY DONE this _____ day of _____, 2001.

_____
HONORABLE DOROTHY KINNAIRD
Circuit Court of Cook County,
Illinois

16di-003702

HOWARD N. REISMAN
55 E. WASHINGTON ST.
SUITE 830
CHICAGO, ILLINOIS 60602

July 31, 2001

ID #36-3994829

Ms. Susan A. Stone
Sidley, Austin, Brown
& Wood
10 S. Dearborn St.
Chicago, Illinois 60603

Transcript of court proceeding:

July 24, 2001 - Dean L. Buntrock, a Director of the Terra Foundation for the Arts, et al., Plaintiffs, vs. Judith Terra, a Director of the Terra Foundation for the Arts, et al., Defendants.

No. 00 CH 13859

Before Judge Dorothy Kirie Kinnaird

142 pages - copy - $397.60

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.
AND
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

No. 00 CH 13859

REPORT OF PROCEEDINGS had in the above-entitled cause, before the HONORABLE DOROTHY KIRIE KINNAIRD, Judge of said Court, in Courtroom 2302, on the 24th day of July, A.D. 2001, at the approximate hour of 4:30 o'clock p.m.

16di-003704

APPEARANCES:

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BY: MS. SUSAN A. STONE and
MS. LORI LE PAR ROESER
Appeared on behalf The Terra Foundation
for the Arts;

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HON. JAMES E. RYAN, Attorney General of
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BY: MR. FLOYD D. PERKINS and
MS. THERESE HARRIS
Assistant Attorney General
Appeared on behalf of the Plaintiff-
Intervenor;

16di-003705

APPEARANCES CONTINUED:

VERNER, LIIPFERT, BERNHARD, MC PHERSON & HAND
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BY: MR. LEONARD GARMENT
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PATTISHALL, MC AULIFFE, NEWBURY, HILLIARD & GERALDSON
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BY: MR. DAVID C. HILLIARD, Mediator, and
MR. BRETT A. AUGUST, Deputy.

I N D E X

WITNESS: page:

None

EXHIBITS: page:

None

THE COURT: And who will be speaking at this table besides Mr. Cummins?

MR. TODD: Chris Todd. I don't know whether Mr. Garment will have that much to say or not, Judge.

THE COURT: Okay. Mr. Quinlan, I am trying to get a handle on the case law issue about something that's close to here.

Let's assume we have a regular law-suit which this, of course, is not. And some of the parties settle with others of the parties and they come to the Court and they say, "Please approve this settlement."

Usually they come and they say, "Give us a good faith finding that this settlement is in good faith or whatever," and they proceed against the others. You don't have that situation here.

MR. QUINLAN: You don't have that. That's only a contribution.

THE COURT: Right, and in this case you are dismissing everything in regard to everybody else.

MR. QUINLAN: That's correct.

THE COURT: So any of the cases that have

been cited, is anything close to the situation where someone is attacking or wants to attack the settlement?

MR. QUINLAN: Sure.

THE COURT: How does one do it?

MR. QUINLAN: One would do it either by motion to vacate a settlement or you would do it by -- depending upon your time, a 21401 gives you two years to try to claim you have some basis for doing it, but you can't be dilatory, as your Honor knows, on a 21401.

If I may, my suggestion is that these are the weapons you take off the arsenal wall. I don't mean to suggest that counsel even has them available to him.

I have a real hard problem with what standing they have. Now, they participated in this. In a mediated settlement, the only basis for ever setting aside or objecting to a mediated settlement is if you haven't had the opportunity to participate.

In fact, it was their client who asked for it. It was their clients who chose a mediator. It was their clients who wanted none

of this information to be circulated or to go forward any further.

It was their clients who sought, participated in, and negotiated throughout this process.

Only when it didn't end up with the result that they wanted do they now attempt to object. So they withdraw from the agreement, refuse to be part of it, refuse, even though they participate in the hearing, a Board meeting which was lawfully called, as pointed out by Ms. Stone. And everybody had notice and they participated.

Eight members were there and their two people were there and they did participate and they did object to certain things.

They didn't object to the agreement. They didn't object and say it wasn't the agreement. They didn't say the terms weren't right. They didn't say the terms should be changed.

We are now here to present that agreement to your Honor to be signed. There is no fairness hearing that has to be held here. There is nothing of that nature to take place.

What these people are doing is they

are trying to stop you from signing it. There is absolutely no basis to stop this Court from signing it.

You have a validly-executed agreement that was mediated. It was determined by mediation. Everybody participated in it. They were there. They asked for it. They wanted to be part of it.

And that mediated agreement then went to the Board. The Board held a valid hearing. Everybody was there that could be there and it was voted on and they lost.

THE COURT: Give me an example of a case, a non-class-action case, non-class-action, where someone has successfully come forward and challenged a mediated -- or not even a mediated -- a settlement. Just I will settle for a settlement and I am looking for the procedure on how it's done.

MR. QUINLAN: I can give you the procedure, but I don't have a case in front of me where they have been successful.

I have cases where they haven't been successful and the reason, your Honor, they haven't been successful is just, as Judge Posner said, the situations where settlements are ever considered

beyond is this -- the agreement of the party and the needs reflected in terms of the party are almost nonexistent, because the parties determine the fairness and the appropriateness of the settlement.

By the parties agreeing to it, by the Board voting for this, determines the fairness. They were exercising their business judgment when they did that.

I would call your Honor's -- yes, Posner's decision: "Fairness of a settlement of a legal dispute is like the adequacy of consideration supporting contractual funds, a matter best left to negotiation between the parties."

And only in class actions is that a different setting and he points out that's only because the lawyer is the principal here. And the lawyer himself is acting not only supposedly on everybody else's behalf but only on his own behalf. They often conflict.

And the case is the Marco case that we cited to you, which is a divorce case, and in that case they said you don't have to have an evidentiary hearing. You don't have to even go

through that process. Look at what's been filed here.

Your Honor has seen it twice now, the same documents that were filed in Federal proceedings, which Judge Bucklo discounted, he said did not raise an issue for her to consider.

THE COURT: Their documents are much different this time. Mr. Cummins is --

MR. QUINLAN: Well, the second time -- They are very similar. They are the same type of affidavits. None of those affidavits are based on personal information.

We have evidence of, you know, the potential of looking for real estate, I have some possibilities of putting the property temporarily someplace else, using it for headquarters or facilities and things of that nature.

None of those things are raised in any kind of evidentiary issue or a material evidentiary here. And all of the things are consistent with, in fact, this being a valid, appropriate settlement. And frankly they all went to the intent of the testator here, the settler here, which your Honor says wasn't even an issue.

It was all coercion. None of it goes to coercion.

All we have here is people who have speculated before, Mr. Tucker, about he thinks they may have been coerced.

THE COURT: How about some case law on coercion?

MR. QUINLAN: On coercion?

THE COURT: And who was normally the party who is bringing the coercion issue?

MR. QUINLAN: The people who have been coerced, your Honor.

THE COURT: Okay. Do we have any cases cited in this mass of cases that you have all given me --

MR. QUINLAN: Sure.

THE COURT: -- that talk about someone other than the person who was conversed -- coerced coming forward and saying somebody else was coerced?

MR. QUINLAN: I don't see that, your Honor. I think Judge Bucklo didn't really address that.

She said, "They are asking me to --" First of all, she said, "Where is Mr. Stebbins and where is Ms. Marshall? They are not here. They do not offer any affidavits."

And said, "What you are asking me to do, to find the two actions that you allege that were taken, one was the threatening of filing of the Complaint and the fact that they changed their vote to be a grounds for me to enjoin them from doing that."

She found both of them to be legal actions. And the changing of the vote to be consistently legal actions.

The investigation she also found to be legal and she says, "You are asking me to take legal actions and to somehow apply them to somebody else and to say that that's coercion. It is not coercion."

Even the cases that we cite to your Honor in our brief show that it isn't coercion. They threaten to file a Complaint, to file a Complaint. And what they are saying is that they settled this because they were subject to this Complaint. Isn't every lawsuit about that?

They try to torture this alleged coercion into a conflict of interest, because they had a person conflict. It was their benefit to settle this so all these things wouldn't happen.

Your Honor, this was only the potential of lawsuits here, the potential against Mr. Stebbins and to Ms. Marshall; but, in fact, their clients have the suit against them.

How in God's name under their theory could they participate? They are already in suit here. How can anybody in a settlement ever participate? Because they are sued. That's how you settle cases. Those are the people who sit down and settle.

How could you ever settle a divorce case? Because on the one side is the husband, who is either bringing the suit or has a suit brought against him and vice versa with the wife. And both of those people are the people that come forward to settle.

Those are conflicts? They are not conflicts under the law, your Honor, and surely we can't torture this alleged charge of coercion into a conflict and it doesn't make a conflict.

As we point out in our papers, it requires a wrongful or illegal act or a threat against the person which deprives of them of their free will.

We cite the Reginal case, the Waldeens case, Lindberg/Flynn, Heggins vs. Brunswick, Town vs. -- the Town of Libertyville, In Re the Marriage of Hammond Smith (phonetic spellings).

All these cases stand for that proposition that unless you can do that, that it fails, and that's what basically they have found, that it fails.

The Wellings case, the firm -- the Trial Court's refusal to even vacate a settlement agreement where the movants failed to establish fraud, coercion, or duress by clear and convincing evidence.

The Flynn case, burden of proving duress or coercion by clear and convincing evidence, is on the party asserting. Defendants failed to meet their burden.

Your Honor, there isn't a single situation here and they cite no case, no authority to support any of their positions. What they try to do is they try to torture by analogy class actions into the settings.

Most of the cases that they cite to you, they don't even tell you it's a class action.

And they suggest that it supports their position. But if you look at it, it is a class action, a totally different situation.

Each one of their alleged conflict cases, in fact, involve for the most part pecuniary conflicts. Other situations are conflicts involving lawyers. It's a lawyer's conflict that they had.

In some of the situations it didn't even involve the Board of Directors, so that none of the situations -- frankly, they are the ones that are throwing out the cases on the basis that there is a conflict and it's a pecuniary conflict. And that's why they couldn't participate.

So those cases really support our position, but the issue here, really, your Honor, is not whether or not they can set aside this Consent Decree.

It's whether your Honor can sign it. And they don't even challenge the terms. They don't even challenge whether it's an agreement, because they can't.

They were there. They participated in the mediation. They were there and participated in the Board hearing. They know that this is the

terms. They know that this was accepted. And they know it's an agreement of the parties.

They are not there. They are not part of this. This is like the uncle trying to charge in and contest the divorce proceeding between the parties who agree.

I don't know what standing there is for that. None. I don't see any. You may have some sort of an interest, because you know the parties and you have some relationship. But that's not good enough.

THE COURT: So -- I have been taking a look at the cases you were talking about, also. And as I understand it, what you are saying is all of these involve Motions to Vacate, like this.

MR. QUINLAN: Right.

THE COURT: That a Motion to Vacate and already entered into an Agreed Order, the parties have stepped up.

MR. QUINLAN: Right.

THE COURT: And in each of those cases it is a party who participated who seeks to vacate it for some reason. It's not a stranger to it.

MR. QUINLAN: That's right.

THE COURT: And you are saying these three are essentially strangers?

MR. QUINLAN: They are strangers to the agreement.

THE COURT: So you would be saying that they wouldn't be able to bring the 21401?

MR. QUINLAN: Absolutely. I don't see it. I mean, it's their burden to show you. I don't see how they can do it, but they have a long process here. First of all, they don't --

THE COURT: What's the right process? What can they do?

MR. QUINLAN: They can challenge the agreement after it's been entered.

THE COURT: Yes, but how? You said they couldn't bring the 21401, so --

MR. QUINLAN: I don't think they can. That's the process.

THE COURT: So how can they?

MR. QUINLAN: They can't. Well, if you don't have standing, your Honor, you can't bring it. You can't bring a lawsuit without standing.

THE COURT: Okay.

MR. QUINLAN: So without standing to

bring a lawsuit, you can't bring it. I think they don't have standing, but it's not my job to research that finding.

I don't find anything in all the papers that they find that show that they have any standing. I don't see anything in all the documents that they filed that shows that any kind of coercion took place here that is recognizable in the law.

I don't see anything in here that shows that there is a conflict of interest that took place on the part of Mr. Stebbins and Ms. Marshall when they voted.

In fact, I see the law under the Statute, in fact, under the procedures that were adopted by the Foundation for their people that established that a code of ethics that was a pecuniary requirement, and that's not met here, either.

Nothing in any of the papers, any of the documents, establishes a conflict, establishes any coercion taking place. And as a matter of fact, don't even establish any harm to these people, who aren't participating. So I don't know

what they are complaining about.

Their lawsuit is dismissed, for they are no longer parties to a lawsuit and will not be, as soon as your Honor signs it. They are out of the case. They suffer no harm from that.

What you have here are disgruntled directors who participated in a vote and lost, which was legal, which was proper. They participated in mediation and they lost. Mediation --

THE COURT: Well, you don't lose in mediation. You just don't agree.

MR. QUINLAN: Pardon?

THE COURT: You don't --

MR. QUINLAN: Well, you don't lose; you don't agree. That's the point. And that's why they are saying I am not supporting this.

And it's the same as in any other settlement. You have two of the parties, three of the parties, four of the parties settle it. They are just not party to it.

And so I don't know what standing they have here to complain about anything.

On the other hand, --

THE COURT: Okay. Mr. Quinlan, I really

do want to hear from the defendants, because they are the objectors.

MR. QUINLAN: The real point, though, your Honor, the only thing that they can complain about before you sign this is whether or not there is an agreement and whether or not this is the terms. They don't even do that.

So there is nothing here but for you to sign it.

They complain about the conflict of interest that was created by this coercion, saying that it voided their votes. But, as we point out, it isn't a conflict of interest. The votes weren't voided. And even under the procedure and the Statute, there is possibly a way in which that wouldn't make any difference.

But, in any event, they don't even have any standing to do any of those.

THE COURT: Thank you.

Mr. Perkins. You don't need to say anything, if you don't want to. If you want to say anything in support of entering this Consent Decree or do you want to hold your remarks in response to whatever they say or objections? It's up to you.

MR. PERKINS: Judge, I just -- I am not going to repeat.

THE COURT: Okay.

MR. PERKINS: I do think it's important to note that mediation started at the defendants' request, that mediation was conditioned by these defendants by coming to us and saying, "Can we give full releases in a total global Terra-related settlement?"

They came to us, the Attorney General's office, in the middle of expedited hearings and expedited discovery, and said, "Stop litigation. Let's mediate."

So they were the ones who first came to us and said, "Can we get individual releases? Can we settle everything?" And that was the start of mediation.

We never talked to Dr. Stebbins ever. We have never had a conversation with him. We've never sent him a separate communication. We never sent him our First Amended Complaint. He must have gotten it through counsel.

That was sent --

THE COURT: You did meet him. When you

say "we," you were the only one who was there with him, all when they had their Board meeting.

You did meet Dr. Stebbins?

MR. PERKINS: When they -- Yes. When we were in mediation sessions, he was present in the room and we did say probably "hello" and he did speak about two other people in the room.

But we did not have any conversation with him. We did not talk about his -- the matters related to him individually.

They were never discussed in those mediation sessions. In fact, none of the matters about individuals were ever discussed in the mediation sessions. That was --

Part of the deal was, if we could resolve the issues with regard to the Foundation staying in Chicago or Illinois or how we resolve its function, that it would -- that the idea was all -- would be included and there would be releases for everyone.

That -- It's also important to note that that draft amended complaint which was sent to people in settlement is to show our position with regard to the -- our belief that the Foundation

couldn't leave Illinois, which was a real reason it was given to them. That was given to them in March of 2001.

We then went and spent April, May, and June mediating. Now, if they were concerned that Dr. Stebbins had changed his mind or he was going to have these conflicts, they certainly didn't do anything for all that time period. That's because they all expected to get releases. They wanted releases for themselves. It was part of the mediated plan.

THE COURT: And part of this settlement is to give them those releases.

MR. PERKINS: They have got it, Judge.

THE COURT: Only them. What do you mean by "them," "they have gotten them"?

MR. PERKINS: All the directors of the Foundation, everybody is released.

THE COURT: Okay.

MR. PERKINS: The releases -- The cause is dismissed with prejudice. They have gotten really what they were seeking.

Due to the fact that in the end of May we thought settlement was over and we have set

that forth in our papers. We started to get ready. We were up against law firms that were spending quite a bit of time preparing it.

We are -- You know, we may be the Attorney General's Office, but we have, you know, limited resources. And as we started to do that, we became aware of an unrelated matter. That matter, it was a review by us. It's our duty to do those things.

And we have set those forth in those papers, but we never communicated directly with Dr. Marshall and we resolved that matter with her counsel. And those matters were never tied together. And if they were still going, she would have given up.

Perhaps, if she was going to do something about trading or tying the matter together, she certainly didn't accomplish it, because she already voted. And this deal is already accomplished.

There was no tying those matters by her, by us, or by anyone.

We didn't do anything unlawful or wrongful in this case and we never caused anybody

any duress. We participated in mediation.

The contentions about Dr. Stebbins were the releases that everybody was going to get. And it's just convenient now to complain about those.

We don't agree with counsel from Sidley and Austin whether the Foundation is a charitable trust or not.

THE COURT: Let's not get into that.

MR. PERKINS: We put that in our papers. It's moot, Judge, and we agree. However, the objectors have made an issue of it. We placed our arguments in the papers. As is the issue of what Dan Terra's intent was.

There is all kinds of remarks bandied about about what it is. We disagree. However, that also is moot.

We acquiesce to letting the Foundation run as it has and certainly the Foundation running as it has is clearly within its past intent and clearly within its Articles of Incorporation.

So the contention that this settlement is causing it to act contrary to its history is preposterous. It's precisely going to act as it

acted in the past.

If there is any particular questions your Honor has, --

THE COURT: No, I don't. I really do want to hear finally from the defendants.

Before I do that, we have -- I know we switched court reporters. I can keep going. I want to make sure that you all don't want to take a five-minute break before you start. It's up to you.

MR. CUMMINS: It will really take a lot longer for me to congeal all of those eloquent words of my colleagues, so we are ready to go now.

THE COURT: Fine. Mr. Cummins, go ahead.

Let me know if anybody feels a need to take a break. I have a tendency to just keep going through. So just let me know. Request a recess at any time.

MR. CUMMINS: I had that feeling earlier, but I restrained myself.

Judge, let me start with some -- just a simple proposition.

You have before you a piece of litigation that has momentous applications to people

in the State of Illinois. It is a critical issue in this community. No question about it.

The Attorney General, in his complaint, where he is complaining that folks on the Board weren't doing the right thing, he says, paragraph one: "This cause is brought for and on behalf of the People of the State of Illinois by and through the Attorney General," and citing the Charitable Trust Act, "and his common law power and duty to protect the interests of the People of Illinois and pertaining to charitable assets."

Now, that's the context in which this litigation from the AG's standpoint was initiated.

This is a court of equity and I am going to suggest a couple of things. The decision that you are called upon to make on this settlement, which by any objective standard has some questionable aspects to it, is a critical decision.

You invested a lot of time and effort, the folks who sat through mediation with my colleague, Mr. Cronin.

Judge, there is no need for you to resolve this matter today. And I am not suggesting

-- In our papers that we filed, we asked for a couple of simple things. And if you want to restrict me to two hours a shot, that's fine.

I need three depositions. I need the deposition of Mr. Perkins, who was interviewed and said and did certain things.

He contests those matters before this Court. He files a 40-some-page document that is replete with factual assertions that have not been tested.

With respect to the obvious conflicted posture of these two Board members, Marshall and Stebbins, without the opportunity to effectively cross-examine these folks, Judge, you are certainly not in the position to make a determination of whether or not their decision in this case was appropriate.

And more importantly, we take the position they should not have participated in this vote, because they were not disinterested, which is a standard that must apply here.

THE COURT: Okay. Well, then, weren't your clients also not disinterested? I mean, weren't they also disinterested parties? They

should not have participated in the vote, either?

MR. CUMMINS: Well, Judge, let me answer it this way.

My clients -- My clients were not during the course of mediation, put in a position where they were threatened with the possibility of additional protracted litigation, as was the case of Stebbins.

They were not in the position of allegations that they were engaging in possible conflicted employment positions with the State of Illinois, as with Dr. Marshall.

There was not a word said, with all of the great Foundation guidance and counsel, read those transcripts. There was not --

When the folks from Winston & Strawn asked them about, "Are you sure you are making this vote, you are conducting this vote independent of any pressure or coercion --" you know, the Miranda warnings that he gave them -- there was not a word said about the fact that, "Hey, wait a minute, we have to decide whether or not these people, given their posture in this matter, are conflicted."

THE COURT: Well, your clients didn't

say it, either.

MR. CUMMINS: Judge, --

THE COURT: Dr. Tucker were there and Mrs. Terra were there.

MR. CUMMINS: Our clients -- I wasn't there, Judge. Their lawyers weren't there. Nobody was there from my folks.

THE COURT: Why?

MR. CUMMINS: If you expect --

THE COURT: Why? I mean, the rest of these folks had lawyers with them, did they not?

MR. CUMMINS: No, Judge, the only people --

THE COURT: I don't mean on the line. They weren't on the phone. But did any of them have lawyers with them or Acts --

MR. CUMMINS: No.

THE COURT: Not even in the room?

MR. CUMMINS: No, your Honor.

THE COURT: Do we know that?

MR. CUMMINS: You see, here is the --

THE COURT: I'm sorry. Do we know that? I --

MR. CUMMINS: Yes, we know that.

THE COURT: Let me go to the transcript.

I know they said they couldn't be on the line, but there sure is an awful lot of whispering on that tape with people.

MR. CUMMINS: Well, there were folks from Sidley, folks from Winston.

THE COURT: So --

MR. CUMMINS: That's who was there. That's all. Those are the only lawyers. They can tell me if I am wrong. I know I am not wrong.

THE COURT: Okay.

MR. CUMMINS: Now, Judge, here is the simple proposition. You are going to be gone for three weeks.

THE COURT: Yes.

MR. CUMMINS: There is no reason for you to rush this thing to a conclusion today. I am just trying to be pragmatic. We don't need to go across the street and go through all the, you know, monkey business.

And if they think that we are going to walk away from this and have these counterclaims just filed away, this litigation isn't over, Judge, but it ought to get over but it ought to get over fair and right.

And one way to do it is you afford me six hours of discovery of deposition testimony of those three folks. We will come back here in three weeks. Let's have a presentation on the issues that we have raised, giving us at least, Judge, a fair opportunity to present our position.

Now, there is nothing unreasonable about that, most respectfully. You know I am not a guy that's going to go out and just waste a lot of time. I don't have the attention span for that.

But I will tell you this: Your Honor, it is not coincidental, it is not coincidental that the Attorney General's Office would flip on the switch of an investigation of Dr. Marshall's facility in the midst of these negotiations.

Is that coincidental? It's not coincidental that Dr. Stebbins is accused of engaging, not just in conflict of interest but compromising confidential information of the Foundation in furtherance of his own interests as a director or a participant in the affairs of another institution.

Those things aren't coincidental. Anybody that's been out after dark, who is looking

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at those facts, and a member of the public would say, "Wait a minute. Something is rotten here."

And all I am asking you to do, in simple sense of simple fairness, consistent with the stakes that are at issue here, give us a chance to vent these things.

And as officers of the court, we are not going to come back here and protract this, if we don't -- if we don't back up what we are saying.

We will make an offer of proof. I will make an offer of proof on what exactly we expect to show.

And I will bet you this: With Dr. Marshall's and Dr. Stebbins' cross examination, they will not be able to utter a word to suggest that anyone reviewed with them the implications of these activities and the impact that it had on them.

Now, if --

THE COURT: On the cases that you cited, and that I did spend a lot of time with over the weekend, your cases, do we have anything that comes close, a non-class-action case where parties to a settlement or a nonparty to a settlement in which your clients are not parties to a settlement,

but certain parties in the case have settled and a nonparty to the settlement comes forward and challenges that?

MR. CUMMINS: Judge, we are defendants in this lawsuit.

THE COURT: And they are going to dismiss you with prejudice.

MR. CUMMINS: Well, they are going to dismiss us, but we are counterclaimants, your Honor.

And, your Honor, let me just -- This ain't -- This isn't just, you know, a procedural nicety. You abated, and I don't want to put you in the trick bag, you abated these proceedings. That doesn't bar my client from filing an answer to these unfounded charges. We did that. You abated these proceedings. We were not foreclosed and cannot be foreclosed, most respectfully, from filing a counterclaim. Those pleadings are on file.

Just so the record is clear, we filed a motion for leave to submit those, because you directed it to be done that way. And I was --

THE COURT: Well, normally, when someone doesn't file -- You have one client that's filed

an answer, never filed a counterclaim. You have two other clients --

MR. CUMMINS: Okay. Blame me, Judge. I wasn't there.

THE COURT: I know. You have two other clients that never answered. One had a motion to dismiss pending and the other one I don't think any responsive pleadings were --

MR. CUMMINS: Well, now you have it all in front of you.

THE COURT: And so, you know, there is a time in Illinois procedure to file a counterclaim. And if you don't file it when you file your answer, I think you have to come in on a motion for leave to file it.

MR. CUMMINS: Judge, you -- No, your Honor directed no further pleadings be filed. That stopped the clock. The only reason --

And when I talked to Jim Wilson, the only reason that they were able to get that one pleading on file was they had the opportunity before you closed the case on pleadings.

Your Honor, it would be --

THE COURT: When we went to -- When you

went to mediation, right.

MR. CUMMINS: It would be grossly unfair for you to suggest that, "Hey, having entered an order that says no more pleadings, oh, Mr. Cummins, you are too late." I know you wouldn't do that.

THE COURT: Well, I understand that. It's just that I think it was around February 6th. I don't have all the orders here, but when you went -- or February 5th or whatever, when you went -- when they went to mediation, I entered an order that enjoined or stopped anybody from filing any-more, I think we called it briefs or motions, did we not? No more motions could be filed in this case.

Did I -- Is that the way it was worded, that no one could file any motions?

MR. CUMMINS: I've got the order somewhere in this morass of paper.

THE COURT: Okay.

MR. CUMMINS: But there is no question, according to the lawyers, the lawyers' understanding who represented my clients at the time, was that there were to be no further pleadings.

And for better or worse, we are new

lawyers, but that doesn't mean we have to compromise our clients' interests.

And, Judge, you know, I don't want to -- I don't want to get off side-tracked on that, because maybe some of these issues -- I said to you the last time a lot of this can get simplified.

One way to get simplified is to give us a fair opportunity to present our position. And most respectfully, you have given us an opportunity to present a lot of our views and legal arguments. But the critical element, the critical element, the role of these folks and the implications that the Attorney General's conduct has not been dealt with and to leave this record open, your Honor, on that subject is what I am addressing in the first instance.

You -- Your order specifically said, and I am quoting from Paragraph 5 of the order entered on February 5th, 2001: "All motions and matters herein, all matters herein are hereby stayed, pending the further order of court, with the exception of directing the defendants' motion for advancement of fees and emergency motion and so forth, respectfully."

So, Judge, I want to keep that issue aside, except to tell you we believe we have appropriate pleadings on file. I believe those pleadings are on file. Obviously, I'd like you to say, "Yeah, your pleadings are on file." But I think, even if you don't say that, under the Rules of Civil Procedure, the orders of this Court, we are timely and these pleadings are proper.

But let me come back to the major premise of our position. We are asking you, we are respectfully soliciting from you some limited consideration of giving us an opportunity to represent our clients effectively by affording us the limited discovery that we have requested.

THE COURT: Do we have any non-class-action case authority where this has -- this kind of procedure is being asked for when parties who are not --

MR. CUMMINS: I don't know. Candidly, I don't know the answer to that, as I sit here.

THE COURT: Well, I looked at all the cases that were cited, to try to find something that was close here. And I am just not finding

anything.

MR. CUMMINS: Well, since last Thursday -- Since last Thursday, having -- We are a group of lawyers, all of whom came to this case relatively recently, as you know.

THE COURT: For somebody who came relatively recently, you put together a fine bit of work here.

MR. CUMMINS: Yes. I don't take credit for that. It's all these folks.

THE COURT: Okay. Well, then they did.

MR. CUMMINS: I just say this: We will supplement our submission in response to precise questions that you want. We will be happy to do that. And Chris Todd may have a comment on that.

But I come back to where we are in this proceeding and I can't imagine you being rushed to conclude this matter, without giving us the opportunity to investigate these issues as we have suggested.

THE COURT: And what you want to file, I guess you already have with leave, but what you are asking leave of Court to file as a counterclaim, where you want to sue Mr. Perkins and you want to

sue everybody else on the Board?

MR. CUMMINS: We have named those parties in good faith, consistent with our obligations as lawyers under Rule 37 and otherwise, yes.

THE COURT: So he would be now a party, he personally would be a party to this case?

MR. CUMMINS: Well, he is named in the pleadings.

THE COURT: And I think -- Isn't the -- Is the Attorney General, also, if I remember?

MR. CUMMINS: Of course, the Attorney General is a party.

THE COURT: Is a party?

MR. CUMMINS: Yes.

THE COURT: Okay. So we would be talking special counsel would then have to be coming in on their behalf, is that correct?

MR. CUMMINS: Well, here is what I would -- Here is what I would -- You know, there is a -- You know, I am asking you to be reasonable. And I think we can persuade my clients to be reasonable.

If you want -- If you want to continue the issue of these pleadings -- I am not saying we are giving them up or suggesting that they are not

properly filed, but if you want to finesse that issue for a moment.

THE COURT: I don't want to finesse anything. I would like to deal with what I have got in front of me. And I have got a motion which you have motioned-up for today --

MR. CUMMINS: Right.

THE COURT: -- along with all the rest of this stuff --

MR. CUMMINS: Right.

THE COURT: -- for leave to file counter-claims and which you want to sue the parties that have entered into this Settlement Agreement.

MR. CUMMINS: Right.

THE COURT: I have that right?

MR. CUMMINS: Right.

THE COURT: Okay. And so you want to sue all the directors who are presenting this individually?

MR. CUMMINS: For the reasons that we articulate in those pleadings.

THE COURT: Okay. And let's assume you file that when you are -- when the day is done and you have totally proven up all of your facts here

on it, you get an order that says "no settlement," right?

And you also want damages from each one of these individual directors?

MR. CUMMINS: We plead for that, yes.

THE COURT: It looks like actual and punitive damages from each director or is it just from the Attorney General under your 1983 count?

Now, you see, you have got your wherefore clauses for everybody. So it looks like you want damages from everybody. So you want damages from Ambassador Hartman and Ambassador Andreani and everybody?

MR. CUMMINS: Your Honor, those pleadings are serious. They are brought in good faith.

THE COURT: I know they are serious. I am just trying to figure out is that -- is your pleading to stop the settlement or is your pleading to also get damages for breach of fiduciary duty for all of them?

MR. CUMMINS: The possible focus of those pleadings is to abort this improvident settlement.

THE COURT: Okay.

MR. CUMMINS: That's the principal focus.

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Now, lawyers, like everybody else that does this, tack on all kinds of other claims for relief. And they are serious. We are not saying they are not serious.

But what's the focal point of this? The focal point is what I am talking about here, which is the problems with the settlement and we can -- If you want me to address the pleadings, I will be happy to do that.

But I come back to where I think we ought to be, if reason prevails here. And that is afford us a limited opportunity. I am asking for a limited opportunity to conduct some decisive discovery with respect to these very serious circumstances, which clearly taint this process, Judge.

You know, I am not going to start repeating what I said. You know that this isn't coincidental that these things happened. You know that.

THE COURT: You had about a two-and-a-half- hour meeting with the Attorney General, is that correct?

MR. CUMMINS: My colleagues did.

THE COURT: And were there -- I read through your attachment in that regard, if I have got to the right one.

MR. CUMMINS: And with respect to --

THE COURT: I think that's Mr. -- Just one second. I want to get the right one.

MR. TODD: Your Honor, --

THE COURT: Your exhibit number.

MR. TODD: That's Mr. Longwell's affidavit.

THE COURT: So it's No. 7. Seven?

MR. TODD: Mr. Longwell is an attorney in my law firm. He accompanied me to the intervenor that was held here in Chicago in the Attorney General's Office.

THE COURT: Right. So is No. 7 attached?

MR. TODD: Correct.

THE COURT: And I remember, when I read this one this week and then going through all of this, there were no points, even in this meeting with Mr. Perkins where he was asked questions and he flatly refused, is that correct?

MR. TODD: That's not accurate.

THE COURT: Okay. Well, point out to me where he --

MR. TODD: If you will look at page two, about the middle of the page, I showed Mr. Perkins the exhibits, what were marked FT2 through 7, which are the -- if I recall correctly, were the declarations of various individuals who had spoken to Dan Terra before his death about moving the collection from Chicago to either Philadelphia, New York, or Washington.

THE COURT: Yes.

MR. TODD: The architect that had drawn up the plans in Washington to build the new museum, the real estate agent that had taken him on a helicopter ride to look at places appropriate for a museum in Washington, D.C.

THE COURT: Okay. That all goes to Dan Terra's intent. Now, that wasn't what we were supposed to be talking about.

MR. TODD: I asked Mr. Perkins if he would tell us whether or not he knew about the facts contained in those declarations before he came into this court and represented to your Honor that there was no doubt that Dan Terra intended to lock up this Foundation's collection here in Chicago.

And he said, "You have lost. We have settled this. I am not going to answer those questions."

THE COURT: But that --

MR. TODD: The answer to your question is clearly plainly "yes."

THE COURT: But that wasn't what you were supposed to be talking to him about. You were supposed to be talking to him about the issues of coercion in regard to Dr. Stebbins and Dr. Marshall. It wasn't supposed to be about Dan Terra's intent.

So what I am trying to figure out, when you questioned them about those issues, you were talking about those issues, is there something that he was noncooperative with?

I wasn't seeing that here.

MR. TODD: Well, your Honor, there was a question put to him, not by me but by Susan Stone, about whether or not he had coerced, whether he had intimidated, whether he intended to compromise Dr. Stebbins or Dr. Marshall.

And guess what? To everyone's shock and surprise, he said, "Absolutely not, that's not

the test, that's not the issue. That's not the standard of review. That's not the law in Illinois or any other State, I submit."

What is the issue is what Mr. Perkins did under the circumstances. Those are objective facts. And then what -- Not subjectively, but what Dr. Stebbins and what Dr. Marshall did after Mr. Perkins did what he did, and those are all objective facts that we can determine.

It doesn't -- It is not, as Ms. Stone and Mr. Quinlan have represented to the Court, that you have to do an analysis of the mental state of Dr. Stebbins and Dr. Marshall. That's not the analysis. That's not the law.

THE COURT: We pretty much know what they did or they didn't do, based on this mediation record that we have?

There is an abundance of correspondence to and from the mediator and in the various sessions here.

And if you put them in order and you put them in order by date, could you highlight for me where you think the point in time came where they switched gears so dramatically in regard to

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something that the Attorney General did?

MR. CUMMINS: Well, Judge, most respectfully, on the issue of coercion and intimidation and so forth, those are issues that ought to be explored.

And with respect to that issue, and I don't mean to take my colleague's thunder here, but when -- there was an attempt to do this informally. And you have heard what took place with Mr. Perkins. He wasn't under oath and he wasn't subject to cross examination. And I'm not suggesting anything by those comments regarding Mr. Perkins.

There is a letter of July 13th that was one of our exhibits, you will see. When the issue came up, let's have an opportunity to chat with Dr. Stebbins.

Sidley and Austin, the same law firm that purports to represent the museum and the Board, the Foundation, is speaking for now Dr. Stebbins, who is accused of compromising interests by the AG of the Foundation.

And in that letter of July 13th, which is Tab 34, you will see that they respectfully

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declined to make Mr. Stebbins available for any kind of examination or interview.

Now, all of us who have tried cases know that what folks do when they are sitting down talking and what they do when they are sitting in that stand having raised their hand to tell the truth, the whole truth, and nothing but the truth and incisively interrogated about facts and circumstances, can turn out to be 180 degrees out of phase with the story they were telling before they hit that stand.

Now, all we are asking you to do is afford us the opportunity to conduct these limited interrogations of these people and come back to you and establish, as I believe we will, and which we offered to prove, that the timing of the Stebbins-Marshall incidents were not fortuitous, coincidental or happenstance, that these individuals did indeed, whether or not they would say that it affected their judgment, felt threatened and intimidated by these activities. They said this much on the record.

And whether or not in that circumstance, as a matter of law, they were conflicted

to the point and interested in the outcome of this matter to the point where they are impaired and disqualified from voting in favor of this settlement.

That's the simple proposition. We have put aside the coercion. We put aside the threat. We put aside all that. The package that we will present to you I respectfully suggest that we offer to prove will conclude -- have you conclude that the way this settlement was resolved at that meeting was not appropriate, not consistent with controlling Illinois law.

And given the amount of time and effort that's been put into this case, to deprive of that, deprive us of that opportunity, which you can constrain in any way you want, I respectfully suggest, Judge, leaves a gap in this record that renders this proceeding unfortunately not complete, not appropriate, not fair.

THE COURT: Can we go back to the issue of the point in time there was a draft of a complaint that was circulated by the Attorney General in regard to Dr. Stebbins.

MR. CUMMINS: Yes.

THE COURT: And that exhibit that circulated that -- Someone help me out on the exhibit number. I am not finding --

MR. CARROLL: Twenty-four?

THE COURT: Twenty-four of the objections exhibit. That was done on March 21st. That was done early on in the mediation process.

Now, do we have between March 21st of that year, of this year, and the time that the mediation concluded or some major shift that's attributable timewise?

Is there anything that I have in any of these minutes where Dr. Stebbins had a certain position in the mediation that changed or was different after that?

Can you point to anything?

MR. CUMMINS: No, I can't.

THE COURT: Because I know you have a lot of -- Well, you have all the same things that I have, which are all these communications to and from counsel and from the mediator.

Do we have anything that shows that the ultimate position that he took in this case at the end was any different than something that

he had all along, that he was taking all along?

MR. TODD: Yes, your Honor. There are a couple of things.

THE COURT: Okay.

MR. TODD: If you look at Dr. Tucker's declaration, it's Exhibit 9, and the paragraph is -- discusses in here Dr. Stebbins' position, the fact that Dr. Stebbins embraced, and I will use the -- with all due respect to the Court, Dan Terra's intent, the original intent, which was not to keep it isolated in Chicago or anywhere else, but that this collection was for all of the people of the United States and indeed the world. And --

THE COURT: I'm sorry. Which paragraph are referring to?

MR. TODD: Just I will find it.

THE COURT: I am showing that he has got Page 7, Paragraph 19, the Attorney General drafted the complaint and then he just says, the Attorney General used this to threaten Dr. Stebbins. But I've got Dr. Stebbins saying no shaky voice, nothing at all on that tape during that hearing, when he approved this, that he is one of the believers from day one that this collection should

be in Chicago.

And while he willing to work with Dr. Tucker -- I am doing this from memory. While he was willing to work with Dr. Tucker to talk about various partnerships elsewhere, he always thought that this should be a Chicago based deal.

MR. TODD: Your Honor, if you will also look, I will find it for you, there is a letter from Dr. Stebbins, it's 1997, was written to the Board before he was even on the Board. And he was recommending to the Board -- I think the letter was -- is Exhibit 18.

THE COURT: Your Exhibit 18, sir?

MR. TODD: Yes.

THE COURT: Okay. I have got it.

MR. TODD: Okay. This is from Dr. Stebbins to Mr. Collins, who was then the attorney for the Foundation.

And then if you will look on Page 4 --

THE COURT: He is talking about various alternatives here.

And on Page 4 he says, under A, "We strongly feel the present building in Chicago is inappropriate as a museum and the building

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should be sold and the collection moved to a more appropriate space."

Then he talks for a while about -- if any -- then under "defining the mission" on the next one he is talking about concentrating in France and he is talking about under this plan the Chicago museum will be eliminated. That's at the bottom of page five.

MR. TODD: Correct.

THE COURT: And he is talking about another plan about or moving it to another city with a complementary collection.

But isn't he in this letter just talking about alternatives here?

MR. CUMMINS: Judge, over at the top of the page, under paragraph number three, they were considering keeping the collection in Chicago.

THE COURT: I'm sorry, Mr. Cummins, I am having trouble hearing you.

Three?

MR. CUMMINS: Yes. Top -- Above the recommendations paragraph, you will see that there is a discussion moving into another city with a complementary collection, either a merger or a

cooperative relationship.

And they cite the Corcoran and the Pennsylvania Academy, which are precisely a couple of the issues that we addressed earlier today, which depending upon how one wants to interpret paragraph five, the Consent Decree may or may not be appropriate.

But, your Honor, to answer your question straight up, until we get a chance to cross-examine Mr. Stebbins, I would like to find out what he understands this settlement is supposed to be, what he understands the limitations on this collection are, whether or not he understands it as folks were describing the real meaning of the Consent Decree.

And also what kind of advice or guidance he was given, if any, concerning the implications of these allegations by the Attorney General.

And who were his lawyers? Were they the same lawyers that purport to represent the Foundation, whose interest he is alleged to have compromised?

These are questions, Judge, that

without answers, most respectfully, we have got a record that can only be best characterized as manifestly incomplete on a critical issue.

And the critical issue is were these two Board members conflicted to the point that they should not have voted?

Forget whether or not they believe they were voting in good faith. That's not the stand.

Judge, judges in this building disqualify themselves from cases every day. Lawyers remove themselves from cases every day, because they recognize that to proceed in a conflicted or presumed or apparent conflicted position compromises our professional and fiduciary duties. And we need to explore that.

And I don't think what we are asking for is in any sense unreasonable in the context of not only this protracted litigation, which I have heard so much about, I want to get to it, get it done and over and come back when you come back three weeks from now, present you with a package so that if at the end of the day you disagree with us, so be it. At least we will

have had a fair shot. That's all we want, is a fair shot.

This is a court of equity. And I am asking you to exercise your equitable discretion and give us that opportunity.

THE COURT: And can we go back, just for the last time, before I hear from them again, unless there is something else you wanted to add?

Is there any case where a party in a non-- why don't we call it a nonderivative case or a non-class-action case or a nonparty to a settlement that has had an opportunity to get this kind of discovery before the Court approves the settlement?

MR. CUMMINS: I am sure if their interests are being affected or compromised that, yes, there are cases. To stand here and tell you that I have got it in my hip pocket would be silly. I don't have it, but I --

THE COURT: And the interests that are compromised, isn't it a fact that these three Board members are bound by this settlement to leave the Board? Is that really the --

MR. CUMMINS: That's the long -- That's

the long of it.

THE COURT: That's it, because all claims against them are being dismissed with prejudice.

MR. CUMMINS: Well, I can -- You know, there are a lot of people walking around this town, as we know, who have been accused of all kinds of things and then they say, "Oh, well, forget about it, we dismissed the complaint."

This has had a significant impact on the distinguished former Senator Mrs. Terra, and other folks that we represent. And to say that, "Well, we are just going to release all of this resolves all of these problems" just doesn't do it, Judge. And we know that.

Your Honor, I am now at the point where I have said it 15 times. I am asking only to be given a fair opportunity to present you a complete record on these critical issues on a case that's being watched by the press. It's being watched by everybody in the art community. And this is not the time, most respectfully, particularly given your schedule and the circumstances that prevail, to shut us down.

THE COURT: Well, I will be shutting you

down because of my schedule. I set this ahead of a whole bunch of other cases and moved cases for a couple of days so I could read this and get through it today --

MR. CUMMINS: Well, Judge, --

THE COURT: -- and make this Decision, so --

MR. CUMMINS: The time we spent here today won't be wasted. It is now focused. You put us on our mark. If we come back, if we come back and we are short on our proofs, then we have had an opportunity to present our position. That's all we are asking for.

THE COURT: I think we have one more defense counsel here.

MR. GARMENT: May I?

THE COURT: Sure.

MR. GARMENT: Your Honor, I listened to the proceedings today with care and interest, with a partisan interest as one of the lawyers, but with a certain amount of, I think, of objective sadness to hear some of the things that have been said by counsel and the nature of the case, the importance of the case that Mr. Cummins has stressed in his

brief remarks.

Before we came here, I wrote something down as -- that I might say before all this took place today. With the exception of two or three words that I changed, I would just like to read what I wrote, which I think is relevant to some of what we are trying to do. And I wrote it down, also, as a curb on myself and my own capacity to go on endlessly and vehemently.

So respectfully --

THE COURT: Sir, if you want to speak from sitting down, you don't have to stand.

MR. GARMENT: No, I --

THE COURT: I am trying to get every -- I am trying to get everybody comfortable.

MR. GARMENT: I would prefer to say this standing up.

THE COURT: All right.

MR. GARMENT: Your Honor, the two basic issues in this case are among the most serious issues the Court of the United States can confront. And they are in the particular circumstances of this case closely connected and reinforced each other's considerable significance.

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The first issue involves an abuse of power. And these are fighting words in modern law and politics, and rightly so. I am talking about the intervention under the collar of law by the highest law enforcement office of this State, using the power of that office to constrain the free and unimpaired exercise of personal judgment by the directors of Terra Foundation.

That is our allegation. It is our contention that there is sufficient evidence, circumstances that are not coincidental, that require the test of testimony.

There is, I went on to write, in any event, abundant justification for further and precise evidentiary discovery under oath.

Second, the second paramount issue involves the plain abuse of that State power to aggrandize the State itself by the assertion that the heart of this case of a categorical self-proclaimed right to appropriate the property of a private charitable foundation, its assets, its art collection, its fundamental constitutional right of self-government, particularly to determine venues for the use of its property and to appropriate that

to State dominion and State control and a State locking, a classic taking of private property.

With respect, your Honor, these matters central to law dominate the contested issues of this case and require, I would say demand, appropriate action by this Court.

Thank you.

THE COURT: Thank you, sir.

MR. CUMMINS: Your Honor, just one -- my colleague's comments remind me of one other thing that ought to be said, simply as footnotes of his observations.

We submitted the affidavit of Professor Brody. If, in fact, it is correct, that whether the perception is a completely accurate perception; if, in fact, the consequence of a rush to judgment in this case is to provide a clear disincentive from other foundations or eleomosanary (phonetic) institutions from coming and finding their own State of Illinois and the Chicago area, that would be the antithesis of what we should all, as interested citizens, be concerned with.

And nothing could be more clear

than the message that might be sent as a result of this case, if it's concluded with us -- without us having a full opportunity to develop a record. That might be the message that is sent to other folks: "Don't come to Illinois if you don't want the State to take over and hijack your operation." That's what we need to avoid.

THE COURT: Isn't your objection more to the whole notion of the 50 years and the whole notion to this Board having predominant Illinois representation?

If you do your discovery and you find that there is absolutely no coercion on behalf of the two -- or involving the two individuals, you still have Professor Brody's affidavit. And isn't her affidavit or her declaration simply saying, even if there wasn't that kind of coercion, this settlement itself shouldn't be -- is that the public policy dictates that this settlement shouldn't be approved?

MR. CUMMINS: Well, the answer to that is, first of all, there has been such a great emphasis on coercion, if as a matter of law and fact under the circumstances that people develop in this

discovery, these Board members, whether they believe they were coerced or not coerced, were disqualified from voting on this, you have an issue before you that resolves that.

We don't have a valid settlement. But then we take it from there, Judge.

You see, I think that -- I think that the argument -- and, you know, we put the issue on the table, but that issue on the table insofar as the activities and maybe the motives of the Attorney General -- I don't know what his motives are until we -- and why these coincidental events took place allegedly, we will develop that.

But more fundamentally, I think we will establish to your satisfaction that there wasn't a legitimate settlement here. And that these folks were not disinterested, were disqualified from voting on the settlement and we are back to square one. That's what I believe we will present.

MR. TODD: Your Honor, --

THE COURT: Yes.

MR. TODD: May I just add to --

THE COURT: Would you identify yourself,

please, Mr. Todd?

MR. TODD: Yes. It's Chris Todd.

And Dr. Tucker submitted the Second Declaration, which is attached as Exhibit 19. And in paragraph eight he speaks directly to a Dr. Stebbins' issue stating that, starting with his first report to the Board as an advisor in 1997, there were strategic planning sessions in 2000. Dr. Stebbins encouraged a review of both in-state and out-of-state options.

He has been an especially strong advocate of maintaining a stand-alone museum.

So I submit that to your Honor as further evidence of Dr. Stebbins' position prior to the draft complaint that the Attorney General showed Dr. Stebbins.

THE COURT: Okay. But it goes on and it says right after that that, when Mr. Perkins and the plaintiffs turned their focus on threatening him, that's when he started wanting to spearhead the idea of mediation.

Now, wasn't he a proponent of the mediation from the beginning? Am I wrong on this one?

He was the Special Litigation Committee representative and he was the client that Mr. Carlson and Mr. Conlon were talking to about proceeding or starting mediation. And it was the Foundation and the defendants from day one, long before Mr. Perkins did whatever Mr. Perkins did, that one mediation.

Am I not remembering this correctly?

MR. TODD: I think that's inaccurate, your Honor. What you are probably remembering is that, because of Dr. Stebbins' closeness to Dr. Tucker, the plaintiffs moved to have him disqualified for serving on the special -- on the litigation.

THE COURT: Right. And then we had initial discussions about mediation, where I brought counsel back at least a half a dozen times to try to convince it's time for mediation. And one of the earliest proponents, in addition to Mr. Crowe pushing mediation, was Mr. Conlon.

Am I remembering this correctly?

MS. STONE: Your Honor, Sidley & Austin took direction from the Independent Litigation Committee, the ILC, for purposes of receiving our

direct communication. The ILC was composed of Jacque Adreani --

THE COURT: And Dr. Stebbins.

MS. STONE: -- and Ted Stebbins. They were equal members of the Independent Litigation Committee.

Without in any way waiving the attorney-client privilege, I will state that the Independent Litigation Committee authorized us to explore the possibility of mediation.

I believe, even before this time, Mr. Crowe had already started to make noises about mediation to your Honor, but they might have been more closely linked to time. I am not precisely certain on that point.

THE COURT: I remember even recessing some of our discussions, so that Mr. Conlon -- to get on the phone and try to get direction from the client, who wanted -- I remember one day in particular, particularly wanted the mediation idea to be explored, because it was the plaintiffs who originally didn't want anything to do with mediation.

MR. TODD: But, your Honor, this points

out, respectfully, the need for a clear directive on what are the facts and what is the timing, what happened, when did it happen, because that will tell the story.

And I am informed reliably that Dr. Stebbins' proof will show that Dr. Stebbins did not become a proponent of mediation until after there was a motion that he had a conflict and could not serve on the Special Litigation Committee.

And there was discovery about to begin related to that possible conflict.

THE COURT: Well, nobody was talking seriously about mediation until after the motion was made that Dr. Stebbins was conflicted with the Special Litigation Committee. I think we can all agree to that.

I mean, I don't think we even talked -- When we saw what was coming up in the future, what the potential was here on the motion for a receiver and special litigation issue and the discovery, that's when everybody started talking about mediation.

MR. TODD: Your Honor, may I ask a

question before his?

THE COURT: Yes.

MR. TODD: This has mystified me since I have entered this case. We have this extraordinary situation where you -- we are all proponents of mediation and your Honor is one of the -- I am led to believe, the foremost proponents of mediation.

It is a good thing, but I have never seen nor would I submit we would ever want a mediation where one of the parties, in this case the Attorney General of the State of Illinois, during the course of the mediation, step aside and uses a very powerful weapon that the Attorney General has. He says unrelated to the mediation.

He says, "I didn't really -- I didn't speak to Mr. Stebbins about the draft complaint."

That wasn't -- It's like coming into a settlement conference and putting a .357 Magnum on the table and saying, "I never talked about the gun," or whether it would go off or whether someone could get hurt.

It's nonsense. I have never heard of a mediation where in the middle of the mediation,

under the guise of now to keep it out of the public domain a mediation document, to pull out a complaint that names for the first time a person with whom you are mediating, where in the middle of the mediation, when you find out that one of the other parties to the mediation may not be -- agree to your rather, I would submit, extreme demands, gets a summons pursuant to an investigation that only the Attorney General can conduct. That's bizarre.

I don't understand that.

THE COURT: Thank you.

MR. CUMMINS: Your Honor, one other point, if I may.

You know, part and parcel of all of this gets laid out on the table and resolved. I have a lot of respect for my colleague, Mr. Quinlan, and the members of his law firm.

I don't believe for one moment, when they filed plaintiff's motion to appoint an Independent Litigation Committee, an independent litigation counsel for the Terra Foundation and/or receiver, the caption of their brief, and when they went on at page nine, for example,

and regaled this Court with the critical analysis of the law that demanded independent and disinterested members of this Board, in order to reach decisions about litigation decisions.

Judge, the very folks that are not suggesting to you that whether or not folks are disinterested or independent or whether or not we can establish the necessary elements to have this settlement seen for what it is are the folks who are arguing 180 degrees out of phase on that issue earlier.

And it comes down to one simple proposition: Let us please develop the record.

THE COURT: Okay. I assume that Ms. Stone wants to be heard, because she is standing.

I assume, and tell me if I am wrong, that Mr. Perkins may want to say something or is that a wrong assumption?

MR. PERKINS: Judge, I will wait until after Ms. Stone has to say.

THE COURT: What about you, Mr. Quinlan or Mr. Kennedy?

MR. QUINLAN: I would like to say something. Let her speak.

THE COURT: Okay. I would like to take at least a five-minute break before we do that. Is five enough or would you like ten? Tell me what you'd like.

MS. STONE: Five is fine.

THE COURT: Okay.

(WHEREUPON, a recess was had.)

THE COURT: Let's go back on the record for just a moment.

I know that the Court Clerk had asked some of you to start writing the orders on the documents to be unsealed. The Clerk's Office is closed and they are leaving.

However, what I will do is I will sign the order today and authorize counsel to release two members of the press -- I will sign the orders on the sealing today and authorize counsel to release to members of the press any of those unsealed documents, if you have copies of them with you.

MR. CUMMINS: Judge, I drafted the order. And the only imprecise aspect of it is those documents that were to be redacted, but I have simply identified those that are to be held in camera

or under seal.

THE COURT: Okay.

MS. STONE: Including the three that we have asked for more time to that.

MR. TODD: I don't mention those.

THE COURT: Okay. So I am going to need -- when you present me with the orders, to take a few moments and make sure that they correspond with what my understanding of what everything was. And I would like to make sure that we are covering everything, because my goal here is to unseal as much as we possibly can get unsealed and so that all of this can be made available to the public.

So we need to -- I would really like to sign those orders today so that overnight you can give whatever is needed to be given.

Ms. Stone.

MS. STONE: Your Honor, several points.

First, your Honor asked pointedly of the objectors: Is there any case where someone who is not a party to the hearing has come in to court and successfully blocked the agreement that the agreeing parties want to enter into?

They have not been able to find

any such case. We have found no such case in our research. So what they are really asking you to do, Judge, would be unsupported by the case law of Illinois.

Number two, your Honor pointedly asked, "Show me where the coercion is. Show me the beef. Where is the beef? Show me --"

THE COURT: I don't think that's a bad suggestion.

MS. STONE: Well, I didn't -- I am paraphrasing.

THE COURT: Okay.

MS. STONE: He said, "Show me the switch in the timeline. Show me where the votes switch."

And perhaps I interpreted that to mean where is your evidence of the actual supposed effect of whatever the Attorney General is doing. And they could not pinpoint the switch, your Honor. And the reason they could not pinpoint the switch is because there was no switch.

As your Honor correctly noted, the transcript of the Board meeting makes it clear that Dr. Stebbins, as far back as last September, said he believed the collection should remain in

Chicago. And there was no inconsistency with that position and the documents he agreed to at the Board meeting.

Whatever Dr. Tucker may say in paragraph eight of his Exhibit 19 about thinking that this is a serious tension with Dr. Stebbins' long-stated views about the Foundation's best interest, that's not what Dr. Stebbins himself believes.

With respect to Dr. Marshall, they have not been able to show you the switch, the coercion, the intimidation, because once again they don't have the facts to support it.

The settlement -- Excuse me. The mediation documents before you show that in May Dr. Marshall said that she wouldn't be able to accept the current proposal under debate. She thought that certain changes should be made.

You can tell, your Honor, by looking at the document that the Board agreed to, that those changes were, in fact, made so that Dr. Marshall, if anything, was a vigorous advocate for the Foundation's interest.

And, in fact, the deal did get better

over time from the Foundation's perspective in a number of aspects.

As late as June 29th, the day of the Board meeting, when a new proposal was suddenly floated for the first time, Dr. Marshall said, "No, if that's going to be the way it is, I am not voting for it." So she was not desperate to enter into this at any cost.

What have they shown? I guess they cite you now to Exhibit 18, which my reading of this, this appears to be a document authored by three individuals, including Ted Stebbins, done back, I guess, about four years ago.

THE COURT: It was done shortly after -- about six months or so after Dan Terra died and it was a document that was talking about how to look at the Foundation now that its founder was gone.

MS. STONE: Correct. And it's dated February, 1997, and they cited to you on page, I believe, six of the document, in paragraph three. I think they quoted one section of a sentence to you that says, "or moving it to another city with a complimentary collection."

What they didn't read to you is the

statement that -- the first part of the sentence that says they would consider keeping the collection in Chicago while perhaps considering a merger with the Art Institute or Northwestern or moving it to another city.

So they are citing to you half of a sentence from a document authored by three people several years ago and using that as their clear and convincing evidence of coercion. It just doesn't wash, your Honor.

Number three, they use a lot of hyperbole. They talk about abuse of power, a gun pointing at someone on the settlement team, something rotten here. It's a lot of very sexy, highly charged language. But when you strip away the hyperbole and look at what they really have, there just isn't any evidence, let alone any clear and convincing evidence of something rotten.

Your Honor has given them an opportunity to come forward. You said at the last hearing, "What you said about the opportunity to take discovery, I have not foreclosed that."

I am saying that based on what you filed, there is nothing to take discovery on right

now. I have nothing verified from these defendants to suggest this Court should not approve the settlement. And I am willing to let you file something.

You gave them an opportunity, your Honor. They did have an opportunity to sit down and talk with the AG for two and a half hours.

We did inform them that Dr. Stebbins would, if questioned, say the same thing that he said at the Board meeting. They have every reason to conclude Dr. Marshall would adhere to her position, as well.

They have not come forward with any affidavit from Dr. Marshall or Dr. Stebbins saying --

THE COURT: Well, they won't talk to him, so how can they get an affidavit from him?

MS. STONE: I understand. I am just talking about what evidence they have, what they have presented to your Honor.

They under the case law have to show by clear and convincing evidence that there was an actual corruption of someone's free will, and they have simply not made that threshold standing.

And that gets to their -- my fourth point, their argument that sounds so appealing on its face, which is, Judge, all we are asking for is six hours. You are going to be gone for three weeks. What's the problem?

I mean, it does sound very reasonable, your Honor, and given your attention to detail, I'm sure it hasn't appealed to you, but your Honor has to stop and think about the equities for everyone involved here.

First of all, look at what the resolution is. Look at what the Consent Judgment says. It says that by August 1st we have a deadline the Board has to meet -- if you approve this, the Board has to meet to elect a new Chairman, elect new officers, elect new committee heads, elect a new Executive Committee, elect a new Strategic Planning Committee. These are real deadlines.

THE COURT: Okay. They are real deadlines, but are they hard and fast deadlines?

Are you trying to say that the Board is going to say there is no deal if the Consent Decree is not signed before that day?

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MS. STONE: I think in the extreme, your Honor.

THE COURT: Okay.

MS. STONE: But I think you do have to recognize what the structure put into place was by the Board. They are the ones coming in and challenging this. They are the ones who are not party to this agreement, who want to upset something they are not party to. And they are asking to do something which would upset that structure.

And you have to understand, your Honor, that right now we have a situation where the current president of the Foundation is suing or seeks leave to file a counterclaim, suing the Foundation, suing six of the directors, so this is a somewhat unusual situation that we are dealing with.

And you have to factor that in, too, when you decide whether or not you want to prolong this.

In addition, your Honor, they have cited no cases to you saying -- I think they asked for leave to try to look to see if there was something, but they have cited no cases saying that

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they should be afforded an opportunity to discover.

Fifth point, your Honor. They are advocating really a very dangerous reading of this proposed Consent Judgment.

When Mr. Garment, a noted lawyer, gets up and speaks about appropriation of Foundation property, that's a very scary reading of this document. It is not supported by a literal reading of this document.

I would think that the individual defendants would not want this document to be screwed -- to be construed in such a way as to hamstring the Foundation's going forward.

And I would submit that, if your Honor carefully reads the Consent Judgment, asks all the questions you have asked during these several hours of hearings, you will recognize that the Foundation has preserved to itself full rights to operate its own affairs and businesses, with the few restrictions we have identified, but that there has been no appropriation of Foundation property, that the property remains the Foundation's and the Foundation Board will decide how to use that property.

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Final point, number six, this has to do with their motion for leave to file the counterclaim. Now, it's true that as a general matter in Illinois, leave to file Amended Pleadings are liberally granted. It is also true that these defendants are not releasing any legal rights they may have, so that they may have the right some-place to try to advance some sort of argument against someone, but the point is right now, your Honor, not here and not now.

THE COURT: So how do they do it?

MS. STONE: Well, your Honor, if I can explain by not hearing that now, if your Honor enters the Consent Judgment, the case is over. It is fully dismissed. There is nothing for them to be counter to. So what can they do?

They could very well seek out another venue and try to institute some sort of lawsuit against someone there.

Now, on behalf of the Foundation, we certainly take exception to their attempt to sue the Foundation. We think that that lacks merit and we would move to dismiss if we were counsel in that case.

But we simply don't think that they should be granted leave to file a counter-claim when there is nothing to be counter to, if the Consent Decree is entered.

THE COURT: I do have one question for you, Ms. Stone.

Defendant's objections are four-part. And the first of the four part I never quite was clear on and that's the business about the number of directors, the four, the five, counting the votes.

Let me just start with the beginning. This meeting was held that approved the Consent Decree with Ms. -- or Dr. Marshall chairing the meeting.

MS. STONE: Correct.

THE COURT: Let's start with that. How did she get to be the chair?

MS. STONE: Your Honor, she has chaired several meetings as an officer, who is not a named party, the only officer of the Foundation who is not a named party.

Ever since your Honor ruled that you didn't think it was appropriate for Dr. Tucker to

give Sidley and Austin direction in this case, ever since you required the establishment of an ILC, which Ms. Marshall has, to my knowledge, chaired the meeting.

THE COURT: So that's been just something the Board has decided. In other words, Ms. Marshall has been chairing any meetings that have taken place?

MS. STONE: Yes, your Honor, and I believe they thought that -- the Board members believed that was appropriate, since she is Treasurer and Secretary of the Foundation.

THE COURT: Okay. Now, you amended the bylaws?

MS. STONE: Correct.

THE COURT: And if Dr. Stebbins' vote is eliminated or Dr. Marshall's vote is eliminated, could they be amended?

MS. STONE: I do not think they could be amended, if those two votes were --

THE COURT: Okay. Could they be amended if one vote was eliminated?

MS. STONE: Your Honor, --

THE COURT: That's the part I got a little

fuzzy --

MS. STONE: Your Honor, --

THE COURT: -- because they are talking about five lawful votes and I am not quite sure what your position is on that one.

MS. STONE: Yes. I think it's fair to say that there is some ambiguity in the bylaws, your Honor. And as to whether it would require five or six votes.

We believe out of an abundance of caution to make sure that this bylaw change is airtight from the Foundation's perspective that six members should vote for it, because that would constitute a majority of the directors in office, you know, on the Board.

The individual defendants have said, well, they believe it was -- only five is necessary, given the fact that only eight people showed up at the meeting.

So they said -- because they are saying it's a two-part test, the majority present -- the majority who are in office, plus a majority who are present in the meeting and they say, because there are only eight people present at

the meeting you only need five.

THE COURT: So you -- So that --

MR. TODD: Your Honor, may I just say we corrected that. We agree with Ms. Stone.

THE COURT: Well, I know it's to your advantage to agree with her now --

MR. TODD: Your Honor, we -- In six votes it was made clear at the vote, if you look at the transcript, everyone agreed, including able counsel, who was advising the Board that under the bylaws you have to have six votes.

Now, Ms. Stone is trying to back-track a bit. But it was six votes then that was required. That's what Dr. Marshall understood. That's how the vote was taken. It's six votes.

THE COURT: Okay. I'm sorry. But your papers said five, right?

Did you change that?

MR. TODD: Our original papers misstated five. We corrected it in our reply --

THE COURT: Okay.

MR. TODD: -- to embrace the fact that it is six. And I believe we are all agreed on it.

THE COURT: Does everybody agree that you

need six votes? So --

MR. PERKINS: No, your Honor.

THE COURT: We have some headshaking.

MR. QUINLAN: Well, your Honor, --

THE COURT: How many votes do you need, Mr. Quinlan?

MR. QUINLAN: Your Honor, we raised the possibility under the Statute of 108.60. I think all this is academic, because there is no conflict. But we have raised even under the worst possible scenario under 108.60, which is the Statute, a not-for-profit, and the articles don't address their attention to that. Surely no -- address their attention to situations where there is interest. Strike it. Strike that.

Excuse me. That they don't address the situation where there is an interest, a director who has voted, but the article date does, and it specifically provides that, if there is enough people for a quorum, including the directors who are interested, the quorum stands.

Then the only question after that is the majority of people, when you remove the interested directors. The majority vote would

still prevail and that prevails and you don't set it aside. That's exactly what the Statute provides.

I just don't think we need to get there, but I think under the law it would still say under 108.60, because it anticipates such a situation where you have interested directors who vote on a matter who are subsequently disqualified.

THE COURT: Okay. So let's assume for purposes of arguing their argument, they are interested and they should be disqualified.

It doesn't matter, is what you are saying.

MR. QUINLAN: It doesn't matter.

THE COURT: Even if we disqualify both of them?

MR. QUINLAN: Right. It doesn't matter.

THE COURT: And that --

MR. QUINLAN: The matter was introduced. It's introduced by Mr. Heatwole, who brought that out and said here is a challenge, this challenge has been made to you. We want to raise the issue about coercion that was presented to him. Everybody, the Board was there; they were aware of it,

they were aware of those things. They acted upon it and acted upon it, in any event.

THE COURT: And so then the vote is four-two and that's enough to carry the day, is that what you are saying?

MR. QUINLAN: Right, right. Four of the six would be voting and that would be enough under the Statute to do it.

We would argue the Statute applies. On the other hand, we only cite that because we are saying under that scenario, even if they were right, which they are not right, still it would pass, it would be valid, and we could still go forward. So there is no basis for that.

THE COURT: Okay.

MR. QUINLAN: If counsel is finished, I have a couple of other comments.

THE COURT: Okay.

MR. QUINLAN: Your Honor, here we had several things.

First of all, there is no subsequent pleading in front of your Honor of any kind.

THE COURT: They want to.

MR. QUINLAN: They want to, but there

is none.

And they are in here asking for discovery based upon what they have in front of your Honor as an objection to a motion that was to enter and file a Consent Decree.

He is requesting discovery and the basis of the exhibits, which are self-serving, not in compliance with 191B, raise no evidentiary facts and nothing, no new material or material presentation.

They have had five weeks to get something together. They filed in Federal Court. They filed a two-count complaint there, both in 1983 count. That matter was dismissed after a two-hour hearing and a 12-page opinion by the judge there.

They then came here to State Court and they filed in front of your Honor, trying to stop these proceedings. And again filed these voluminous affidavits that your Honor has to consider.

We considered it. We argued. Everybody argued. And your Honor denied that. That's twice that they have been in court.

This is all this time. Now they have filed merely an objection, which is not a substantive pleading.

In all of this, these things, they have made no showing of any standard. They have no cases of authority to support their contentions or any of their requests. They have not addressed the matters that we have raised in our response to their objections and our cases and authorities. They have done nothing.

All we have here, your Honor, is rhetoric. They talk about abuse of power. The issue here is there would be an abuse of power if, in fact, we get into a situation where this leads to discovery.

And what we are doing here is putting ourselves at risk here of having discovery taking place when there is no pleading on file. And I will address the counterclaim in a second.

We talk about policy. They cite Professor Brody. Professor Brody's comments are very interesting, but they are all her own opinions. Her background is in teaching, somewhat of the charitable trusts and not-for-profit, but tax,

as well. She cites no case, no authority, and has no personal knowledge of this. This is not a basis on which to make any decision.

Your Honor, we have -- What they talk about is their right to file a counterclaim. Our complaint was filed on September 22nd, 2000. The answer was due October 22nd, 2000. Terra, Tucker, and Simpson entered an Appearance on October 12th, 2000. The Foundation filed an Appearance on 9/26.

December -- Defendant Simpson filed on January 12, 2000, a motion to dismiss, leave asking for a motion to dismiss.

On October 12th the Foundation filed its motion to dismiss. That was denied on October 20th, 2000, without prejudice. A verified answer was filed by Mr. Tucker on October 20th of 2000, with affirmative defenses, no counterclaim.

Mr. Natale asked leave to file an answer on January -- to January 16th, 2000, and he filed on January 9th an answer with affirmative defenses, no counterclaim.

Nothing else has been filed since that time. We are talking about since the beginning

of this, over ten months. Five months, nothing has been filed.

THE COURT: But you do recognize that from February 5th on there was this order that pretty much everybody wasn't supposed to file anything.

MR. QUINLAN: But they had over five months from the time that the answer was due. In all of that time, they did not file.

Some other things that I think are worth noting, as well, here is if we look at the situation, first of all, if we look -- what can you do if you don't have a complaint on file? The only thing you can do is you file under 5402, which is respondents in discovery. That only allows you to identify the parties.

Rule 181 requires that the answer be filed in 30 days. Under 240 -- Excuse me. Under 52608, the counterclaim is required to be filed, with the answer. No counterclaim has been filed. They haven't asked leave to file the counterclaim. There has to be something that would be meritorious.

We have a situation here that the real thing and the only thing that's in front of your Honor is the motion to file on the Consent

Decree, which has really not been challenged.

Everybody is trying to challenge whether or not a Consent Decree should be set aside, but we have looked at this and there really is no evidence. There is no merit to any of this.

And there really is no basis to do anything other than enter the Consent Decree that we proposed to your Honor that's in proper form and that has been accounted here, adequate or full notice and a proper hearing of the Board plus having gone through mediation, where all the parties participated in that.

The other thing here we are looking at -- we are looking at the equities. The equities here really are on the side of the parties here.

We have been in this for over ten months, the litigation. The attorneys, the plaintiffs, the Foundation are all entitled to have this thing finally resolved.

There is nobody here complaining about this who really has any standing to complain. And I think the time now is to resolve this matter so that we can go forward.

The mediation raised another issue

with discovery here. They are asking for a discovery. The only basis for this will be going into mediation matters.

THE COURT: I'm sorry. You need to slow down, because I am not even getting the words, they are coming so fast. So I can't imagine that the court reporter is getting them all.

MR. QUINLAN: Okay.

THE COURT: Slow it down a little bit.

The mediation --

MR. QUINLAN: They are asking for discovery and the discovery that they are asking for will necessarily invade mediation. And they have agreed mediation statements or process would be private and that nothing that is said there could be used by anybody in any litigation for any purpose outside the mediation.

They asked for the mediation. They participated in the mediation. They agreed to that.

The only basis for getting -- interdicting the mediation is where a criminal act may have taken place. Beyond that, there is no authority to get in to invade discovery.

But the real bottom line here is

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that there is nothing that is a predicate for the discovery, but an effort to file an untimely counterclaim, which, in fact, that counterclaim is not even a proper counterclaim.

They attempt to bring in new parties. And when you can bring in new parties the allegations have to be based upon the complaint that had been filed initially. They have not done that. And under the Statute, that's exactly what you have to do.

What they are complaining about is the settlement process, not anything that's raised in the new complaint.

They also make no allegations against any of these parties. The only allegations that are made are that they participate in the vote. Nothing that indicates it's improper, illegal, that anything was done wrong.

So the problem is they don't even have a proper counterclaim, to begin with. It's untimely. It can be filed without leave of this court. It is preempted by our motion to ask you to have the settlement entered by this Court and accepted by this Court, which really requires

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nothing other than agreement, the agreement of the parties and being the right terms. And that's what it is.

So that we dismiss -- The case will be dismissed. It is dismissed pursuant to the terms of that agreement. There is no case pending.

If they have any rights, those rights are out there like anybody else has a right if there is a case to be filed, if there is something that can be filed, a complaint that can be filed, that's wonderful. I doubt that there is any. I can't see that any grievance has been foisted upon them as a result of this, other than they are dissatisfied with the result.

In every situation where you have a resolution there are always dissatisfied parties. That does not give you a right to complain. It surely doesn't give you any right to discovery.

THE COURT: One of the counts of the counterclaim is the 1983 action. Now, there was a 1983 action filed in Federal Court.

MR. QUINLAN: Right.

THE COURT: That's been dismissed with prejudice?

MR. QUINLAN: That has been dismissed, your Honor, and I don't -- and the time there, more than 30 days running, would render it being a final order, so that you would not be able to come in and file again.

THE COURT: Okay.

MR. TODD: So I am asking -- Your Honor, may I speak to that?

Judge Bucklo specifically referred to the abstention doctrine, observing that there is a pending lawsuit here in the State Court. There is a forum to bring a 1983 case and other language.

You have a proper forum. I am deferring this to the State.

You have a Court that will protect your rights, the State Court and Chancery Division. They go back there and litigate this.

Now, we are back here and the position on this side of the courtroom reminds me of what Gertrude Stein said about, oh, "When you get there, there is no there there."

We are here and they say there is no here here.

MR. CUMMINS: There are a number of

abstention rulings, Judge, and it was done on the 29th, so it was within 30 days.

MR. QUINLAN: Your Honor, --

THE COURT: Okay. So it was the 29th of June. Okay.

MR. QUINLAN: The plan -- She does base it on abstention, but she goes on and also addresses the substance of the 1983 action.

THE COURT: She essentially says that there wasn't any 1983 violation here.

MR. QUINLAN: 1983 action, that is correct. And they talk about --

MR. CUMMINS: Well, that's a nisi prius judge that you don't have to refer to, with all due respect to Judge Bucklo.

MR. QUINLAN: Your Honor, -- First of all, let me finish. Would you like counsel --

All I am trying to say is the Court dismissed it, did look at the merits of it, dismissed it. It was out there. It's dismissed.

They say -- They came back here and they brought their action here.

I would like to find it. There is no 1983 action pending here. They are trying --

THE COURT: They want to file one.

MR. QUINLAN: They want to take some time, make some claim on a counterclaim. There is no counterclaim to be filed here. And there is no basis for that counterclaim against these people. They are trying to add new parties, which to add new parties has to be based on the other complaint.

And what the 1983 action is based upon and is, in fact, a settlement that took place, if you will, after the case.

It's not part of the complaint. It has nothing to do with the complaint. So they can't bring a counterclaim to do that, anyway.

THE COURT: Are you suggesting that if I deny them leave to file a counterclaim they may or they may not be able to file a separate lawsuit at a later time in another forum against Mr. Perkins or the Attorney General or whoever of these Board members they want to sue?

MR. QUINLAN: They may be able to try, your Honor. It's only noted by the imagination of counsel. And that doesn't mean that it's got any foundation, where there is any basis for it.

THE COURT: What are you showing me,

Mr. Cummins?

MR. CUMMINS: It's a printed opinion of Judge Bucklo's.

THE COURT: Oh, okay. I've got the other one all marked up.

MR. QUINLAN: Page ten of the other one is the slip.

THE COURT: Yes, that's the one I have all marked up, so.

MR. CUMMINS: It's just easier to read those, Judge, at least at my age.

MR. QUINLAN: Your Honor, on that basis, we would ask that you sign the order today and that order is the order that should be signed here.

As I indicated before, the process -- nobody has objected to this being the agreement. Nobody has objected to this being the terms.

And on that basis, I think we are entitled to have the order.

THE COURT: Ms. Stone, you don't want it signed today?

MS. STONE: Well, I don't think it's a matter of corporate formality. It should be signed today.

I mean, we want to do this with meticulous attention to what the Board has authorized and what the Board authorized in the resolution is that an officer, Stephanie Pace Marshall, is authorized to execute and deliver in the name and on behalf of the Foundation a Consent Judgment, if and when it has been executed on behalf of Mr. Buntrock, Gidwitz, and the AG, substantially in the form presented to this meeting, but with such changes therein as the officer executing the same shall approve, such approval to be conclusively evidenced by his or her execution therefor.

Given the fact that your suggested changes or your required changes are in our view administrative, ministerial clarification rather than whole-scale changes to the agreement, we do not -- we concluded with the advice from corporate counsel that it is not necessary to convene another Board meeting, that Stephanie Pace Marshall could sign the clarified proposed Consent Judgment that your Honor wants us to present, but we think we need to give her the opportunity to do that.

She is currently on vacation.

I believe she is in Wisconsin tonight. I will make every opportunity to fax the red line version to her and get her to sign it. But I think it would be more appropriate for us, then, to present it to you tomorrow.

Alternatively, we could handmark the version to your Honor, present it to you tonight, with the idea that Stephanie Pace Marshall's signature only would become binding tomorrow if she agreed to it.

I think the cleaner way to do it is to give a chance to reach out to Ms. Marshall tonight.

MR. QUINLAN: Your Honor, the only thing I would say is it, in fact, is administrative. It is really just a scrivener type of thing. It's making the clarifications that your Honor indicated. That doesn't require anybody's approval, because that says the agreement is the agreement.

It would seem to me that we could do that by interlineating between the lines as to what -- these matters being re-added. I don't see that anybody has to approve it or not approve it. But at the same time I think it's something that

can be ordered today and can be signed under either theory, one way or another.

THE COURT: Mr. Perkins, you are anxious to say something.

MR. PERKINS: Not too much, Judge. Just to clarify a few things, Judge.

Your Honor asked me to sit forward and interview with counsel and I did. I spent two and a half hours with him. And the only thing we really refused to talk about was Dan Terra's intent and at the start of this lawsuit we talked about the alleged portion, duress and intimidation, for two and a half hours.

But your Honor did ask about time-line. I think it's really important to keep in mind that in January, 2001, Dr. Stebbins' matters were in pleadings and in discovery in this court and that that is the time when these defendants, the defendants who are objectors, came to us, came to the court and came to the plaintiffs and said, "We want to have this mediated," after Dr. Stebbins' matters were put into the record.

These were these defendants, not Dr. Stebbins, not the Foundation.

These defendants came and said and conditioned, "Only if you will do a global release of us and everybody else, because we want it to be over with. We don't want to settle with the Foundation and litigate against the directors."

So they came knowing what the Stebbins issues were, trying to get more releases. And they sought those rights for themselves.

And Dr. Stebbins -- and from February 5th to the end of May and through June, they thought they were going to get releases. And they participated in mediation.

And it's only now, when at the last minute they didn't get what they wanted, that these defendants didn't have to get the terms they like, that they now try to point -- maybe Mr. Dobbins and/or Mr. Stebbins is the person who shouldn't have been able to vote, because he has some kind of conflict.

It's ridiculous, Judge. It was the process of mediation. It was their very terms. They are the ones that waived the right to complain about Dr. Stebbins' time.

Coincidence. They want to talk about

what a coincidence. Well, at the end of May, they were making noises that mediation is over. "We don't want to mediate. We want to litigate."

The Attorney General's Office took them seriously. "You want to litigate, we've got to get back to it. We are going to file a new complaint. We are going to start preparing."

In that process, we came across some unrelated matters. How does that work? Well, we have plenty of cases at our office right now where we are starting to look at something and we discover something else. It turned out that those matters were a minor inquiry into that -- into that organization, had nothing to do with the Terra.

Unfortunately, it became an obligation of our office. We are responsible for doing these matters across the whole state with regard to many organizations.

THE COURT: It was a minor question that you had about the Illinois Math and Science Academy. It was answered and there is no pending investigation and there is no finding of any kind of wrongdoing; is that correct?

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MR. PERKINS: Judge, it was a very discrete -- It's over now. We don't even call it an investigation, because that terminology displayed to the public is something we would never have said. We would have called it review or inquiry, because it's too derogatory to call it an investigation.

We investigate and look into cases when we have charges. We review and do inquiries when we have matters that we need to attend to.

The Attorney General is charged with protecting the public interest, the beneficial interest of 25,000 charities. By Illinois law, he is the only person who can look at what charities do, what charities are doing and question them.

THE COURT: So you made a factual inquiry. You are making no investigation into the Academy or in regard to Ms. -- Dr. Marshall; is that correct?

MR. PERKINS: That's correct, Judge. There were no charges made. There were no attempts to -- There is no proceedings involved, an inquiry, "please produce this," a question to them. That was the extent of it. And those matters were quickly resolved.

THE COURT: And "quickly" is like one meeting. You had one meeting with their lawyer, is that correct?

MR. PERKINS: I only met with the lawyer. He came and brought the documents and clarified the matter and that matter was over.

THE COURT: And that lawyer left that day, knowing that matter was over?

MR. PERKINS: Well, you know, Judge, as counsel pointed out in our meeting, I guess people -- you know, it was pretty clear to me that it was over. I knew it was over. I think it was pretty clear to him that the matter was so discrete.

And we had a discussion of whether someone can read my mind, so I can't say that he positively knew.

We don't issue releases in -- when we do reviews. We don't say, "Good job." They produce documents and we know what -- But we all knew what we were looking at and we knew it was over. They knew it was over before they brought the document.

MR. TODD: Judge, --

THE COURT: And the point at time that

that took place, Mr. Perkins, in the mediation scheme of things was when?

MR. PERKINS: At the end of May, when the parties threatened that they weren't going to continue with mediation, we started to look at the preparer, because we had certain matters to look at.

And on May 25th, we issued what's called an Order to Produce, a statutory order to produce, produce a particular document to Ms. Marshall and her school. And that was resolved probably by June 12th, 14th, something like that.

THE COURT: And right before that happened, had Ms. Marshall taken any position in the mediation that reflects that she wasn't -- didn't want to settle this case? Did her position change?

Is there anything in these documents that reflects a change in her position?

MR. PERKINS: Judge, as you know, what we have given you in the exhibits is her May 21st transmittal letter saying she didn't particularly -- though she didn't like everything, she had a laundry list of things she wanted to change with

regard to what had been sent on May 15th, her items.

And I took the time in my response to go down the six or seven things that she found particularly unsatisfactory to her on the May 15th document.

And each one of them is addressed in the final document that we have here.

She was concerned about particularly in the May 15th document the part about the Attorney General -- the original document said the Attorney General has to give authority for it to leave after 50 years. She said she didn't think that was right. And it's been changed, just notice comes to us.

And there were concerns of her about certain people having extraordinary powers and they were taken out. And she asked that the Attorney General agree that Giverny could be continued as it has been. That's obviously included.

And, as your Honor knows, there are several -- it's written in my response that we addressed her very -- her varied concerns were addressed.

She was -- In her letter of May 21, at the end paragraph she says, "I am interested in continuing mediation, where these defendants were not."

But, Judge, you asked this question. You said, you know, what do they do now?

Well, Judge, they have no evidence and we are really -- Where are we? We are in a part -- a point where they don't really have any right to discover at all.

Where we are at is there is a settlement proposal before your Honor. Maybe they have a counterclaim on file. Maybe they don't. We can all argue about that.

But if they do, it's not timely for discovery to take place under their counterclaim. And their objections don't have evidence, that they have any proof of wrongdoing.

Your Honor, duress has been universally defined as a condition which exists where one is induced by the unlawful act of another. That's Illinois Supreme Court law in our State. That's People vs. Catholic Homes Bureau at 68 Ill 2d, 433. It's in our papers, unlawful.

There is no showing of unlawful. They are hoping it might be. They have supposition. They have surmise. They would like to be, but there is no evidence.

The people who were allegedly coerced, Dr. Stebbins, they waived to release him. And Stephanie Pace Marshall says, "No, I wasn't."

And when one listens to the tape, that lady was never intimidated by anybody. And certainly not by myself, a lowly Assistant Attorney General.

THE COURT: Do you have a degree from Harvard. like they were talking about?

MR. PERKINS: No, I don't, your Honor.

THE COURT: Okay.

MR. PERKINS: I have a night law school degree. And I probably know half of these Harvard lawyers.

MR. CUMMINS: Don't assume that.

MR. PERKINS: They have no right for this expedited discovery they would like, Judge. If they have a counterclaim on file, we will battle that out after your Honor enters this Consent Decree. If they haven't met it timely, then they will be

out and they will have to figure out another way.

There is no right to go on a fishing expedition in the hope that maybe they will find evidence that will then give them rights to have a cause of action. That's not how it's done. You don't get expedited discovery to go on a fishing expedition in the hope.

They just don't have a position here that allows them to get the expedited discovery. And they don't have any pleadings on file that would stand in the way of your Honor entering a Consent Decree.

THE COURT: Thank you.

MR. TODD: Your Honor, may I just respond?

THE COURT: Sure.

MR. TODD: Could I direct your Honor's attention to Exhibit 21, since your Honor has kept that under seal? This is Dr. Marshall's May twenty--

THE COURT: Hold it one second. I need to get -- It's your Exhibit 21, right?

MR. TODD: Correct, yes.

THE COURT: Okay.

MR. TODD: You asked the question, did

Dr. Marshall take a contrary position before this, quote, inquiry that the Attorney General did?

THE COURT: Right.

MR. TODD: And if I can direct your attention to the third full paragraph, it's the first indented paragraph.

THE COURT: I'm sorry. The third full paragraph of which page, sir?

MR. TODD: It's Exhibit 21.

THE COURT: It's got three pages.

MR. TODD: And it's the second page.

THE COURT: Okay.

MR. TODD: And if you will go down to the first indented paragraph where it says, "first."

THE COURT: Okay. Is it under the section, "foundation"?

MR. TODD: First with respect to the Attorney General's version.

THE COURT: Oh, page two, I have got it. Okay.

MR. TODD: Okay? I'll just ask the Court to read it to yourself, since it's still under seal.

THE COURT: Now I want to go back into the timeframe here.

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MR. TODD: Okay. That's --

THE COURT: There wasn't -- Just wait one second.

There was a meeting of -- with the mediator on May 11th? Is that a Friday?

MS. STONE: Correct.

THE COURT: An all-day session with mediator on May 11th. And at the conclusion of that day, parties walked away with the idea that there was a settlement.

MS. STONE: Well, --

MR. PERKINS: Some parties, Judge.

THE COURT: Some parties.

MS. STONE: Not all parties.

THE COURT: Well, some parties went away with the idea that there was a supplement and then all the mediator had to do that day was put it in writing and pass it around.

MS. STONE: Well, no, the Foundation always believed that a properly convened Board meeting would be necessary, in effect.

THE COURT: Well, yes, but in other words, the mediator was going to put it into writing. It was put into writing. It was then distributed to

everyone and that was -- I am doing this by memory.

May 15th Mr. Hilliard wrote the thing?

MR. PERKINS: That's correct, Judge.

THE COURT: Okay. And May 20th, then, these -- What we are referring to are Ms. Marshall's comments --

MR. TODD: Correct.

THE COURT: -- to Mr. Hilliard's May 15th submission.

Okay. I just wanted to see where we are in terms of the mediation process. And this is how many days after the administrative subpoena?

MR. TODD: No, this is --

THE COURT: This is before the administrative?

MR. TODD: This is five days before the administrative subpoena.

THE COURT: Okay.

MR. TODD: Okay. That's her position, five days before the subpoena.

THE COURT: Okay.

MR. TODD: The subpoena occurred on May 25. The, quote, inquiry --

THE COURT: Okay, but she is talking about

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-- Excuse me. She is talking about the Attorney General's version of the proposal.

MR. TODD: Correct.

THE COURT: Now, somebody give me the exhibit number, please, because it's getting very late and I'm getting a little bit tired. Tell me the exhibit number of Mr. Hilliard's proposal.

MS. STONE: Well, --

THE COURT: We have that here.

MS. STONE: Which proposal, your Honor?

THE COURT: The one after May 11th.

MS. STONE: As long as your Honor understands that the proposal being discussed back in May is not the proposal which found form in the Consent Judgment.

THE COURT: Okay. Wait one second.

MS. STONE: Two technically different proposals.

THE COURT: Right. I've got -- I am just trying to understand counsel's argument and in order for me to understand it, I have got to put it in context. And that's Exhibit K of the Attorney General, has got what --

Is this what Mr. Hilliard was

circulating -- Right, this is what he was circulating right after. Okay.

So Ms. Marshall is saying in response to that that she doesn't agree with the Attorney General's version of what Mr. Hilliard thought was the settlement, is that correct? Am I reading this right?

MR. TODD: Yes, you are, your Honor.

MR. PERKINS: Well, Judge, just so that everybody can understand, after Mr. Hilliard issued his May 15th draft, the Attorney General issued a draft, a red line variance from what Mr. Hilliard had issued.

So when you look at the paragraph counsel is referring to, she is talking about the AG's version of Mr. Hilliard's draft.

Two paragraphs below that, she talks about David's version, where she says, "David's version, I am working with, and I am making my suggestions to David's version. I am completely disregarding the Attorney General's version."

THE COURT: Okay. So she is ignoring whatever you wrote.

MR. PERKINS: That is correct.

THE COURT: And she is saying, "I am going to make my comments on David Hilliard's version."

MR. PERKINS: That's correct.

THE COURT: Okay. Now, go ahead.

MR. TODD: Your Honor, it speaks for itself.

And in reply to the last comment, that's why we need some evidence, why we need Dr. Marshall to clarify what was in her mind. I know Mr. Perkins from our last conversation, he conceded he doesn't read minds. He is telling you what was in Mrs. -- Dr. Marshall's mind. We need for her to tell us.

MR. PERKINS: I think the last paragraph of Dr. Marshall's May 20th document, your Honor, says, "I am very interested in continuing working on mediation." I really wasn't reading her mind. I was reading her words.

MS. STONE: And, your Honor, you have her words. You have her words at the Board meeting, where she said she is voting her free will. She is not being coerced.

And, again, your Honor, it makes no

sense to take one letter that she wrote back on May about the AG's version of what was under discussion back in May, when that's not at all what is now being considered.

What is now being considered is the AG himself has admitted this is something which is much better from the Foundation's perspective. It's better because Dr. Marshall fought for it.

She was not a victim of the AG. She was a protagonist against the AG. She fought long and hard for the Foundation.

THE COURT: Okay. And after this date, after she wrote this letter, there was -- were how many more mediation sessions with the mediator after May 20th?

MR. PERKINS: There were individual discussions, Judge, but I believe the next actual meeting was June 19th.

THE COURT: And the June 19th meeting was pretty much an all-day meeting with the mediator and all of the Board members. Was everybody there or was somebody absent?

No, a number of people were on the phone. That was the one that we excused people

from attending.

MS. STONE: And some people were not even able to participate on the phone, your Honor, like Madame Ahweiler.

MR. PERKINS: Most were, Judge. Most of the Board members participated.

THE COURT: And there was a circulation of what -- right before that meeting, of what was a latest draft, which also embodied subsequent input from Ms. Marshall?

MS. STONE: That's correct.

THE COURT: And the bottom line, as you see these progress, is the Foundation came out better at the end, did it not, because of this?

MS. STONE: It did, your Honor, and, you know, again, I thought we were not supposed to get into the intricacies of mediation. I didn't think we were supposed to be able to use what was said in mediation to further their litigation strategy.

THE COURT: They were real simple. They didn't say what she said. They just asked me to read it.

MS. STONE: Well, without myself violating

that, I can tell you there were several ways in which it got better for the Foundation. I won't be specific. I will be general.

With respect to the period of years under consideration, with respect to the period of years for Illinois residents under consideration, with respect to the specific recognition and acknowledgement of Giverny, with respect to some other very specific language about the right to exhibit art outside of the Chicagoland area, there were a number of ways in which this document got better, from the Foundation's purposes, perspective. And, in fact, it got better throughout the course of the mediation.

There were some proposals on the table that I am sure the individual defendants would have found even -- and did find even more egregious.

So there was a steady improvement of the document, your Honor.

MR. CUMMINS: Judge, I don't know what folks mean by "got better." You mean the attempt at hijacking by the Attorney General resulted in changes that were less onerous? I mean, that's

hardly getting better.

I think it's probably time to wrap it up. I would just say this, your Honor. When Mr. Perkins was speaking and explaining who said what to whom, what happened when, without any record, that's precisely why we need this discovery. And I am not going to put you through the same arguments once again.

I just ask you to grant us the limited relief that we are requesting.

I think there is more than ample evidence before you to justify that relief and not give us that will in our judgment compromise this entire process that you spent so long and hard on.

And we ask you to rule in our favor on that matter, Judge, and simply defer, do what they say is alleged housekeeping. And we dispute that, as well. Defer ruling on this matter until we have had an opportunity to present you with the evidence that we said we will present.

Thank you very much.

THE COURT: Thank you.

Counsel, we have had a long day today

and I want to, first of all, apologize to you for keeping you from 2:00 o'clock until a quarter to 7:00 with only a few breaks.

I am sure you are all as hungry and tired as I am, but we have a lot of people that are interested in this case and a lot of people that are here today watching it. And I wanted to make sure that you all had a chance to say what you wanted to say.

I apologize, also, to you that, unlike the Federal Court that has a much larger support staff than we have, I don't have the facilities to hand you out a written decision today. It would have been totally improper for me to do that, anyway, because I wanted to hear everything that was said.

I spent my entire weekend reading only the papers of the objectors and I have read everything that's here. I have read all of the attachments and I have read all other cases.

I can't say the same for everything that the plaintiffs have delivered yesterday. I have read the briefs. I have read most of the attachments and I have read the main portions of

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their cases.

This case has had a very, very contested and, shall we say, tortuous history since last September when it was filed.

I believe there have been three appeals, there may have been more, with cross appeals and further appeals. There have been -- There has been a contest along the line of virtually every issue that has been raised in the case and it's an important Foundation and it's an important case and it needs to have careful and deliberate consideration. And I have tried to do that.

I have found nothing in these papers that have been cited by the objectors that should cause me not to approve this settlement. I really don't see it as a close call with respect to counsel and with the fine amount of work that was done here.

I have thought about the process of where we were when we went to mediation and the history of the case and what we were facing and why we went. It was a very difficult process to even get the parties to go to mediation. And the

fiercest proponent of that were these defendants, who are now objecting.

At no time was there any even suggestion that Dr. Stebbins whould not be a participant in the mediation, even though everyone knew what was pending against him in regard to disqualifying him from the Special Litigation Committee.

I had the opportunity in the early portion of this case to read many, many Board minutes; and when I got those minutes and I went through and I took a look at the history of this Foundation, one person really stood out in my mind as the voice of reason in this whole process. And that was Dr. Marshall.

And I remember my sincere disappointment at the time that when the Board met and chose a Special Litigation Committee that didn't include Stephanie Pace Marshall.

I have never met any of these Board members, by the way, but I have spent a lot of time reading materials that I have been given.

I listened very, very carefully to the tape and I listened to it twice, yesterday

and again today in Chambers.

And after you get through all the music and all the stuff in the beginning of getting everybody on the line and you try to get to that first motion, which is an interminable motion to change the documents, which never got changed, I listened and relistened to the section of the tape when counsel for the Foundation advised everyone about their fiduciary obligations and their votes.

And I listened to the way Ms. Marshall voted and what she said and how she said it, as well as Dr. Stebbins and what he said and how he said it.

This was a lady who was in control. She was running that meeting and she was controlling some very difficult situations and early on in this meeting she said, without any hesitation, that if they made a change she wasn't going to go for this thing.

She didn't like the change that had been advanced by Dr. Stebbins and she wasn't going to go along with it. And this was not a lady who was being intimidated by anybody.

I also did not feel that there was

intimidation of Dr. Stebbins in this case. And I just simply don't see it. I have carefully considered all of the objections. I have read every bit, even though they weren't supposed to file it, every bit of the history of the Foundation, the intent of Dan Terra, information that was given by these objectors.

And I do not see this settlement, as the objectors have said as being antithetical -- I am reading from the document -- antithetical to the Foundation's purposes. And that it precludes the Foundation from recruiting the best and brightest worldwide to serve on the Board.

This is not a very limiting document as far as this Foundation is concerned. This Foundation is going to be able to pretty much operate the way that it has. It will be able to conduct its mission of providing education and art throughout the world and, yes, the Board is going to change.

Yes, I wish some of these Board members weren't leaving, but that's not for me to say. Yes, I hope that many of them, including the defenants, may continue to be involved in this

Foundation.

But I don't read this Consent Decree as the restrictive document that counsel for the defendant has said that it is.

I think this collection can be moved around and loaned and shown throughout the world and everybody, including the people of the State of Illinois, are going to benefit from that.

I do have a very severe problem. And I won't sign a piece of paper that has that last sentence on it, that says no other public statement shall be made. So that has to be changed with combining the two sentences and putting in the words, "and these parties have agreed."

And I won't sign it unless -- I don't want to sign a red line or a sloppily-written document today. I want that first paragraph corrected so that it says who filed answers, including defendant Michaeli, who is not mentioned in here. Everybody who has filed a current responsive pleading.

And as far as I am concerned, I have no problem allowing these defendants leave to file their answer and that can be put in there,

also, in the Consent Judgment and Order, if they filed an answer, or it can be in a separate document granting them leave to file an answer.

I do have a problem allowing the filing in this case of the proposed counterclaim. This Consent Judgment, once its signed, and it will be the next -- it will be the document that I sign after I have signed all the orders that release all these things that are under seal.

Once this document is signed, this case will be over. All claims that the plaintiffs have brought will be dismissed with prejudice. And this litigation will be done.

The counterclaim, as I see it, in many parts has a lot of defects to it, not the least of which is against people that aren't even parties to the case; and they have to be added as parties in order to be counterclaimed against. However, I question whether valid causes of action that flow from the main case are, in fact, what's alleged in this counterclaim.

So I am going to be entering an order, shall we call it the third order or fourth, denying the defendants leave to file the counterclaim in

this action. And that's without prejudice to them bringing any other separate lawsuit that they may see may be appropriate in any valid cause of action that they may have against any individual. But it's not part of this case.

This Foundation was lucky enough to have one of the most experienced and capable mediators. I did not really believe that this case could be mediated successfully to conclusion.

At the time that it went out, I had some very, very strong doubts. I believe this is a just and appropriate conclusion. I do not see it as a case in which there has been abuse of power and I definitely don't see it as a case in which the State has tried and succeeded to take control of a charitable foundation.

The Attorney General is not controlling this Foundation, as being alleged in the papers. And this Court is going to be able to continue to operate the way they have.

The big difference is that this Board is now going to be able to operate. There will be a functional Board, which there has not been for almost a year now. And the Board will be able to

make decisions. And the business of art will be able to go ahead, as opposed to the business of litigation.

And seeing what this Foundation is facing ahead of it, I can understand why these directors have made this incredible sacrifice to step down and remove themselves for the good of the Foundation, all of them. I am disappointed that it happened, but I am not supposed to second-guess that.

And so if you bring me in tomorrow morning, I would like to have tonight, if I can, and I will be here, an order unsealing the documents so that there is no issue.

And I would ask counsel to make available to any members of the press who want to have copies of the unsealed documents, those documents today, if you have them with you.

MR. CUMMINS: You are denying the motion for discovery, Judge?

THE COURT: I am denying the motion for discovery, too.

MR. CUMMINS: Will you certify the question on the counterclaim?

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THE COURT: On the what, sir?

MR. CUMMINS: On the counterclaim, the denial of the counterclaim.

THE COURT: Well, once I sign that, I don't have to certify anything. You have got a final order and you can go up to the Appellate Court tomorrow. I will be signing all of these tomorrow, with the exception of the question of the unsealing. And I want to do the unsealing tonight.

MR. CUMMINS: And you are making a specific finding, I gather, that there is no conflict with respect to those two directors?

THE COURT: I am not putting any Findings of Fact in the order that I am signing, but I am telling you that I do not see anything in the papers that have been presented to me. And I have read all the mediation papers that have been as attachments here. All the sealed documents.

I have not seen anything here that would defeat the entry of this Consent Decree.

MR. CUMMINS: The reason I want a clarification, Judge, you made a ruling with respect to your perception that they didn't seem to feel coerced, which is --

THE COURT: I am not putting a Finding of Fact in this order. I am saying that I am not seeing anything in this order, I mean in these papers, that should defeat the entry of this Consent Decree.

MR. CUMMINS: But --

THE COURT: You are free to file whatever lawsuit you want against whoever and raise whatever allegations that you want about that.

However, there is not going to be that kind of a finding. You don't want that kind of a finding in this case.

MR. CUMMINS: But you didn't address the issue of disinterestedness, as we believe that's critical. It may have come in late in the game, but that's an issue that was not addressed at the Board meeting.

No one was given advice or counsel on that at the Board meeting and that issue remains, as far as I am concerned, an issue that I presume you are overruling.

THE COURT: I am not finding that under the Illinois Not-for-Profit Act that they are an interested -- that they were interested Board

members that should not have participated.

Is that what you are saying?

MR. CUMMINS: I am wanting you to make a ruling on that, yes, Judge.

THE COURT: They could properly participate in this decision and they did properly participate in the decision.

MR. CUMMINS: I just want to clarify that finding, because that's an issue.

MR. GARMENT: May I, your Honor, --

THE COURT: Yes, sir.

MR. GARMENT: -- express my disappointment at your Honor's ruling, understanding what you articulated.

It is a very long distance from the commencement of this proceeding and I would like on the record to simply have it appear once again that this case started with a suit that was brought by two dissident directors, Mr. Buntrock and Mr. Gidwitz, which were not privileged documents, it would have been a very clear, very flagrant slander, because it was filled with false allegations that have been known to be false.

On the basis of that pleading,

on the basis of that pleading, you have the Attorney General come in and bootstrap himself into a position of the intervenor, using false allegations to play a role.

What followed, your Honor, was the contentious and litigious course of conduct that led to the mediation proceeding and within the cover of the mediation proceeding and without your knowing about this, without your being consulted, without your having any knowledge, the Attorney General forced the proceedings to the point of depriving certain of the directors of this Foundation of their free and untrammeled choice.

But we must not forget where this started and where it came out. And we have a situation that reminds me briefly of a custody case where the clients said, "All I want is custody. I will be prepared to do all the cosmetic things with respect to visitation and holidays and gifts," and they have custody now.

And they have made a great deal out of all of the cosmetic changes and alterations that have nothing to do with the fundamental defect in this case that started right at its beginning,

out of all of the cosmetic changes and alterations that have nothing to do with the fundamental defect in this case that started right at its beginning, continued all the way through, and it's now finally solidified in the Judgment of the Court.

MR. QUINLAN: Your Honor, I have to object and ask the comments be stricken. Counsel has no basis to make those comments. Frankly, the only test of this has been where your Honor denied the motion to dismiss.

And they have filed an answer today, which admits there is a cause of action. So I don't know how counsel can stand in front of this Court and make his grand speech of the basis that there is something here that is totally unfounded.

The complaint was proper. It was found proper by this Court and it's now been found proper by filing an answer. And I object and ask it be stricken.

MR. CUMMINS: Well, Judge, --

THE COURT: I am not going to be striking any remarks of counsel. All of counsel's remarks may stay on the record.

And there were -- There was no

trial in this case. None of the allegations that were alleged in either of the complaints filed in this case have been proven and everyone knows that.

This case is a mediated settlement and in large part I was convinced not only about the skill of the mediator but also the fact that all parties in this mediation process had counsel available to them and including the conflicted -- alleged conflicted Board members.

And there is nothing in anything that I have received here that makes me believe that discovery is necessary or anything is further necessary to investigate in this case any alleged conduct. I just simply don't see it.

MS. STONE: Housekeeping matter, your Honor.

MR. CUMMINS: Judge, before --

THE COURT: Yes, housekeeping.

MR. CUMMINS: Just one matter, if I may, your Honor. But before Mr. Quinlan gets too righteously indignant about the comments of my colleague, I would ask him to go back and read his memorandum that I referred to earlier.

THE COURT: Which one, about the Special Litigation Committee?

MR. CUMMINS: Yes, about all the conflicts, Judge.

THE COURT: Okay.

MR. CUMMINS: All the conflicts, which quite frankly no one has addressed in resolution of this matter at any time, including the fact that lawyers who purport to represent the Foundation can currently represent folks individually who purport to be taking actions inconsistent with the Foundation.

But I just assume, when folks made those pleadings, they believed it to be true.

THE COURT: Mr. Cummins, there comes a time that all litigation has to be ended. And this litigation is going to be ended tomorrow in this Court with the signing of these orders.

And the only thing that is going to remain is the Petitions for Attorney's fees, which the Consent Decree requires me to adjudicate. And if I am wrong, I am sure the Appellate Court is going to tell me I am wrong and I will see you all back here.

MR. CUMMINS: We appreciate your indulgence.

THE COURT: But for now I think we need to conclude today's proceedings.

You have a housekeeping matter.

MS. STONE: Housekeeping matter, yes.

Your Honor, we will try to reach Dr. Marshall tonight. I believe she is expecting our call. If there is some logistical difficulty due to the fact that she is on vacation and may not have access to a fax machine, is your Honor also available Thursday?

THE COURT: Sure.

MS. STONE: When do you leave town?

THE COURT: I will be -- I don't leave town until Saturday.

If I needed to be reached, why sign something when I was gone and I will be reachable. But my last day here in the Daley Center is supposed to be Thursday. But I will come in Friday if I need to.

MS. STONE: Your Honor, finally, I believe it's necessary to respond to the last shot by --

THE COURT: Why?

MS. STONE: I believe it's necessary to respond to the last salvo by counsel for the objectors.

Sidley, Austin, Brown & Wood solely represented the Foundation. We do not represent any of the defendants in their -- any of the directors in their individual capacity. We do not represent Dr. Stebbins in his individual capacity. He has another lawyer for that purpose.

We do not represent Dr. Marshall in her individual capacity. We represent merely the Foundation. We give advice to the six non-named, nonparty directors. That includes Dr. Stebbins and Dr. Marshall.

There is no conflict by Sidley, Austin, Brown & Wood at any point in this case. There is no conflict anywhere.

Thank you.

MR. QUINLAN: Judge, I would like to reserve my comments for the lounge across the street after the proceedings here.

Thank you.

THE COURT: We are in recess. Thank you.

Thank you, Mr. Reporter.

(WHEREUPON, the hearing of this matter was adjourned.)

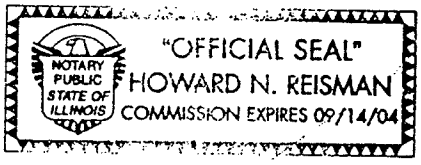
16di-003845

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, HOWARD N. REISMAN, being first duly sworn on oath, says that he is a court reporter doing business in the City of Chicago, County of Cook, and State of Illinois, and that he reported in shorthand the proceedings had in the matter of the above-entitled cause, to the best of his knowledge, skill, and ability, and that the foregoing is a true and correct transcript of his shorthand notes so taken as aforesaid and contains all the proceedings had at the hearing of the said matter.

Howard N. Reisman

HOWARD N. REISMAN, CSR and Notary Public, Cook County, Illinois
License #084-000411 7-31-01
Expires 5/31/03



CERTIFICATE OF SERVICE

I, Susan A. Stone, one of the attorneys for Defendant Terra Foundation for the Arts, do hereby certify that I caused a true and correct copy of the attached DEFENDANT TERRA FOUNDATION FOR THE ARTS' REPLY IN SUPPORT OF ITS MOTION TO TRANSFER THIS MATTER TO THE PRESIDING JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, CHANCERY DIVISION, FOR REASSIGNMENT TO JUDGE DOROTHY KIRIE KINNAIRD to be served upon the following counsel by messenger deliver:

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on this 27th day of August, 2001.

Susan A. Stone

AUG 31 2001

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August 28, 2001

Honorable Timothy C. Evans
Presiding Judge
Circuit Court of Cook County
2005 Richard J. Daley Center
Chicago, IL 60602

Re: Tucker, et al. v. Buntrock, et al.,
No. 01 L 009112

Dear Judge Evans:

Enclosed please find a courtesy copy of the Defendant Terra Foundation for the Arts' Reply in Support of its Motion to Transfer this Matter to the Presiding Judge of the Circuit Court of Cook County, Chancery Division, for Reassignment to Judge Dorothy Kirie Kinnaird.

Very truly yours,

SIDLEY AUSTIN BROWN & WOOD

Robert P. O'Keefe

Enclosure

cc: All counsel of record

SIDLEY AUSTIN BROWN & WOOD IS AN ILLINOIS GENERAL PARTNERSHIP

AUG 29 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service list

PLEASE TAKE NOTICE that on the 27th day of August, 2001, the attached REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER TO THE CHANCERY DIVISION was filed with the Clerk of the Circuit Court of Cook County, County Department, Law Division, at the Richard J. Daley Center, Room 500, Chicago, Illinois 60602, a copy of which is attached hereto.

JAMES E. RYAN, #99000
Attorney General of Illinois

Thomas G Ioppolo

THOMAS A. IOPPOLO
Assistant Attorney General
General Law Bureau
100 W. Randolph Street, 13-246
Chicago, Illinois 60601
312/814-7198

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the named individuals, indicated on the attached Service List, at their addresses, by mail, postage pre-paid, by depositing same in the U.S. mail located at 100 West Randolph Street, Chicago, IL 60601 , on the 27th day of August, 2001.

Thomas G Ioppolo
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO TRANSFER TO THE CHANCERY DIVISION

The Illinois Attorney General's office, on behalf of Attorney General Ryan and Assistant Attorney General Floyd Perkins, submits the following reply memorandum in support of its motion to transfer this case to the Chancery Division:

This case should clearly be transferred to the docket of Judge Kinnaird in the Chancery Division. The Terra Museum case, and the litigation among the board members of the Terra Foundation, was before Judge Kinnaird in Buntrock v. Terra, et al., 00 CH 13859. This case is nothing more than a continuation of the dispute, arising out of the same facts, with the same allegations and the same parties (now with new defendants being added). The plaintiffs here, Mr. Tucker, Ms. Terra, Mr. Simpson, fully participated in the earlier case through counsel. That case went into mediation by the agreement of all the parties, including these plaintiffs. Judge Kinnaird conducted numerous hearings; her mediator, David Hilliard, conducted numerous mediation sessions; hundreds of attorney hours were spent trying to reach a settlement acceptable

to all the parties. After lengthy negotiations, a settlement was reached. The Illinois Attorney General's Office, which had intervened in the case; the Terra Foundation; and the board members who brought the Chancery action, all agreed to the settlement. A minority of Terra board members voted against it. That minority resisted the settlement at great length; sought a TRO before Judge Kinnaird to prevent the Board from voting on it; sought an injunction in federal court to prevent the Board from voting on it; sought in a lengthy hearing before Judge Kinnaird to overturn the Board vote and urged her not to sign the consent decree. The challengers made the same allegations that they now make here in this Law Division case, and alleged improprieties against the Attorney General's Office which Judge Kinnaird found totally lacking in merit. Finally, Judge Kinnaird held a hearing lasting more than five hours at which all of these matters were discussed, and she signed the consent decree, which states: "The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment and Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment and Order." This jurisdiction will extend beyond the pendency of any appeal taken from it.

Having been turned down in Chancery and in federal court, plaintiffs now seek to raise the same allegations in a new case before a new judge in a different Division of the Circuit Court. The relief plaintiffs seek is the same they sought before Judge Kinnaird - - to reduce the consent decree signed by Judge Kinnaird to a nullity. A new judge would now be expected essentially to "start over" and educate himself or herself about this case; attorneys' fees (already large and all billed against the assets of the not-for-profit Terra Foundation) would no doubt be vastly higher as counsel present their positions anew to a new judge unfamiliar with the lengthy history of the case. Fee petitions in the first case are pending before Judge Kinnaird; the

reasonableness of future fee petitions should be evaluated by the same judge. It is simply not in the interests of justice and a grossly inefficient use of judicial resources to reinvent the wheel on what is essentially a collateral attack on a consent decree that is only a month old.

CONCLUSION

For the foregoing reasons, defendants Attorney General Ryan and Assistant Attorney General Floyd Perkins request that this case be transferred to the Chancery Division.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

Thomas A. Ioppolo

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AUG 29 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	**No. 01 L 009112**
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

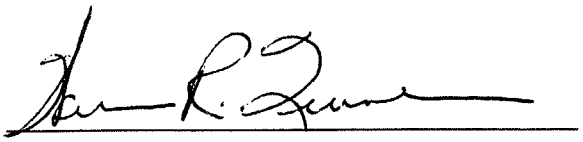
NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on August 27, 2001, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **Reply in Support of Motion for Transfer Based on Case**

Filed in the Wrong Division and on Relatedness , a copy of which is attached and hereby served upon you.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and Correct Copies of the Attached **Notice of Filing** and **Reply in Support of Motion for Transfer Based on Case Filed in the Wrong Division and on Relatedness**, to be served on August 27, 2001 in the manner listed on the attached service list.

Jacqueline Walsh

SUBSCRIBED AND SWORN to before me this 27th day of August, 2001.

Mary Butler
NOTARY PUBLIC

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Doc:181160

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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Doc:181160

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

AUG 29 2001

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	Before Presiding Judge Evans for Reassignment
Defendants.	)	

REPLY IN SUPPORT OF MOTION FOR TRANSFER BASED ON CASE FILED IN THE WRONG DIVISION AND ON RELATEDNESS

Defendants Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Crisham, Ltd., and Theodore Stebbins and Stephanie Pace

16di-003862

Marshall, by and through their attorneys, McDermott Will & Emery, hereby state as follows as their reply in support of their motion to transfer based on case filed in the wrong division and relatedness:

INTRODUCTION

As set forth in the motion to transfer, *Terra II* should be transferred to the Chancery Division for reassignment to Judge Kinnaird because *Terra II* is a direct attack on the consent decree entered into by the Terra Foundation and approved by Judge Kinnaird in *Terra I*. Tellingly, plaintiffs, in response to the motion, totally fail to address the undisputed fact that *Terra II* is directly related to *Terra I* and, in fact, that *Terra I* is the basis for *Terra II*. For this reason alone, transfer to the Chancery Division is proper.

Plaintiffs' suggestion that the filing of an appeal is dispositive of the motion to transfer is wrong. It is undisputed that Judge Kinnaird expressly retained jurisdiction to enforce the consent decree and regardless of the filing of an appeal in *Terra I*, Judge Kinnaird may continue to enforce the consent decree unless a stay is imposed. In any event, even if Judge Kinnaird were divested of all jurisdiction over *Terra I* — which she is not — it does not in any way diminish the fact that *Terra I* is inextricably related to *Terra II*. An ongoing appeal in *Terra I* does not change the fact that Judge Kinnaird is familiar with the complex issues involved in *Terra II* and that judicial economy would be best served by transfer of *Terra II* to the Chancery Division for reassignment to Judge Kinnaird. *Terra II* is, in essence, the same case as *Terra I* as these very issues have been raised and considered by Judge Kinnaird in *Terra I*. In fact, plaintiffs objected to the consent decree on *three* separate occasions and their objections were found to be without merit.

Plaintiffs devote a substantial amount of effort attempting to persuade this Court that the consent decree of *Terra I* was not binding on plaintiffs, had no effect on them, and was simply a

16di-003863

contract between the Foundation and the *Terra I* plaintiffs that did not resolve any legal or factual issues. Plaintiffs' attempt to minimize *Terra I* is totally undermined by the filing of a notice of appeal from *Terra I.* Assuming the genuineness of plaintiffs' argument, the merits of plaintiffs' appeal from *Terra I* and even plaintiffs' standing to pursue the appeal is questionable, at best.

In fact, the relief sought by plaintiffs in *Terra II* falls within the purview of cases that are expressly designated by General Order 1.2 as those which must be filed in the Chancery Division. Plaintiffs — without any support whatsoever — suggest that General Order 1.2 is about to be modified or has been modified and that somehow this should affect the transfer of this matter to the Chancery Division. Plaintiffs ignore the fact that *Terra II* seeks declaratory and injunctive relief which is directly encompassed by General Order 1.2. Plaintiffs also fail to state the fact that Judge Gardner has already determined that *Terra II* should be transferred to the Chancery Division and assigned to Judge Kinnaird. *See* Order and Transcript of August 13, 2001, pp.12-13, attached as Exs. A and B to motion to transfer.

Plaintiffs' objection to the motion to transfer only serves to further illustrate the blatant forum shopping that plaintiffs have engaged in with hope that another court — even a court of coordinate jurisdiction to Judge Kinnaird — will allow them to undermine the consent decree of *Terra I* after having been rebuffed by the *Terra I* court and by United States District Court Judge Bucklo. Accordingly, this Court should put an end to such improper tactics and grant defendants' motion to transfer this matter to the Chancery Division for assignment to Judge Kinnaird.

ARGUMENT

I. The Motion To Transfer Is Proper Based On The Relatedness Between *Terra I* And *Terra II.*

Plaintiffs have suggested that by their filing a notice of appeal in *Terra I*, that action is no longer pending before Judge Kinnaird, and thus the motion to transfer is somehow improper.[1] Notwithstanding the notice of appeal, Judge Kinnaird expressly reserved jurisdiction to enforce the consent decree that is at the heart of *Terra II.* Plaintiffs' notice of appeal does not in any way limit Judge Kinnaird's jurisdiction to enforce the consent decree that is challenged in *Terra II.* There is no stay in effect that prevents Judge Kinnaird from enforcing the consent decree. *See* Sup. Ct. R. 305(b) (providing that "[o]n notice and motion . . . .the court may stay the enforcement of any judgment . . . or any other judicial or administrative order.") In fact, defendants never sought a stay of Judge Kinnaird's order. Thus, plaintiffs' argument that Judge Kinnaird is without jurisdiction is simply wrong and based on a fundamental misapprehension of Rule 305. *See Town of Libertyville v. Moran*, 179 Ill. App. 3d 880, 535 N.E.2d 82 (2d Dist. 1989) (appeal was moot because appellant failed to perfect its interest by failing to obtain a stay); *see also JoJan Corp v. Brent*, 307 Ill. App. 3d 496, 718 N.E.2d 539 (1st Dist. 1999) (noting that stay is necessary to prevent enforcement of a judgment pending appeal). Clearly, Judge Kinnaird has jurisdiction to enforce the consent decree.[2]

---

[1] Plaintiffs' argument totally ignores the clear language of General Order 1.3(d) that provides that this Court may transfer a matter "[f]or the convenience of parties and witnesses and for the more efficient disposition of litigation." There is no provision in General Order 1.3(d) that limits this Court's authority to transfer actions only if the division proposed for the transfer has a "*pending*" related action. Nor would such a limitation be proper because that limitation would only serve to facilitate the forum shopping that plaintiffs have demonstrated.

[2] Plaintiffs readily admit that Judge Kinnaird has jurisdiction to consider plaintiffs' pending petition for fees incurred by their former counsel, Shefsky & Froelich, in *Terra I.* That plaintiffs are seeking payment of attorneys' fees pursuant to a consent decree that they are

16di-003865

Plaintiffs rely on *Cowdery v. Northern Trust Co.*, 321 Ill. App. 243, 53 N.E.2d 43 (1st Dist. 1944), *In re Parentage*, 321 Ill. App. 3d 823, 748 N.E.2d 291 (1st Dist. 2001), and *In re Marriage of Holem*, 153 Ill. App. 3d 1095, 506 N.E.2d 739 (5th Dist. 1987), for the unremarkable proposition that the filing of a notice of appeal divests the circuit court of jurisdiction to enter further substantive orders in the action before the circuit court. That law is not in dispute. It is equally undisputed that there is no stay in place pursuant to Rule 305. Thus, in the absence of a stay, Judge Kinnaird may continue to exercise jurisdiction to enforce the consent decree. *See* Sup. Ct. R. 305(b). Because *Terra II* directly challenges the consent decree, transfer to Judge Kinnaird is proper.[3]

II. It Is Indisputable That *Terra II* Is Related To *Terra I.*

Plaintiffs devote a substantial section of their brief arguing that *Terra I* is not the "same case" as *Terra II.* Yet nowhere do plaintiffs contest — because they cannot — that *Terra II* is inextricably related to *Terra I.* In fact, the Complaint is replete with allegations regarding *Terra I. See* ¶33, complaining of the filing of *Terra I* by Gidwitz and Buntrock; ¶35, complaining of the Attorney General's complaint filed in *Terra I*; ¶ 37, complaining of the Attorney General's intervention in *Terra I; ¶ 38 (same);* ¶ 39, complaining of a motion filed in *Terra I*; ¶ 40, complaining of other motions filed in *Terra I*; ¶ 42, complaining of the mediation process in *Terra I*; ¶ 43, complaining of Assistant Attorney General Perkins' actions during the mediation process in *Terra I*; ¶¶ 48-53, complaining of actions relating to Dr. Stebbins' involvement in *Terra I*; ¶¶ 55-58 complaining of actions relating to Dr. Marshall's involvement in *Terra I*; ¶¶ 59-74, complaining of the settlement

---

appealing further illustrates the inconsistency that plagues their objection to the transfer.

[3] Assuming arguendo that *Terra I* and *Terra II* were not the same case (which of course, they are), as plaintiffs suggest, then Judge Kinnaird would have jurisdiction to hear *Terra II*, regardless of the appeal, and it should be transferred based on relatedness.

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secured in *Terra I.* Plaintiffs' Complaint in *Terra II* is attached hereto as Exhibit A. *See also* Exhibit A, p. 25, Count I, Prayer for Relief, seeking "[a] declaration that the *settlement* [in *Terra I*] is unlawful..." (Emphasis added.)

It is undisputed that *Terra II* is simply plaintiffs' effort to challenge the settlement that was reached in *Terra I.* Plaintiffs are unhappy with the settlement, and in fact, tried to prevent its approval by the Foundation and Judge Kinnaird on numerous occasions. Plaintiffs have now initiated *Terra II* to attempt to review the settlement yet again. In fact, the defendants in *Terra II* consist of every Foundation Board member who voted for the settlement, two of the law firms involved in *Terra I*, the intervenor Illinois Attorney General and an Assistant Attorney General from *Terra I*, and all new Foundation Board members who are responsible for complying with the consent decree.

Rather than even attempting to demonstrate a lack of relatedness between *Terra I* and *Terra II* or even suggesting that somehow judicial economy and efficiency would not be served by a transfer, plaintiffs suggest that the effect of *Terra I* is minimal, citing general principles of law defining a consent decree as an agreement between parties. Plaintiffs argue that by entering into a consent decree, there was no judicial resolution of the rights of Tucker, Terra, and Simpson. Of course, plaintiffs' position regarding the limited effect of a consent decree is totally inconsistent with the arguments that plaintiffs raised in objecting to Judge Kinnaird's approval of the consent decree, namely, that the consent decree would impact the rights of numerous beneficiaries and plaintiffs and that an evidentiary hearing was necessary to demonstrate the fairness of the settlement. Notwithstanding the clear inconsistency, plaintiffs' argument here is without support because a motion for transfer itself does not require that another court have already conclusively resolved the

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parties' rights. Plaintiffs again miss the point.[4] There is no such limitation on this Court and plaintiffs' objection should be rejected.

Moreover, even plaintiffs acknowledge — as they must — that Judge Kinnaird, in presiding over *Terra I* and ruling on plaintiffs' objections to the consent decree, spent a great deal of time addressing the issue reraised in *Terra II*. In fact, Judge Kinnaird has already considered plaintiffs' claims — raised on several occasions in *Terra I* — that the consent decree was the product of coercion on the part of the Attorney General. Risk of inconsistent rulings is substantial here. Indeed, virtually all of the issues raised in plaintiffs' current motion to strike Sidley & Austin's pleadings and appearance were raised before and decided by Judge Kinnaird in *Terra I*.

In their effort to minimize the effect of the consent decree, plaintiffs have misrepresented to this Court that counsel for Buntrock and Gidwitz drafted the consent decree. This is totally false. The consent decree was drafted by the Court-appointed mediator in *Terra I* and reviewed by all parties and their counsel. Plaintiffs further misrepresent to this Court that defendants somehow short-circuited Judge Kinnaird's ability to adjudicate the issues in *Terra I* or that by fashioning the settlement in terms of a consent decree, defendants deprived themselves of a hearing on the merits. As set forth in the motion to transfer, the consent decree was only entered after substantial briefing by all parties and five hours of argument before Judge Kinnaird. Accordingly, the significant amount of time that this matter was before Judge Kinnaird, and her resulting familiarity with the legal issues further support transfer to Judge Kinnaird in accordance with General Order 1.3.

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[4] Plaintiffs would have this Court exercise its authority to transfer related matters only if another court previously resolved and adjudicated the issues alleged in the action sought to be transferred. Under such a "rule," a matter could only be transferred if another action was no longer pending. Thus, plaintiffs' position totally contradicts their argument that transfer is improper if the related action is no longer pending.

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Finally, plaintiffs' argument as to the limited effect of the consent decree is fundamentally inconsistent with their filing of a notice of appeal. On one hand, plaintiffs would have this Court find that the appeal in *Terra I* prevents the transfer of this matter, while at the same time, plaintiffs suggest that the order that is subject of the appeal in *Terra I* was not really a judgment and did not bind plaintiffs. Plaintiffs cannot have it both ways and the motion for transfer should be granted.

III. Defendants Are Not Barred From Requesting That This Court Transfer This Matter To The Chancery Division.

Plaintiffs suggest that defendants are somehow barred from even requesting that this Court transfer this matter to the Chancery Division. The basis for the purported "bar" is the fact that defendants did not object to Judge Kinnaird's statement in *Terra I* that plaintiffs would be free to file whatever lawsuit they wanted and raise whatever allegations they wanted. Plaintiffs have construed Judge Kinnaird's statement, that simply recognizes plaintiffs' constitutional right to file a lawsuit, as somehow validating *Terra II*. Plaintiffs' argument is totally baseless. Defendants' motion to transfer does not in any way in conflict with Judge Kinnaird's statement. Significantly, defendants have not contested plaintiffs' right to file this "action." Defendants have simply requested that this Court transfer this matter to Judge Kinnaird because *Terra II* is an attack on *Terra I*.

The authority relied on by plaintiffs to support the purported "acquiescence" is inapposite. In *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 474 N.E.2d 817 (1985) and *Drollinger v. Merrell*, 57 Ill. App. 3d 792, 373 N.E.2d 407 (5th Dist. 1978), the reviewing courts held that a party waived the ability to argue certain issues on appeal because the issues were inconsistent with positions taken before the trial court or had not been properly preserved. In *Terra II*, there is no reviewing court

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considering an appealable issue in this case and thus, *Auton* and *Drollinger* have no relevance.

Plaintiffs rely on *Chicago Park District v. Chicago & North Western Transportation Company*, 240 Ill. App. 3d 839, 859, 607 N.E.2d 1300, 1314 (1st Dist. 1992), to suggest that there is a "bargain" that defendants entered into that is somehow violated by this motion. Plaintiffs have unilaterally constructed a "bargain" based on the fact that defendants did not object to Judge Kinnaird's statement recognizing plaintiffs' constitutional right to file an action. There was no "bargain" and plaintiffs' insinuation is disingenuous.[5]

IV. THE COMPLAINT IN *TERRA II* SEEKS RELIEF THAT IS WITHIN THE TYPE OF RELIEF AWARDED BY CHANCERY COURTS.

It cannot be reasonably disputed that the relief sought in the Complaint is primarily equitable relief that is, pursuant to General Order 1.2, among the express types of relief and cases reserved to the Chancery Division. Specifically, *Terra II* seeks injunctive and declaratory relief and plaintiffs have already sought a restraining order. Plaintiffs' only response is that General Order 1.2 has been modified or is about to be modified. Of course, plaintiffs have not directed this Court to any such proposed modification or authority to support their suggestion.

Plaintiffs suggest that this matter has been assigned to the "Commercial Litigation Division" and as support, submit a blank Civil Action Cover Sheet. Plaintiffs ignore that the Civil Action Cover Sheet itself provides that "[t]he information contained herein is for administrative purposes only and cannot be introduced into evidence." Plaintiffs also fail to note that the judge to whom this case was assigned in the Commercial Litigation Division, Judge Gardner, *sua sponte* transferred this action to this Court for purposes of consideration of transfer and expressly stated that it should be

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[5] *Chicago Park District* is totally irrelevant to plaintiffs' "bargain" theory. *Chicago Park District* involved fraudulent discovery perpetuated by one of the parties and is thus, inapplicable.

transferred to the Chancery Division for assignment to Judge Kinnaird. In addition, the Civil Action Cover Sheet is a form to be completed by the attorneys for the plaintiff. Thus, the fact that plaintiffs' attorneys deem their case as appropriate for the Law Division did not bind Judge Gardner.

Finally, plaintiffs suggest that because the Civil Action Sheet provides for general "statutory actions" and certain statutes provide for injunctive relief, the Law Division is thus the proper division to hear *Terra II*. Such an argument is illogical and ignores that General Order 1.2 expressly defines injunctions as appropriate for resolution in the Chancery Division.

CONCLUSION

Plaintiffs accuse defendants of "gamesmanship." That plaintiffs are unable to provide any authority to support their unfounded allegations is not surprising. Defendants' motion to transfer is entirely proper. It is plaintiffs who have engaged in a forum shopping expedition that more accurately constitutes gamesmanship. Indeed, if plaintiffs' appeal of *Terra I* and the separate litigation of *Terra II* before a new judge is permitted to proceed, the end result could be inconsistent and conflicting judgments: a decision in the *Terra I* appeal may moot the proceedings in *Terra II*.

Plaintiffs' objection to the motion to transfer is predicated solely on plaintiffs' effort to find another forum to reevaluate the consent decree — even a forum of coordinate jurisdiction. Defendants have established that *Terra II* is based on the consent decree of *Terra I*. Plaintiffs have not even attempted to rebut the relatedness between *Terra I* and *Terra II*. Instead, plaintiffs have sidestepped the issue, suggesting that Judge Kinnaird does not have jurisdiction over *Terra I*. Plaintiffs' arguments fail because regardless of the filing of a notice of appeal, Judge Kinnaird clearly has jurisdiction to enforce the consent decree as no one has even sought entry of a stay pursuant to Rule 305.

For all foregoing reasons, Defendants Buntrock, Gidwitz, Daley, Hartman, Marshall, and Stebbins respectfully request that this Court transfer this case to the Presiding Judge of the Chancery Division for assignment to Judge Kinnaird.

Dated: August 27, 2001

Respectfully Submitted,

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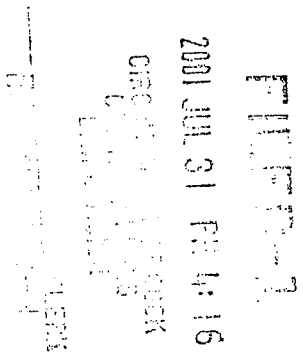
Doc:181193

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	01L 009112 CALENDAR # STATUTORY ACTION
Plaintiffs,	)	No.
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD. D. PERKINS, Assistant Illinois Attorney General,	)	**JURY TRIAL DEMANDED**
Defendants.	)	



COMPLAINT AT LAW

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson complain of the Defendants Dean Buntrock and Ronald Gidwitz, James E. Ryan, Floyd D. Perkins, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, and the Terra Foundation for the Arts ("Foundation") as follows:

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Preliminary Statement

1. Through this action, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson seek to vindicate both the mission of the Foundation and the intent of its founder Daniel J. Terra. The plaintiffs complain that certain directors of the Foundation are irreconcilably conflicted and have willfully and wantonly breached their fiduciary obligations by pursuing a course of action antithetical to the best interests of the Foundation and inconsistent with both the purpose of the Foundation and the clearly expressed intentions of its founder. These breaches of fiduciary duty were aided by – and even induced by – the illegal conduct of the Illinois Attorney General and his assistant. Indeed, as we set out more fully below, the improvident conduct of the Attorney General not only induced breaches of fiduciary duty but constitutes an unlawful deprivation of the Foundation's property without due process of law and an unlawful deprivation of the Foundation's rights to freedom of speech. The Foundation's interests have been further compromised by the conflicted interests of several Directors and various counsel who purported to, but did not, represent and counsel the Foundation free of improper influence

2. The plaintiffs have been unlawfully denied the opportunity to bring these claims in other litigation. As a result, this case is filed to secure relief – a declaratory judgment, injunctive relief and damages – in order to halt the perversion of the Foundation's mission which has been the direct result of the defendants' conduct.

Nature of the Case

3. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts, by a conflicted majority, voted to accept a settlement of this litigation that would chain the Foundation to Chicago for 50 years and install a majority of Illinois residents on its

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Board. As the dissenting board members stated before the vote, this acquiescence to the extraordinary intrusions by the State of Illinois into the Foundation's affairs was *ultra vires* and an utter abdication of the Board's fiduciary responsibilities. Yet six board members, some with personal conflicts, none acting in the best interests of the Foundation, chose to vote in favor of a proposal that—if allowed to stand—will do violence to the clear vision of an American philanthropist and set a chilling precedent for all not-for-profit corporations.

4. The Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Yet six Board members voted to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the Foundation's charter and its founder's demonstrated intentions.

5. Earlier litigation and a mediation process compromised by conflicts of interest became a vehicle for a power grab by the Attorney General of the State of Illinois and Assistant Attorney General Floyd D. Perkins, who is charged with enforcing the State's charitable institution laws. Through threats of investigation and legal action—including the threat of suing pivotal board members - Perkins has used his official powers to compromise and conflict certain members of the Foundation's Board of Directors such that the Foundation's right of self-governance, its right to control its own assets, and its

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right to freedom of speech have been effectively nullified. The Attorney General's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens further to deprive Plaintiffs of (1) their freedom of speech, in violation of the First Amendment; (2) their property without due process of law, in violation of the Fourteenth Amendment; and (3) rights under the commerce and contracts clauses of the Constitution. Through this unlawful conduct, Mr. Perkins has also induced certain Board members to violate their fiduciary duties to the Foundation.

6. In approving a tainted mediation process, a conflicted a majority of the Board of Directors of the Foundation have violated their fiduciary duties to the Foundation and caused the Foundation to act *ultra vires*. Despite irreconcilable conflicts of interest and their consequent disqualification, directors Stephanie Pace Marshall and Theodore Stebbins have acted against the interest of the Foundations. By taking action incompatible with the Foundation's charter and wasting valuable assets and opportunities for the Foundation to carry out its mission, the Board members who approved the proposed settlement violated duties of obedience to the Foundation's purpose and best interests.

Parties

7. The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

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8. Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachusetts.

9. Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming. Senator Simpson also serves as Chairman of the Board of Trustees of the Buffalo Bill Historical Center in Cody, Wyoming, which maintains assets valued in excess of $350 million.

10. Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's widow, and a resident of Washington, D.C.

11. Dr. Stephanie Pace Marshall is the Foundation's Secretary and Treasurer and chairman of its finance and strategic planning committees. She is president of the Illinois Mathematics and Science Academy, and a resident of Illinois.

12. Dr. Theodore O. Stebbins is a Director of the Foundation and Chairman of the collections committee. He currently serves as curator of American art at the Fogg Museum at Harvard University and resides in Massachusetts.

13. Margaret Daley is a Director of the Foundation and Chairman of its education committee. She is a resident of Illinois.

14. Dean Buntrock is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

15. Ronald Gidwitz is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

16. James E. Ryan is the Attorney General of Illinois.

17. Floyd D. Perkins is Assistant Attorney General, Bureau of Charitable Trusts and Solicitations.

The History of the Terra Foundation

18. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. Born and educated in Philadelphia and a graduate of Pennsylvania State University, Mr. Terra maintained residences in Chicago and Washington, D.C. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to 1950. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

19. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Its purposes, according to its original Articles of Incorporation, were

> to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation (as filed Dec. 13, 1978).

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20. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He created a multimillion dollar museum facility on North Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Mr. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art. Today, the Foundation owns substantial property in the Village of Giverny.

21. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the North Michigan Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

22. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson and his long-time friend Peter Solmsson of the University of the Arts in Philadelphia, that he wanted his art to achieve the broadest possible impact on the public.

23. Between 1991 and 1993, Mr. Terra negotiated with the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City to form a strategic alliance that would pool the Foundation's collection with those of the other two institutions and move the emphasis of the Foundation's work from Chicago to Washington. Discussions broke down over issues relating to the Whitney Museum's control over the collection.

24. Between 1993 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized.

25. In 1996, the last year of his life, Mr. Terra focused intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect

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to draw plans and obtain zoning permits for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Phone lines, name plates, furniture and other items were purchased for the new property. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location, sometimes with his own handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

26. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable North Michigan Avenue museum site. Between 1996 and 1998, the Foundation was consumed with issues relating to Mr. Terra's estate.

The Board Fight Over the Future of the Foundation

27. Upon settlement of Mr. Terra's estate, the Board returned to consideration of a strategic plan for the Foundation. At a November 1998 meeting, Mr. Buntrock recommended that the Board form a Strategic Planning Committee to consider options for the future of the Foundation. Mr. Gidwitz was elected chairman of this committee.

28. Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard

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University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris; Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis Corporation.

29. Under Dr. Tucker's leadership, the Foundation continued active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. The Strategic Planning Committee met several times to consider options, with Mr. Gidwitz himself raising suggestions of building a new museum facility on a different site, affiliation with other museums, and closing the museum to focus on education efforts and building the collection.

30. In preparation for the Board's September 2000 annual meeting in France, Dr. Tucker encouraged members to focus on long-term planning options and circulate ideas they might have in advance of the meeting for the group to study and consider.

31. Dr. Tucker circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities

frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly, Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

32. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

The Ploy to Keep the Foundation in Chicago

33. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock filed a lawsuit alleging that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

34. In their lawsuit, Messrs. Gidwitz and Buntrock claimed, contrary to fact, that Mr. Terra intended that the Foundation would always remain in the Chicago area. The complaint quoted news reports from 1987, the time of the move from Evanston to North Michigan Avenue, in which Mr. Terra described his enthusiasm for the new location. The complaint did not refer to Mr. Terra's 1990 statement to the Board of Directors or to any of his subsequent discussions and plans relating to relocation of the Foundation to

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another city. It also did not mention the 1994 amendment to the charter which permitted the Foundation to operate museums and schools "both in the United States and abroad." Based on this misleading statement of Mr. Terra's intent, the defendants alleged that the Foundation's mission was to operate a "museum of American art . . . in the Chicago area to be held in trust for the benefit of the people of the State of Illinois."

35. Attorney General James Ryan and Floyd Perkins, an Assistant Attorney General, seized upon the turmoil of the Terra Foundation Board as an opportunity to assert State control over its assets. At the inception of the lawsuit, the Attorney General filed an intervenor complaint that simply borrowed the allegations of Messrs. Gidwitz and Buntrock. The complaint also reiterated the faulty premise -- based upon a demonstrably incorrect statement of Mr. Terra's intent -- that the Board of Directors were without authority to relocate the Foundation. The complaint sought a declaration, among other things, that "[t]he intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the Foundation intended and expected the Museum to remain in Chicagoland."

36. The Attorney General intervened expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an *ultra vires* act. As Assistant Attorney General Perkins has stated in an interview for that case, he believes it is his role as assistant attorney general to see that Illinois-based charitable institutions utilize their assets in Illinois. Mr. Perkins attempts to accomplish this by seeking installment of Illinois directors on the boards of such institutions and through other restrictions. He has employed this tactic successfully in other cases, for

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example, that of the Regenstein Foundation. Mr. Perkins acknowledges, however, that he does not have the authority to impose Illinois-related restrictions on institutions which were created to serve broader interests, such as national and international aid organizations, even though such institutions may be based in Illinois and subject to reporting and other statutory requirements of Illinois law.

37. As authority for his intervention in that lawsuit, Mr. Perkins relied on the Charitable Trust Act (760 ILCS 55/1 et seq. (1997)) and his "common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts." Whatever authority these sources of law may provide to the Attorney General, they do not permit any action to force a charitable trustee or Board member of a not-for-profit corporation to change the institution's fundamental purpose in a manner inconsistent with its charter or founder's intent. Nor do these authorities mandate that any charitable trust or not-for-profit corporation that is established in the State of Illinois must remain in Illinois, regardless of its purposes and founder's intent.

38. The propriety of the Attorney General's intervention and sole basis for authority in that case depended upon his claim that the Terra Foundation's purpose was to serve the people of Illinois, rather than a broader population. Like the other defendants, the Attorney General based this claim on selected statements of Mr. Terra to the press. A reasonable investigation of the facts would have revealed, however, that Mr. Terra did not intend that any of the assets of the Terra Foundation should be restricted geographically. Mr. Perkins did not conduct such an investigation before filing his initial complaint. For example, Mr. Perkins has admitted that when he filed that complaint he was unaware of Mr. Terra's 1994 amendment to the Articles of Incorporation of the

Foundation expressly stating that the Foundation's efforts shall include museums "both in the United States and abroad."

39. In January 2001, the Terra Foundation filed a motion for judgment on the pleadings, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead encouraged simply the best possible dissemination of art knowledge and appreciation among the public in the United States and abroad.

40. Although the true facts of Mr. Terra's intent were revealed early in litigation, and at the latest by the Foundation's motion for judgment on the pleadings, defendants and the Attorney General persisted in their efforts to capture the Foundation in Illinois. They were able to do so through a barrage of motions designed to delay the proceedings and deflect attention from the core issue of Mr. Terra's intent. Mr. Perkins and the other defendants first challenged the Board's choice of counsel and early decisions about directing and funding the litigation. Then, once the Board had selected an independent litigation committee of Dr. Stebbins and Amb. Andreani, Mr. Perkins and the other derfendants challenged Dr. Stebbins' ability to serve on this committee. These tactics had the desired effect of paralyzing the Board and placing Mr. Perkins and the other defendants in a strong position to make demands upon the Foundation, without regard to the merits of their lawsuits.

41. As the case proceeded to mediation, the Attorney General and Assistant Attorney General Perkins insinuated themselves into the process in an attempt to railroad its result. Mr. Perkins pursued the goal of capturing the Foundation's assets in Illinois despite the fact that he had no basis to assert that he was seeking to preserve Mr. Terra's intent.

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42. In mediation, the Attorney General and Assistant Attorney General Perkins took several extraordinary positions that evidenced their recognition that Mr. Terra's intent was not to constrain the Foundation to Chicago. The Attorney General disagreed that the Board of Directors was governed in the use of the Foundation's funds solely by the Articles of Incorporation. He argued that those Articles were too broad to provide any meaningful purpose to the Foundation. Most strikingly, the Attorney General maintained that a not-for-profit corporation established for charitable purposes in a particular jurisdiction, simply by virtue of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population.

43. Without legal authority and in disregard of the facts regarding Mr. Terra's intent. Assistant Attorney General Perkins demanded throughout the mediation that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with the Art Institute of Chicago in which the Foundation would sell the North Michigan Avenue property to fund a new wing at the Art Institute.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois in perpetuity.

c. Maintain and exhibit its collection in the Chicago metropolitan area in perpetuity.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois.

44. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

45. Frustrated by the Board's resistance to his demands, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation. These tactics were directed in particular at two key swing directors, Drs. Stebbins and Marshall.

Attacks on Dr. Stebbins

46. Since his earliest involvement with the Terra Foundation, Dr. Stebbins had supported a comprehensive approach to strategic planning that included consideration of options outside of Illinois. In 1997, before Dr. Stebbins joined the Board, he headed an advisory committee that conducted a review and analysis of the collection and reported recommendations to the Board for the future. The committee consisted of Dr. Stebbins, then curator of American paintings at the Museum of Fine Arts in Boston, Professor John Wilmerding, former chairman of the art department at Princeton, and Charles Moffett, former deputy director of the National Gallery and director of the Phillips Collection in Washington. In its report to the Board in February 1997, the advisory committee concluded strongly that the present building in Chicago is inappropriate as a museum. The committee envisioned three alternative scenarios for the future, two of which involved discontinuing the Chicago presence by: (1) concentrating on French operations, with the establishment of a new Terra Center for American Art and American Studies in Paris, or (2) improving the collection and housing it another American city.

47. Dr. Stebbins joined the Board in April 1998. In Strategic Planning Committee

meetings until the outbreak of litigation, he continued to advocate consideration of options within and without Illinois. He was an especially strong advocate for the idea of maintaining a stand-alone museum.

48. When litigation began, Dr. Stebbins became a key figure in its conduct. Upon defendants' demand for an independent litigation committee, Dr. Stebbins and Amb. Jacques Andreani were chosen from among the non-party directors to oversee the litigation on behalf of the Foundation. Because Amb. Andreani was in France at the time, Dr. Stebbins effectively controlled the litigation committee.

49. Within three weeks of Dr. Stebbins' election to the litigation committee on November 30, 2000, Mr. Perkins filed a motion to remove Dr. Stebbins from the committee on the grounds of conflict of interest. On January 22, 2001, Mr. Perkins obtained a Court order to conduct special discovery focusing on Dr. Stebbins' conduct as a director. Within two weeks of that order — and less than two weeks before a scheduled evidentiary hearing focusing upon Dr. Stebbins' conduct — the Foundation entered into mediation. With challenges to his reputation and integrity having become the central focus of the litigation, Dr. Stebbins strongly advocated directing the Foundation into mediation.

50. On March 21, 2001, Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant for the first time. In a cover letter, Mr. Perkins stated that the document was a draft and was not being filed, but rather supplied to set forth issues to be discussed at settlement. The draft complaint named Dr. Stebbins as a new defendant and included specific charges of impropriety against him. The allegations included alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions.

The amended complaint also charged Stebbins with breaching the Code of Ethics for Professional Practices in Art Museums. The amended complaint was never filed.

51. Dr. Stebbins now knew that, if settlement was not reached, the litigation would resume, with his reputation and integrity once again the central focus, and he would become a defendant in the case.

52. On the same day that the draft complaint was distributed to counsel, the mediator circulated to the Board a revised mediation proposal, which had been formulated after reviewing the amended complaint and discussing this matter with the Attorney General. The proposal contained a requirement that the Foundation would maintain and exhibit its collection in perpetuity at the Art Institute of Chicago. According to the mediator, this provision resulted from the position of the Attorney General. Mr. Perkins had not participated in mediation sessions on March 5 and 6, but worked behind the scenes with the mediator to influence the course of mediation.

53. Dr. Stebbins, facing the threat of becoming a defendant in the lawsuit, now expressed his support for settlement. On April 2, 2001, he and Amb. Andreani prepared a letter to the mediator stating that "in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago." They enclosed a settlement proposal "follow[ing] the outline" of the March 21, 2001, proposal reflecting the Attorney General's positions.

Attacks on Dr. Marshall

54. Dr. Marshall joined the Board in 1998. Like Dr. Stebbins, Dr. Marshall held the view that the Terra Foundation was established for the broadest possible dissemination of American art. For example, at a May 10, 2000, meeting of the Strategic Planning

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Committee that Drs. Stebbins and Marshall attended, consensus was reached that the beneficiaries of the Foundation included the national and international public.

55. Late into the mediation process, Dr. Marshall remained a strong critic of the Attorney General's methods and proposals. In a May 20, 2001, letter to counsel for the Foundation and her fellow Board members she reported:

> [W]ith respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

56. In addition to serving on the Board, Dr. Marshall serves full-time as president of the Illinois Mathematics and Science Academy, a highly-regarded education institution that depends on public funding for the bulk of its operating budget and is currently in the midst of a significant capital campaign.

57. After a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins believed that he had been tricked into going along with mediation and had lost valuable time preparing for litigation. He began to investigate Dr. Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He considered these issues for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr. Perkins knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

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58. Mr. Perkins never informed Dr. Marshall or her counsel that the investigation had been concluded.

The Proposed Settlement and Board Approval

59. On June 29, 2001, the Board held a special meeting to consider the terms of a proposed settlement of this litigation. The settlement called for entry of a consent judgment and order implementing the Attorney General's goal of locking the Foundation in to the State of Illinois. In this regard, the proposed judgment requires:

a. For at least 50 years, the Foundation shall remain an Illinois corporation, with its principal office and corporate headquarters in Illinois;

b. For at least 50 years, the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago metropolitan area;

c. For at least 25 years, the Foundation will require that a majority of its Board positions be at all times held by residents of Illinois;

d. The Foundation shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

60. Dr. Marshall, the Foundation's Treasurer and Secretary, presided at the special meeting. Other directors present were: Mr. Gidwitz, Mr. Buntrock, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Mrs. Terra and Dr. Tucker.

61. Immediately prior to the vote, several Board members made personal statements. Mrs. Terra objected that "the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees."

> Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art . . . . [W]e will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of

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> Illinois to really come in and run our Foundation . . . telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most . . . outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation.

62. Dr. Tucker echoed Mrs. Terra's concerns. He stated that

> what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview. The invasion of its independence, its privacy, by . . . the Attorney General, I find repugnant. I find it detrimental and offensive.

63. At the recommendation of the Foundation's attorney, Drs. Stebbins and Marshall each addressed the issue of conflict of interest due to the Attorney General's conduct in the case. Dr. Marshall confirmed that "the Attorney General has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation," but insisted that the investigation "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation."

64. Dr. Stebbins first defended his "reputation, both as a scholar and as someone of complete integrity," and maintained that he had served on the Board "without any iota of a conflict of interest." He then stated that he "abhor[ed] the threatening tactics of the Attorney General." Dr. Stebbins also insisted that he was voting his "own conscience."

65. Upon the motion of Dr. Stebbins, the Board voted on whether to approve the proposed resolutions to amend the By-Laws and accept the settlement. Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Mr. Hartman, Dr. Marshall and Dr. Stebbins voted in favor. Mrs. Terra and Dr. Tucker voted against.

66. Members of the Board of Directors of the Terra Foundation have statutory and common law fiduciary duties to the Foundation. These duties include, but are not limited to, the duty of loyalty, which encompasses the duty to avoid conflicts of interest and to

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act in the best interests of the Foundation; the duty of obedience to purpose, which prohibits action contrary to the purposes for which Foundation was established; and the duty to use the Foundation's assets productively and not to waste Foundation assets.

67. At least two members of the Board who voted in favor of the proposed settlement were faced with a conflict of interest. Dr. Marshall expressly acknowledged that the Attorney General, the primary beneficiary of the settlement transaction, was conducting an investigation of the publicly-funded institution of which Dr. Marshall is president. Dr. Marshall reasonably could expect her vote on the settlement to influence the outcome of that investigation, either positively or negatively.

68. Dr. Stebbins also had strong personal incentives to support the settlement to the detriment of the Foundation. During the course of the litigation and corresponding public scrutiny of the Foundation's operations, he had faced charges of serious lapses of professional responsibility. In acknowledging his abhorrence of the Attorney General's tactics and vociferously defending his reputation and integrity immediately prior to the vote, Dr. Stebbins plainly identified his conflict of interest. If the mediation was unsuccessful, Dr. Stebbins would become a defendant in the case and face personal liability. Only through settlement could Dr. Stebbins hope to avoid more scrutiny which carried the threat of a potentially devastating effect on his career.

69. The Foundation's bylaws can be amended only "by a majority of the directors then in office and present" at the meeting at which the vote is taken. Because eight members of the Board were present at the June 29, 2001 meeting, the affirmative vote of five directors was required to approve the Proposed Settlement's many bylaw changes. Without the votes of Dr. Stebbins and Dr. Marshall, the Proposed Settlement garnered

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only four votes.

70. Each Board member who voted in favor of the settlement did so in violation of their fiduciary duty of obedience to the Foundation's purpose. Restricting the Foundation's art collection to isolation in Chicago for 50 years and installing a majority of Illinois residents on its Board is directly contrary to the Foundation's stated purpose in its Articles of Incorporation to "expand the artistic horizons of a growing art public" and to "operate museums and schools, both in the United States and abroad." Articles of Incorporation (Aug. 26, 1994) (emphasis added).

71. The Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry. Indeed, the problems of the 50-year lock-in and Illinois-majority provisions were identified by Dr. Marshall prior to her conflict of interest arising. In her letter of May 20, 2001, she stated that because of the Foundation's "intentional national and international outreach and presence," she did "not believe any specifically defined constituency should hold a reserved majority." Dr. Marshall acknowledged that a 50-year lock-in would be a relinquishment of the Board's power to govern the Foundation when she stated that "[a]fter the stipulated period, it is the Board of the Foundation that must make decisions regarding the Foundation's future."

72. Each Board member who voted in favor of the proposed settlement also violated a duty not to waste the Foundation's assets. By eliminating the possibility of merger or partnership with a non-Chicago institution, the Board accepted a undue limitation on its negotiating power. By limiting the field of competitors for the Terra relationship, the Board would waste all the benefits that would flow from that competition, and in

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particular the ability to secure the most attractive possible terms for the future and for the collection to have the greatest possible impact on the art world and public education.

73. The Foundation has benefited tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a major Parisian art museum. Yet the Board majority voted in favor of a settlement under which the Foundation would forfeit the benefit of such experts in favor of a board packed with individuals whose chief virtue is that they are residents of Illinois. By limiting the pool of talent from which the Board can recruit directors, the Board would waste its opportunity to secure the best and most experienced leadership.

74. Locking the Foundation into Chicago for 50 years or any other length of time and stacking the Board with Illinois residents dangerously compromises the Foundation's flexibility to fulfill its charter. There is absolutely no guarantee that the Chicago community will provide adequate support to the Foundation over such a long period of time. If the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract the maximum possible interest.

CLAIMS FOR RELIEF

Count I - Declaratory Relief

75. All foregoing paragraphs are incorporated herein by reference.

76. An actual and justiciable controversy exits between the parties as defined by 735 ILCS 5/2-701.

77. As directors of the Terra Foundation, Plaintiffs have donated their time, efforts and resources to accomplish the mission of the Foundation.

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78. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

79. The conduct of the Defendants alleged herein has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

80. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count II - *Ultra Vires* Acts (805 ILCS 105/103.15)

81. All foregoing paragraphs are incorporated herein by reference.

82. The resolutions approved by six members of the Board of the Foundation on June 29, 2001, constitute acts of the Foundation taken in contravention of its Articles of Incorporation and By-Laws, and thus taken without lawful authority, capacity or power.

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83. The court should enjoin the doing of such acts in this proceeding pursuant to the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a).

Prayer for Relief

Plaintiffs request that this Court to enter judgment as follows:

(a) an Order enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation;

(b) Damages in an amount to be determined at trial;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Count III - Breach of Fiduciary Duty

84. All foregoing paragraphs are incorporated herein by reference.

85. A fiduciary relationship exists between the Foundation and the members of its Board of Directors. The Board's fiduciary duties include, without limitation, the duties of acting in good faith and with due regard for the Foundation's interest, of refraining from acting in a manner adverse to the Foundation's interest, of making full disclosure of all material information in their possession, of obedience to the Foundation's purposes as established by its Articles of Incorporation, of making productive use of the Foundation's assets and opportunities, and the duties of care, loyalty, fair dealing, and honesty.

86. The Defendant Board Members who voted in favor of the proposed settlement willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation.

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87. In addition, board members Stephanie Pace Marshall and Theodore Stebbins breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation.

88. As a direct and proximate result of these breaches of fiduciary duty, the plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count IV - Inducing Breach of Fiduciary Duty

89. All foregoing paragraphs are incorporated herein by reference.

90. As set forth above, the Defendant members of the Board who voted in favor of the proposed settlement of this litigation did so in violation of their fiduciary duties to the Foundation.

91. Attorney General Ryan and Assistant Attorney General Perkins colluded with these Board members in committing breach of their fiduciary duties, or otherwise induced or participated in such breach.

92. As a direct and proximate result of this conduct, Plaintiffs and the Foundation have suffered injury.

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Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Punitive damages;

(d) Such other relief as may be just and proper.

Count V - Deprivation Under Color of Law of Constitutional Rights (42 U.S.C. § 1983)

93. All foregoing paragraphs are incorporated herein by reference.

94. At all relevant times, Attorney General Ryan and Assistant Attorney General Perkins acted under color of law as Assistant Attorney General of the State of Illinois.

95. Mr. Perkins' conduct constitutes an unlawful deprivation of the Foundation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

96. The conduct of the Attorney General and Assistant Attorney General constitutes an unlawful deprivation of the Foundation's rights to freedom of speech under the First Amendment to the Constitution of the United States.

97. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful restraint by the State of Illinois on interstate commerce in violation of Art. I, § 8 of the Constitution of the United States.

98. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful impairment of the Foundation's contractual obligations in violation of Art. I, § 9 of the Constitution of the United States.

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99. The Attorney General and Assistant Attorney General engaged in such illegal conduct to the injury of Plaintiffs and the Foundation.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Jury Trial Requested

100. Plaintiffs request trial by jury.

16di-003902

Dated: July 31, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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16di-003903

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AUG 29 2001

August 27, 2001

VIA MESSENGER

Hon. Timothy C. Evans
Presiding Judge
Circuit Court of Cook County
Law Division
2005 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Tucker et. al. v. Buntrock, et al.*; 01 L 009112**
Motion for Transfer Based On Relatedness;
Hearing Set 9/13/2001 at 2:00 p.m.

Dear Judge Evans:

Enclosed please find a courtesy copy of the Reply in Support of Motion for Transfer Based on Case Filed in the Wrong Division and on Relatedness filed with the court today. The motion itself was provided to you last week under separate cover. This motion is set to be heard by you on September 13, 2001 at 2:00p.m.

Very truly yours,

William R. Quinlan

Enclosure

cc: Donna Stolar
All Counsel of Record (w/o enclosure)

16di-003904

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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VOLUME 2

23.	08/31/01	Notice of Filing of Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading
24.	08/31/01	Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading
25.	08/31/01	Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading"
26.	09/04/01	Defendants Stebbins and Marshall's Motion for Leave to File Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading"
27.	09/11/01	Dr. Stebbins' and Dr. Marshall's Motion to Extend Date or Otherwise Respond to Plaintiffs' Complaint
28.	09/12/01	The Terra Foundation's Motion for Extension of Time to Answer or Otherwise Respond to Plaintiffs' Complaint
29.	09/19/01	Opposition to Plaintiff's Motion for Substitution of Judge as a Matter of Right
30.	09/20/01	Terra Foundation for the Arts' Opposition to Mrs. Terra's Motion for Substitution of Judge
31.	09/20/01	Transcript of Proceedings
32.	09/21/01	Transcript of Proceedings
33.	09/21/01	Order--Defendant Stephanie Pace Marshall for Substitution of Judge as of Right
34.	09/21/01	Order
35.	09/21/01	Order
36.	10/11/01	Agreed Order
37.	10/24/01	Notice of Filing and Dr. Stebbins' and Stephanie Pace Marshall's Memorandum in Opposition to Plaintiffs' Motion to Disqualify Sidley
38.	10/24/01	Terra Foundation for the Arts' Opposition to Plaintiffs "Emergency" Motion to Disqualify

16di-003907

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

NOTICE OF FILING

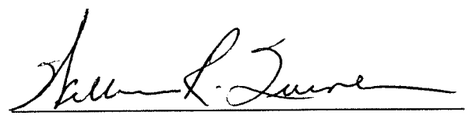
TO: See attached Service List

PLEASE TAKE NOTICE that on August 31, 2001, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **Objections to "Emergency" Motion to Strike Appearance**

16di-003908

and to Strike "Unauthorized" Pleading, a copy of which is attached and hereby served upon you.

Respectfully submitted,

By: 

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Firm ID # 33745

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and correct copies of the attached **Notice of Filing** and **Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading**, to be served on August 31, 2001 in the manner listed on the attached service list.

Ann D Haller

SUBSCRIBED AND SWORN to before me this 31st day of August, 2001.

Mary Butler
NOTARY PUBLIC

"OFFICIAL SEAL"
Mary Butler
Notary Public, State of Illinois
My Commission Expires March 2, 2004

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	Before Presiding Judge Evans for Reassignment
Defendants.	)	

OBJECTIONS TO "EMERGENCY" MOTION TO STRIKE APPEARANCE AND TO STRIKE "UNAUTHORIZED" PLEADING

Defendants Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Crisham, Ltd., hereby object to the "Emergency" Motion to Strike Appearance and Strike "Unauthorized" Pleading. In further objection, defendants state as

16di-003913

follows:

I. This Motion is Premature

A. Resolution of These Issues would Interfere with the Consent Judgment and Order Entered by Judge Kinnaird in Terra I.

In the interest of judicial economy, as reflected in the Circuit Court's General Orders, a single judge should hear and decide all aspects of this case. The questions regarding representation of the Foundation and the issue of whether or not Marshall Field V has been properly elected as Chairman and President of the Foundation are not stand-alone issues and cannot be separated from *Terra I*. These issues cannot be resolved independent from consideration of the consent judgment and order entered in *Terra I*, the Foundation's by laws, the Illinois Not For Profit Corporations Act, the customs and practices of the Foundation's Board and various other issues which have been previously considered by Judge Kinnaird. Plaintiffs' claim that counsel has not been properly retained by the Foundation stems from a theory that the consent judgment and order entered in *Terra I* is invalid. Plaintiffs' logic is as follows: the consent judgment is invalid, therefore the board was not properly elected, therefore Marshall Field V could not have hired counsel on behalf of the Foundation. Any court deciding whether Plaintiffs' theory is correct must necessarily interpret and interfere with the consent judgment. Judge Kinnaird has retained jurisdiction to enforce and interpret the consent judgment.[1] Moreover, as defendants illustrated in the motions to transfer, this entire "action" including the issues raised in Plaintiffs' motion are inextricably connected to *Terra I* and should be decided by Judge Kinnaird.

---

[1] Judge Kinnaird expressly reserved jurisdiction "for the purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order." Exhibit A, p. 4, ¶ 13.

16di-003914

Finally, although Plaintiffs would have this Court believe that it is considering a simple motion to strike, this motion is, at best, a thinly-veiled motion to disqualify.[2] These issues should be decided in the context of *Terra I* and not at this stage and out of context.

B. Resolution of these Issues Should be Reserved Until After Transfer to the Proper Judge.

Although the Plaintiffs self-styled their motion an "emergency" there is no emergency here. Plaintiffs have offered no justification for asking this Court to answer the issue of representation while this matter is pending before this Court *for reassignment*. Fully briefed motions to transfer to the Chancery Division are pending before this Court. In fact, pursuant to the Circuit Court of Cook County General Order No. 1.3, the only question before this Court is whether or not this matter should be transferred to the Chancery Division. *See* General Order 1.3(c) "[Any action improperly filed in the wrong division] shall be transferred to the Presiding Judge of the division or district in which it is pending *for the purpose of transferring the action* to the Presiding Judge of the proper division or district..." (Emphasis added.)

As the Plaintiffs have failed to articulate any emergency which would justify a circumvention of the General Order, and have failed to present this Court with any authority in support of their attempt to do so, this Court should not condone Plaintiffs tactics and should consider only the transfer motions at this time. After the transfer motions have been resolved, the proper judge (in this

---

[2]As a matter of judicial economy and practicality, it is important to note that any decision made by this Court disqualifying counsel is immediately appealable to the Appellate Court by petition under Supreme Court Rule 306(a)(7). As this matter, and this very issue, has been appealed to the appellate court in *Terra I*, a further appeal would do nothing but create a procedural morass in an already convoluted matter. Indeed, Plaintiffs have filed a notice of appeal in *Terra I*. (*See* notice of appeal attached as Exhibit A to Plaintiffs' Objections to Various Motions to Transfer.)

16di-003915

case Judge Kinnaird) will be able to adjudicate whether there is any merit to the Plaintiffs' accusations.

At this time, pending before this Court are three fully briefed motions to transfer this cause to the Chancery Division and ultimately to Judge Kinnaird. The motion to transfer filed by the Foundation is under attack in Plaintiffs' motion, however there are two independent motions to transfer filed by the Attorney General and director defendants, herein. Therefore, even if Plaintiffs' motion to strike the Foundation's motion to transfer were granted, there remain two independent motions which seek the identical relief. Even if this Court were to grant the motion to strike, Plaintiffs are asking this Court to enter a futile order which does nothing to change the case. In the face of the other two motions which have not and cannot be challenged, this Court should deny the Plaintiffs' motion and proceed directly to transferring this matter.

C. Plaintiffs Never Filed a First Amended Complaint at Law.

Contrary to Plaintiffs' assertion in their motion (Motion to Strike, p. 2), the Plaintiffs have not been granted leave to file a first amended complaint at law in this matter. On August 13, 2001, Plaintiffs served upon the defendants a "First Amended Complaint at Law" with a notice which claimed that they would file that amended complaint *"instanter"* at the hearing scheduled for 2:00p.m. that day. Pursuant to the Code of Civil Procedure, 735 ILCS 5/2-616, a complaint may be amended before final judgment, "on just and reasonable terms". § 2-616(a). A plaintiff must seek leave of court to amend a pleading. Therefore, Plaintiffs' assertion that they could file an amended complaint "instanter" without a proper motion and without leave of court is wrong.

Moreover, the August 13, 2001 transcript of proceedings and the order entered by Judge Gardner on that same day belie the Plaintiffs' claim that a first amended complaint was ever filed.

16di-003916

A copy of the August 13, 2001 Transcript of Proceedings is attached as Exhibit B. Plaintiffs' own counsel, Mr. Novoselsky, requested of the court:

> What I would like to do at this point, your Honor, is at least enter since the case is still before you, **enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am sure...**

Exhibit B, August 13, 2001 Transcript of Proceedings, p. 11 (emphasis added).

In support of their claim that the first amended complaint was actually filed, Plaintiffs ignore their own representations to the court. Instead, the Plaintiffs direct this Court to the portion of the proceedings wherein the attorneys were introducing themselves for the record. *Id.* at p. 5. Read in its entirety, the transcript of proceedings before Judge Gardner establishes that a motion for leave to file a first amended complaint was not in fact granted but only entered and continued.

Plaintiffs also ignore the order entered following that same hearing. A copy of the August 13, 2001 order entered by Judge Gardner is attached as Exhibit C. That order states "Plaintiffs' Motion for Leave to File a First Amended Complaint is entered and continued." Exhibit C.

The record is clear that the first amended complaint has not yet been filed and therefore neither Sidley Austin Brown & Wood ("Sidley") nor Winston & Strawn are yet parties to this action. Thus, at this time, Plaintiffs' claim that Sidley cannot represent the Terra Foundation for the Arts ("Foundation") because Sidley is a defendant in this matter is totally inconsistent with the procedural posture of this case.

CONCLUSION

Plaintiffs' motion is premature. This Court should only address the transfer of this matter and not allow itself to be lead by Plaintiffs into the trap of interfering with the consent judgment and order entered by Judge Kinnaird. Wherefore, the defendants Buntrock, Daley, Gidwitz and Hartman

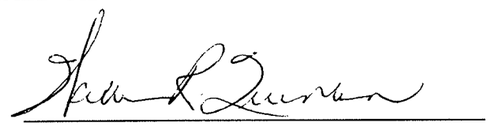
16di-003917

respectfully request that this Court deny Plaintiffs' motion in its entirety and proceed directly to transferring this matter to the Chancery Division and ultimately to Judge Kinnaird.

Dated: August 31, 2001

Respectfully Submitted,

DEAN L. BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

By: 
One of Their Attorneys

William R. Quinlan
James R. Carroll
Jasmine de la Torre
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 33745

16di-003919

Exhibit A

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

16di-003920

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-003921

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:05 A.M.

16di-003923

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date:_____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By:_____

Its_____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____
Assistant Attorney General (Title)
State of Illinois

Print Name: _____

Date: _____

7/6/01

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

16di-003928

Exhibit B

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

No. 01 L 009112

PROCEEDINGS AUGUST 13, 2001

McCORKLE COURT REPORTERS, INC.
CHICAGO, ILLINOIS - (312) 263-0052

16di-003929

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

APPEARANCES:

CUMMINS & CRONIN, by

MR. THOMAS C. CRONIN

77 West Wacker Drive, Suite 4800

Chicago, Illinois 60601

(312)578-0500

-and-

DAVID A. NOVOSELSKY & ASSOCIATES, by

MR. DAVID A. NOVOSELSKY

120 North LaSalle Street, Suite 1400

Chicago, Illinois 60602

(312)346-8930

On behalf of the Plaintiffs,

QUINLAN & CRISHAM, LTD., by

MR. WILLIAM R. QUINLAN and

MR. JAMES R. CARROLL

30 North LaSalle Street, Suite 2900

Chicago, Illinois 60602

(312)263-0900

On behalf of the Defendants

Dean Buntrock, Ronald Gidwitz,

Margaret Daley and

Ambassador Hartman,

APPEARANCES CONTINUED:

SIDLEY, AUSTIN, BROWN & WOOD, by
MR. STEPHEN C. CARLSON
10 South Dearborn Street
Chicago, Illinois 60603
(312)853-7717

-and-

WINSTON & STRAWN, by
MR. SCOTT SZOLA and
MR. MARK M. HEATWOLE
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312)558-5137

On behalf of the Defendant
The Terra Foundation For The Arts,

OFFICE OF THE ATTORNEY GENERAL, by
MR. FLOYD D. PERKINS
100 West Randolph Street
Chicago, Illinois 60601
(312)814-2533

On behalf of the Defendants
James E. Ryan and Floyd D. Perkins.

MR. CARLSON: Your Honor, I am Steve Carlson from Sidley & Austin. I got these papers about two minutes before --

THE COURT: Let me ask you, can we stay off the record just a minute?

MR. CARLSON: Sure, absolutely.

(Discussion off the record.)

MR. QUINLAN: William R. Quinlan and James Carroll on behalf of certain defendants.

MR. CARLSON: Steve Carlson from Sidley, Austin I believe on behalf of The Terra Foundation.

THE COURT: And pro se, aren't you a party now?

MR. CARLSON: Maybe.

MR. NOVOSELSKY: You granted us leave to file.

THE COURT: Okay. Go ahead.

MR. SZOLA: Your Honor, Scott Szola of Winston & Strawn technically hasn't been served either yet, so we will be in the same position as Sidley & Austin.

MR. PERKINS: Floyd Perkins. I am a defendant pro se and Assistant Attorney General on behalf of the Attorney General of Illinois.

MR. HEATWOLE: Mark Heatwole, Winston & Strawn.

MR. NOVOSELSKY: I apologize, Judge.

THE COURT: He assumes everybody knows him, but give them your name.

MR. NOVOSELSKY: David Novoselsky and Tom Cronin for plaintiffs.

These are our motions. And I guess the first I would only ask Mr. Quinlan, certain defendants which one, Bill, so there is no question?

MR. QUINLAN: Well, if you want me to go through, I am representing Mr. Hartman, Mrs. Daley, Mr. Buntrock, Mr. Gidwitz. And we are not at the moment representing Miss Marshall or Mr. Stebbins.

MR. NOVOSELSKY: As a housekeeping matter, your Honor, we have --

THE COURT: Let me before we start indicate that this case having been set for 2:00 o'clock, as the parties came in, we have had informal discussions which precluded in opening we had as a remaining defendants' attorney came in since the shortage of notice, nobody was essentially late because everything was pretty much of emergency. And that's what we have talked.

A moment ago the attorneys, half a dozen

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Attorney General, Floyd Perkins. Judge, we object to venue here so anything -- if there is any kind of prejudice --

THE COURT: What are you worried about? I am sending it out sua spontae.

MR. PERKINS: I understand, Judge. I am just -- I don't want any rulings by the court --

THE COURT: Where do you want the venue, in Springfield?

MR. PERKINS: I just don't want any rulings by the court to be used as some prejudice.

THE COURT: Well, I thought everybody heard me since I raised it sua spontae. And I only did you for an afterthought; didn't I?

MR. CARLSON: You sure did, your Honor.

THE COURT: It doesn't make sense to be here. So if you want to argue, I can end up disagreeing. But I totally agree with you. Okay?

MR. PERKINS: Judge --

THE COURT: I think the whole principle of judicial economy and good sense is you put it all in one place. And I have always done that.

MR. NOVOSELSKY: Which, your Honor, we may find ourselves going back to square one in front of

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

THE COURT: I am not going to call it which I could do. I could do it. I just don't. I have the right to call it, and it is not ex parte. But I wouldn't do it.

If he has a problem with having this go, that's his problem. I don't see any problem in having it go there. And you would be a delight in my life. I would grow older with you all. But it would be the delight of my life. Sometime when all of you can get a new case from the beginning, it would be my pleasure to have you all here.

(Whereupon, further proceedings in said cause were adjourned sine die.)

STATE OF ILLINOIS)
) SS:
COUNTY OF DuPAGE)

Patricia L. Wangler, being first duly sworn, on oath says that she is a court reporter doing business in the City of Chicago; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

Patricia L Wangler

Certified Shorthand Reporter

SUBSCRIBED AND SWORN TO
before me this 17th day
of August 2001.

OFFICIAL SEAL
DOROTHY CALLAHAN
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. SEPT. 29,2004

Dorothy Callahan

Notary Public

16di-003944

Exhibit C

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Bantrock, et al

NO. 01 L 009112

ORDER

This matter coming on to be heard upon plaintiffs' Emergency Motion for the Entry of Temporary Restraining Order, the Court being fully advised in the premises, [redacted] and the Court being advised that the Terra Foundation for the Arts has cancelled its Board of Directors meeting scheduled for August 14, 2001, IT IS HEREBY ORDERED THAT:

1) This matter is hereby transferred to Judge Timothy Evans, Presiding Judge of the Law Division, for the purpose of transferring said cause for reassignment, consideration of;

2) The Motion for TRO is moot, and

3) Plaintiffs Motion for Leave to File a First Amended Complaint is entered and continued.

Atty No.

Name Stephen C. Carlson / Sidley Austin

Attorney for Terra Foundation

Address Bank One Plaza, 10 S. Dearborn

City / Zip Chicago, Ill 60603

Telephone (312) 853-7717

JUDGE SHELDON GARDNER

ENTER: AUG 13 2001 /ME/

CIRCUIT COURT - 1506

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-003945

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HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

August 31, 2001

VIA MESSENGER

Hon. Timothy C. Evans
Presiding Judge
Circuit Court of Cook County
Law Division
2005 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Tucker et. al. v. Buntrock, et al.*; 01 L 009112**
Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading; Hearing Set 9/17/2001 at 10:00 a.m.

Dear Judge Evans:

Enclosed please find a courtesy copy of the Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading filed with the court today. This motion is set to be heard by you on September 17, 2001 at 10:00a.m. in Room 2001.

Very truly yours,

William R. Quinlan

Enclosure

cc: All Counsel of Record (w/o enclosure)

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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US OFFICE PRODUCTS

16di-003948

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	
Defendants.	)	

TERRA FOUNDATION FOR THE ARTS' OPPOSITION TO PLAINTIFFS' "EMERGENCY MOTION TO STRIKE APPEARANCE AND TO STRIKE UNAUTHORIZED PLEADING"

Defendant Terra Foundation for the Arts (the "Foundation"), by its attorneys, submits its opposition to Plaintiffs' Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading. Plaintiffs' premature motion has no merit and should be summarily denied.

I. PLAINTIFFS' MOTION SHOULD BE DECIDED BY THE JUDGE THAT IS ULTIMATELY ASSIGNED TO THIS CASE.

As an initial matter, this Court should not even delve into the issues raised in Plaintiffs' premature motion. On July 31, 2001, Plaintiffs filed their original complaint in the

Law Division of the Circuit Court of Cook County. The matter was subsequently assigned to Judge Sheldon Gardner. At a hearing held on August 13, 2001, Judge Gardner stated that he believed that this case should be transferred back to Judge Dorothy Kirie Kinnaird, who is currently presiding over a related case, *Buntrock, et al. v. Terra, et al.*, No. 00 CH 13859. (*See* 8/13/01 Transcript of Proceedings, p. 13 ("this case [should] go back [to Judge Kinnaird] and you can quote me."), attached hereto as Exhibit A). This matter was thereafter transferred to this Court, as Chief of the Law Division, for consideration as to the appropriate venue.

For the reasons laid out in the Foundation's *Motion to Transfer this Matter to the Presiding Judge of the Circuit Court of Cook County, Chancery Division, for Reassignment to Judge Dorothy Kirie Kinnaird*, Judge Gardner was correct in stating that this case is appropriately transferred back to Judge Kinnaird. The Foundation's motion on that issue has now been fully briefed before this Court and is currently set for hearing on September 17, 2001. Until the assignment issue is resolved, this matter is not technically pending before any judge. As such, this Court should simply rule on the Defendants' motions to transfer this matter and not allow itself to be brought into the contentious motion practice which has historically plagued this litigation. Once the case is assigned to the appropriate judge, that judge can then address Plaintiffs' concerns at the appropriate time. Contrary to the title of Plaintiffs' motion, there is simply no "emergency" here, and Plaintiffs' motion should therefore be denied.

II. EVEN IF THIS COURT CHOOSES TO RULE ON PLAINTIFFS' MOTION, IT SHOULD BE DENIED ON ITS MERITS.

A. This litigation is part and parcel of the *Buntrock et al. v. Terra et al.* matter for which Sidley Austin Brown & Wood was unquestionably retained as the Foundation's counsel.

This litigation is nothing more than an effort by Plaintiffs to circumvent Judge Kinnaird's denial of their motion for leave to file counterclaims in the *Buntrock, et al. v. Terra,*

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et al. case. In other words, they took their counterclaim, fashioned it into a complaint and filed it in the Law Division. There is no question that Sidley Austin Brown & Wood ("Sidley") was properly retained by the Foundation to represent it in the *Buntrock* matter. At the Foundation's annual Board of Directors meeting in Giverny, France, on September 26, 2000, the Board voted to retain Sidley to represent it in connection with the *Buntrock* matter by a vote of 9 to 0 – with only plaintiff Gidwitz abstaining. (*See* Minutes of 9/26/00 Board of Directors Meeting, attached hereto as Exhibit B). Since that time (almost one year now) Sidley has served as the Foundation's counsel in that litigation as it continues to do so today.

Moreover, after Judge Kinnaird directed the Foundation to elect an independent litigation committee ("ILC") to direct the litigation, an ILC was formed by the Board and specifically authorized to select and direct counsel for the Foundation. The ILC interviewed Sidley in December 2000 and thereafter reconfirmed Sidley's role as counsel for the Foundation and specifically authorized Sidley "to take any and all action which in its professional judgment is appropriate in representing the Foundation in connection with the Lawsuit." (*See* 12/4/00 ILC Meeting Minutes and Resolution re: Retention of Counsel, attached hereto as Exhibit C). The ILC has recently indicated that Sidley should continue to represent the Foundation in this litigation because it is nothing more than a collateral attack on the Consent Judgment that settled the *Buntrock* case, and which merely rehashes the same arguments with which Sidley is intimately familiar.

Indeed, Plaintiffs are simply attempting to "horizontally" appeal Judge Kinnaird's entry of a Consent Judgment and Order in the *Buntrock* matter and her denial of Plaintiffs' motion for leave to file counterclaims. It appears that Plaintiffs are improperly attempting to cover all their bases. Plaintiffs filed a notice of appeal of Judge Kinnaird's ruling, but rather than

wait it out in the appellate court, they also went ahead and filed another lawsuit making the very same allegations they wanted to make in the *Buntrock* matter. Conveniently, Plaintiffs now claim that, technically, this case is a new matter; therefore, Sidley is not authorized to continue to represent the Foundation. Plaintiffs should not be permitted to use such a tactic to deprive the Foundation of counsel of its choosing who has become uniquely familiar with the allegations and history of this litigation.

B. While not necessary, Sidley's representation of the Foundation in this case has been specifically confirmed.

Even though it was not necessary to do so, Marshall Field V, the new President and Chairman of the Foundation's Board of Directors, has specifically confirmed that Sidley is authorized to defend the Foundation in this case. Retaining litigation counsel is within the broad powers of a corporation's President and Chairman of the Board. *See* 805 ILCS 105/108.50 ("All officers and agents of the corporation . . . shall have such implied authority as recognized by the common law from time to time."). This type of administrative decision is certainly within the purview of decisions made by presidents and chairmen of corporations all the time, and does not in this case require a formal meeting and vote of the Foundation's entire Board of Directors. Plaintiffs' suggestion that Mr. Field does not have the power to make such a decision is wrong, and in any event is at best a question for another day, and another judge – the one who will ultimately be presiding over this case.

Plaintiffs' motion must be seen for what it truly is. It is not just an attempt to disqualify Sidley – the counsel of choice for the Foundation – but it is even more broadly an attempt to prevent the Foundation from having any counsel to represent it in these contested matters. Plaintiffs' theory that the Foundation's new directors (who were elected on August 1, 2001 as part of the Consent Judgment and Order entered by Judge Kinnaird on July 26, 2001 in

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the *Buntrock* matter) were not properly elected to the Board and therefore have no authority to act, is an attempt to bring the Foundation's operations to a screeching halt. If Plaintiffs' theory prevailed, the Foundation would in essence be prevented from making any kind of decision whatsoever, including the retention of counsel to defend itself in the myriad of lawsuits and appeals that Plaintiffs have filed. In short, this is an effort by Plaintiffs to render the Foundation counsel-less. Again, this tactic should not be permitted to prevail.

C. Attempts to disqualify Sidley have already been rejected several times at every court level in Illinois.

Throughout the pendency of the *Buntrock* litigation, there have been approximately six attempts to disqualify Sidley as the Foundation's counsel. These attempts have been soundly rejected by Judge Kinnaird and the Appellate Court. (*See* J. Kinnaird's 9/25/00, 10/20/00, 1/2/01 Orders and 1/19/01, 2/16/01 Appellate Court Orders, attached hereto as composite Exhibit D). In addition the Illinois Supreme Court has refused to hear such arguments. (*See* 6/6/01 letter from Clerk of Ill. Sup. Ct., attached hereto as Exhibit E). In fact, the Plaintiffs in this matter actually filed briefs opposing any disqualification of Sidley by the plaintiffs in *Buntrock* arguing that any "request to disqualify Sidley [] should be rejected by this Court." (Terra, Tucker and Simpson's *Opposition to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation and/or Receiver,* filed 10/17/00, p. 3). While Plaintiffs may now believe that it suits their situation to contradict themselves, their attempt to change their position is simply too late. As Judge Kinnaird recently stated, in response to Plaintiffs' counsel's objections to Sidley as counsel for the Foundation, "We've been through this Sidley issue so many times I don't even want to think about it . . . Sidley is here, they are representing the Foundation . . . and I don't see a conflict." (7/24/01 Transcript of Proceedings, pp. 14-15, attached hereto as Exhibit F).

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Plaintiffs' current attempt to deprive the Foundation of its counsel is nothing more than a legal maneuver which they have no standing to bring in the first place, has no factual basis and should not be permitted by this Court. *See Schwartz v. Cortelloni*, 177 Ill.2d 166, 173, 685 N.E.2d 871, 874 (1997)(noting that "only a party who has been a client of the attorney whose conduct is in question may complain" of a conflict); *Renard v. Columbia Broadcasting System, Inc.*, 126 Ill.App.3d 563, 567, 467 N.E.2d 1090, 1094 (1st Dist. 1984)("Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice.") Attorney disqualification is a "drastic measure" which "destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Schwartz*, 177 Ill.2d at 178, 685 N.E.2d at 877; *accord, Weil, Freiburg & Thomas v. Sara Lee Corp.*, 218 Ill.App.3d 383, 395, 577 N.E.2d 1344, 1353 (1st Dist. 1991). As the Illinois Supreme Court has admonished, "caution must be exercised to guard against motions to disqualify being used as tools for harassment." *Schwartz*, 177 Ill.2d at 178, 685 N.E.2d at 877 (emphasis added). In the words of *Weil, Freiburg & Thomas v. Sara Lee Corp.*, 218 Ill.App.3d at 395, 577 N.E.2d at 1353, "our courts disapprove of the use of disqualification motions as a tactical weapon in litigation insofar as such motions can be misused for purposes of harassment." Plaintiffs' motion is similarly just a tactic.

D. Plaintiffs' claim that Sidley made misrepresentations to Judge Gardner is just that – a misrepresentation.

Plaintiffs' citation to supposed promises made to Judge Gardner at the August 13 hearing are completely disingenuous. In their motion, Plaintiffs state that Sidley represented to Judge Gardner that "no action would be taken by the Foundation's board without proper and lawful notice." This statement is simply not true. On August 13, 2001, the parties were before Judge Gardner for a hearing on Plaintiffs' Emergency Motion for the Entry of a Temporary

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Restraining Order to prevent the Foundation from holding a Board of Directors meeting that it had scheduled for the next day. As the transcript clearly reflects, the only thing that Sidley represented that the Foundation would do is "cancel the board meeting" thereby rendering Plaintiffs' motion for a TRO moot. (*See* 8/13/01 Transcript of Proceedings, pp. 7, 9 ("We are simply canceling the meeting, your Honor.")

Sidley made no representation that the Foundation would refrain from doing anything else. In fact, there was explicit discussion of the possibility of rescheduling the Board meeting with the appropriate five days notice and, therefore, any such Board meetings would happen when Judge Kinnaird returned from vacation putting her in a position to deal with any TRO's that Plaintiffs might wish to bring. (*See* 8/13/01 Transcript of Proceedings, pp. 9-10). Additionally, there certainly was no "promise" to refrain from moving to transfer this case back to Judge Kinnaird. Rather, Sidley made that very motion orally before Judge Gardner, with no objection by Plaintiffs' counsel whatsoever, and Judge Gardner stated that he agreed that it should go back to Judge Kinnaird. (*Id.* at pp. 8, 13). Obviously, Judge Gardner was not operating under the assumption that Sidley would simply refrain from pursuing that motion.

E. Naming Sidley as a proposed defendant in a proposed pleading does not warrant disqualification.

Despite Plaintiffs' representation, Sidley is not a defendant in this lawsuit. At the August 13 hearing before Judge Gardner, Plaintiffs merely sought leave to file an amended complaint purporting to name Sidley as a defendant (which request for leave the Foundation intends to oppose once the case is assigned to a judge in an appropriate venue). As the Court's Order reflects, Plaintiffs were not granted leave to file that complaint. (8/13/01 Order, attached hereto as Exhibit G; *see also* 8/13/01 Transcript of Proceedings, p. 11). It was specifically merely entered and continued. Id. Accordingly, Plaintiffs' amended complaint has never been

filed and is not currently pending. It is nothing more than a proposed pleading. As counsel for Plaintiffs, Mr. Novoselsky, specifically stated to Judge Gardner, "What I would like to do at this point, your Honor, is . . . at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it [at this time]." (8/13/01 Transcript of Proceedings, p. 11). The fact that Plaintiffs have attempted to name Sidley in a proposed amended complaint – which has never been filed – does not mandate the disqualification of Sidley. Accordingly, there is no basis for disqualifying Sidley at this juncture.

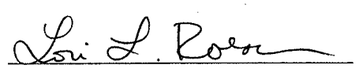
Moreover, even if leave were to be granted for the filing of Plaintiffs' amended complaint – which it should not be – that fact alone would not warrant disqualification of Sidley. First, it is important to note that Plaintiffs are not seeking anything in their complaint against Sidley in the nature of monetary damages, but are merely seeking to disqualify Sidley as counsel. On the face of the few paragraphs supposedly directed toward Sidley in Plaintiffs' proposed pleading, the complaint obviously does not even state a cause of action. All they are really doing in "naming" Sidley in their proposed pleading is using a supposed complaint as a way to file a disqualification motion – just another legal maneuver, and one which the courts have stated must be viewed with skepticism. *See Schwartz*, 177 Ill.2d at 178, 685 N.E.2d at 877; *Weil, Freiburg & Thomas*, 218 Ill.App.3d at 395, 577 N.E.2d at 1353. Permitting such a ploy would obviously have a pernicious effect by essentially giving attorneys unbridled power to disqualify their opposing counsel by simply adding them to their complaint as supposed defendants. Second, Plaintiffs' basis for their requested relief of disqualification is nothing more than the same

supposed conflict arguments which have been heard and rejected by courts of every level of the judiciary in Illinois, and which should also be rejected by this Court.[1] (*See* Exhs. D and E).

Conclusion

For the foregoing reasons, as well as those to be presented at oral argument, the Foundation respectfully requests that this Court refuse to hear Plaintiffs' Motion to Strike Appearance and Strike Unauthorized Pleading. In the alternative, the Foundation requests that such motion be denied.

Respectfully submitted,



One of the attorneys for defendant
Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
Sidley Austin Brown & Wood
10 S. Dearborn
Chicago, IL 60603
Firm No.: 38315

[1] Ironically, the argument made by the plaintiffs in the *Buntrock* matter was that Sidley was, contrary to the truth, hired by and taking direction from Dr. Tucker (one of the Plaintiffs in this action) and was therefore beholden to him.

16di-003958

Exhibit A

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,
Plaintiffs,
vs.
No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation of the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREIIBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,
Defendants.

PROCEEDINGS AUGUST 13, 2001

COPY

McCORKLE COURT REPORTERS, INC.
CHICAGO, ILLINOIS - (312) 263-0052

16di-003959

REPORT OF PROCEEDINGS at the trial of the above-entitled cause before the Honorable SHELDON GARDNER, Judge of said Court, on the 13th day of August 2001 at the hour of 2:00 o'clock p.m.

Reported by: Patricia L. Wangler

License No. 084-002417

attorneys jointly for the defendants went out to discuss the possibility of some interim action as suggested by the court. Is that a fair statement?

MR. QUINLAN: That's fair.

MR. CARLSON: That's correct, your Honor. And I could respond to that suggestion, your Honor --

MR. NOVOSELSKY: I am sorry, unless there is going to be an agreement --

MR. CARLSON: I think there is.

THE COURT: I said --

MR. CARLSON: I think there probably in essence is an agreement, your Honor. We have represented The Terra Foundation in the underlying lawsuit in front of Judge Kinnaird. And I think your Honor's off-the-record questions I think correctly pointed out that this piece of litigation probably should be transferred back to the Chief Judge to go back to Judge Kinnaird because it is fundamentally the same thing.

But more importantly the motion for TRO that is up apparently seeks to enjoin a board meeting from taking place tomorrow morning. We can cancel that board meeting so that it doesn't take place tomorrow morning.

None of us have had a chance to take a look at this first amended complaint or maybe even the original complaint. None of us have had a chance to look at any detail at the motion for TRO, so we will cancel the board meeting for tomorrow. So there is no need for any further action in that respect, your Honor.

And I think also as the court was suggesting in your off-the-record comments, this is a case that is rightful to be transferred to the Chief Judge and to be transferred back to Judge Kinnaird. She will --

THE COURT: Do you so move?

MR. CARLSON: I so move, your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: I have no problem with your suggestion except as follows, I presume that the agreement would be there would be no meeting scheduled unless and until the matter can be presented to -- first of all --

THE COURT: That would be the entering of an injunction. You have to have how many days' notice?

MR. CARLSON: Five, five business days.

THE COURT: So that actually there can't be any meeting scheduled -- let's agree -- we can agree to something, but I can't rule.

MR. CARLSON: We are simply canceling the meeting, your Honor. There isn't any need.

THE COURT: And you will have one within ten days; is that agreeable? If you want to agree to that. I don't want to rule because then I exercise some jurisdiction.

MR. QUINLAN: I think the short answer is there cannot be a meeting of the board of directors without five days' business notice and cannot possibly take place before Monday.

MR. NOVOSELSKY: Except then we are in a position of, as you pointed out, your Honor, Judge Kinnaird is coming back from abroad which is a phrase which permeates this case on Monday. I think it would be cruel and unusual to have her come in the door and get hit over the head with this.

I would be willing to agree on behalf of my clients that if there is an agreement to put this over for at least a few days after Judge Kinnaird comes back, we would not take the

position that there has been a denial of injunction or that Judge Gardener has entered a substantive ruling.

I don't want to prejudice your clients, but I also don't want to put Judge Kinnaird in the position if the Chief Judge transfers it, he may or may not, to have Judge Kinnaird come back in on a Monday morning from Paris and say, okay, Judge, here is a hearing, let's go.

MR. QUINLAN: Your Honor, first of all, the likelihood of anything taking place is almost nonexistent. Second of all, we have already stricken the meeting so there is nothing that's at issue here. There is no case in controversy.

THE COURT: And it couldn't be any sooner than five days' notice. If you had five days' notice, you wouldn't be able to have it any sooner than a week from Tuesday. That's from the time at the end of the day. I don't want to do anything that exercises something because that would be wrong. I am not afraid.

My understanding is that the meeting has been canceled. This being a quarter to 3:00, I don't think you can conceivably have five business

days which would be any closer to Tuesday.

I am going to suggest that you draw an order up on your motion, I will sign it, it will go to Judge Evans. You can contact Judge Evans because they don't argue those before me. My understanding of a transfer that it is really up to the judge to make the provision.

MR. NOVOSELSKY: What I would like to do at this point, your Honor, is at least enter since the case is still before you, at least enter and continue our motion to file the amended complaint. I am not asking you to rule on it since I am --

THE COURT: I don't think anybody cares. You have it. You are on a roll. Okay?

MR. NOVOSELSKY: And as far as the motion for the restraining order, the court has --

MR. CARLSON: It is moot because we have canceled the meeting.

MR. QUINLAN: You can withdraw it if you want.

THE COURT: The emergency is moot.

MR. NOVOSELSKY: I could. Why don't we just have the court find that it is moot.

THE COURT: It is moot. That's fine.

MR. PERKINS: Judge, for the record from the

Judge Kinnaird while you heard a statement that we were absolutely free to file any lawsuit we wanted against anybody.

THE COURT: Well, so far I am sending you back to that square.

MR. NOVOSELSKY: Judge, you are such a wonderful person to be in front of. I don't want to leave.

THE COURT: Well, you are all wonderful. And it is my loss having eight of the finest lawyers in America in front of me and not have --

MR. QUINLAN: On behalf of our clients we surely don't object to venue in front of your Honor. Unfortunately you are probably correct, it isn't appropriate venue. Thank you.

MR. NOVOSELSKY: Judge, I don't want them going to Judge Evans and saying Judge Gardener says that case should go back to --

THE COURT: All right, I will say it, Judge Gardener as sua spontae has suggested that this case go back. And you can quote me. Okay?

MR. NOVOSELSKY: That's fine.

THE COURT: I am not shy. All right?

MR. SZOLA: Thank you, your Honor.

16di-003967

Exhibit B

Terra Foundation
Board Meeting
Minutes
September 26, 2000

In Attendance:

Paul Tucker, Chair
Helene Ahrweiler
Jacques Andreani
Dean Buntrock
Maggie Daley
Ron Gidwitz
Arthur Hartman
Stephanie Pace Marshall
Theodore Stebbins
Judith Terra
Absent: Alan Simpson

By Invitation:

Mark Heatwole, Foundation Legal Counsel, Winston & Strawn

Staff:

Donald H. Ratner, Vice President Finance & Administration

The meeting was called to order at 10:00am.

Dr. Tucker indicated that the alteration of convening time (the meeting was originally scheduled to begin at 9:00 AM) was a result of needing to clarify the issues with respect to Board actions in response to the constraints imposed by the court action of September 25, 2000.

Mr. Heatwole reported that the court order relating to the lawsuit brought by Messrs. Buntrock and Gidwitz against the Foundation and the hearing on Monday, September 25, had two principal constraints on Board action:

1. The Board could not take any action to remove any Board members from either the Board or the Executive Committee against their will; and
2. The Board could continue with its normal business except that it could not take any action to transfer offices or assets out of Chicago.

Mr. Heatwole indicated that both of these restrictions continue through October 12 when the next hearing will occur.

Mr. Heatwole indicated that the Board has two options:

1. Re-elect all Board members at this meeting; or

2. Adjourn the election of members to a later date.

Dr. Tucker then asked for a motion to move Item X on the Agenda, "Other Business", to Item II. Ted Stebbins moved and Judith Terra seconded the motion. The motion carried by a unanimous vote.

The two items requiring action in Item X were:

1. The ratification of the selection of Sidley & Austin to represent the Foundation in the lawsuit; and
2. The authorization of the Chairman to deal with all matters regarding the litigation and to defend the Foundation against the charges brought by Mr. Buntrock and Mr. Gidwitz. Dr. Tucker indicated that, with respect to the second motion, he would bring any settlement proposal back to the Board for final approval.

Discussion ensued, followed by a consensus to call the question.

The vote to move the 10th item "other business" to the 2nd item on the agenda was unanimous.

The first item (the ratification of hiring Sidley & Austin as Counsel for the Foundation for the lawsuit) was moved by Dr. Stebbins and seconded by Dr. Marshall. There was no discussion. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	None
	Jacques Andreani		
	Dean Buntrock	Abstain:	Ron Gidwitz
	Margaret Daley		
	Arthur Hartman		
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next item (giving authorization to the Chair for any and all actions regarding the lawsuit except for the settlement) was moved by Mrs. Terra and seconded by Mme. Ahrweiler.

Mrs. Daley stated that since Dr. Tucker was named as a defendant in the lawsuit, she wondered if it was appropriate for Dr. Tucker to have this authority to act for the Foundation. Mr. Heatwole affirmed that there was no conflict in this matter.

The vote was called. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		
	Arthur Hartman	Abstain:	Margaret Daley
	Stephanie Pace Marshall		Ron Gidwitz
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next item on the agenda was the minutes. Dr. Tucker said that we needed to follow the judge's court order to the letter. Since the court order had not allowed any votes from committees up until this point, the committees could not review and approve their minutes and therefore there was no possibility for Board approval. Therefore, Dr. Tucker recommended that we table the vote on the minutes until the next meeting.

Mr. Gidwitz moved and Ambassador Hartman seconded the tabling of the approval of the minutes.

Ambassador Hartman asked if not approving the minutes would affect the deaccessioning of works of art from the collection. Mr. Heatwole said that it would not.

The vote was taken and there was a unanimous vote in favor of tabling the minutes.

The next item was the election of Directors, Officers and Committee Chairs.

The Board had two alternatives: to elect all Directors as a slate or table a decision until the next meeting.

Dr. Tucker recommended that we proceed with the election and approve the current slate of Directors. Mme. Ahrweiler moved and Dr. Stebbins seconded the motion to approve the current slate of Directors.

Dr. Tucker then asked if anyone did not want to stand for re-election.

At this point Dr. Marshall asked Mr. Buntrock what his reasons were for bringing the lawsuit. He replied:

- That he believed the Board had a "different agenda".
- That he believed there was a conspiracy to move the museum out of Chicago.

- That he had had frustrations with the fact that he had written to Dr. Tucker numerous times about employees being treated poorly, about Senator Simpson's "agenda", about Ambassador Hartman's proposed resolution, about the estate review, about his own suggested resignation, about his frustration with the deterioration of the Chicago museum and with his perception of the lack of focus on the educational aspect of the potential partnerships, and that he did not feel Dr. Tucker responded by bringing closure/resolution to these issues.

Dr. Marshall indicated that she could support the re-election of the Directors if everyone could commit to an openness of discussion.

Mme. Ahrweiler then withdrew her motion. Ambassador Andreani then moved not to take the vote at this time but to defer it to a later session of the annual meeting. Dr. Stebbins seconded Ambassador Andreani's motion.

Dr. Tucker reviewed the discussion of Sunday, September 24. Mr. Gidwitz had said that he could make a dispassionate decision on where the site of the museum and Foundation should be in the best interests of the Foundation, as he understood it.

Dr. Tucker asked if everyone could commit to being open and objective to the alternatives presented to the Foundation and could commit to honestly, fairly and without prejudice evaluating all proposals about the Foundation's strategic future.

Mr. Gidwitz indicated that he would be willing to work toward a position of trust. Ambassador Andreani's motion was then withdrawn.

Dr. Stebbins then moved to vote to re-elect the current slate of Directors and Mme. Ahrweiler seconded. The vote was taken. The results were:

Ayes:	Helene Ahrweiler	Nayes:	none
	Margaret Daley		
	Ron Gidwitz	Abstain:	Dean Buntrock
	Arthur Hartman		Jacques Andreani
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next order of business was to elect the Officers. It was decided to take each position individually. The first office was Chairman. Mrs. Terra nominated Dr. Tucker. Dr. Stebbins seconded. The vote was taken.

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Arthur Hartman		Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next vote taken was for Vice Chair. Dr. Tucker moved that Mrs. Terra be Vice Chair. Mme. Ahrweiler seconded.

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Arthur Hartman		Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next vote was for Secretary and Treasurer. Dr. Stebbins nominated Dr. Marshall for Secretary and Treasurer. Ambassador Andreani seconded it. Dr. Marshall indicated that she would be willing to serve as Treasurer for a short period of time if the Board commits to re-evaluating the situation after that limited period of time. The results of the vote were:

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Ron Gidwitz		Stephanie Pace Marshall
	Arthur Hartman		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

Mr. Gidwitz and Mr. Buntrock remained on the Executive Committee as members-at-large.

The Board then moved to Item IX on the Agenda, Executive Session. Dr. Tucker left the room. Vice Chairman, Mrs. Terra, presided indicating that the purpose of the Executive session was to discuss a salary increase for Dr. Tucker. Mme. Ahrweiler proposed a

bonus for Dr. Tucker. Dr. Stebbins moved that we double his compensation until a new President is hired. This motion was seconded by Mme. Ahrweiler.

Discussion followed.

Dr. Stebbins withdrew his motion.

Dr. Stebbins then moved to give Dr. Tucker a $25,000 bonus to recognize Dr. Tucker for the considerable additional time he spent on Foundation affairs over the past year. This was seconded by Ambassador Andreani.

The vote was taken. The results were:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		Margaret Daley
	Arthur Hartman	Abstain:	Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		

Mrs. Daley indicated that her no vote was <u>not</u> a vote of no confidence in Dr. Tucker but that she believed a decision should have been deferred until after the lawsuit was settled.

The Executive Session was adjourned.

Dr. Tucker returned to the meeting and discussed the slate of committees and committee chairs. (See attached)

The Finance Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		
	Arthur Hartman	Abstain:	Margaret Daley
	Stephanie Pace Marshall		Ron Gidwitz
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The Collections Committee and Chair was moved by Dr. Tucker, seconded by Mme. Ahrweiler. The vote in favor was unanimous.

The Education Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote in favor was unanimous.

The Strategic Planning Committee and Chair was moved by Dr. Tucker, seconded by Mrs. Terra. The vote in favor was unanimous.

At 2:10 PM the meeting was adjourned for lunch. At 2:40 the meeting resumed. The next item on the agenda was to review the estate. Mr. Heatwole did so and indicated that there were three issues that Winston & Strawn examined:

1. The transaction with Lawter
2. The transactions between Dan Terra and Jim Terra
3. The magnitude of the Bell, Boyd bills

Mr. Heatwole indicated Winston & Strawn had discussed the estate report with Bell, Boyd, BIK, Mayer, Brown & Platt, the Foundation Board and had reviewed all papers. Winston Strawn has concluded its review. He also indicated that the one open point was that Schiff, Hardin & Waite will be reviewing issues relating to Mercury Finance.

Winston & Strawn's conclusion was that, after thorough review, they found no reason for the Foundation not to accept the report of the Executor, except for Mercury Finance, which they have not reviewed.

He indicated that Bell, Boyd has not turned over the Mercury Finance papers to Schiff, Hardin and that we need to give them a waiver for Schiff, Hardin to get the papers. He noted that Jim Collins needed a letter from the Foundation to turn over the material to Schiff, Hardin.

A resolution with four components, which was as follows, was moved by Mme. Ahrweiler and seconded by Dr. Marshall:

1. Accept the Winston Strawn report as issued.
2. Approve that a letter be sent to Bell, Boyd to release the papers to Schiff, Hardin immediately so that Schiff Hardin may review the Mercury Finance issues expeditiously.
3. Report to the Executive Committee on the result of Schiff, Hardin's review of Mercury Finance.
4. Authorize the Executive Committee to close the estate.

The vote was taken unanimously in favor of this resolution.

The Finance Committee report was given by Mr. Ratner. He discussed results of the audit. He also discussed the four points raised in the Management Letter: Terra Museum Accounting, Endowment Income, Intercompany Activity and In-kind Contributions. Mr. Ratner addressed each of the points and indicated that a resolution of these points would be made. A motion to accept the Audit and Management Letter, subject to any footnotes relating to the current lawsuit, was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. Mr. Ratner then discussed the change of investment allocations within the equity portion. A memo on this matter is included in the Board book under the September 25 Finance Committee section. A motion to accept this reallocation was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. The third item was to review three new potential investment advisors: Kennedy, Ennis and Cambridge. Mr. Ratner recommended Kennedy which Mr. Gidwitz agreed with. The motion to approve was made by Dr. Stebbins and seconded by Dr. Marshall. The vote was unanimous in favor.

Dr. Stebbins then gave the Collection Committee report. The first item on the agenda was the motion by Dr. Stebbins to have the Board delegate the approval of the loans, exhibitions, donations, etc. to the Collections Committee to cover the report included in the Board book. Mme. Ahrweiler seconded. The motion was unanimously in favor. The next item was the Deaccession report. Dr. Stebbins indicated that, after careful review by the Committee and the outside advisors who made two trips to Chicago to examine the proposed deaccessions, the final list had been winnowed to 27 objects, with 16 of them not being included in the American Impressionist sale at Christie's on November 29, 2000.

Ambassador Hartman suggested that there should be some public relation's communications at the time about the deaccessioning. He suggested that it be made clear that these items are being sold to raise purchase funds for new additions to the collection. Dr. Stebbins also indicated that we have chosen Christie's and indicated some of the details of the contract and the reasons for selecting that venue as opposed to Sotheby's or Vance Jordan, a private dealer.

Mr. Gidwitz moved to approve the deaccessioning report and the selection of Christie's. Seconded by Ambassador Hartman. Unanimously in favor.

The Director's reports and VP of Finance reports were not given orally, but were included in the September 26, 2000 Board book.

Dr. Tucker suggested that he and Dr. Stebbins form a search committee for the new MAAG Director.

Mr. Ratner was instructed to change Sophie Levy's position at MAGG to Curator from Assistant Curator.

Mr. Ratner was asked to set-up both an Executive Committee conference call and a Board conference call after the court hearing on the 12th.

Dr. Marshall suggested that we need some formal communication structure perhaps in the form of a written newsletter every 3-4 weeks to keep the Board apprised of developments regarding the lawsuit. Mr. Ratner and Dr. Tucker were asked to coordinate.

The meeting was adjourned at 4:00pm.

Respectively submitted,

_____
Stephanie Pace Marshall
Secretary and Treasurer

16di-003977

Exhibit C

TERRA FOUNDATION FOR THE ARTS
INDEPENDENT LITIGATION COMMITTEE
MINUTES
December 4, 2000

In Attendance (Conference Call):

Ambassador Jacques Andreani
Dr. Ted Stebbins

Staff:

Donald Ratner

The meeting was called to order at 3:15pm.

There were three agenda items:

- Decide on Counsel for the lawsuit
- Discuss litigation strategy
- Approve legal bills

Dr. Stebbins made a motion to approve the retention of Sidley & Austin, seconded by Ambassador Andreani. After discussion, the attached resolution was approved unanimously.

Litigation strategy was then discussed. Susan Stone from Sidley & Austin was asked to join the call at this time. She discussed the possibility of Sidley & Austin investigating the allegations. Both members of the committee agreed with this idea and Ambassador Andreani made a motion to proceed with this and Dr. Stebbins seconded it. After discussion, the attached resolution was approved unanimously.

The September and October bills of Sidley & Austin were approved. The October bill from Shefsky and Froelich for services for Mrs. Terra, Dr. Tucker, and Senator Simpson were approved for payment subject to our corporate counsel approving the direct payment of these bills.

The meeting adjourned at 3:45pm.

Respectively submitted,

Donald H. Ratner
Assistant Secretary

Independent Litigation Committee
Resolution re: Retention of Counsel

WHEREAS, on or about September 22, 2000 there was filed in the Circuit Court of Cook County, Illinois, Chancery Division, cause no. 00 CH 13850 ("the Lawsuit");

WHEREAS, on September 26, 2000 the Board of Directors of the Terra Foundation for the Arts ("the Board") ratified the hiring of Sidley & Austin as Counsel for the Foundation for the Lawsuit;

WHEREAS, on November 30, 2000 pursuant to the Court Order, the Board of Directors of the Terra Foundation for the Arts ("the Board") established this independent litigation committee and authorized said committee to make all decisions surrounding actions relating to the Lawsuit;

WHEREAS, by way of its Order of November 13, 2000 the Court directed this independent litigation committee to consider the appointment of counsel; and

WHEREAS, one or more members of this independent litigation committee has interviewed Sidley & Austin, checked references, had discussions with Leonard Schrager, reviewed papers filed in connection with the lawsuit and considered the appointment of counsel;

1) This independent litigation committee hereby appoints and ratifies the retention of Sidley & Austin to represent the Foundation in connection with the Lawsuit;

2) This independent litigation committee hereby authorizes Sidley & Austin to take any and all action which in its professional judgment is appropriate in representing the Foundation in connection with the Lawsuit except for settlement and as stated below;

3) This independent litigation committee hereby reserves to itself final approval of the following: the filing of counterclaims in the Lawsuit, the taking of any interlocutory or final appeals from any Order or Judgment entered in the Lawsuit and any other matter which the Committee may from time to time decide to reserve to itself;

4) Notwithstanding anything stated above, settlement of the Lawsuit has been reserved by the Board to itself.

16di-003980

Exhibit D

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1 of 5

Dean L. Buntrock
et al
plaintiffs
v.
Judith Terra
et al
defendants

NO. 00 CH 13859

ORDER

This matter coming before on Plaintiffs' Emergency Motion for TRO, Plaintiffs' motion to disqualify Sidley & Austin as counsel for Terra Foundation, Plaintiffs' motion to file Corrected Emergency Motion for TRO and Plaintiffs' Motion for Expedited Discovery, The Court being fully advised and counsel for Terra Foundation being present, it is hereby ordered:

(1) Plaintiffs' motion to Disqualify Sidley & Austin is denied without prejudice;
(2) Plaintiffs are granted leave to substitute a Corrected Emergency Motion for Temporary Restraining Order

Atty No. 33745
Name Quinlan & Crishan
Attorney for Plaintiffs
Address 30 W. LaSalle #2900
City / Zip Chgo., IL 60602
Telephone (312) 263-0900

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN L. BUNTROCK
et al
plaintiffs
v.
JUDITH TERRA,
et al.
defendants

2 of 5

NO. 00 CH 13859

PAGE TWO
ORDER

(3) Plaintiffs' Motion for Expedited Discovery is granted and Plaintiffs are granted leave to serve discovery upon defendants immediately; AND Defendants are grant reciprocal leave to serve the Plaintiffs;

(4) The Emergency Motions for TRO filed by Plaintiffs and People of the State of Illinois by The Illinois Attorney General are granted with the Court making the following findings:

A. Plaintiffs have established a protectible right in need of protection

B. Plaintiffs have established that they and the public will suffer irreparable injury if injunctive relief is not granted

Atty No. 33745
Name QUINLAN & CRUSHAM
Attorney for PLAINTIFFS
Address 30 N. LaSalle Street Suite 2900
City / Zip CHICAGO IL 60602
Telephone (312) 263-0900

ENTER:

Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-003982

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et al
plaintiffs
v.
Judith Terra et al
defendants

3 of 5

NO. 00 Ch 13859

Page 3 **ORDER**

C. Plaintiffs have established that ~~no~~ there is no adequate remedy at law if injunctive relief were not granted

D. Plaintiffs and The People of The State of Illinois have raised a fair question as to their likelihood of success on the merits

E. On a balance of hardship, the Court finds that Plaintiffs and The People of Illinois would be ~~more~~ harmed ~~by~~ if injunctive relief were not granted whereas any harm to defendants by the entry of a TRO is not as great

Atty No. 33745

Name Quinlan and Crisham

Attorney for Plaintiff

Address 30 N. LaSalle Ste 2900

City / Zip Chicago, IL 60602

Telephone (312) 263-0900

ENTER:

_____, _____

_____

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-003983

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean C. Buntrock et al.
Plaintiffs
v.
Ingram Terra et al
Defendants

4 of 5

NO. 00 ch 13859

Page 4 **ORDER**

(5) The Court therefore orders that defendants are enjoined from:

A. Taking any action at the annual Board of Directors meeting scheduled for Tuesday September 26, 2000, to remove any member of the Board of Directors or the Executive Committee against their will;

B. Taking any final action to close the Terra Museum of American Art in Chicago and from taking any final action to remove or transfer the bulk of any assets or artwork of the Terra Museum or the Terra Foundation outside the State of Illinois

Atty No. 33745
Name Quinlan and Crisham
Attorney for Plaintiff
Address 30 N. LaSalle St. 2900
City / Zip Chicago, 60602
Telephone (312) 263-0900

ENTER:

_____, _____
Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-003984

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

5 of 5

Dian L Buntrock et al

v.

Jud. Th Terra et al

NO. 00 CH 13559

Page 5 **ORDER**

~~Final~~

(6) The temporary restraining order shall remain in effect until October 12, 2000 at 5:00 p.m. unless otherwise extended by The Court

(7) Bond is waived for good cause shown because of public interest is involved

(8) The matter is set for October 12, 2000 at 11:00 a.m. for the purpose of continuing the TRO, discussing dates for responses to discovery requests, set date for preliminary injunction hearing and for status on J. in Terra's ~~Pla~~ Petition to intervene

(9) THIS ORDER IS ENTERED September 25 2000 AT 3:00 P.M. CENTRAL DAYLIGHT TIME

Atty No. 33745

Name Quinlan & Crisham

Attorney for Plaintiffs

Address 30 N. LaSalle #2900

City / Zip Chgo, IL 60602

Telephone (312) 263-0500

ENTER:

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
SEP 25 2000

JUDGE DOROTHY KINNARD #2761 **Judge's No.**

DEPUTY CLERK

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et al.

v.

Judith Terra

NO. 00 Ch 13859

ORDER

This Cause coming to be heard on Plaintiffs' Motion To Appoint Independent Litigation Counsel et al. and Motion to ~~Appoint~~ Enforce The TRO ~~[illegible]~~, due notice having been given and the Court being fully advised, and for the reason set forth on the record IT IS ORDERED.

The TRO remains in full force and effect through November 2, 2000 at 5:00 P.M.

The October 13, 2000 Order remains in full force and effect

Plaintiffs Motion To Appoint Litigation Counsel et al. is granted in part and denied in part. Defendant Tucker is removed as litigation director. The board of directors of the Foundation shall meet and appoint a special litigation committee. The defendants and plaintiffs may participate in the discussion but may not vote on the members of the special litigation committee. The special litigation committee may be composed of any and/or members of the board of directors who are not parties to the litigation and/or all of

non members of the board of directors ~~[illegible]~~ as the voting members may determine. The special litigation committee may consider whether Sidley + Austin remains as counsel for the Foundation. ~~The Reporter~~

Atty No. 33745

Name John F. Kennedy

Attorney for Plaintiffs

Address 30 N. LaSalle

City / Zip Chicago Ill.

Telephone 263.0900

ENTER:

Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

P. 1 of 2

CCG-NOO2-150M-12/29/99(03420164)

16di-003986

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L Buntrock et al.

v.

Judith Terra et al

NO. 00 CH 13859

ORDER

2. (Cont.) The Motion To Appoint Special Litigation Counsel et. al. is denied without prejudice with respect to disqualification of Winston Strawn and Sidley + Austin. Motion To Appoint + Receiver is Denied.

3.) The Motion to Enforce The TRO is denied without prejudice

4.) The Foundations ~~and Defendants~~ 52-615 Motion to Dismiss the Plaintiffs Complaint and Attorney General's Complaint are dismissed without prejudice.

5.) The Report of Proceedings of October 20, 2000 ~~is~~ are incorporated herein. ~~by reference herein~~

7.) Plaintiffs are granted leave to file the Supplement to the Motion to Enforce et. al. and Reply in Support of Motion to Enforce the TRO.

Atty No. 33745
Name John F. Kennedy
Attorney for Plaintiffs
Address 30 N LaSalle
City / Zip Chicago Il. 60602
Telephone 263-0400

P2072

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
OCT 20 2000
JUDGE DOROTHY KINNARD #276
DEPUTY CLERK

ENTER: Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*	)	
Defendants.	)	

ORDER

This cause coming to be heard on Plaintiffs' Emergency Motion to Appoint Receiver and for Temporary Restraining Order and Opposition to Stay ("Plaintiffs Emergency Motion for Temporary Restraining Order") and Plaintiffs' Emergency Motion for Temporary Restraining Order to Enjoin Further Implementation of the Dilenschneider Contract ("Plaintiffs Emergency Motion for Temporary Restraining Order to Enjoin Implementation of the Dilenschneider Contract"), and for scheduling of the Attorney General's and Plaintiffs' Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver, due notice having been given, the Court having heard argument of counsel and having reviewed the briefs of the parties, and for the reasons set forth on the record, IT IS ORDERED:

A. Denial of Temporary Restraining Order

(1) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Terra Foundation's Independent Litigation Committee from continuing to retain Sidley & Austin as counsel is denied, the Court considering the motion as a renewed motion to disqualify counsel and not a proper motion for temporary restraining order;

(2) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Terra Foundations Independent Litigation Committee from taking action to authorize or direct Sidley & Austin to perform the subject investigation is denied;

(3) Plaintiffs' Emergency Motion for Temporary Restraining Order to Enjoin Implementation of the Dilenschneider Contract is denied;

B. Granting of Temporary Restraining Order

(4) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Independent Litigation Committee and the Terra Foundation from paying the legal bills of Sidley and Austin and Shefsky and Froelich to date is granted. This Temporary Restraining Order shall remain in full force and effect until January 30, 2001 at 5:00 p.m. In the event the Board meets as set forth in Paragraph C, this Order may be modified upon motion before January 30, 2001.

In granting this Temporary Restraining Order the Court makes the following findings:

a. Plaintiffs have established a protectible right in need of protection;

b. Plaintiffs have established that they and the public will suffer irreparable injury if injunctive relief is not granted;

c. Plaintiffs have established that there is no adequate remedy at law if injunctive relief were not granted;

d. Plaintiffs have raised a fair question as to their likelihood of success on the merits;

e. To the extent such a finding is necessary, the hardships favor plaintiffs.

The Court therefore orders that the Foundation and the Independent Litigation Committee are enjoined from paying any legal bills of Sidley and Austin and Shefsky and Froelich until

January 30, 2001 at 5:00 p.m. This Temporary Restraining Order is entered with notice, as of 5:00 ~~a.m.~~/p.m. on January 2, 2001. This case is continued to January 30, 2001 at 10:30 a.m. for the Court to determine whether this Temporary Restraining Order should be continued, and whether a preliminary injunction hearing shall be scheduled.

C. Board Meeting Regarding Attorney Fees and Costs

(5) Further, the Court orders during the pendency of this Temporary Restraining Order that no attorney fees or costs of Sidley and Austin and/or Shefsky and Froelich shall be paid unless the Terra Foundation's board of directors meets to consider the issues relating to such fees and costs. If the board of directors elects to meet, the meeting shall take place in Chicago, Illinois at the Foundation's headquarters, and as follows:

a. A purpose of the meeting is to advise the Board as to the issues of the review and payment of the legal bills of Sidley and Austin and Shefsky and Froelich;

b. The Board shall make a specific statement as to whether or not: (1) the Board is delegating the authority to review and pay the subject legal bills to the independent litigation committee; or (2) whether the Board retains the authority to review and pay the subject legal bills for itself; or, (3) whether the Board establishes another mechanism to review the subject legal bills, as it may have done when the Terra Foundation was involved in other litigation;

c. The Board shall be informed of the total expense of this litigation to date, including the total amount of attorney fees and costs incurred by Sidley and Austin and Shefsky and Froelich to date;

d. No Board member who seeks advancement of attorney fees or costs may vote on the issues set forth in section (b) above, as it relates to any such advancement namely, Mrs. Terra, Dr. Tucker, or Senator Simpson;

e. The meeting shall be called upon no less than five business days written notice to each board member. The Foundation shall use its best efforts to schedule the meeting at a time mutually convenient to all board members

16di-003990

to ensure maximum board member participation in the meeting. The Foundation shall survey in writing each board member to determine the date for the meeting before the notice for the meeting is issued to each board member. The Foundation shall communicate the full results of the survey to all counsel of record at least 24 hours before the notice is mailed; and

f. The notice for the meeting shall include the following:

i). A copy of this Order;

ii). The total amount of Sidley and Austin's and Shefsky and Froelich's bills, with each attorneys' hourly rates and total number of hours billed monthly;

iii). The undertakings executed by Mrs. Terra, Dr. Tucker and Senator Simpson.

D. **Attorney General's Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver to Conduct the Independent Investigation**

(6) The defendant Terra Foundation shall respond to the Attorney General's Motion to Enjoin by January 8, 2001.

(7) The Attorney General's Emergency Motion to Compel Discovery is granted in part, and the parties may commence immediate expedited discovery as it relates to the allegations involving Dr. Stebbins.

(8) The Emergency Motion is set for status on discovery on January 9, 2001 at 2:00 p.m.

E. **Terra Foundation's Motion to Continue Stay of Proceedings Pending Independent Litigation Committee Investigation**

(9) The Foundation's motion to continue the stay of proceedings is denied and discovery may commence on all issues after counsel has met and conferred to determine an outline of discovery.

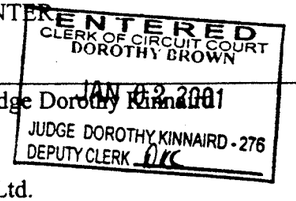
F. **The Plaintiffs' Emergency Motion to Stay**

(10) The Plaintiffs emergency motion to stay the enforcement of the orders entered in Paragraph A(1)(2) and (3) of this Order is denied.

16di-003991

(11) That portion of the Report of Proceedings of December 29, 2000, not held in the courtroom shall be under seal and the original shall be submitted to the Court. The court reporter's office shall not release a copy of the sealed transcript to anyone.

ENTER



Judge Dorothy Kinnaird

Prepared by
Atty No. 33745
Name John F. Kennedy; Quinlan & Crisham, Ltd.
Attorney for Plaintiffs
Address 30 North LaSalle
City/Zip Chicago, IL 60602
Telephone 263-0900
Reviewed as to Form by All Counsel of Record

16di-003992

No. 01-0034

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	)	Appeal from the Circuit Court of Cook County Chancery Division No. 00 CH 13859 Honorable Dorothy Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	)	

ORDER

This cause coming to be heard on Plaintiffs' Petition for Interlocutory Appeal Pursuant to Rule 307(d) and Memorandum of Law in support, due notice having been given and the Court being fully advised,

IT IS HEREBY ORDERED:

A. Plaintiffs' Petition for Interlocutory Appeal Pursuant to Rule 307(d) is ~~granted~~/denied.

B. Sections A (1), (2) and (3) of the Circuit Court's Order of January 2, 2001 are vacated.

C. A temporary restraining order is hereby entered, effective immediately, as follows:

1. The Terra Foundation's Independent Litigation Committee is enjoined from continuing to retain Sidley & Austin as counsel;

2. The Terra Foundation's Independent Litigation Committee is enjoined from taking action to authorize or direct Sidley & Austin to perform the subject investigation, as defined in plaintiffs' petition and memorandum in support, is denied; and

3. The Terra Foundation, and the Foundation's Independent Litigation Committee is enjoined from taking any action to implement the Dilenschneider Contract, as defined in plaintiffs' petition and memorandum in support;

D. This cause is remanded to the circuit court for further proceedings consistent with this Order.

Justice

Justice

Justice

Prepared by William R. Quinlan
James R. Carroll
John F. Kennedy
Quinlan & Crisham, Ltd.
Attorney for Plaintiffs
Address 30 North LaSalle
City/Zip Chicago, IL 60602
Telephone 263-0900

Attorney Number 33745

ORDER ENTERED

JAN 19 2001

APPELLATE COURT, FIRST DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 1-01-0034
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Defendants-Appellees.	)	

O R D E R

This cause coming to be heard on the Petition For Rehearing of the Plaintiffs-Appellants and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition For Rehearing is DENIED.

ORDER ENTERED
FEB 16 2001
APPELLATE COURT, FIRST DISTRICT

Justice

Justice

Justice

DATED: _____

16di-003996

Exhibit E

91161

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 6, 2001

Mr. Stephen C. Carlson
Sidley & Austin
One First National Plaza
Chicago, IL 60603

No. 91161 - Dean L. Buntrock, etc., et al., petitioners, v. Judith Terra, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 28, 2001.

16di-003998

Exhibit F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

DEAN BUNTROCK,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	00 CH 13859
	)	
TERRA MUSEUM,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DOROTHY KINNAIRD, Judge of said court, on the 24th day of July, 2001.

APPEARANCES: MESSRS: JAMES CARROLL, JOHN F. KENNEDY and WILLIAM R. QUINLAN, on behalf of Plaintiffs;

MESSRS: FLOYD PERKINS and THOMAS IOPPOLO, Assistant Attorney Generals.

MISS SUSAN STONE, on behalf of the Terra Foundation;

MESSRA: ROBERT CUMMINS and CHRIS TODD, on behalf of Defendants.

Josephine Raines
Official Court Reporter
Circuit Court of Cook County
County Department-Chancery Division

FENGAU/INDT. MUNCIE, IN 47302

Foundation the Foundation does assert attorney client privilege over any communications going either way from an attorney for the Foundation, which Mr. Collins was at this point in time, to Mr. Terra who was then chairman of the Terra Museum.

THE COURT: I don't want to get hung up on this letter forever. Mr. Cummins, how did you all get this?

MR. CUMMINS: I can't answer that question, Judge. I'll find out. One of the preliminary things I was going to address, and I am relying largely on papers that were previously filed by Mr. Quinlan on behalf of his clients Buntrock and Gidwitz. I'm going to object to anything Sidley and Austin does in this case today because based upon the assertions of Mr. Quinlan and his clients they are conflicted in this proceeding. That is one of the reasons we want to adjourn it. We believe Winston and Strawn is conflicted, We believe Sidley is conflicted. And we think that these are serious issues that have to be addressed by the Court as a premise to this entire proceeding.

I just want to make that of record.

THE COURT: It's on the record. And to the extent it's an objection, it's going to be overruled.

We have been through the Sidley issue so many times I don't even want to think about it. The Appellate Court reviewed it. I know that Mr. Quinlan probably totally agrees with you generally on the whole subject matter, but maybe today he disagrees.

But Sidley is here, they are representing the Foundation and they have not been removed and I don't see a conflict so let's just move on.

I'm going to keep this letter, it really doesn't do much. I've read it all, I'm going to keep it sealed for now. If you want to come in later and have it unsealed. If you concede that this was somehow in the public domain, attached to a pleading, that somewhere along the line the attorney client privilege got waived we'll open it up. For those of you who have not seen this letter, it's really nothing heavy anyway.

The next thing, Exhibits 9, 10,11, 12, 13 are all documents that relate to Dan Terra. intent. They were declarations filed in Federal Court. They should all be unsealed.

Fourteen I want to unseal. That's a mailing address announcement. The Simpson declaration in Federal Court is 15. That should be unsealed.

16di-004002

Exhibit G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Bantrock, et al

NO. 01 L 009112

ORDER

This matter coming on to be heard upon plaintiffs' Emergency Motion for the Entry of Temporary Restraining Order, the Court being fully advised in the premises, and the Court being advised that the Terra Foundation for the Arts has cancelled its Board of Directors meeting scheduled for August 14, 2001, IT IS HEREBY ORDERED THAT:

1) This matter is hereby transferred to Judge Timothy Evans, Presiding Judge of the Law Division for the purpose of transferring said cause for reassignment, consideration of

2) The Motion for TRO is moot, and

3) Plaintiffs Motion for Leave to File a First Amended Complaint is entered and continued.

Atty No.

Name Stephen C. Carlson / Sidley Austin

Attorney for Terra Foundation

Address Bank One Plaza, 10 S. Dearborn

City / Zip Chicago, Ill 60603

Telephone (312) 853-7717

JUDGE SHELDON GARDNER

ENTER: AUG 13 2001 /1E1

CIRCUIT COURT - 1506

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on August 31, 2001 by Federal Express upon the following out of state counsel and by messenger upon the following Chicago counsel:

William R. Quinlan
James R. Carroll
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
29th Floor
Chicago, IL 60602

K. Chris Todd
Kellogg, Huber, Hansen, Todd & Evans
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036

Thomas Ioppolo
Floyd D. Perkins
Assistant Attorney General
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100 W. Randolph Street
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William P. Schuman
Debra Tucker
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227 W. Monroe Street
Chicago, IL 60606

David Novoselsky
Novoselsky Law Offices
120 North LaSalle
Suite 1400
Chicago, IL 60602

Scott J. Szala
Winston & Strawn
35 W. Wacker Drive
Chicago, IL 60601

Lori L. Roeser

SIDLEY AUSTIN BROWN & WOOD
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

DALLAS
LOS ANGELES
NEW YORK
SAN FRANCISCO
SEATTLE
WASHINGTON, D.C.

BANK ONE PLAZA
10 S. DEARBORN STREET
CHICAGO, ILLINOIS 60603
TELEPHONE 312 853 7000
FACSIMILE 312 853 7036
www.sidley.com

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LONDON
SHANGHAI
SINGAPORE
TOKYO

SEP 0 4 2001

WRITER'S DIRECT NUMBER
(312) 853-7565

WRITER'S E-MAIL ADDRESS
lroeser@sidley.com

August 31, 2001

By Courier

Hon. Timothy C. Evans
Presiding Judge
Circuit Court of Cook County
Law Division
Richard J. Daley Center
Chicago, Illinois 60602

Re: Tucker et al. v. Buntrock et al. No.: 01 L 009112

Dear Judge Evans:

Please find enclosed a courtesy copy of the *Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading."* This motion is set to be heard by you on September 17, 2001 at 10:00 a.m.

Sincerely,

Lori L. Roeser

Lori L. Roeser

cc: All Counsel of Record

16di-004005

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Timothy C. Evans
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DEFENDANTS STEBBINS AND MARSHALL'S MOTION FOR LEAVE TO FILE BRIEF JOINING IN TERRA FOUNDATION FOR THE ARTS' OPPOSITION TO PLAINTIFFS' "EMERGENCY MOTION TO STRIKE APPEARANCE AND TO STRIKE UNAUTHORIZED PLEADING."

Defendants Theodore Stebbins and Stephanie Pace Marshall hereby move for leave to file their Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading". In support of their Motion, Defendants Stebbins and Marshall state as follows:

1) On August 23, 2001, Plaintiffs filed their "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading" ("Plaintiffs' Motion").

2) On August 31, 2001, briefs by the Defendants in opposition to Plaintiffs' Motion were due to be filed.

3) Accordingly, on August 31, 2001, Defendant Terra Foundation for the Arts filed its Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading." Also on August 31, 2001, Defendants Buntrock, Daley, Gidwitz and Hartman filed their Objections to "Emergency" Motion to Strike

Appearance and to Strike "Unauthorized" Pleading, (collectively referred to hereinafter as "Defendants' Oppositions").

4) Defendants Marshall and Stebbins did not file their own opposition to Plaintiffs' Motion on August 31, 2001 because Defendants Marshall and Stebbins anticipated that the other Defendants would file an opposition in which Marshall and Stebbins could join to conserve on the effort and expense of this litigation.

5) The other Defendants' Oppositions have been served on Defendants Stebbins and Marshall, and Stebbins and Marshall now have had the opportunity to review them.

6) Defendants Stebbins and Marshall agree with, and support, both of the Defendants' Oppositions.

7) Defendants Stebbins and Marshall move for leave to file their attached Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading."

8) Defendants Stebbins and Marshall also state for the record that they agree with and fully support Defendants Buntrock, Daley, Gidwitz and Hartman's Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading.

WHEREFORE, Defendants Stebbins and Marshall respectfully request this Court to grant them leave to file their attached Brief Joining in Terra Foundation for the Arts'

Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading."

DATED: September 4, 2001

Respectfully submitted,

THEODORE STEBBINS AND STEPHANIE PACE MARSHALL

By: _____
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Timothy C. Evans
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DEFENDANTS STEBBINS AND MARSHALL'S BRIEF JOINING IN TERRA FOUNDATION FOR THE ARTS' OPPOSITION TO PLAINTIFFS' "EMERGENCY MOTION TO STRIKE APPEARANCE AND TO STRIKE UNAUTHORIZED PLEADING."

Defendants Theodore Stebbins and Stephanie Pace Marshall, by their attorneys, hereby submit the following in opposition to Plaintiffs' Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading:

Defendants Stebbins and Marshall agree with and join in its entirety the Terra Foundation of the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading." Defendants Stebbins and Marshall also agree with, and support, in its entirety Defendants Buntrock, Daley, Gidwitz and Hartman's Objections to "Emergency" Motion to Strike Appearance and to Strike "Unauthorized" Pleading (collectively referred to hereafter as "Defendants' Oppositions").

16di-004010

In addition, as a member of The Terra Foundation for the Arts' ("Foundation") independent litigation committee ("ILC"), Defendant Stebbins specifically confirms that the ILC interviewed Sidley in December 2000 and thereafter reconfirmed Sidley & Austin's role as counsel for the Foundation, as discussed at page 3 of the Foundations' Opposition. As a member of the ILC, Defendant Stebbins also confirms his position that Sidley & Austin should continue to represent the Foundation in this litigation, as this litigation is essentially the same as, and a continuation of, the *Buntrock* case, with which Sidley & Austin is intimately familiar as counsel for the Foundation in that case.

For all of the reasons set forth above and in the Defendants' Oppositions, Defendants Stebbins and Marshall respectfully request that this Court refuse to hear Plaintiffs' Motion to Strike Appearance and Strike Unauthorized Pleading. In the alternative, Defendants Stebbins and Marshall request that such motion be denied.

DATED: September 4, 2001

Respectfully submitted,

THEODORE STEBBINS AND STEPHANIE PACE MARSHALL

By: _____
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

CERTIFICATE OF SERVICE

I, Debra J. Tucker, an attorney on oath, certify that I caused copies of the foregoing **Defendants Stebbins and Marshall's Motion for Leave to File Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading" and accompanying Brief** to be served upon the individuals listed on the attached service list via **regular U.S. Mail** postage prepaid or **via messenger** (as indicated on the service list) on this 4th day of September, 2001.

Debra J. Tucker

SERVICE LIST

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
01 L 9112

VIA MESSENGER
Floyd D. Perkins
Thomas Ioppolo
Jeffrey Gray
Therese Harris
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Chief of Charitable Trusts
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VIA MESSENGER
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VIA U.S. MAIL
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Neil M. Gorsuch
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Kellogg, Huber, Hansen, Todd & Evans
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VIA U.S. MAIL
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SEP 0 6 2001

McDERMOTT, WILL & EMERY

A Partnership Including Professional Corporations
227 West Monroe Street
Chicago, IL 60606-5096
312-372-2000
Facsimile 312-984-2099

William P. Schuman
Attorney at Law
312-984-7716

Boston
Chicago
Los Angeles
Miami
Newport Beach
New York
Tallinn (Estonia)
Vilnius (Lithuania)
Washington, D.C.

Associated (Independent) Offices
London
Paris

September 4, 2001

BY HAND DELIVERY

Hon. Timothy C. Evans
Circuit Court of Cook County
Law Division
Richard J. Daley Center
50 West Washington Street
Chicago, IL 60602

Re: Tucker, et al. v. Buntrock, et al.
Case No. 01 L 009112

Dear Judge Evans:

Enclosed is a courtesy copy of Defendants Stebbins and Marshall's Motion for Leave to File Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading" and accompanying Brief. This motion is set to be heard by you on September 17, 2001 at 10:00 a.m.

Sincerely,

William P. Schuman

DJT:sac
Enclosure

CHI99 3778069-1.060885.0012

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Timothy C. Evans
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on **September 17, 2001** at **10:00 a.m.,** I shall appear before the Honorable Timothy C. Evans in Room 2005 of the Richard J. Daley Center, 50 West Washington Street, Chicago, Illinois and shall then and there present **Defendants Stebbins and Marshall's Motion for Leave to File Brief Joining in Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency Motion to Strike Appearance and to Strike Unauthorized Pleading,"** a copy of which is attached and hereby served upon you.

DATED: September 4, 2001

Respectfully submitted,

THEODORE STEBBINS AND STEPHANIE PACE MARSHALL

By: _____
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Timothy C. Evans
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DR. STEBBINS' AND DR. MARSHALL'S MOTION TO EXTEND DATE TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS' COMPLAINT

Defendants Dr. Theodore Stebbins ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall"), by their attorneys, hereby move for an order extending the date for them to answer or otherwise respond to Plaintiffs' Complaint. In support of their motion, Dr. Stebbins and Dr. Marshall state as follows:

1. On July 31, 2001, Plaintiffs filed their original Complaint in the Law Division of the Circuit Court of Cook County. The matter was assigned to Judge Sheldon Gardner.

2. Dr. Stebbins and Dr. Marshall were not then served with the Plaintiffs' original Complaint.

3. On August 13, 2001, Plaintiffs filed an emergency Motion for the Entry of a Temporary Restraining Order and sought leave to file a First Amended Complaint.

4. On August 17, 2001, Defendants filed Motions to Transfer this action to the Chancery Division of this Court because, among other reasons, the Plaintiffs have impermissibly filed this equitable action in the Law Division and because this case is closely related to *Buntrock, et. al. v. Terra, et. al.,* No. 00 CH 13859 ("the Buntrock Case"), which is pending in the Chancery Division before Judge Dorothy Kirie Kinnaird.

5. At a hearing on August 13, 2001, Judge Gardner, who was originally assigned to this case, expressed his opinion that this case should be transferred to Judge Kinnaird. Judge Gardner entered and continued Plaintiffs' motion for leave to file their First Amended Complaint, and this matter was transferred to Law Division Chief Judge Evans for his further consideration and disposition of the Motions to Transfer. A hearing on these motions is set for September 17, 2001 before Judge Evans.

6. The undersigned counsel filed appearances for Dr. Stebbins and Dr. Marshall in connection with the above motions. Accordingly, the undersigned agreed to accept service of process on their behalf, which plaintiffs accomplished on August 28, 2001.

7. Based on the above, it is not yet known in which court Dr. Stebbins and Dr. Marshall should file responsive pleadings, and it is not yet clear which pleading they will be responding to.

8. As a result, Dr. Stebbins and Dr. Marshall seek leave to file their responsive pleadings within 30 days after this case is assigned to a specific presiding judge.

WHEREFORE, Defendants Dr. Stebbins and Dr. Marshall respectfully request that this Court enter an Order extending the date by which their responsive pleadings are due and permitting Dr. Stebbins and Dr. Marshall 30 days after this case is assigned to a presiding judge to answer or otherwise respond to Plaintiffs' Complaint.

DATED: September 11, 2001

Respectfully submitted,

THEODORE STEBBINS AND
STEPHANIE PACE MARSHALL

By: _____
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

CERTIFICATE OF SERVICE

I, Debra J. Tucker, an attorney on oath, certify that I caused copies of the foregoing **Defendants Stebbins' and Marshall's Motion to Extend Date to Answer or Otherwise Respond to Plaintiffs' Complaint** to be served upon the individuals listed on the attached service list via regular U.S. Mail postage prepaid on this 11th day of September, 2001.

.

Debra J. Tucker

SERVICE LIST

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
01 L 9112

Floyd D. Perkins
Thomas Ioppolo
Jeffrey Gray
Therese Harris
Assistant Attorney General & Bureau
Chief of Charitable Trusts
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Leonard Garment
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Verner, Liipfert, Bernhard, McPherson
& Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

COPY

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Timothy C. Evans
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

FILED
01 SEP 10 PM 3:58
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
COOK COUNTY, IL

NOTICE OF MOTION

TO: See Attached Service List

#50

PLEASE TAKE NOTICE that on **September** 17, **2001** at 9:30 **a.m.**, I shall appear before the Honorable Timothy C. Evans in Room 2005 of the Richard J. Daley Center, 50 West Washington Street, Chicago, Illinois and shall then and there present **Defendants Stebbins' and Marshall's Motion to Extend Date to Answer or Otherwise Respond to Plaintiffs' Complaint**, a copy of which is attached and hereby served upon you.

DATED: September 11, 2001

Respectfully submitted,

THEODORE STEBBINS AND
STEPHANIE PACE MARSHALL

By: Debra J. Tucker
One of their attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

16di-004022

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	Judge Timothy C. Evans
Defendants.	)	

THE TERRA FOUNDATION'S MOTION FOR EXTENSION OF TIME TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS' COMPLAINT

The Terra Foundation for the Arts (the "Foundation") hereby moves for an extension of time to answer or otherwise respond to Plaintiffs' Complaint. In support of its motion, the Foundation states as follows:

1. On July 31, 2001, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson filed their original complaint in the Law Division of the Circuit Court of Cook County. The matter was assigned to Judge Sheldon Gardner.

2. To the best of its knowledge, the Foundation was never served with the Plaintiffs' original complaint.

3. On August 13, 2001, Plaintiffs filed an Emergency Motion for the Entry of a Temporary Restraining Order and sought leave to file a First Amended Complaint. After expressing an opinion that this matter should be transferred to Judge Dorothy Kirie Kinnaird, who is currently presiding over a related case, (*Buntrock, et al.* v. *Terra, et al.*, No. 00 CH 13859), Judge Gardner entered and continued Plaintiffs' motion for leave to file their First Amended Complaint.

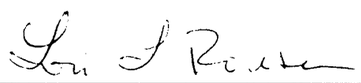
4. This matter was thereafter assigned to Judge Evans for consideration as to what the appropriate venue is for the case.

5. Accordingly, this case is not actually pending in front of any particular judge.

6. At this point it is unclear when the Foundation must respond to Plaintiffs' Complaint.

WHEREFORE, the Foundation respectfully requests that this Court enter an Order that the Foundation shall have 30 days after this case is assigned to a judge to answer or otherwise respond to Plaintiffs' complaint.

Respectfully submitted,



One of the Attorneys for Defendant
The Terra Foundation for the Arts

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16di-004025

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CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on September 12, 2001 by United States mail upon the following counsel:

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Lori L. Roeser

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

OPPOSITION TO PLAINTIFF'S MOTION FOR SUBSTITUTION OF JUDGE AS A MATTER OF RIGHT

Defendants Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Carroll, Ltd., and Theodore Stebbins and Stephanie Pace

16di-004029

Marshall, by and through their attorneys, McDermott Will & Emery, hereby state as follows in opposition to plaintiff Judith Terra's motion for substitution of judge as a matter of right:

INTRODUCTION

Under well-established Illinois law, plaintiff Judith Terra's motion for substitution of judge "as a matter of right" constitutes improper forum shopping and an abuse of process. Plaintiff's motion violates section 2-1001(a)(2) of the Illinois Code of Civil Procedure, as well as the September 17, 2001 order entered by Judge Mulhern that specifically transferred this matter — *Terra II* — to the Chief Judge of the Chancery Division for reassignment to this Court based on its clear relatedness to *Terra I*.

Terra II is simply an attempt to challenge the consent judgment and order ("consent judgment") entered by this Court in *Terra I*. This Court expressly retained jurisdiction to enforce that consent judgment. Thus, *Terra II* is clearly the same case as *Terra I* and *Terra II* is a separate action in its physical form only. As discussed below, section 2-1001(a)(2) has no application here. By its terms, section 1001(a)(2) requires that the judge to whom such a motion is presented has not ruled on "any substantial issue in the case." It cannot be reasonably disputed that this Court has previously ruled on most of the issues of *Terra II*, namely, the alleged coercion of the Attorney General and the validity of the consent judgment. Illinois law does not permit a substitution of judge when a court has ruled on a substantial issue, even if that ruling occurred in a related case. Accordingly, plaintiff's reliance on section 2-1001(a)(2) is improper.

Moreover, on September 17, 2001, the Acting Presiding Judge of the Law Division (Judge Mulhern), transferred this matter to the Chief Judge of the Chancery Division for reassignment to this Court. In so doing, Judge Mulhern expressly found that *Terra II* was, at a minimum, so

16di-004030

intertwined and related to *Terra I*, that this Court was the appropriate forum to hear *Terra II*. A copy of the September 17, 2001 order is attached hereto as Exhibit A. Plaintiff's motion seeks to render Judge Mulhern's order meaningless and section 2-1001(a)(2) cannot be used as the vehicle for plaintiff's tactics.

Put simply, plaintiff's motion is yet another example of the clear forum shopping that prompted the commencement of *Terra II*. Section 2-1001(a)(2) does not allow such improper tactics. Indeed, section 2-1001(a)(2) is intended to be used when a particular judge has not ruled on an issue in a case or otherwise given a movant the opportunity to test the waters as to the court's reaction to his or her claim. Here, this Court has ruled on most of the ultimate issues of *Terra II*. Unhappy with that ruling, plaintiff appealed *Terra I* — though, at the same time, claiming not to be bound by *Terra I* — and filed a new action in the Law Division. That new action — as evidenced by plaintiff's petition for fees and expenses — is directly based on *Terra I* and the counterclaims plaintiff attempted to raise in that case on an untimely basis. Since *Terra II* was filed, plaintiff has been unable to find any court that has found it to be separate from *Terra I*. To the contrary, Judge Gardner and then Judge Mulhern, Acting Presiding Judge of the Law Division, found that *Terra II* was the same case as *Terra I*, or at least so related, that *Terra II* should be reassigned to this Court. Plaintiff's motion for substitution of judge is wholly improper and illustrates plaintiff's effort to obtain review of *Terra I* by a court of coordinate jurisdiction. For these reasons, plaintiff's motion should be denied.

16di-004031

ARGUMENT

I. Section 2-1001(a)(2) Is Not Applicable To *Terra II*.

Contrary to the requirements of section 2-1001(a)(2), *Terra II* is not a new and separate action on which this Court has not issued any ruling on "any substantial issue in the case." 735 ILCS 5/2-1001(a)(2)(ii). Indeed, most, if not all of the allegations of *Terra II* are based on the consent judgment entered by this Court in *Terra I*.[1] Specifically, *Terra II* again alleges coercion on the part of the Attorney General — an issue which was considered and rejected by this Court on several occasions, as well as rejected by the United States District Court for the Northern District of Illinois. Rulings are considered "substantial" when they are directly related to the merits of the case or otherwise allow a movant to test the water's as to a judge's reaction to its claims. *Bonnie Owen Realty, Inc. v. Cincinnati Ins. Co.*, 283 Ill. App. 3d 812, 670 N.E.2d 1182 (5th Dist. 1996); *Paschen Contractors, Inc. v. Illinois State Toll Highway Authority*, 225 Ill. App. 3d 930, 590 N.E.2d 539 (2d Dist. 1992); *Estate of Roselli*, 70 Ill. App. 3d 116, 388 N.E.2d 87 (1st Dist. 1979). This Court's rulings in *Terra I* directly relate to the merits of *Terra II*. Thus, this Court has clearly ruled on substantial issues in this case and section 2-1001(a)(2) is not applicable.

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[1] In fact, the Complaint is replete with allegations regarding *Terra I*. Plaintiffs' Complaint in *Terra II* is attached hereto as Exhibit B. *See* Exhibit B, ¶33, complaining of the filing of *Terra I* by Gidwitz and Buntrock; ¶35, complaining of the Attorney General's complaint filed in *Terra I*; ¶ 37, complaining of the Attorney General's intervention in *Terra I;* ¶ *38 (same);* ¶ 39, complaining of a motion filed in *Terra I*; ¶ 40, complaining of other motions filed in *Terra I*; ¶ 42, complaining of the mediation process in *Terra I*; ¶ 43, complaining of Assistant Attorney General Perkins' actions during the mediation process in *Terra I*; ¶¶ 48-53, complaining of actions relating to Dr. Stebbins' involvement in *Terra I*; ¶¶ 55-58 complaining of actions relating to Dr. Marshall's involvement in *Terra I*; ¶¶ 59-74, complaining of the settlement secured in *Terra I*. *See also* Exhibit B, p. 25, Count I, Prayer for Relief, seeking "[a] declaration that the *settlement* [in *Terra I*] is unlawful..." (Emphasis added.)

16di-004032

Plaintiff's motion seemingly suggests that the mere act of filing a new action is sufficient to entitle one to seek a substitution of judge as a matter of right. Such "reasoning" flies in the face of section 2-1001(a)(2) which expressly requires that such a motion be raised prior to a court's ruling on a substantial issue. *Terra II* is a separate action only in its physical form. Thus, *Terra II* — despite its separate matter number — is a part of *Terra I.*

Illinois law clearly recognizes that a court's ruling in one matter may constitute a ruling on a substantial issue in another matter when the two matters, as here, are related and differ only in the case number. *See Marshall Sav. & Loan Ass'n v. Henson*, 78 Ill. App. 2d 14, 222 N.E.2d 255 (1st Dist. 1966); *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill. App. 3d 618, 396 N.E.2d 552 (4th Dist. 1979); *see also Alcantar by Alcantar v. Peoples Gas Light and Coke Co.*, 288 Ill. App. 3d 644, 681 N.E.2d 993. In *Marshall*,[2] the court affirmed the denial of a petition for substitution of judge because it was raised after the court ruled on a substantial issue in another related matter. In *Marshall*, there were three separately filed actions that the court found to be interrelated legal disputes involving the same issues and parties. *Marshall*, 78 Ill. App. 2d at 19-20, 222 N.E.2d at 257-58. The court noted that *Marshall* — similar to *Terra II* — was unique in that the substantive rulings occurred in separate proceedings, as opposed to the typical situation where the substantive issue and request for a substitution of judge occur in the same proceeding. *Id.* Further, as here, the

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[2] The court in *Marshall Sav. & Loan Ass'n v. Henson*, 78 Ill. App. 2d 14, 222 N.E.2d 255 (1st Dist. 1966), addressed a motion for substitution of judge raised under the predecessor version of section 2-1001. The petition sought a change of venue based on the alleged prejudice of the trial court judge. Although the petition in *Marshall*, unlike plaintiff's motion here, alleged prejudice by the judge, the law required, as it does today with regard to substitutions as a matter of right, that it be filed prior to a ruling on a substantive issue. Thus, the reasoning of *Marshall* is certainly relevant.

16di-004033

separate actions in *Marshall* were all pending before the same judge. *Id.* Significantly, in *Marshall*, the court noted that "except for different court numbers," the cases were an "integrated series of legal disputes involving generally the same parties and issues." *Id.* at 20, 222 N.E.2d at 258. The court affirmed the denial of the motion for substitution because the judge had ruled on substantial issues in two of the related actions even though there had been no rulings issued in the third action where the motion was sought. *Id.* As in *Marshall*, the motion for substitution of judge should be denied because *Terra I* and *Terra II* — despite separate court numbers — is an integrated legal dispute involving generally the same parties and issues.

In addition, *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill. App. 3d 618, 396 N.E.2d 552 (4th Dist. 1979), supports the denial of plaintiff's motion, notwithstanding that this Court has not issued a ruling under the *Terra II* case number. In *Wilsonville*, the court affirmed the denial of a motion for substitution of judge in one action based on rulings issued by the judge in a related case. *Wilsonville* involved two separate actions that were eventually consolidated. *Wilsonville*, 77 Ill. App. 3d at 621, 396 N.E.2d at 554. The court affirmed the denial a motion for substitution of judge in one of the actions because the judge had already issued rulings on substantial issues in the other related case. *Id.* at 639, 396 N.E.2d at 566. The court noted that although the judge had issued a ruling on an *ex parte* matter, as a result of its *ex parte* nature, the defendant had no notice of that ruling prior to seeking the substitution. Thus, as far as the defendant was concerned, the judge had not issued any rulings on substantial issues in that action. Nevertheless, because the judge issued rulings on substantial issues in the other action, the motion for substitution of judge in the related action was deemed properly denied. Likewise, regardless of the fact that this Court has not yet issued a ruling under the *Terra II* case number, this Court's rulings in *Terra I* constitute rulings on

16di-004034

substantial issues of *Terra II* so that plaintiff's motion for substitution of judge as a matter of right is improper.

Further, *Terra II* is seeking relief from this Court's consent judgment entered in *Terra I*. In essence, *Terra II* is a post-judgment motion under section 2-1401. 735 ILCS 5/2-1401. Pursuant to section 2-1401, in order to obtain relief from this Court's order, "[t]he petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof." 735 ILCS 5/2-1401(b). Therefore, a motion for substitution of judge would not be appropriate because the relief sought in *Terra II* must be brought before this Court.

If more were needed, under the circumstances, even plaintiff cannot reasonably dispute that *Terra II* is not a "new" or "separate" action. Incredibly, plaintiff has sought attorneys' fees and expenses from this Court (and in *Terra I*) for the preparation and filing of the complaint in *Terra II*. *See, e.g.,* Petition for Fees and Expenses submitted by Cummins & Cronin, LLC. Accordingly, plaintiff has essentially admitted that *Terra II* is not a new action and its motion for substitution is without merit.

Terra II is not a new action at all and simply requires this Court to vacate the consent judgment of *Terra I*. A motion for substitution of judge is improper when it is presented after a judge has ruled on substantial issues. *See* 735 ILCS 5/2-1001(a)(2)(ii). This Court has rendered numerous rulings on substantial issues raised in *Terra II* and thus, plaintiff's motion for substitution of judge should be denied.

II. Plaintiff's Motion Violates Judge Mulhern's Order Of September 17, 2001.

On September 17, 2001, the Acting Presiding Judge of the Law Division ordered that this matter be transferred to the Chief Judge of the Chancery Division for reassignment to this Court,

16di-004035

pursuant to General Orders 1.3(c),(d) and 1.2. *See* Exhibit A. In so doing, Judge Mulhern found that *Terra II* was so related to *Terra I* that it would be transferred to this Court for all further proceedings. Plaintiff's motion should be denied because it not only violates Judge Mulhern's order but, in fact, would render that order, as well as General Orders 1.2 and 1.3 virtually meaningless.

General Orders 1.2 and 1.3, that authorized Judge Mulhern to transfer *Terra II* for reassignment to this Court, exist to prevent the very forum shopping that plaintiff has engaged in. There has already been a determination that *Terra II* is related to *Terra I* and based on that relatedness, this Court was deemed the appropriate forum for *Terra II*. *See e.g. Alcantar*, 288 Ill. App. 3d. at 648-49, 681 N.E.2d at 996 (denying motion for substitution of judge as a matter of right raised with regard to motion for sanctions because request for sanctions was directly related to issues of underlying case). The order of September 17, 2001 clearly recognizes that this Court has, in fact, ruled on substantial issues raised in *Terra I*. Indeed, the fact that this Court has ruled on such substantial issues was the basis for the order to transfer this matter for reassignment to this Court.

Finally, if this Court were to grant plaintiff's motion, General Order 1.3 would be read out of existence. The purpose of these rules is to further judicial economy and minimize the risk of inconsistent judgments. Under plaintiff's theory, a party could totally avoid the effect of rulings by the Presiding Judge of the Law Division, by simply filing a motion for a substitution of judge. Thus, General Order 1.3 would be, for all practical purposes, meaningless. Plaintiff's motion is an improper attempt to thwart the order of September 17, 2001 and General Order 1.3, and should be denied accordingly.

III. Section 2-1001(a)(2)(ii) May Not Be Used To Further Plaintiff's Judge Shopping.

Section 2-1001(a)(2)(ii) expressly limits its application to situations where a judge has not

16di-004036

ruled on any issue. This rule is intended to prevent a litigant's attempt to "judge shop" based on a judge's prior rulings. *See Marriage of Passiales*, 144 Ill. App. 3d 629, 494 N.E.2d 541 (1st Dist. 1984); *Bonnie Owen Realty, Inc. v. Cincinnati Ins. Co.*, 283 Ill. App. 3d 812 (5th Dist. 1996). Litigants must not be permitted to "judge shop" after learning that a judge may be unfavorably disposed toward his or her cause. *In re Marriage of Kozloff*, 101 Ill. 2d 526, 530-31, 463 N.E.2d 719, 721 (1984); *Alcantar*, 288 Ill. App. 3d at 648, 681 N.E.2d at 996. Indeed, even when a court has not ruled on a substantial issue — which this Court has clearly done — a motion for substitution may be denied if a movant has had the opportunity to test the waters and form an opinion as to the court's reaction to his claim. *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 338, 744 N.E.2d 877, 887 (1st Dist. 2001). Plaintiff's motion exemplifies the very judge shopping that section 2-1001(a)(2)(ii) prohibits.

The record is replete with examples of plaintiff's judge shopping. Plaintiff has sought to challenge *Terra I* in the United States District Court, the Illinois Appellate Court, First District, and in the Circuit Court of Cook County. Plaintiff's efforts continue in hopes of finding a court — even a court of coordinate jurisdiction — to review the consent judgment entered by this Court.[3] *Terra II* is a continuation of *Terra I*. Section 2-1001(a)(2)(ii) does not support the forum shopping the plaintiff's motion is predicated on. To the contrary, section 2-1001(a)(2) is a safeguard against such forum shopping and plaintiff's motion should be denied.

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[3] Plaintiff's concurrent effort to seek review of this Court's order has necessarily required plaintiff to take conflicting positions. On one hand, plaintiff has maintained that the consent judgment entered by this Court has no effect on plaintiff, yet plaintiff's entire appeal is based on that decree. Notably, the bona fide basis of plaintiff's appeal is questionable as plaintiff has failed to file a docketing statement with the appellate court on September 5, 2001, as required by Supreme Court Rule 312, or to pay the fees necessary to pursue its appeal.

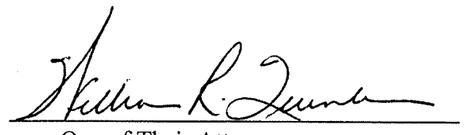
CONCLUSION

WHEREFORE, based on the foregoing reasons, Defendants Buntrock, Gidwitz, Daley, Hartman, Stebbins, and Marshall respectfully request that this Court deny plaintiff Terra's motion for substitution of judge as a matter of right, and order all other relief that this Court deems fair and just.

Dated: September 19, 2001

Respectfully Submitted,

DEAN L. BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

By: 
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16di-004039

Exhibit A

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

TUCKER et.al.

v.

BUNTROCK et al.

NO. 01 L 009112

ORDER

THIS MATTER COMING BEFORE THE COURT ON THE ATTORNEY GENERAL'S AND BUNTROCK, DOLEY, GOLITZ HARTMAN & DOLEY'S ALONG WITH STEBBINS & MARSHALL'S MOTION FOR TRANSFER BASED ON CASE FILED IN THE WRONG DIVISION AND ON RELATEDNESS, THE COURT BEING FULLY ADVISED IN ITS PREMISES, IT IS HEREBY ORDERED THAT:

1. THE MOTION TO TRANSFER IS HEREBY GRANTED AND THIS MATTER IS TRANSFERRED INSTANTER TO THE CHIEF JUDGE OF THE CHANCERY DIVISION FOR REASSIGNMENT TO JUDGE KINNAIRD FOR THE REASONS STATED OF RECORD IN OPEN COURT
2. PLAINTIFFS RESERVE THE RIGHT TO OBJECT TO SUCH TRANSFER.

Atty No. 33745
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QUINLAN & CARROLL
Attorney for Defendant Buntrock et.al.
Address 30 N. LaSalle ST Suite 2900
City / Zip CHICAGO, ILLINOIS 60602
Telephone (312) 263-0900

JUDGE MARY MULHERN

SEP 17 2001

ENTER: Circuit Court - 1703

Judge **Judge's No.**

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-004041

Exhibit B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD. D. PERKINS, Assistant Illinois Attorney General,

Defendants.

No. 01L 009112
CALENDAR W
STATUTORY ACTION

JURY TRIAL DEMANDED

FILED
2001 JUL 31 AM 9:16

COMPLAINT AT LAW

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson complain of the Defendants Dean Buntrock and Ronald Gidwitz, James E. Ryan, Floyd D. Perkins, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, and the Terra Foundation for the Arts ("Foundation") as follows:

16di-004042

Preliminary Statement

1. Through this action, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson seek to vindicate both the mission of the Foundation and the intent of its founder Daniel J. Terra. The plaintiffs complain that certain directors of the Foundation are irreconcilably conflicted and have willfully and wantonly breached their fiduciary obligations by pursuing a course of action antithetical to the best interests of the Foundation and inconsistent with both the purpose of the Foundation and the clearly expressed intentions of its founder. These breaches of fiduciary duty were aided by – and even induced by – the illegal conduct of the Illinois Attorney General and his assistant. Indeed, as we set out more fully below, the improvident conduct of the Attorney General not only induced breaches of fiduciary duty but constitutes an unlawful deprivation of the Foundation's property without due process of law and an unlawful deprivation of the Foundation's rights to freedom of speech. The Foundation's interests have been further compromised by the conflicted interests of several Directors and various counsel who purported to, but did not, represent and counsel the Foundation free of improper influence

2. The plaintiffs have been unlawfully denied the opportunity to bring these claims in other litigation. As a result, this case is filed to secure relief – a declaratory judgment, injunctive relief and damages – in order to halt the perversion of the Foundation's mission which has been the direct result of the defendants' conduct.

Nature of the Case

3. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts, by a conflicted majority, voted to accept a settlement of this litigation that would chain the Foundation to Chicago for 50 years and install a majority of Illinois residents on its

16di-004043

Board. As the dissenting board members stated before the vote, this acquiescence to the extraordinary intrusions by the State of Illinois into the Foundation's affairs was *ultra vires* and an utter abdication of the Board's fiduciary responsibilities. Yet six board members, some with personal conflicts, none acting in the best interests of the Foundation, chose to vote in favor of a proposal that—if allowed to stand—will do violence to the clear vision of an American philanthropist and set a chilling precedent for all not-for-profit corporations.

4. The Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Yet six Board members voted to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the Foundation's charter and its founder's demonstrated intentions.

5. Earlier litigation and a mediation process compromised by conflicts of interest became a vehicle for a power grab by the Attorney General of the State of Illinois and Assistant Attorney General Floyd D. Perkins, who is charged with enforcing the State's charitable institution laws. Through threats of investigation and legal action—including the threat of suing pivotal board members - Perkins has used his official powers to compromise and conflict certain members of the Foundation's Board of Directors such that the Foundation's right of self-governance, its right to control its own assets, and its

right to freedom of speech have been effectively nullified. The Attorney General's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens further to deprive Plaintiffs of (1) their freedom of speech, in violation of the First Amendment; (2) their property without due process of law, in violation of the Fourteenth Amendment; and (3) rights under the commerce and contracts clauses of the Constitution. Through this unlawful conduct, Mr. Perkins has also induced certain Board members to violate their fiduciary duties to the Foundation.

6. In approving a tainted mediation process, a conflicted a majority of the Board of Directors of the Foundation have violated their fiduciary duties to the Foundation and caused the Foundation to act *ultra vires*. Despite irreconcilable conflicts of interest and their consequent disqualification, directors Stephanie Pace Marshall and Theodore Stebbins have acted against the interest of the Foundations. By taking action incompatible with the Foundation's charter and wasting valuable assets and opportunities for the Foundation to carry out its mission, the Board members who approved the proposed settlement violated duties of obedience to the Foundation's purpose and best interests.

Parties

7. The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

16di-004045

8. Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachusetts.

9. Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming. Senator Simpson also serves as Chairman of the Board of Trustees of the Buffalo Bill Historical Center in Cody. Wyoming, which maintains assets valued in excess of $350 million.

10. Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's widow, and a resident of Washington, D.C.

11. Dr. Stephanie Pace Marshall is the Foundation's Secretary and Treasurer and chairman of its finance and strategic planning committees. She is president of the Illinois Mathematics and Science Academy, and a resident of Illinois.

12. Dr. Theodore O. Stebbins is a Director of the Foundation and Chairman of the collections committee. He currently serves as curator of American art at the Fogg Museum at Harvard University and resides in Massachusetts.

13. Margaret Daley is a Director of the Foundation and Chairman of its education committee. She is a resident of Illinois.

14. Dean Buntrock is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

15. Ronald Gidwitz is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

16. James E. Ryan is the Attorney General of Illinois.

17. Floyd D. Perkins is Assistant Attorney General, Bureau of Charitable Trusts and Solicitations.

The History of the Terra Foundation

18. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. Born and educated in Philadelphia and a graduate of Pennsylvania State University, Mr. Terra maintained residences in Chicago and Washington, D.C. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to 1950. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

19. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation.

Its purposes, according to its original Articles of Incorporation, were

> to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation (as filed Dec. 13, 1978).

20. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He created a multimillion dollar museum facility on North Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Mr. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art. Today, the Foundation owns substantial property in the Village of Giverny.

21. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the North Michigan Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

22. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson and his long-time friend Peter Solmsson of the University of the Arts in Philadelphia, that he wanted his art to achieve the broadest possible impact on the public.

23. Between 1991 and 1993, Mr. Terra negotiated with the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City to form a strategic alliance that would pool the Foundation's collection with those of the other two institutions and move the emphasis of the Foundation's work from Chicago to Washington. Discussions broke down over issues relating to the Whitney Museum's control over the collection.

24. Between 1993 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized.

25. In 1996, the last year of his life, Mr. Terra focused intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect

to draw plans and obtain zoning permits for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Phone lines, name plates, furniture and other items were purchased for the new property. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location, sometimes with his own handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

26. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable North Michigan Avenue museum site. Between 1996 and 1998, the Foundation was consumed with issues relating to Mr. Terra's estate.

The Board Fight Over the Future of the Foundation

27. Upon settlement of Mr. Terra's estate, the Board returned to consideration of a strategic plan for the Foundation. At a November 1998 meeting, Mr. Buntrock recommended that the Board form a Strategic Planning Committee to consider options for the future of the Foundation. Mr. Gidwitz was elected chairman of this committee.

28. Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard

University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris; Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis Corporation.

29. Under Dr. Tucker's leadership, the Foundation continued active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. The Strategic Planning Committee met several times to consider options, with Mr. Gidwitz himself raising suggestions of building a new museum facility on a different site, affiliation with other museums, and closing the museum to focus on education efforts and building the collection.

30. In preparation for the Board's September 2000 annual meeting in France, Dr. Tucker encouraged members to focus on long-term planning options and circulate ideas they might have in advance of the meeting for the group to study and consider.

31. Dr. Tucker circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities

frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly. Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

32. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

The Ploy to Keep the Foundation in Chicago

33. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock filed a lawsuit alleging that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

34. In their lawsuit, Messrs. Gidwitz and Buntrock claimed, contrary to fact, that Mr. Terra intended that the Foundation would always remain in the Chicago area. The complaint quoted news reports from 1987, the time of the move from Evanston to North Michigan Avenue, in which Mr. Terra described his enthusiasm for the new location. The complaint did not refer to Mr. Terra's 1990 statement to the Board of Directors or to any of his subsequent discussions and plans relating to relocation of the Foundation to

another city. It also did not mention the 1994 amendment to the charter which permitted the Foundation to operate museums and schools "both in the United States and abroad." Based on this misleading statement of Mr. Terra's intent, the defendants alleged that the Foundation's mission was to operate a "museum of American art . . . in the Chicago area to be held in trust for the benefit of the people of the State of Illinois."

35. Attorney General James Ryan and Floyd Perkins, an Assistant Attorney General, seized upon the turmoil of the Terra Foundation Board as an opportunity to assert State control over its assets. At the inception of the lawsuit, the Attorney General filed an intervenor complaint that simply borrowed the allegations of Messrs. Gidwitz and Buntrock. The complaint also reiterated the faulty premise -- based upon a demonstrably incorrect statement of Mr. Terra's intent -- that the Board of Directors were without authority to relocate the Foundation. The complaint sought a declaration, among other things, that "[t]he intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the Foundation intended and expected the Museum to remain in Chicagoland."

36. The Attorney General intervened expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an *ultra vires* act. As Assistant Attorney General Perkins has stated in an interview for that case, he believes it is his role as assistant attorney general to see that Illinois-based charitable institutions utilize their assets in Illinois. Mr. Perkins attempts to accomplish this by seeking installment of Illinois directors on the boards of such institutions and through other restrictions. He has employed this tactic successfully in other cases, for

example, that of the Regenstein Foundation. Mr. Perkins acknowledges, however, that he does not have the authority to impose Illinois-related restrictions on institutions which were created to serve broader interests, such as national and international aid organizations, even though such institutions may be based in Illinois and subject to reporting and other statutory requirements of Illinois law.

37. As authority for his intervention in that lawsuit, Mr. Perkins relied on the Charitable Trust Act (760 ILCS 55/1 et seq. (1997)) and his "common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts." Whatever authority these sources of law may provide to the Attorney General, they do not permit any action to force a charitable trustee or Board member of a not-for-profit corporation to change the institution's fundamental purpose in a manner inconsistent with its charter or founder's intent. Nor do these authorities mandate that any charitable trust or not-for-profit corporation that is established in the State of Illinois must remain in Illinois, regardless of its purposes and founder's intent.

38. The propriety of the Attorney General's intervention and sole basis for authority in that case depended upon his claim that the Terra Foundation's purpose was to serve the people of Illinois, rather than a broader population. Like the other defendants, the Attorney General based this claim on selected statements of Mr. Terra to the press. A reasonable investigation of the facts would have revealed, however, that Mr. Terra did not intend that any of the assets of the Terra Foundation should be restricted geographically. Mr. Perkins did not conduct such an investigation before filing his initial complaint. For example, Mr. Perkins has admitted that when he filed that complaint he was unaware of Mr. Terra's 1994 amendment to the Articles of Incorporation of the

Foundation expressly stating that the Foundation's efforts shall include museums "both in the United States and abroad."

39. In January 2001, the Terra Foundation filed a motion for judgment on the pleadings, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead encouraged simply the best possible dissemination of art knowledge and appreciation among the public in the United States and abroad.

40. Although the true facts of Mr. Terra's intent were revealed early in litigation, and at the latest by the Foundation's motion for judgment on the pleadings, defendants and the Attorney General persisted in their efforts to capture the Foundation in Illinois. They were able to do so through a barrage of motions designed to delay the proceedings and deflect attention from the core issue of Mr. Terra's intent. Mr. Perkins and the other defendants first challenged the Board's choice of counsel and early decisions about directing and funding the litigation. Then, once the Board had selected an independent litigation committee of Dr. Stebbins and Amb. Andreani, Mr. Perkins and the other derfendants challenged Dr. Stebbins' ability to serve on this committee. These tactics had the desired effect of paralyzing the Board and placing Mr. Perkins and the other defendants in a strong position to make demands upon the Foundation, without regard to the merits of their lawsuits.

41. As the case proceeded to mediation, the Attorney General and Assistant Attorney General Perkins insinuated themselves into the process in an attempt to railroad its result. Mr. Perkins pursued the goal of capturing the Foundation's assets in Illinois despite the fact that he had no basis to assert that he was seeking to preserve Mr. Terra's intent.

42. In mediation, the Attorney General and Assistant Attorney General Perkins took several extraordinary positions that evidenced their recognition that Mr. Terra's intent was not to constrain the Foundation to Chicago. The Attorney General disagreed that the Board of Directors was governed in the use of the Foundation's funds solely by the Articles of Incorporation. He argued that those Articles were too broad to provide any meaningful purpose to the Foundation. Most strikingly, the Attorney General maintained that a not-for-profit corporation established for charitable purposes in a particular jurisdiction, simply by virtue of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population.

43. Without legal authority and in disregard of the facts regarding Mr. Terra's intent. Assistant Attorney General Perkins demanded throughout the mediation that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with the Art Institute of Chicago in which the Foundation would sell the North Michigan Avenue property to fund a new wing at the Art Institute.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois in perpetuity.

c. Maintain and exhibit its collection in the Chicago metropolitan area in perpetuity.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois.

44. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

45. Frustrated by the Board's resistance to his demands, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation. These tactics were directed in particular at two key swing directors, Drs. Stebbins and Marshall.

Attacks on Dr. Stebbins

46. Since his earliest involvement with the Terra Foundation, Dr. Stebbins had supported a comprehensive approach to strategic planning that included consideration of options outside of Illinois. In 1997, before Dr. Stebbins joined the Board, he headed an advisory committee that conducted a review and analysis of the collection and reported recommendations to the Board for the future. The committee consisted of Dr. Stebbins, then curator of American paintings at the Museum of Fine Arts in Boston, Professor John Wilmerding, former chairman of the art department at Princeton, and Charles Moffett, former deputy director of the National Gallery and director of the Phillips Collection in Washington. In its report to the Board in February 1997, the advisory committee concluded strongly that the present building in Chicago is inappropriate as a museum. The committee envisioned three alternative scenarios for the future, two of which involved discontinuing the Chicago presence by: (1) concentrating on French operations, with the establishment of a new Terra Center for American Art and American Studies in Paris, or (2) improving the collection and housing it another American city.

47. Dr. Stebbins joined the Board in April 1998. In Strategic Planning Committee

meetings until the outbreak of litigation, he continued to advocate consideration of options within and without Illinois. He was an especially strong advocate for the idea of maintaining a stand-alone museum.

48. When litigation began, Dr. Stebbins became a key figure in its conduct. Upon defendants' demand for an independent litigation committee, Dr. Stebbins and Amb. Jacques Andreani were chosen from among the non-party directors to oversee the litigation on behalf of the Foundation. Because Amb. Andreani was in France at the time, Dr. Stebbins effectively controlled the litigation committee.

49. Within three weeks of Dr. Stebbins' election to the litigation committee on November 30, 2000, Mr. Perkins filed a motion to remove Dr. Stebbins from the committee on the grounds of conflict of interest. On January 22, 2001, Mr. Perkins obtained a Court order to conduct special discovery focusing on Dr. Stebbins' conduct as a director. Within two weeks of that order — and less than two weeks before a scheduled evidentiary hearing focusing upon Dr. Stebbins' conduct — the Foundation entered into mediation. With challenges to his reputation and integrity having become the central focus of the litigation, Dr. Stebbins strongly advocated directing the Foundation into mediation.

50. On March 21, 2001, Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant for the first time. In a cover letter, Mr. Perkins stated that the document was a draft and was not being filed, but rather supplied to set forth issues to be discussed at settlement. The draft complaint named Dr. Stebbins as a new defendant and included specific charges of impropriety against him. The allegations included alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions.

The amended complaint also charged Stebbins with breaching the Code of Ethics for Professional Practices in Art Museums. The amended complaint was never filed.

51. Dr. Stebbins now knew that, if settlement was not reached, the litigation would resume, with his reputation and integrity once again the central focus, and he would become a defendant in the case.

52. On the same day that the draft complaint was distributed to counsel, the mediator circulated to the Board a revised mediation proposal, which had been formulated after reviewing the amended complaint and discussing this matter with the Attorney General. The proposal contained a requirement that the Foundation would maintain and exhibit its collection in perpetuity at the Art Institute of Chicago. According to the mediator, this provision resulted from the position of the Attorney General. Mr. Perkins had not participated in mediation sessions on March 5 and 6, but worked behind the scenes with the mediator to influence the course of mediation.

53. Dr. Stebbins, facing the threat of becoming a defendant in the lawsuit, now expressed his support for settlement. On April 2, 2001, he and Amb. Andreani prepared a letter to the mediator stating that "in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago." They enclosed a settlement proposal "follow[ing] the outline" of the March 21, 2001, proposal reflecting the Attorney General's positions.

Attacks on Dr. Marshall

54. Dr. Marshall joined the Board in 1998. Like Dr. Stebbins, Dr. Marshall held the view that the Terra Foundation was established for the broadest possible dissemination of American art. For example, at a May 10, 2000, meeting of the Strategic Planning

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Committee that Drs. Stebbins and Marshall attended, consensus was reached that the beneficiaries of the Foundation included the national and international public.

55. Late into the mediation process, Dr. Marshall remained a strong critic of the Attorney General's methods and proposals. In a May 20, 2001, letter to counsel for the Foundation and her fellow Board members she reported:

> [W]ith respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

56. In addition to serving on the Board, Dr. Marshall serves full-time as president of the Illinois Mathematics and Science Academy, a highly-regarded education institution that depends on public funding for the bulk of its operating budget and is currently in the midst of a significant capital campaign.

57. After a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins believed that he had been tricked into going along with mediation and had lost valuable time preparing for litigation. He began to investigate Dr. Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He considered these issues for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr. Perkins knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

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58. Mr. Perkins never informed Dr. Marshall or her counsel that the investigation had been concluded.

The Proposed Settlement and Board Approval

59. On June 29, 2001, the Board held a special meeting to consider the terms of a proposed settlement of this litigation. The settlement called for entry of a consent judgment and order implementing the Attorney General's goal of locking the Foundation in to the State of Illinois. In this regard, the proposed judgment requires:

a. For at least 50 years, the Foundation shall remain an Illinois corporation, with its principal office and corporate headquarters in Illinois;

b. For at least 50 years, the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago metropolitan area;

c. For at least 25 years, the Foundation will require that a majority of its Board positions be at all times held by residents of Illinois;

d. The Foundation shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

60. Dr. Marshall, the Foundation's Treasurer and Secretary, presided at the special meeting. Other directors present were: Mr. Gidwitz, Mr. Buntrock, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Mrs. Terra and Dr. Tucker.

61. Immediately prior to the vote, several Board members made personal statements. Mrs. Terra objected that "the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees."

> Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art . . . . [W]e will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of

> Illinois to really come in and run our Foundation . . . telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most . . . outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation.

62. Dr. Tucker echoed Mrs. Terra's concerns. He stated that

> what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview. The invasion of its independence, its privacy, by . . . the Attorney General, I find repugnant. I find it detrimental and offensive.

63. At the recommendation of the Foundation's attorney, Drs. Stebbins and Marshall each addressed the issue of conflict of interest due to the Attorney General's conduct in the case. Dr. Marshall confirmed that "the Attorney General has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation," but insisted that the investigation "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation."

64. Dr. Stebbins first defended his "reputation, both as a scholar and as someone of complete integrity," and maintained that he had served on the Board "without any iota of a conflict of interest." He then stated that he "abhor[ed] the threatening tactics of the Attorney General." Dr. Stebbins also insisted that he was voting his "own conscience."

65. Upon the motion of Dr. Stebbins, the Board voted on whether to approve the proposed resolutions to amend the By-Laws and accept the settlement. Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Mr. Hartman, Dr. Marshall and Dr. Stebbins voted in favor. Mrs. Terra and Dr. Tucker voted against.

66. Members of the Board of Directors of the Terra Foundation have statutory and common law fiduciary duties to the Foundation. These duties include, but are not limited to, the duty of loyalty, which encompasses the duty to avoid conflicts of interest and to

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act in the best interests of the Foundation; the duty of obedience to purpose, which prohibits action contrary to the purposes for which Foundation was established; and the duty to use the Foundation's assets productively and not to waste Foundation assets.

67. At least two members of the Board who voted in favor of the proposed settlement were faced with a conflict of interest. Dr. Marshall expressly acknowledged that the Attorney General, the primary beneficiary of the settlement transaction, was conducting an investigation of the publicly-funded institution of which Dr. Marshall is president. Dr. Marshall reasonably could expect her vote on the settlement to influence the outcome of that investigation, either positively or negatively.

68. Dr. Stebbins also had strong personal incentives to support the settlement to the detriment of the Foundation. During the course of the litigation and corresponding public scrutiny of the Foundation's operations, he had faced charges of serious lapses of professional responsibility. In acknowledging his abhorrence of the Attorney General's tactics and vociferously defending his reputation and integrity immediately prior to the vote, Dr. Stebbins plainly identified his conflict of interest. If the mediation was unsuccessful, Dr. Stebbins would become a defendant in the case and face personal liability. Only through settlement could Dr. Stebbins hope to avoid more scrutiny which carried the threat of a potentially devastating effect on his career.

69. The Foundation's bylaws can be amended only "by a majority of the directors then in office and present" at the meeting at which the vote is taken. Because eight members of the Board were present at the June 29, 2001 meeting, the affirmative vote of five directors was required to approve the Proposed Settlement's many bylaw changes. Without the votes of Dr. Stebbins and Dr. Marshall, the Proposed Settlement garnered

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only four votes.

70. Each Board member who voted in favor of the settlement did so in violation of their fiduciary duty of obedience to the Foundation's purpose. Restricting the Foundation's art collection to isolation in Chicago for 50 years and installing a majority of Illinois residents on its Board is directly contrary to the Foundation's stated purpose in its Articles of Incorporation to "expand the artistic horizons of a growing art public" and to "operate museums and schools, both in the United States and abroad." Articles of Incorporation (Aug. 26, 1994) (emphasis added).

71. The Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry. Indeed, the problems of the 50-year lock-in and Illinois-majority provisions were identified by Dr. Marshall prior to her conflict of interest arising. In her letter of May 20, 2001, she stated that because of the Foundation's "intentional national and international outreach and presence," she did "not believe any specifically defined constituency should hold a reserved majority." Dr. Marshall acknowledged that a 50-year lock-in would be a relinquishment of the Board's power to govern the Foundation when she stated that "[a]fter the stipulated period, it is the Board of the Foundation that must make decisions regarding the Foundation's future."

72. Each Board member who voted in favor of the proposed settlement also violated a duty not to waste the Foundation's assets. By eliminating the possibility of merger or partnership with a non-Chicago institution, the Board accepted a undue limitation on its negotiating power. By limiting the field of competitors for the Terra relationship, the Board would waste all the benefits that would flow from that competition, and in

particular the ability to secure the most attractive possible terms for the future and for the collection to have the greatest possible impact on the art world and public education.

73. The Foundation has benefited tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a major Parisian art museum. Yet the Board majority voted in favor of a settlement under which the Foundation would forfeit the benefit of such experts in favor of a board packed with individuals whose chief virtue is that they are residents of Illinois. By limiting the pool of talent from which the Board can recruit directors, the Board would waste its opportunity to secure the best and most experienced leadership.

74. Locking the Foundation into Chicago for 50 years or any other length of time and stacking the Board with Illinois residents dangerously compromises the Foundation's flexibility to fulfill its charter. There is absolutely no guarantee that the Chicago community will provide adequate support to the Foundation over such a long period of time. If the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract the maximum possible interest.

CLAIMS FOR RELIEF

Count I - Declaratory Relief

75. All foregoing paragraphs are incorporated herein by reference.

76. An actual and justiciable controversy exits between the parties as defined by 735 ILCS 5/2-701.

77. As directors of the Terra Foundation, Plaintiffs have donated their time, efforts and resources to accomplish the mission of the Foundation.

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78. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

79. The conduct of the Defendants alleged herein has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

80. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count II - *Ultra Vires* Acts (805 ILCS 105/103.15)

81. All foregoing paragraphs are incorporated herein by reference.

82. The resolutions approved by six members of the Board of the Foundation on June 29, 2001, constitute acts of the Foundation taken in contravention of its Articles of Incorporation and By-Laws, and thus taken without lawful authority, capacity or power.

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83. The court should enjoin the doing of such acts in this proceeding pursuant to the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a).

Prayer for Relief

Plaintiffs request that this Court to enter judgment as follows:

(a) an Order enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation;

(b) Damages in an amount to be determined at trial;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Count III - Breach of Fiduciary Duty

84. All foregoing paragraphs are incorporated herein by reference.

85. A fiduciary relationship exists between the Foundation and the members of its Board of Directors. The Board's fiduciary duties include, without limitation, the duties of acting in good faith and with due regard for the Foundation's interest, of refraining from acting in a manner adverse to the Foundation's interest, of making full disclosure of all material information in their possession, of obedience to the Foundation's purposes as established by its Articles of Incorporation, of making productive use of the Foundation's assets and opportunities, and the duties of care, loyalty, fair dealing, and honesty.

86. The Defendant Board Members who voted in favor of the proposed settlement willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation.

87. In addition, board members Stephanie Pace Marshall and Theodore Stebbins breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation.

88. As a direct and proximate result of these breaches of fiduciary duty, the plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count IV - Inducing Breach of Fiduciary Duty

89. All foregoing paragraphs are incorporated herein by reference.

90. As set forth above, the Defendant members of the Board who voted in favor of the proposed settlement of this litigation did so in violation of their fiduciary duties to the Foundation.

91. Attorney General Ryan and Assistant Attorney General Perkins colluded with these Board members in committing breach of their fiduciary duties, or otherwise induced or participated in such breach.

92. As a direct and proximate result of this conduct, Plaintiffs and the Foundation have suffered injury.

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Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Punitive damages;

(d) Such other relief as may be just and proper.

Count V - Deprivation Under Color of Law of Constitutional Rights (42 U.S.C. § 1983)

93. All foregoing paragraphs are incorporated herein by reference.

94. At all relevant times, Attorney General Ryan and Assistant Attorney General Perkins acted under color of law as Assistant Attorney General of the State of Illinois.

95. Mr. Perkins' conduct constitutes an unlawful deprivation of the Foundation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

96. The conduct of the Attorney General and Assistant Attorney General constitutes an unlawful deprivation of the Foundation's rights to freedom of speech under the First Amendment to the Constitution of the United States.

97. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful restraint by the State of Illinois on interstate commerce in violation of Art. I, § 8 of the Constitution of the United States.

98. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful impairment of the Foundation's contractual obligations in violation of Art. I, § 9 of the Constitution of the United States.

16di-004069

99. The Attorney General and Assistant Attorney General engaged in such illegal conduct to the injury of Plaintiffs and the Foundation.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Jury Trial Requested

100. Plaintiffs request trial by jury.

16di-004070

Dated: July 31, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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Attorneys for Plaintiffs

16di-004071

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Orange County
Silicon Valley
Vilnius
Washington, D.C.

MCDERMOTT, WILL & EMERY

September 21, 2001

All Counsel of Record

Re: Tucker v. Buntrock
Case No. 01 L 9112

Dear Counsel:

Enclosed are copies of our handwritten Motion of Defendant Stephanie Pace Marshall for Substitution of Judge as of Right and the two orders by Judge Bush granting this motion, which were entered and filed today. If you have any questions, please do not hesitate to call me.

Very truly yours,

William P. Schuman, P.C.

WPS:mes
Enclosure

CHI99 3787040-1.060885.0012

QUINLAN & CARROLL, LTD.

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WRITER'S DIRECT DIAL NO.

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AFFILIATES:
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WASHINGTON, D.C.

HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

September 19, 2001

VIA MESSENGER DELIVERY
The Honorable Dorothy K. Kinnaird
Circuit Court of Cook County
Chancery Division
2302 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Paul Hayes Tucker, et al. v. Dean Buntrock, et al.***
No. 01 L 009112

Dear Judge Kinnaird:

Enclosed please find a courtesy copy of the Opposition to Plaintiff's Motion for Substitution of Judge as a Matter of Right that was filed today in the above-referenced matter. Pursuant to plaintiff's notice of motion, plaintiff's motion is scheduled to be presented to this Court on September 20, 2001 at 11:00 a.m. Also enclosed, please find copies of all case law cited in the Opposition.

Very truly yours,

William R. Quinlan

WRQ/jmm
Enclosure

cc: Attached Service List

Doc:182975

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

SERVICE LIST

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Assistant Attorney General
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William Schuman
Debra Tucker
McDermott Will & Emery
227 W. Monroe Street, 55th Floor
Chicago, IL 60606

Doc:182987

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on September 19, 2001, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **Opposition to Plaintiff's Motion for**

16di-004075

Substitution of Judge as a Matter of Right, a copy of which is attached and hereby served upon you.

Respectfully submitted,

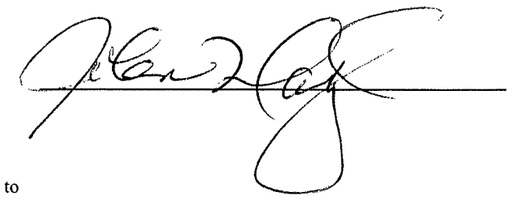
By: Lisa M. Hegedus

Counsel for Dean Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman
William R. Quinlan
James R. Carroll
Lisa M. Hegedus
QUINLAN & CARROLL, LTD.
30 North LaSalle Street, 29th Floor
Chicago, Illinois 60602
(312) 263-0900
Firm ID # 38600

Counsel for Theodore Stebbins
William Schuman
Debra Tucker
MCDERMOTT WILL & EMERY
227 West Monroe Street, 55th Floor
Chicago, IL 60606
(312) 372-2000

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and correct copies of the attached **Notice of Filing** and **Opposition to Plaintiff's Motion for Substitution of Judge as a Matter of Right**, to be served on the attorneys listed on the attached service list on September 19, 2001 by messenger delivery before 5:00 p.m.



[X] Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth herein are true and correct.

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

SERVICE LIST

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VIA U.S. Mail
K. Chris Todd
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William Schuman
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227 W. Monroe Street, 55th Floor
Chicago, IL 60606

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	
Defendants.	)	

TERRA FOUNDATION FOR THE ARTS' OPPOSITION TO MRS. TERRA'S MOTION FOR SUBSTITUTION OF JUDGE

Defendant Terra Foundation for the Arts (the "Foundation"), by its attorneys, submits its Opposition to Mrs. Terra's Motion for Substitution of Judge. In support of its Opposition, the Foundation states as follows:

1. Mrs. Terra's motion for substitution of judge is just another attempt to backdoor her previously rejected claims into yet another forum with the hopes of finally finding one that is favorable to her. In this regard, Mrs. Terra continues to engage in obvious forum and judge shopping which this Court should not condone.

2. After having failed on numerous attempts to convince this Court to permit them leave to file "counterclaims" and to overturn the agreed settlement entered into in *Buntrock, et al. v. Terra, et al.*, Case No. 00 CH 13859, Mrs. Terra, Dr. Tucker and Senator Simpson filed a complaint in the Law Division, *Tucker, et al. v. Buntrock, et al.*, Case No. 01 L 009112, in the hopes of finding a judge who might rule in their favor. Seeing through this tactic, Judge Mary Mulhern, the interim Chief Judge of the Law Division, ruled that Mrs. Terra's "new" complaint was, in fact, related to the *Buntrock* matter currently pending before this Court and ordered that the *Tucker* matter be transferred back to the Chief Judge of the Chancery Division "for reassignment to Judge Kinnaird." (9/17/01 Order, attached hereto as Exhibit A).

Mrs. Terra's Claims are Nothing More than a Collateral Attack on the Judgment Entered in the *Buntrock v. Terra* Matter

3. A party may only exercise her right to a substitution of judge without cause "before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2)(ii) (emphasis added). Mrs. Terra simply cannot meet this requirement here. There is no question that this Court has already ruled on numerous "substantial issues" in this case, not the least of which is the entry of a Consent Judgment and Order which resolved any claims Mrs. Terra may have purportedly alleged in the *Tucker* complaint that the Consent Judgment and Order and the settlement it embodied was somehow invalid.

4. Mrs. Terra lost her arguments regarding the invalidity of the Consent Judgment and Order before this Court. She certainly has the opportunity to argue that the Consent Judgment is invalid for some reason or make any other arguments she wishes through the appeal process. Indeed, Mrs. Terra filed a Notice of Appeal of this Court's entry of the Consent Judgment and Order on August 22, 2001.

16di-004081

5. However, rather than simply making her arguments in the Appellate Court and waiting for a ruling, Mrs. Terra has also attempted to take a second bite of the apple by filing an entirely "new" lawsuit purportedly raising the same issues which this Court rejected in entering the Consent Judgment and Order in the hopes of having a new trial court judge hear those issues again. This is nothing more than an improper horizontal appeal of this Court's entry of the Consent Judgment and Order. Judge Mulhern's transfer order recognized that this "new" lawsuit is nothing more than the same old claims objecting to the Foundation's decision to enter into the settlement. Accordingly, Judge Mulhern ordered the matter transferred back to the Chancery Division for assignment to Judge Kinnaird. Mrs. Terra now tries yet again to remove Judge Kinnaird by filing her motion to substitute under the mistaken assumption that she is somehow "entitled" to such a substitution at this time. She simply is not.

6. The claims made in the *Tucker* complaint are part and parcel of the claims made and rejected in the *Buntrock* matter as Judge Mulhern recognized in finding that Cause No. 01 L 009112 was related to Cause No. 00 CH 13859 and ordering that it be sent back to Judge Kinnaird. Indeed, the vast majority of the allegations contained in the *Tucker* complaint have already been adjudicated by this Court in the *Buntrock* matter - namely, the validity of the Consent Judgment and whether the Attorney General "coerced" certain Directors to vote in favor of the Consent Judgment. It is irrelevant that those rulings took place in the *Buntrock* case rather than in the *Tucker* case. (*See Marshall Savings & Loan Ass'n v. Henson*, 78 Ill. App. 2d 14, 21 (1st Dist. 1966) (holding that plaintiff's petition for substitution of judge was properly denied where the court had already ruled on substantive issues in a related matter involving generally the same parties and issues)). This Court has already made substantive rulings on the

issues raised in the *Tucker* complaint and therefore Mrs. Terra's motion for substitution of judge is not timely under Section 2-1001(a)(2)(ii).

7. Mrs. Terra's attempt to judge-shop by creating a supposedly "new" lawsuit out of her previously denied counterclaims and then claiming a supposed right to a substitution of judge should be seen for what it is: a tactical maneuver which should not be countenanced by this Court. To do otherwise would permit litigants to simply create and file new lawsuits every time a judge rules contrary to their position. Section 2-1001(a)(2)(ii) should not be permitted to be used as a tool for such an absurd result.

Allowing Mrs. Terra to Substitute Judges Would Render this Court's General Order Regarding Related Cases Meaningless.

8. Even if Mrs. Terra can convince this Court to accept her view that the *Tucker* matter is "technically" a new case, Mrs. Terra is nevertheless not entitled to a substitution of judge at this point.

9. Circuit Court of Cook County General Order No. 22 provides that "In order to conserve judicial resources and promote efficiency in the administration of the Circuit Court . . . the Circuit Court may assign or reassign related cases to a single judge whenever it serves the convenience of interested parties and the court." As Judge Mulhern has already ruled, the *Tucker* and *Buntrock* matters are related and accordingly the *Tucker* matter was transferred back to this Court. The purpose of the Order is to promote judicial economy by allowing judges who are intimately familiar with the history, facts and issues surrounding particular matters to use that unique knowledge and insight to foster the efficient adjudication of related cases. This not only conserves judicial resources but prevents inconsistent rulings. To grant parties permission to disregard that Order by simply filing a motion for substitution of judge is wholly inconsistent with the stated purpose of the Order. Permitting Mrs. Terra to now take a

substitution of judge would totally circumvent the purpose for which General Order No. 22 was designed and would essentially render the Order meaningless. For that reason alone, her motion should be denied.

This Court Has Already Rendered an Opinion on the Allegations Contained in the *Tucker* Case

10. A petition for substitution of judge "must be brought at the earliest practical moment in order to prevent a litigant from seeking a change of judge only after he has formed an opinion that the judge may be unfavorably disposed toward his cause." *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 338 (1st Dist. 2001). The statutory right to a substitution of judge "does not exist beyond the time at which the judge has indicated a position . . . in the cause." *Barnes v. The Peoples Gas Light & Coke Co.*, 103 Ill. App. 2d 425, 428 (1st Dist. 1968). A party cannot simply "judge shop until he finds a jurist who is favorably disposed to his cause of action." *In re Marriage of Petersen*, 319 Ill. App. 3d at 338; *Hader v. St. Louis Southwestern Ry. Co.*, 207 Ill. App. 3d 1001, 1008 (5th Dist. 1991); *Paschen Contractors, Inc. v. Ill. State Toll Hwy. Authority*, 225 Ill. App. 3d 930, 937 (2nd Dist. 1992). Even when the court has not ruled on a substantial issue, a motion for substitution may be denied "if the movant had the opportunity to test the waters and form an opinion as to the court's reaction to his claims." *In re Marriage of Petersen*, 319 Ill. App. 3d at 338. Any other construction "would subvert the whole trial system." *Barnes*, 103 Ill. App. 2d at 428.

11. Mrs. Terra had more than an "opportunity to test the waters" in this case. There is no question that this Court has already ruled on issues in these related cases and has expressed her opinion that she finds Mrs. Terra's claims regarding the Consent Judgment questionable. As this Court stated in the July 24th hearing, "The counterclaim, as I see it, in many parts has a lot of defects to it." (7/24/01 Transcript of Proceedings, p. 129, attached hereto

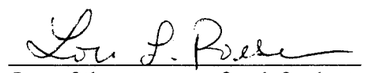
16di-004084

as Exhibit B). In filing the *Tucker* matter, Mrs. Terra simply took her "defective counterclaim" and re-labeled it as a "new" complaint. In this regard, Mrs. Terra certainly has an indication as to how this Court views her allegations. Considering this, it is no wonder that Mrs. Terra now seeks to find a new judge. Unfortunately for Mrs. Terra, however, it is simply too late. *See Marshall Savings & Loan Ass'n,* 78 Ill. App. 2d at 21.

Conclusion

12. For the foregoing reasons, defendant Terra Foundation for the Arts respectfully requests that this Court deny Mrs. Terra's Motion for Substitution of Judge.

Respectfully submitted,



One of the attorneys for defendant
Terra Foundation for the Arts

William F. Conlon
Stephen C. Carlson
Susan A. Stone
Lori L. Roeser
Sidley Austin Brown & Wood
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Chicago, IL 60603
Firm No.: 38315

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

TUCKER et.al.

v.

BUNTROCK et al.

NO. 01 L 009112

ORDER

THIS MATTER COMING BEFORE THE COURT ON THE ATTORNEY GENERAL'S AND BUNTROCK, DOLL, GIKOWITZ HARTMAN & DOLEY'S ALONG WITH STROBINS & MARSHALL'S MOTION FOR TRANSFER BASED ON CASE FILED IN THE WRONG DIVISION AND ON RELATEDNESS, THE COURT BEING FULLY ADVISED IN ITS PREMISES, IT IS HEREBY ORDERED THAT:

1. THE MOTION TO TRANSFER IS HEREBY GRANTED AND THIS MATTER IS TRANSFERRED INSTANTER TO THE CHIEF JUDGE OF THE CHANCERY DIVISION FOR REASSIGNMENT TO JUDGE KINNAIRD FOR THE REASONS STATED OF RECORD IN OPEN COURT
2. PLAINTIFFS RESERVE THE RIGHT TO OBJECT TO SUCH TRANSFER.

Atty No. 33745
Name J. CARROLL QUINLAN & CARROLL
Attorney for Defendant BUNTROCK et al
Address 30 N. LaSalle ST Suite 2900
City / Zip CHICAGO, ILLINOIS 60602
Telephone (312) 263-0900

JUDGE MARY MULHERN

SEP 17 2001

ENTER: Circuit Court 1703

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.
AND
THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

No. 00 CH 13859

REPORT OF PROCEEDINGS had in the above-entitled cause, before the HONORABLE DOROTHY KIRIE KINNAIRD, Judge of said Court, in Courtroom 2302, on the 24th day of July, A.D. 2001, at the approximate hour of 4:30 o'clock p.m.

HOWARD N. REISMAN COURT REPORTING SERVICE, LTD.

also, in the Consent Judgment and Order, if they filed an answer, or it can be in a separate document granting them leave to file an answer.

I do have a problem allowing the filing in this case of the proposed counterclaim. This Consent Judgment, once its signed, and it will be the next -- it will be the document that I sign after I have signed all the orders that release all these things that are under seal.

Once this document is signed, this case will be over. All claims that the plaintiffs have brought will be dismissed with prejudice. And this litigation will be done.

The counterclaim, as I see it, in many parts has a lot of defects to it, not the least of which is against people that aren't even parties to the case; and they have to be added as parties in order to be counterclaimed against. However, I question whether valid causes of action that flow from the main case are, in fact, what's alleged in this counterclaim.

So I am going to be entering an order, shall we call it the third order or fourth, denying the defendants leave to file the counterclaim in

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on September 20, 2001 by hand delivery upon the following Chicago counsel and by United States mail upon the following out of state counsel:

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James R. Carroll
Quinlan & Crisham, Ltd.
30 N. LaSalle Street
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Floyd D. Perkins
Assistant Attorney General
Charitable Trusts
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William P. Schuman
Debra Tucker
McDermott Will & Emery
227 W. Monroe Street
Chicago, IL 60606

Lori L. Roeser

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; et al.,
Plaintiffs

-vs-

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; et al.,
Defendants.

No. 01 L 009112
Trans. to Chancery

Record of proceedings before the Honorable DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County, Illinois, commencing at 3:10 o'clock p.m. on the 20th day of September, A.D. 2001.

A P P E A R A N C E S :

CUMMINS & CRONIN by
MR. ROBERT P. CUMMINS
MR. THOMAS C. CRONIN
77 West Wacker Drive
Suite 4800
Chicago, Illinois 60601
(312) 578-0500

on behalf of the Plaintiffs;

QUINLAN & CARROLL, LTD. by
MR. JAMES R. CARROLL
MS. CHERYL NIRO
30 North LaSalle Street
Suite 2900
Chicago, Illinois 60602
(312) 263-0900

on behalf of the Defendants Dean Buntrock, Ronald Gidwitz, Margaret Daley, and Arthur Hartman;

McDERMOTT, WILL & EMERY by
MR. WILLIAM P. SCHUMAN, P.C.
227 West Monroe Street
Chicago, Illinois 60606
(312) 984-7716

on behalf of the Defendants Stephanie Pace Marshall and Theodore Stebbins;

OFFICE OF THE ATTORNEY GENERAL by
MR. THOMAS A. IOPPOLO
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-6213

on behalf of the Defendants James E. Ryan and Floyd D. Perkins;

SIDLEY, AUSTIN, BROWN & WOOD by
MS. SUSAN A. STONE
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7384

on behalf of the Defendants Terra Foundation and Sidley & Austin.

* * * * *

(Whereupon, the following proceedings were held in court.)

THE COURT: Okay. We just called 01 CH 9112 which is a new case on my calendar as of, I guess, this morning.

MR. CUMMINS: I think it's 01 L, Judge.

THE COURT: I'm sorry, 01 L 9112.

MR. CUMMINS: Your Honor --

THE COURT: And who represents plaintiffs?

MR. CUMMINS: Robert Cummins on behalf of the plaintiffs, Tucker, Terra, and Simpson, Your Honor.

MR. CRONIN: Thomas Cronin, also on behalf of plaintiffs.

THE COURT: Okay. And we have some defendants in this case. Let's go in order. Who is representing Defendants Buntrock and Gidwitz and anybody else?

MR. CARROLL: Actually, Your Honor, yes. It's James Carroll and Cheryl Niro on behalf of the Directors Buntrock, Gidwitz, Daley, and Hartman, Your Honor.

THE COURT: Okay. So you've got four. And have you filed an appearance?

MR. CARROLL: I'm not really sure, Your Honor. I don't think -- I don't think we have yet, Your Honor.

THE COURT: Have you been served with the Complaint?

MR. CARROLL: Your Honor, we've waived service of the Complaint and accepted service on that.

THE COURT: Okay. So you are representing the first four named defendants?

MR. CARROLL: Yes, Your Honor.

THE COURT: Okay. Is there anybody in the courtroom who is representing Defendant Stephanie Pace Marshall?

MR. SCHUMAN: Yes, Your Honor, I am. William Schumann from McDermott, Will & Emery on behalf of both Dr. Stephanie Pace Marshall and Dr. Theodore Stebbins. And we have filed our appearances. We accepted service and process on behalf of them.

THE COURT: Okay. And let me see who else I've got in this cast. I have the Terra Foundation for the Arts. Three guesses. I bet that's you, Ms. Stone.

MS. STONE: It is until you say it's not, Your Honor. Susan Stone, Sidley, Austin on behalf of the Terra Foundation.

THE COURT: Okay. And I have the Attorney General and Mr. Perkins. Mr. Perkins is a defendant.

Who's representing him?

MR. IOPPOLO: I am, Your Honor. Tom Ioppolo, I-o-p-p-o-l-o, on behalf of Mr. Perkins and the Attorney General.

THE COURT: Okay. This case is originally filed in the Law Division. It was sent by Judge Gardner in the Law Division. I think -- unless I'm wrong -- he sent it himself to the Presiding Judge in the Law Division to make a decision as to where it should be assigned, and you had some kind of a hearing over there --

MR. CARROLL: On Monday, Your Honor.

THE COURT: -- in front of Judge Mulhern?

MR. CARROLL: As the Acting Chief of division.

THE COURT: And I take it it was not all by agreement, right? Is that right? It wasn't an amicable hearing or whatever?

MR. CUMMINS: Here's the odyssey if you will, Judge.

THE COURT: It went then from Judge Mulhern who did not consolidate the cases but assigned this case back to the Presiding Judge of the Chancery to be assigned to me as a related case under Rule 22? Is that what we're dealing with here?

MR. CARROLL: Yes, Your Honor.

THE COURT: Do I have that right, Mr. Cummins? It's Rule 22?

MR. CUMMINS: I don't think -- we believe that Judge Mulhern's ruling was in error.

What happened, just to clear up the record, Judge, the matter was assigned to Judge Gardner. There was a hearing before Judge Gardner on the 13th of August, at which point he transferred the case to Judge Evans. There was a subsequent appearance before Judge Evans where a briefing schedule was established. A number of briefs were filed with respect to the issue of transfer. There are also two other motions pending in the Law Division case that aren't before Your Honor, or aren't on the call today. That case was then set for disposition by Judge Evans, who then handed it off to Judge Mulhern, who then ruled and entered the order that you have in front of you.

And our motion today is simply for substitution of judge.

THE COURT: Okay. But we've got some rules of the court. There's Rule 22, and there's Rule 12. And Rule 12 makes cases consolidated.

MR. CUMMINS: There's no consolidation.

THE COURT: And Rule 22 assigns a case to a judge who has a similar case.

MR. CUMMINS: That's the -- it was the latter, Judge.

THE COURT: I want to make sure that that's what we're here on.

MR. CUMMINS: That's what she ruled but that, we believe, is in error. But that's okay.

THE COURT: So you thought it should have been consolidated?

MR. CUMMINS: No. No. We just don't think it should have been transferred at all. There's no consolidation.

MS. STONE: Just so the record is complete, Your Honor, Your Honor is right that she ruled pursuant to General Order 22.

THE COURT: Okay.

MS. STONE: However, she did also state, and I believe it's on page 35 of the transcript, and I unfortunately did not in my case have a copy with me, she did say that she believed these cases are related if not identical. So she did make that statement, Your Honor.

THE COURT: Okay. Now, I have a Motion for Substitution of Judge as a matter of right.

MR. CUMMINS: Yes.

THE COURT: It's a brand new case, by case name and by case number. And it has some of the same parties we had before. It has some of the same counsel that we had before. And it also has some new parties.

If I remember correctly, the Complaint is in three or four counts, and each of the three or four counts stems from and relates to my case. Is that correct? It all comes down to my case. I mean, there's not like a new fact pattern. There's nothing that came out that --

MR. CUMMINS: Well, I wouldn't characterize it that way. I would say that the -- that the gravamen of the Complaint, and the various counts, arises from the unlawful conduct of certain Directors, of the Attorney General of the State of Illinois, which, in part, was implemented in earlier litigation before this Court, yes. That case, having been concluded by a settlement, now in the Appellate Court.

THE COURT: Did anything that is complained of in case number 01 have anything unrelated to do with my

case?

MS. STONE: No. And in fact --

THE COURT: I'm asking Mr. Cummins.

MS. STONE: Okay.

THE COURT: Tell me something different. I just -- I delayed my people that were supposed to be here at 2:30. I had a little bit of trouble getting a copy of the Complaint. Fortunately, one of you had attached it to the --

MR. CARROLL: We did, Your Honor.

THE COURT: -- opposition on the substitution, and so I read that copy quickly because I had read an outline of that before, and I have not seen anything that doesn't come out of my case or come out of the mediation process or anything.

MR. CUMMINS: Well, there are claims against parties who were not part of that litigation, weren't even part of the Terra Foundation. They still aren't, in our view. We were denied leave to file claims in your case.

THE COURT: I'm sorry, just help me out. I've got two different headings here.

MR. CUMMINS: Yeah.

THE COURT: I've got a heading with a whole bunch

of people. Donnelley. New Board members. And then I've got a heading that doesn't have all those people. What's the right heading? Is there an Amended Complaint?

MR. CUMMINS: There's an Amended Complaint. Leave has been sought to file that. We believed it was filed. There's an issue about that.

THE COURT: They're shaking their head and they're saying the Amended Complaint was never filed.

MR. CARROLL: That's correct, Your Honor.

MR. CUMMINS: Here's why --

MS. STONE: No leave was granted. They sought leave. That was not granted. That was entered -- their Motion for Leave to File was entered and continued. So the Amended Complaint, the proposed Amended Complaint, is not -- has not been granted leave to have been filed.

THE COURT: Does somebody have a piece of paper that shows that leave was granted to file an Amended Complaint?

MR. CUMMINS: Let me --

MR. CARROLL: Your Honor, we can get the order because the order clearly says it was entered and continued. Mr. Cummins is going to say that in an

off the record conversation it was granted. But at the end of the on record hearing --

THE COURT: How can it be granted in an off the record conversation?

MR. CARROLL: That's exactly the point.

THE COURT: It can only be done in a Court order.

MR. CUMMINS: Mr. Cummins isn't speaking.

THE COURT: Mr. Cummins, do you have an order that says --

MR. CUMMINS: I have a transcript, Judge. Let me tell you what the --

THE COURT: I don't go by transcripts. I've got to go by signed orders. Was there an order granting anybody leave to file an Amended Complaint?

MR. CUMMINS: Was there an order? No, there is not an order.

THE COURT: When you got over to Judge Evans and eventually to Judge Mulhern or whatever, did any of them sign an order granting leave?

MR. CARROLL: No, Your Honor.

THE COURT: So I don't have to worry right now that Mr. Donnelley, Ms. Forster, Mr. Hamada, and all these other people aren't properly represented by counsel because I don't have them as parties right

now. Is that right?

MS. STONE: Right.

MR. SCHUMAN: That's right.

THE COURT: And I don't have to worry about Winston & Strawn right now because they're not parties.

MS. STONE: And you don't have to worry about Sidley, Your Honor.

MR. CARROLL: I have an order from the Court that day which at the last paragraph, if you'll notice, enters and continues the Motion for Leave to File the Amended Complaint. And it was on Mr. Novoselsky's motion.

THE COURT: As much as I would like nothing better, probably, than to grant Mr. Cummins' motion, I think that based on the Complaint that I have, there is nothing here that's anything other than is coming out of my case.

MR. CUMMINS: Your Honor, most respectfully, first of all, I don't think anything's funny about this.

THE COURT: Well, I don't think it's funny either.

MR. CUMMINS: Well, there was a lot of laughter

when you made that observation. I don't think it's funny. And I'm going to say something, Your Honor.

THE COURT: I'm trying to make things easy for all of us and for me, too. And the easiest thing for me to do would be to say, substitution. Go someplace else.

MR. CUMMINS: That's your obligation, most respectfully.

THE COURT: Well, I understand that's the way you read the statute. And I have read what they have said in their responses. Now, I understand there's some urgency today and so you want us all to stop everything for this because you want to have some type of a hearing on some kind of a motion tomorrow. Is that correct?

MR. CUMMINS: Let me --

THE COURT: Sir, I'm trying to do some scheduling, too.

MR. CUMMINS: Yes. Is that correct? Yes, Your Honor, it's correct. And I'll explain why it's correct.

THE COURT: And I want to be able to give you as full of a hearing on your motion for substitution and your cases if you want me to.

However, you have to understand. They have both filed responses. One of the responses just came in this morning. I haven't read the Terra Foundation's response. I was here with you on another case 'til almost 1:00 and was delayed for a meeting for the new judge seminar, which I know you are familiar with, sir, and didn't get to that meeting for an hour. I was late an hour to that meeting. I have just returned from that meeting, and I still haven't read their cases.

MR. CUMMINS: All right. Here's my dilemma.

THE COURT: If you want this heard and you want it heard and have a full opportunity to argue, I'll have to do it tomorrow.

MR. CUMMINS: All right, Judge. Here's the problem. And I -- and you put -- and, you know, they made a tactical move, and I understand tactics.

THE COURT: I'm sorry, what is their tactical move?

MR. CUMMINS: A meeting of the Terra Foundation, which we sought to enjoin before Judge Gardner on the 13th. And here's the transcript of that proceeding.

THE COURT: Okay.

MR. CUMMINS: I've given everybody that.

We filed an Emergency Motion for a Temporary Restraining Order. And the reason -- and here's the Emergency Motion for the Temporary Restraining Order. It was agreed and understood that no meeting would go forward. We withdrew our motion as moot at that point. We now have a situation where yesterday, my clients received an agenda of items attempting to do exactly what we sought to enjoin on August 13 but which the various defendants, and Mr. Quinlan was one of the most articulate on the subject, said, okay, we won't do anything without appropriate notice.

We believe that our Motion for Temporary Restraining Order is well founded. That there should be no meeting tomorrow for the various reasons we set forth. You're unfamiliar with those. Here's what I don't want to get into the trick bag on. I want the meeting tomorrow stopped because we're entitled to that emergency relief. And I can persuade you on that. If everybody's --

THE COURT: You don't want to persuade me. You want to persuade someone else. So first we have to go through the issue of substitution of judge. And if you want it done right, I have to read this stuff.

MR. CUMMINS: Well, then can we have an agreement

of all these parties that if you hear the Motion for the Temporary Restraining Order, that -- the meeting is tomorrow at 10:00. That's the schedule. If you hear that, we don't waive our right to substitution by statute as it's set forth in our motion.

THE COURT: Is there a meeting tomorrow?

MS. STONE: There is a meeting tomorrow, Your Honor. 10:00. Notice was --

THE COURT: When was it scheduled?

MS. STONE: Pardon?

THE COURT: When was it scheduled?

MS. STONE: You man when was the notice sent out?

THE COURT: Yes.

MS. STONE: It was sent out by messenger on the 7th and -- I'm sorry, messengered to people on the 7th. Fed Ex'd to people on the 6th with delivery on the 7th.

MR. CUMMINS: That's incorrect. Our clients received the information last evening. There was no agenda sent of any kind or character. And Ms. Stone --

THE COURT: Ms. Stone, you're holding something up. What are you holding?

MS. STONE: Yes. I have the Federal Express

receipts showing when the notice was given. An agenda is not required under the Bylaws, Your Honor. The agenda is done as a courtesy so that the Board members can more efficiently conduct the Board meeting.

The point is, Your Honor, there is no stay in place as Mrs. Terra, Dr. Tucker, and Senator Simpson pursue their appeal. In other words, you have granted and entered the Consent Judgment --

MR. CUMMINS: Well, now we're arguing the --

MS. STONE: Excuse me.

MR. CUMMINS: We're now arguing the TRO.

MS. STONE: Excuse me.

MR. CUMMINS: The question is whether there's a meeting tomorrow scheduled? Yes. Did we get proper notice? No. Did we get notice consistent with what was represented to Judge Gardner? No.

MS. STONE: Your Honor, may I be permitted to finish?

THE COURT: Yes, please finish.

MS. STONE: And I would ask if the Court could remind counsel that it is impolite to interrupt other counsel.

MR. CUMMINS: I don't need --

THE COURT: I think Mr. Cummins understands manners, but we have to kind of tone the advocacy down a little bit and let her finish. Go ahead.

MS. STONE: Thank you, Your Honor.

As Your Honor has required of us on previous occasions, the Terra Foundation is carrying out business. And it has done so since Your Honor has entered the Consent Judgment on July 26. This Board meeting is the second Board meeting that is planned that will be held since the entry of your Consent Judgment. There are many very important items that have to be discussed including the budget, certain educational proposals, other matters of importance to the Board. We cannot allow the work of the Foundation to grind to a halt merely because the objectors, having had numerous opportunities to be heard, want yet another opportunity to be heard.

THE COURT: Okay. I'm a little lost on this thing that you gave me. I'm not real good at finding out these tracking directions. What piece of paper do I look at to see that Mr. -- or I'm sorry, Dr. Tucker, Senator Simpson, and Mrs. Terra got it? I see an entry on Abe Gomez.

MS. STONE: May I direct Your Honor to the right

page?

THE COURT: Sure.

MS. STONE: In addition, we also have Don Ratner here who is in charge of sending out the notice. He's also available to give testimony to Your Honor.

MR. CUMMINS: Put him on the stand -- excuse me. I apologize, Judge.

MS. STONE: If I may turn down the corners of the pages that relate to Dr. Tucker, Mrs. Terra, and Senator Simpson? Is that your question?

THE COURT: Sure. That would help. I just want to look at it for a minute.

MS. STONE: And it is my understanding, Your Honor, having spoken with Mr. Ratner, that the Federal Express packages were sent out on the 6th. Received on the 7th. Although the Directors in France received them, I believe, on the 10th. And that messengered delivery was given to folks in Chicago on the 7th.

MR. CUMMINS: Well, what's wrong with what Ms. Stone just said is there were no packages sent that my client ever received. In fact, co-counsel who represents Buntrock said that he found out about the meeting today when he got back to his office.

Those are the folks that represent Mr. Buntrock and Mr. Gidwitz.

Here is what my client got yesterday, Judge. (Handing.)

THE COURT: I'm sorry, when you say "your client," I'm looking at, for instance, shipping instruction that shows that the one that was sent Judith Terra in Washington at her address was signed for by a representative called Laverne and that it was received, notice was received, on September 7.

And in regard to Dr. Tucker, it looks like it was also signed for and there is -- I don't see the name of the signed for.

MS. STONE: I don't see the name either, Your Honor. But I think it does say the receipt date. The delivery date.

THE COURT: Okay. The same thing for Senator Simpson. And they are both received on September 7. Now --

MS. STONE: I believe the 10th, Your Honor.

MR. CUMMINS: But none of -- Judge --

THE COURT: It says delivery date September 7.

MS. STONE: I'm sorry.

MR. CUMMINS: What's critically important here,

not only in the context of the Bylaws, but in the context of the representations made before Judge Gardner when we withdrew the TRO motion, is the substance of what was purporting to be done. This was received for the first time by our client last evening. That's precisely the -- many of those items are precisely the items that were on the August 14 Board meeting that was aborted. Here's that agenda, Judge. (Handing.) And here's the material that came to my client yesterday. My client, whether or not they contend that they got some notice of some meeting that might deal with something, my client did not know until yesterday that there was going to be this attempt to try to repair what wasn't appropriately done on August 1 following the Settlement Agreement that you approved.

Let me say one other thing since we're into this now.

THE COURT: Well, I'm not into this now. I still have to decide what order I'm going to do it in, and I have to get into the merits.

MR. CUMMINS: If they will --

THE COURT: I'm just asking. There's a meeting scheduled tomorrow. You want to stop that meeting

tomorrow.

MR. CUMMINS: Yes.

THE COURT: They've known about it since September 7. You didn't know what the agenda was. You were all in front of me on the 29th and the 7th. I remember the Terra Foundation counsel saying there's absolutely nothing to stop us from meeting and having Board meetings.

MS. STONE: Right.

THE COURT: And I remember you saying, but they agreed. And I remember them saying, no, they didn't -- we didn't agree. I'm doing this from memory. I'm not doing it from anything else. And Ms. Stone is holding up right now a transcript and I assume I'm -- I hope I'm close to what the -- what happened on those days.

But is this a big surprise that they were going to continue to plan --

MR. CUMMINS: Absolutely

THE COURT: -- and meet and do these things?

MR. CUMMINS: Absolutely because it's precisely what we sought to enjoin, and they said that there would be appropriate notice given.

Now, Judge, if they wanted to have a meeting

to do something that did not necessarily involve Mr. Field and some of these other folks who have not yet been duly elected to this Board, and you know what, when Ms. Stone says -- twice now she said this in proceedings, that this Board has conducted business, well, my clients don't know about that. And there is probably --

THE COURT: Let's not get into too much merits here because we've got a Motion for Substitution.

MR. CARROLL: We're getting very far afield, Your Honor.

MR. CUMMINS: Well, you're the one -- excuse me. My colleague --

THE COURT: I'll see you tomorrow -- I'll see you tomorrow at 8:00 in the morning. Please bring your own reporter because our reporters don't start until 9:15. That will give me overnight to have a chance to read the case law that has been cited by the people who are opposing it. My initial reaction is it's a brand new case. Of course you get an automatic substitution as a matter of right. You've cited some case law that says, can't do it under grounds of forum shopping in this situation.

I've looked at the only Complaint that's of

record in this case. I'm willing to take a look at your case law based on that. And I'll let you know when I see you tomorrow morning whether the case is going to be in front of me or not. Just in case it is in front of me, I will also read overnight the Emergency Motion for a TRO.

Is there anything else you want me to read?

MR. CUMMINS: Sure.

MS. STONE: I would like Your Honor to read the transcript in front of Judge Gardner. There was no agreement --

MR. CUMMINS: The judge has that. I gave it to her.

MS. STONE: Pardon me. There was no agreement that there would never be a Board meeting. On the contrary, there was a discussion about a Board meeting taking place after an appropriate five days' notice.

THE COURT: Do I have that transcript?

MR. CUMMINS: Yes. I just gave it to you.

THE COURT: Is this the entire transcript before Judge Gardner? I can't imagine you were only over there for this amount of time.

MR. CARROLL: Yes, Your Honor.

MR. CUMMINS: There was a lot of stuff said off the record.

MS. STONE: I believe it's 15 pages long, Your Honor.

MR. CUMMINS: Well, they had all kinds of discussions off the record. That's why we'll probably have to file something on behalf of Mr. Novoselsky who was there and I wasn't.

THE COURT: Okay. Well, I will read overnight both of the oppositions. I have the cases that were cited that came over from Mr. Quinlan. The Terra Foundation, did you submit additional cases in your response?

MS. STONE: I believe many of our cases were the same. The Marshall case and the Wilsonville case.

MR. CARROLL: The Wilsonville case is the principal case.

MS. STONE: So we can send over additional copies. If there's anything additional, we'll send it to you.

THE COURT: I'm going to ask you to get them here -- well, the problem is I'm going to be leaving the building soon so I'm not going to be able to read them until 7:00 in the morning. But if you can get

them over here as soon as possible, that would be helpful.

MR. CUMMINS: I may get you some cases by 7:00 in the morning, Judge, if you will, in reply.

THE COURT: I will do the best I can to digest it. We have a lot -- don't try for 7:00 in the morning. We are under very tight security in this building, and no one can get in at that hour except me.

MR. CUMMINS: Can I fax something to you?

THE COURT: No. Anybody who wants me to read anything, have it here by 4:30 because they don't let anybody past the guards before 8:00 in the morning.

MR. CUMMINS: Well, Judge, not that I mind --

THE COURT: This isn't my emergency.

MR. CARROLL: It's not an emergency, Your Honor.

THE COURT: You want me to read this. You want me to rule for you. I'm going to do the best I can to read it and make a reasoned decision. I'm willing to leave my house tomorrow at 6:00 and come here and read your cases at 7:00. But I'm just telling you, you're not going to get 'em in the building unless you get 'em over here tonight.

MR. CUMMINS: Well, here's a simple proposition.

Here's a simple proposition. I want to give you an opportunity -- I think -- I believe you have no discretion. You have to grant us a substitution. You know that's our position. You want to give that further consideration in the context of what's been presented. I'm all for that. And I'd like to have an opportunity to sensibly reply to that. This is the tactical issue.

Now, here's what I'm suggesting. If they will all agree, if all the parties here will agree that allowing you to rule on the temporary restraining order --

THE COURT: They're not going to agree, Mr. Cummins. You can keep asking over and over, but I know. They're shaking their heads. Is anybody going to agree to that?

MR. CUMMINS: Well, of course.

MS. STONE: No.

MR. CARROLL: No.

THE COURT: If I ask you all to agree, are you going to agree to it?

MR. CARROLL: No, Your Honor.

MR. CUMMINS: Well, now you see --

THE COURT: I can't order them to agree to it.

They're not going to agree to it. So what do I do?

MR. CUMMINS: Well, you can also observe the tactics that are in play here.

MR. CARROLL: Your Honor, can I clarify a couple of things? First of all, just because I said I didn't know about the meeting, that doesn't mean my clients didn't get proper notice. And that's the issue here. Not whether the attorneys got notice.

MR. CUMMINS: He's now representing they did, of course.

MR. CARROLL: Second of all, Your Honor, this isn't an emergency matter. Talk about tactics, Mr. Cummins also has tactics at play here.

THE COURT: Let's not get into tactics. I'm just trying to figure out what the law says, and I've got to read it. So please let me read the law.

MR. CARROLL: That's fine, Your Honor.

THE COURT: And then I can tell you tomorrow morning how I interpret it. And I might be right, and I might be wrong, but I'm going to do the best I can and I'll see you at 8:00, and you need a court reporter here.

Now, you put a notebook up here. Do you want me to look at that notebook, too?

MR. CUMMINS: No, Judge.

THE COURT: Okay. Is it all right if I look at the agendas for the meeting?

MS. STONE: That's fine.

MR. CUMMINS: There is something --

THE COURT: I want to make sure I've got a Motion for Substitution. I've got the Quinlan firm's response. I've got the Terra Foundation firm's response. I've got the Quinlan cases. I'm going to get the Terra Foundation cases. I'm going to get cases from plaintiff. And do you have a response?

MR. SCHUMAN: Your Honor, we join with Quinlan's brief, in particular the Marshall case, which is probably cited as the one we think you should pay most attention to.

THE COURT: Did you file something?

MR. SCHUMAN: We're part of their brief.

MR. CARROLL: They signed onto our brief.

MR. SCHUMAN: We signed onto their brief.

MR. IOPPOLO: We have not filed anything, but I just want to join the motion -- the opposition to the substitution.

THE COURT: Okay. And then as far as the TRO, I have a Complaint and I have an Emergency Motion for a

TRO that was filed August 13.

MR. CUMMINS: And you need --

THE COURT: Yes, sir?

MR. CUMMINS: And you need a copy of this Emergency Motion to Disqualify Sidley & Austin which goes to whether or not and to what extent Sidley & Austin can speak to the issue of the temporary restraining order tomorrow.

THE COURT: Stop one moment, please. You motioned this up at 10:00 for September 17 in front of Judge Evans. Did anybody write an order about this motion?

MS. STONE: No.

MR. CUMMINS: That got entered and continued, Your Honor.

MR. CARROLL: Entered and continued, Your Honor.

MR. CUMMINS: As part of --

THE COURT: Generally?

MR. CUMMINS: -- the stuff that came to you.

MR. CARROLL: The order said entered and continued to the judge that will hear the case.

THE COURT: But it wasn't set at a particular time?

MR. CARROLL: That is correct, Your Honor.

THE COURT: It was entered and continued.

MR. CARROLL: There were four motions that were a part of that, Your Honor.

MR. CUMMINS: The reason that you have to read that is because unlike any issue that's been presented to you before, when you read Mrs. Terra's affidavit, her testimony, you will understand why Sidley & Austin cannot act as counsel in this case.

THE COURT: Okay. Did anybody ever file a response to that?

MS. STONE: No. Your Honor, it came in minutes before we walked over to the Court on Monday in front of then Presiding Judge Mulhern.

If Your Honor is not inclined to dismiss it out of hand, and we certainly hope you will --

THE COURT: I won't dismiss anything.

MR. CUMMINS: Ms. Stone can testify, Judge.

MS. STONE: Pardon me. Pardon me. Then we would like the opportunity to respond. We don't think that it is appropriate for tomorrow.

THE COURT: I can only read so much between 7:00 and 8:00 in the morning.

MS. STONE: And, Your Honor, it is not up for tomorrow. They've asked you to rule on the

Substitution of Judge and the TRO. You indicated you would hear those. The Sidley matter can be heard at a different time.

MR. CUMMINS: Well, Judge --

MS. STONE: For the record -- for the record --

THE COURT: Let's talk about the order of things when I get here in the morning.

MS. STONE: Just for the record, we have the Federal Express receipt showing that, in fact, Mr. Buntrock received notice of this on September 7.

THE COURT: Counsel, I'm going to have to leave the building in less than five minutes. I need to have an order entering and continuing the Motion for Substitution of judge to 8:00 tomorrow morning, entering and continuing -- did you just present the motion for a TRO?

MR. CUMMINS: We presented it on --

THE COURT: Did you notice it up for just now?

MR. CUMMINS: We gave everybody -- we explained the problem which was, we had to have the SOJ ruled on before we could present the Motion for Temporary Restraining Order. It's a -- it's simply a renewal of the motion that was withdrawn when the meeting was voluntarily cancelled.

MR. CARROLL: Is it the same exact motion refiled?

MR. CUMMINS: It is exactly.

THE COURT: I think the order should probably say that the Motion for a Temporary Restraining Order will be presented tomorrow morning at 8:00 upon conclusion of the Motion for Substitution.

If I grant the substitution, we've got to wait for the clerk's office to open up. We've got to get it through the system, get it through the computer, get it to another judge, and I don't want you to have an issue that you didn't have proper notice. So I want to make some reference in the order now. So please do that rather quickly because I need to leave the building and I need to leave the building with Judge Foreman and he is counting on me for the transportation and we need to leave very quickly. Thank you.

* * * * *

STATE OF ILLINOIS)
) ss:
COUNTY OF DuPAGE)

LAURA L. KOOY, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County;

That she reported in shorthand and thereafter transcribed the foregoing proceedings;

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause before the Honorable DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County.

Witness my official signature and seal as Notary Public in and for DuPage County, Illinois, on this 21st day of September, A.D. 2001.

Laura L. Kooy

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OFFICIAL SEAL
LAURA L. KOOY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-2-2003

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

SEP 26 2001

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; et al., Plaintiffs	)	
-vs-	)	No. 01 L 009112 Trans. to Chancery
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; et al., Defendants.	)	

Record of proceedings before the Honorable JUDGE DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County, Illinois, commencing at 8:00 o'clock a.m. on the 21st day of September, A.D. 2001.

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* * * * *

(Whereupon, the following proceedings were held in court.)

THE CLERK: Tucker versus Buntrock, 01 L 9112.

MR. NOVOSELSKY: Good morning, Your Honor, David Novoselsky and Robert Cummins on behalf of the plaintiffs.

MR. CARROLL: Good morning, Your Honor, James Carroll and Cheryl Niro on behalf of Defendants Buntrock, Gidwitz, Daley, and Hartman.

MS. STONE: Good morning, Your Honor, Susan Stone on behalf of the Terra Foundation.

MR. IOPPOLO: Good morning, Your Honor, Thomas Ioppolo on behalf of Mr. Perkins and Attorney General Ryan.

MR. SCHUMAN: Good morning, Your Honor, William Schuman on behalf of Dr. Stebbins and Dr. Marshall.

THE COURT: Well, Counsel, it's a couple minutes after 8:00 and I want to make sure that is everyone

here that you believe needed to be here for purposes of this hearing? I want to make sure nobody was caught in security downstairs.

MR. CARROLL: I believe Mr. Quinlan is on his way over, Your Honor, but we can proceed.

THE COURT: But you don't believe anybody's downstairs?

MR. CARROLL: Not that I'm aware of. No. They were allowing anybody to enter.

THE COURT: I was asking them to let anybody on this case to enter.

MR. NOVOSELSKY: They did, so. They asked. They were very pleasant.

MR. CUMMINS: There was essentially no security this morning.

THE COURT: When you came.

MR. CUMMINS: When I came.

THE COURT: Was there security when the rest of you came?

MR. NOVOSELSKY: Yes. In fact, they asked if we were going to Your Honor's courtroom.

THE COURT: I just wanted to find out. I had spoken to the sheriff. I had described the court reporter and asked that they let her equipment in and

to try to accommodate everybody so we would not be delayed this morning.

MR. NOVOSELSKY: We appreciate that, Your Honor.

MR. CUMMINS: Mr. Brandfonbrener's here as well, Your Honor.

THE COURT: Do you want to be identified, sir?

MR. BRANDFONBRENER: Good morning, Your Honor. Eric Brandfonbrener. I represent the five new directors.

THE COURT: Okay. I don't have five new directors in front of me right now.

MR. BRANDFONBRENER: On the L case.

THE COURT: I don't have five new directors in the L case.

MR. NOVOSELSKY: Your Honor, respectfully, you do, and we want to address that.

MR. BRANDFONBRENER: Or, let me clarify.

THE COURT: I don't have a Court order that shows that leave was granted to file an Amended Complaint. And I have what has come to me from the Law Division. And what's come to me from the Law Division is a file that shows that apparently a motion had been made for leave to file.

MR. NOVOSELSKY: Your Honor, they've all

appeared. They've all --

MR. CUMMINS: -- made jury demands.

MR. NOVOSELSKY: They've made jury demands. They joined in the Motion to Transfer.

MR. BRANDFONBRENER: We did not join in any motions.

MR. NOVOSELSKY: Excuse me. Mr. Brandfonbrener didn't. They've appeared. They've filed jury demands. Several of the new defendants have joined in the Motion to Transfer to you urging that it was the same case. They can't on one hand claim that they're not before the Court and at the same -- well, hold on. Why don't we address this.

THE COURT: I'm not saying anything. I'm looking at you.

MR. NOVOSELSKY: Well, Your Honor, made a -- I assume has made a statement which we think is incorrect, so we wanted to correct that. And we'd be happy to provide Your Honor with authority that by appearing generally before a Court and filing pleadings, which they did, which included a jury demand, you obviate the need for summons, service, or anything else. You can voluntarily appear before the Court. So therefore, you heard -- we can have it

read back to you. I appeared just said, for the five new directors. So they've appeared and they've brought themselves into this case.

THE COURT: Well, the five new directors may or may not have filed an appearance.

MR. NOVOSELSKY: They did.

THE COURT: There's no order in this case striking that appearance.

MR. NOVOSELSKY: Nor are we moving to strike it, Your Honor.

THE COURT: That appearance is of record and, Counsel, I believe was introducing himself. I was merely saying -- and you're going to have to tell me if I'm wrong -- there has been no order entered granting leave to file an Amended Complaint and there is no complaint currently on file in this case involving these folks who voluntarily came, apparently, and filed an appearance.

MR. BRANDFONBRENER: That's correct, Your Honor.

THE COURT: Is that correct, Mr. Novoselsky?

MR. NOVOSELSKY: No, ma'am. Very, respectfully. There's a question which I don't think we can get to yet because I don't believe we can go behind the motion for change. If Your Honor insists that I go

behind the motion for change --

THE COURT: I'm not insisting on anything.

MR. NOVOSELSKY: Then I respectfully disagree with Your Honor. There was an Amended Complaint filed. Judge Gardner gave us leave to do so. There was a question as to the Order, which we never resolved. Everybody can shake their head all they want, Your Honor. I'm trying to answer the Court's questions. I'm also suggesting the Court cannot go behind the motion, and I don't want to waive anything.

THE COURT: Counsel, just so I have records, your name again is?

MR. NOVOSELSKY: David Novoselsky.

THE COURT: Your name again?

MR. BRANDFONBRENER: It's Eric --

THE COURT: Eric? I'm sorry, I can't hear you.

MR. BRANDFONBRENER: Eric Brandfonbrener. B-r-a-n-d-f-o-n-b-r-e-n-e-r.

THE COURT: Okay. We need to take --

MR. BRANDFONBRENER: And, Your Honor, your assessment of the case is correct. We are unsure what the status of the pleading was.

THE COURT: I don't need to hear anything more.

I just wanted to know if you're here, you're welcome to be here. I need to go ahead with the motions that I have in front of me.

The first motion in order is a Motion for Substitution as a matter of right. And I have received that motion. I have also received and viewed from Mr. Cummins case law in support of that motion and I assume you've all seen his case law also.

And I have received the Terra Foundation's opposition to that as well as the plaintiffs' opposition to that. And I know that the time is short because these matters were put on my calendar yesterday with the anticipation that this Court would stop everything, decide this motion, and you would either stay here for a TRO or go elsewhere for a TRO because you have the desire to stop a meeting that's supposed to take place at 10:00 this morning. So that is why I wanted to read the case law. And that is why I wanted to have an opportunity to see what both sides were saying.

Time is short, so the plaintiffs did not have an opportunity to file a memorandum. I had the benefit of reading the defendants' memorandum. I

want to ask the plaintiffs, have you been able to distinguish the cases that the plaintiffs -- I'm sorry, the defendants have cited, particularly the Marshall Savings versus Henson case and Village of Wilsonville versus SCA?

MR. CUMMINS: Yes.

MR. NOVOSELSKY: Your Honor, we're prepared to argue this morning.

THE COURT: Go ahead, please.

MR. NOVOSELSKY: Although I would ask you for the materials I just handed you because part of them were my notes.

THE COURT: I handed it back to you, sir, and your notes are on the bottom and I didn't look at them. It is one page and it has some handwriting stuff and I handed it right back.

MR. CARROLL: Your Honor, it would have been on the motion that he put in front of you.

MR. NOVOSELSKY: I handed you a copy of Brandfonbrener's appearance. I apologize. My co-counsel absconded with it. I apologize.

MR. CUMMINS: Judge, Mr. Novoselsky is going to argue this. I need to clarify one point, if I may.

THE COURT: Yes, sir.

MR. CUMMINS: You said that we filed some authority in support of our motion. We didn't file any authority in support of our motion. Our motion should be granted as of right. That's our position. We cited that authority to show what the law is in contradistinction to what was cited by the respondents to the motion.

THE COURT: I asked you to drop off any law you wanted me to read for today. You dropped this off.

MR. CUMMINS: I wanted to clarify, that's all.

THE COURT: I read this. I assume you're citing this in support of your motion.

MR. NOVOSELSKY: Judge, I'll address that.

THE COURT: That This is the authority that addresses your motion. What else would you have given it to me for?

MR. CUMMINS: Well, Judge, maybe there is a technical nicety that Mr. Cummins gets hung up on. The fact of the matter is, that under the established law, which is reflected by those cases, you have no discretion. You may not look behind this motion.

THE COURT: Then I can look at the cases, right?

MR. CUMMINS: Of course you can.

THE COURT: And you brought them to my attention,

and so I said you cited them in support of your motion. What's wrong with that?

MR. CUMMINS: Okay. Well, it's simply a matter we cited them to respond to the authority that they cited which has nothing to do with the issue before this Court. That's why. And Mr. Novoselsky will address that. It's maybe a technical nicety. But some reviewing court may question someday about Mr. Cummins believing that he had to file supporting authority on a Motion for Substitution as a matter of right, which we do not. That's all. Thanks, Judge.

MR. NOVOSELSKY: Judge, let me begin briefly. I agree with my co-counsel. This is a motion which does not require proof of anything other than the issue of whether or not it is filed in a timely fashion.

Your Honor has made no rulings in this case. This is not the same case. With all due respect, I don't think the Court can even consider the arguments raised in opposition. The only inquiry a Court can make is, have I made any rulings in this case? The Court is aware that it has not.

THE COURT: Can't I decide whether or not I have made rulings in related cases that are substantially

the same?

MR. NOVOSELSKY: No, ma'am. Very respectfully. Even the cases that Your Honor questions.

First of all, this is not the same case. The cases don't say if they have some relation that a motion for change as a matter of right, not as a matter of prejudice, can be granted after a ruling.

First of all, Your Honor has made some -- I'd like to correct some statements Your Honor made before we began but which were on the record.

First of all, we have -- in the original Complaint, let's call this Terra II, but it isn't. It's not captioned as that. It's captioned Tucker versus Buntrock, 01 L 9112. The parties are not and have never been identical. We keep forgetting that Mr. Ryan and Mr. --

THE COURT: Perkins.

MR. NOVOSELSKY: -- Perkins were not parties before you.

THE COURT: I know.

MR. NOVOSELSKY: Mr. Perkins was a lawyer.

THE COURT: Still is.

MR. NOVOSELSKY: So the suggestion -- still is. So the suggestion that this is the same case and the

same parties falls on its face. It is not a refiled case. It is not the same case. It is not even arguably the same case. We can't wave our hand and say well, on the merits, Mr. Ryan and Mr. Perkins shouldn't be here, because that's going behind the motion. So the suggestion made to the Court that this is the same case under a different title is wrong as a matter of fact.

Now, as a matter of law, Your Honor, if Your Honor will recall, and, again, our first position is -- if Your Honor wants additional argument, I'll present it -- is Your Honor can't look behind the case. All the Court can do is say, it's a different case. That's the Greiman -- the case we gave you with Judge Greiman where the public guardian said, members of family, these are all the same judges. These are related cases. Judge Greiman said, you know what? Related is wonderful. It's a far more recent decision, but so what. The rule says the party has a right to a change. And simply because you're arguing that they're related or they're similar or judicial economy or the nonsense we heard before Judge Evans originally and then Judge Mulhern. Well, Judge, you know, Judge Kinnaird spent all this

time on Terra I and we have -- it's related. They argued related. Not the same case. It was transferred as related. They always treated it as a different case. They didn't file a Motion to Dismiss saying it's the same case. Nor could they.

So there is no case in Illinois that says, simply by virtue of similar subject matter, automatic change must be denied. Wilson doesn't say that. No case says it. The case that we've given you and the statute itself, the statute itself, more importantly, grants an absolute right. But assuming Your Honor wants to go behind that, and I sense Your Honor does because you asked me to distinguish Wilson and the other cases.

Let's go behind Terra I, for a second. Your Honor entered a Consent Judgment. That is not a ruling of the Court. We provided that authority. Consent Judgment is merely a private Settlement Agreement, binding upon the parties that executed it. The authority we filed in detail opposing the Motion to Transfer Terra II here was never distinguished nor criticized. Nor could it. It says that a trial court that enters an order on the Consent Judgment makes no finding of law or fact. It merely approves

a private settlement. It further says that the parties that don't sign that agreement are not bound by the ruling, nor has the Court made any findings as to them. No contrary authority was ever cited. More importantly, Your Honor --

THE COURT: Did those cases involve any situation where parties were before a court and they were saying, don't sign the Consent Judgment. There's something wrong here. There's been a breach of fiduciary duty. There's been coercion. This is an improper settlement. Those issues were briefed and argued before the Court, and the Court went ahead and signed the Consent Judgment?

MR. NOVOSELSKY: Well, then that's interesting, Your Honor. Because first of all -- well, now we're clearly going behind --

THE COURT: I want to know did any of those cases that you cited in the -- whatever the proceedings or motions were before Judge Mulhern and Judge Evans, did they involve anything close to the facts in this case?

MR. NOVOSELSKY: Well then, Your Honor, now I'm getting --

MR. CUMMINS: Yes.

MR. NOVOSELSKY: Please. Now I'm getting back -- you're asking us to argue Terra I, which is not -- first of all, there's a Notice for Appeal. The issue of that order is now in the Appellate Court. Your Honor had no jurisdiction to do anything.

THE COURT: I'm not asking you to argue Terra I. I'm asking a question.

MR. NOVOSELSKY: Yes, you are. The answer is yes.

THE COURT: You don't have to answer if you don't want to.

MR. NOVOSELSKY: The answer is, yes, those cases dealt with parties who had not agreed to the Consent Judgment, who had opposed it, and then the issue became whether or not they were bound or somehow affected, and the reviewing court said absolutely not. The Consent Judgment is not a finding of the court. It is not binding on anyone who doesn't execute it. Nor can it be.

More importantly, Your Honor, and, again, over our objections, what you said, and we've cited this transcript, when we asked in Terra I --

THE COURT: I'm sorry, you cited this transcript where? I don't have a brief from you, because I

don't know what you're talking about.

MR. NOVOSELSKY: Because we don't believe Your Honor should be reviewing matters that took place -- we don't want to argue the merits of this case. But in Terra I, Your Honor, when Mr. Cummins wanted to file the counterclaims, it would have been similar, or the related matters, although not identical. Your Honor refused to do so and said, I'm not barring you from filing another action against anyone you want. All I'm doing is signing this Consent Decree. Your parties aren't affected by it. You can file whatever lawsuit you want.

Now what they're saying is, Judge, you weren't right. They didn't object to that, we pointed out. And we've also cited -- there's a brand new Supreme Court case that came down in the last six months that said the same thing. When you stand in a court and don't object, you're acquiescing.

THE COURT: I don't think they're saying -- I haven't gotten the merits of this case, that you couldn't file another lawsuit.

MR. NOVOSELSKY: We did.

THE COURT: I think what they're saying is you filed another lawsuit and it needs to be here --

apparently the other judges have decided that -- and that you don't get a substitution as a matter of right. That's what they're arguing today.

MR. NOVOSELSKY: If that's what they're arguing. Then, Your Honor, you have in essence -- then it's the same case because then our rights have been decided. Then what you're in essence saying is we have no right to a change because it really isn't a new lawsuit. Either it's a new lawsuit or it isn't. Either Your Honor should have -- what Your Honor perhaps should have done and maybe what they should have agreed to was when we wanted to file counterclaims to be plaintiffs to object to what they were doing, you were induced by the defendants -- excuse me, the plaintiffs in that case, not to permit us to do so. You were told, go someplace else and file another lawsuit. Which we did.

Now what they're arguing to you, in essence, is, no, this is the same case. Because Illinois law says if it's a new action, you have an absolute right to take a change. They're saying, oh, no, it's really the same case, Judge, because it's related. So what you really were doing was ruling on the rights of my clients. Let's forget that it's a

Consent Decree that they didn't consent to. Let's forget that we induced you not to permit them to file what they now claim is this case. Because that's what they're arguing. That somehow you did rule on matters relating to these cases. To this case. Terra II. And what they're also suggesting, and I'll go back to the Stambaugh case, if Your Honor agrees with them, everything that follows thereafter is void.

THE COURT: I'm aware of that. Thank you.

MR. NOVOSELSKY: And in Stambaugh, 14 years later, the Supreme Court, in its opinion, said, you know what? Fourteen years -- no one's even arguing this, the Supreme Court said. Guess what? Everybody goes back to square 1. And we're talking about millions -- Mr. Perkins, in his pleadings on standing, said millions of dollars of public funds are being spent in attorneys' fees. And more importantly, if you assume this is related and you deny our motion, everything that goes forward from today in both cases would be a nullity. And who's going to end up paying millions of dollars --

THE COURT: I'm sorry, everything that goes forward in both cases?

MR. NOVOSELSKY: Well, if Your Honor says we have no right to a change because this is in essence the same case -- now, the statute doesn't say if it's a related case. Nor does the Wilsonville case say the statute has no impact if you can argue that the two cases are similar or related. In fact, Judge Greiman pointed out quite the opposite.

But if that's their position, Judge, that because there's an exception to the statute which isn't written, and the cases we point out say the statute should be liberally construed in favor of granting it -- not doing what they're doing. I man, You Talk about forum shopping, they're apparently convinced, and I believe improperly, that somehow Your Honor is going to do whatever they want, so they want to stay here because they want to risk millions of dollars in funds. Because I saw some of the fee petitions. And they know that if their -- if Your Honor agrees with them, everything's wasted from today on forward. Millions of funds, dollars of funds for this Foundation disappear.

And what they're arguing is not a case that's even arguably on point. They're not pointing to a statute. They don't distinguish the authorities

we've given you. They don't even -- they suggested to you that -- yesterday, you were in here. You asked a question. I'll show you how wrong they are and how willing they are to induce you into error, or lead you into error. The Court said, and this is yesterday in response to a comment from Mr. Carroll.

"So I don't have to worry right now that Mr. Donnelley, Ms. Forster and Mr. Hamada and all these other people aren't properly represented by counsel because I don't have them as parties right now. Is that right?

"MS. STONE: Right.

"MR. SCHUMANN: That's right."

Not only do you have new parties, but they have all filed appearances in Terra II. The 01 Law Division case.

THE COURT: They might have filed appearances, but that doesn't make them a party.

MR. NOVOSELSKY: Yes, it does. And if the Court wants to focus on that --

MS. STONE: Your Honor, Sidley, Austin never filed appearances. We're also named as defendants in the Amended Complaint.

MR. NOVOSELSKY: I didn't say Sidley & Austin

did, Your Honor.

MS. STONE: We have not appeared. We have not accepted service.

THE COURT: You're getting sidetracked. I still want to go back to the question, and maybe I missed it, but I don't think it's been answered, and it was my initial question. And that is, can you distinguish the cases that they are primarily relying on? The Marshall case and the others. I understand all these cases talk about the general proposition that a substitution of judge is a matter of right before anything is done and, you know, that's an important rule. And I appreciate it. And I understand that if I make the wrong decision here, and if it is -- and if it ultimately is, you know, reversed, I understand this -- this kind of an order is, itself, non-appealable. Can we all agree on that?

MR. NOVOSELSKY: Unless you certify it.

THE COURT: So the case has to go ahead. And if I'm wrong, everything after that is for naught. I understand the importance of this. And I understand what the cases say.

But there are cases that have been cited by

these defendants.

MR. CUMMINS: They're not relevant, Judge, and I'll tell you why.

THE COURT: That's what I'm trying to get at.

MR. CUMMINS: All right. Now, I'll get to it.

THE COURT: There was a different case --

MR. CUMMINS: They were prejudice cases, number one.

MR. NOVOSELSKY: Right.

MR. CUMMIN: They're prejudice cases. Not cases as of right.

They were untimely motions, number two.

MR. NOVOSELSKY: Right.

MR. CUMMINS: That's the distinction. The authority we cite is authority with respect to motions as of right.

Justice Bilandic points out all of the arguments that they make -- and particularly in the cases that we presented to you last evening -- and there's a host of other authority. Remember, we had a half hour to pull those cases together to get them to you. And it is clear that notwithstanding a perceived lack of judicial economy, notwithstanding the fact that there may be inconsistent rulings by

another judge to whom the case is assigned because the substitution is granted, notwithstanding the fact that there may be some inefficiency in the justice system, notwithstanding all of those considerations, the rule is the rule. We have a new case. We have new parties who have appeared. We have new parties who have accepted service. We have new parties who are identified as to claims that were never before this Court. We were foreclosed by this Court from having any findings made. We were foreclosed by this Court in Terra I from asserting any claims even arguably related to the Terra II claims.

MR. NOVOSELSKY: And, Judge, that's exactly --

THE COURT: Was the Wilsonville case a case involving prejudice? Or was it a matter of right?

MR. NOVOSELSKY: It was decided on the issue of prejudice and untimeliness. None of which --

MR. CARROLL: Prejudice --

MR. NOVOSELSKY: I assume I can complete my sentence.

THE COURT: I'm sorry, was it a matter of right or prejudice?

MR. CARROLL: Prejudice.

MR. NOVOSELSKY: It was prejudice. And the issue

there was not only did you prove prejudice, but was it timely.

Justice Greiman, in the case we gave you yesterday, specifically goes through every one of the arguments that they've presented about -- Mr. Cummins is correct. We have a case right on point where Mr. Murphy, who is very eloquent. I mean, he's been my opponent. Patrick Murphy usually doesn't miss much of anything as far as his arguments. Whether they're right or not is a different story. That opinion goes through virtually all the claims presented to you exhaustively and disposes of them and says, wait a minute. Let's stop reaching around looking for reasons to deny things. It's an absolute right. Let's not tell u judicial economy. Let's not say related. Let's not even say it's the same family. Let's not even say there's six other cases in front of that judge and here's one family member who wants to take a change. The Appellate Court said, you know what? You go.

But more importantly here, Your Honor, so the record is clear, we don't think we should be behind this. But let's focus on exactly what happened.

We cited the Auten case in opposition to being here which says you can't take inconsistent positions. Illinois Supreme Court. They opposed us presenting these matters to you in Terra I. They wanted a Consent Decree. You were induced to, very respectfully, Your Honor, disregard what we believe are the rights of our clients because you were told, Judge, it's just a settlement. It's a Consent Decree. It's not affecting them. You were induced to say, you know what? They can go file another lawsuit in another case and argue their rights. And you refused to permit us to file this.

What do we now find? They're arguing that this is really the same case that's related. You're the only person who can hear this case. And somehow, the statutory right, which these, our courts, have long held cannot be questioned and are absolute should somehow be set aside because you really did work on this case, Judge, and you really did make findings of fact -- that's not what the law says. You really -- this is really the issues you already decided, except you have different parties. You really did pass upon something related to our clients on the merits, even though they wouldn't let you. I

mean, this is absurd. It is absolutely absurd.

And then on top of it, so the record is clear, the issue of what you did in Terra I is presently in the Appellate Court. The law says you are out of jurisdiction to do anything that even arguably impacts upon that ruling.

Yes, I will agree, Your Honor, that the issue of attorneys' fees is still before this court. So the only thing -- what they really want to do, Judge, so we understand where they're going, this is not only forum shopping. This is an effort to say nothing can be ruled upon. Because if you get into a TRO here which deals with some of these issues, the argument is made, we've waived our right to appeal because now we're going into the merits.

THE COURT: I don't understand when you say they're forum shopping.

MR. NOVOSELSKY: I'm glad I'm amusing Ms. Stone, Your Honor. Let the record reflect she's laughing in light of all that's going on here.

THE COURT: But I don't understand what you mean when you say they're forum shopping. You filed a lawsuit in another division.

MR. NOVOSELSKY: Because they wanted to be here.

THE COURT: You filed a lawsuit in another division.

MR. NOVOSELSKY: After you told us to file another lawsuit. Which we did. What they're saying is you really should have been before Judge Kinnaird all along. Judge Kinnaird should have let you file it. Because otherwise you would have allowed the counterclaim and there wouldn't have been a second lawsuit.

But they induced you to say, go someplace else. File another lawsuit. What they're now telling you is what you really said, Judge, was you're here on this lawsuit, your claims are here, go ahead and file them. So forum shopping means, you know what? We think Judge Kinnaird has really already made decisions in our favor. We want to have the case here. So they tell Judge Gardner it was your case.

He got our motion two minutes before he saw it and said, oh, this is a Terra Museum case. That's Judge Kinnaird. He says, you know what? I'm sending it over there. They go to Judge Evans and say, Judge Evans, this is the same case.

THE COURT: Did you object to that?

MR. NOVOSELSKY: Of course. Of course.

MR. CUMMINS: Of course.

MR. NOVOSELSKY: And we objected in front of Judge Evans. They stood there and said it's the same case. It's the same case. Judge Kinnaird worked on this for months. Judge --

THE COURT: I'm sorry, could you pronounce it correctly? It's "Kin-nared."

MR. NOVOSELSKY: I apologize.

THE COURT: And every time you say "Kin-nard," I'm thinking of that --

MR. NOVOSELSKY: Well, if Your Honor will recall, when we weren't judge and lawyer, it wasn't that name and I remember the other name. I apologize.

THE COURT: Well, if you could pronounce it correctly --

MR. NOVOSELSKY: I apologize.

THE COURT: -- it's just distracting me and I don't want to be distracted from your legal argument. Go ahead, please.

MR. NOVOSELSKY: I apologize to Burke, too.

They kept arguing it was your case. That you'd already resolved these issues. That these matters had already been resolved. We politely tried

to point out was that what they were doing was talking out of the other side of their mouth. We're not here to argue the Motion to Transfer.

THE COURT: Okay.

MR. NOVOSELSKY: We're only here to argue, but they're trying to go behind everything and say, Judge, this is the same case. You can't look at it.

THE COURT: I think the answer to my question, which is really all I wanted you to say, because I read this stuff, is you distinguish their cases based on timeliness and that they were prejudiced. Is that correct?

MR. CUMMINS: Yes, Judge.

MR. NOVOSELSKY: Yes, ma'am.

THE COURT: I'd like to hear from this side for a few moments.

MR. CUMMINS: But, Your Honor, may I make one other just concluding remark?

THE COURT: Yes.

MR. CUMMINS: The cases, which we weren't required to present, because this is a matter of right, and this entire half hour that we've spent is unnecessary and inappropriate, most respectfully --

THE COURT: Why would it be inappropriate any

time, sir, to advise a Court about the law?

MR. CUMMINS: Well, Judge, because this Court knows --

THE COURT: Why is that --

MR. CUMMINS: I'll tell you why, Your Honor. You asked a question and I respond to questions when judges ask them of me. You know, better than anyone in this courtroom --

THE DEPUTY: Mr. Cummins, lower your tone.

THE COURT: Just a little bit.

MR. CUMMINS: Excuse me. Thank you.

You know better than anyone else in this courtroom that this is a new case involving new parties. There's no doubt about that. You know you've made no rulings in this case. You know that the literal application of the statute grants us a Motion for Substitution.

Now, once you grant that motion, if somebody wants to complain about it or seek reconsideration or do something of that kind -- which would be folly -- let them do that. And that's why I said what I said.

What has happened here, Judge, and Mr. Novoselsky said it straight, what has happened here is that we have been forced to present authority

to you simply to respond to the authority that they cited which has nothing to do with the issue before this Court.

So I just wanted to clear that up.

THE COURT: I'm sorry, the authority that they cited to me has to do with the issue about whether or not a party in these circumstances gets a substitution as a matter of right.

MR. NOVOSELSKY: No. The cases they cite do not deal with a matter of right. They don't deal with -- this is a timely motion as a matter of right. The cases they cite are cases that deal with the issue of timeliness, which is not here, and they have not even raised it. And those were cases where it was an issue of change for cause. I.e., prejudice.

THE COURT: Okay.

MR. NOVOSELSKY: Now the statute is very clear on its face.

THE COURT: I need to hear from them now.

MR. CARROLL: Your Honor, I think we need to get back in focus on what this motion is. We were here on their motion that they filed on Wednesday. We responded on Thursday. And I guess they wanted to respond to any of our cases because we filed a

response. So I think the issue that we're not here on is the relatedness issue because Judge Mulhern already heard a very long argument on that on Monday and she's made a determination that this case is related and that it's related to it. And, in fact, it may be identical to Terra I. And she had the pleadings. She had the file. She had the Complaint. She had the judgment, Judge. She was able to make that determination.

THE COURT: She did not consolidate them. She kept them as separate and --

MR. CARROLL: There was no motion in front of her to consolidate, Your Honor. And there's an issue on consolidate, whether this Court can consolidate a case with another case that's on appeal. So that issue is not before the Court and really bears no relevance to what we're talking about today.

THE COURT: So they're two separate cases. Two separate case numbers. And there has been nothing except this motion, in point of time, put in front of me by the plaintiffs. So we have no timeliness issue here, right?

MR. CARROLL: We do have a timeliness issue, Judge. And I think what plaintiff is actually trying

to do is ask you to read words into the statute. It says here specifically under the substitution of judges, under 5/2-1001 (a)(2)(ii) that an application for substitution of judge as of right shall be a motion and shall be granted if presented before the trial or hearing begins and before the judge -- before -- excuse me, before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

Our position, Judge, is that it is a timely issue. That you have already ruled on a substantial issue in the case. It doesn't say that it has to be in the same case. You have ruled on a substantial issue in this case. In Terra I, in your consideration of whether Mr. Perkins and the Attorney General coerced a settlement and -- coerced the settlement and also the validity of that Consent Decree, whether it was valid agreement among the parties, you ruled on substantially the issues that they have presented in Terra II.

You, in directing -- or in suggesting that they could file another lawsuit certainly didn't suggest that they file it in the Law Division. You

certainly didn't suggest that they file this specific lawsuit. That was their right.

Now it's our right to defend that, Judge. And we brought it back before the Court because it should be before the Court because the pleadings that they have filed are related, if not identical to, as Judge Mulhern has filed.

THE COURT: Are any of the cases that you've cited cases involving substitution as a matter of right?

MR. CARROLL: No, Your Honor, because the statute -- the two cases that we filed were under the prior Act.

THE COURT: Okay.

MR. CARROLL: But the --

THE COURT: And you haven't found anything under the current Act that talks about substitution as a matter of right where the judge has maybe decided a similar issue in another case or this issue, maybe -- let's look at Count I of this Complaint. Count I of this Complaint, you look at it and it looks like, yes, I've already decided that, by implication, if nothing else, in Terra I. Okay.

Any of the cases which you cited deal with

that kind of situation?

MR. CARROLL: Your Honor, I think you have to look to what the statute was on prejudice at the time. The statute of prejudice at the time was that if a plaintiff made a bare allegation of prejudice and it was timely filed, they were automatically entitled to a change as of right. That really isn't much different than the situation we have here, Your Honor, where as a right, they can come in and say it. They don't have to allege prejudice.

But in both the prior statute and the current statute, both of them have to be done in a timely manner. And that's exactly what Wilsonville and the Marshall case stand for.

THE COURT: Okay. Tell me what they could have done more timely. They went and they filed a separate lawsuit. They filed it someplace else. They couldn't have made -- they had no reason to make the motion in front of Judge Gardner, so Judge Gardner decided he shouldn't hear the case. It gets sent to the presiding judges to do what they do with it. And all of a sudden, the case finally is now in front of me for the first time yesterday. I've made no rulings on the case, on that case, 01 L,

whatsoever.

MS. STONE: Your Honor --

THE COURT: I have indicated, by final order in the other case, something. But I've made no rulings, technically, on their case. How could they have done anything more timely than what they're doing?

MR. CARROLL: Your Honor, Your Honor, we're arguing that the case was brought in the wrong place and they're not entitled to a substitution as of right under the circumstances in this case.

THE COURT: I'm sorry, where should they have brought that case?

MS. STONE: Your Honor, can I address that, please? I'm sorry, I don't mean to step on counsel's toes.

The problem, Your Honor, may be with the precise lawsuit that they chose to file. What they are, in essence, doing is rehashing, relitigating, in essence, taking a collateral appeal of matters you already dealt with in Terra I.

THE COURT: I agree. I don't disagree at all. Especially in regard to Count I. I think Count I may, in very fact, be a collateral attack on my order. And it may or it may not be. But my initial

reading of it, that's what it looks like to me.

Okay. But they have a right to file a lawsuit. Now, they may want to amend it. I haven't seen the Amended Complaint or the proposed Amended Complaint. They may want to amend it. I know that they have a five-count Complaint here. And their five counts, as I look at them, Count I looks like I pretty much decided that, and that may be a straight collateral attack. Count II, the ultra vires, breach of duty, inducing a breach of duty, I don't know that I have made any definitive rulings on those legal issues.

And 1983 I haven't dealt with at all.

MS. STONE: But, Your Honor, in all due respect, that's not what the case law says. It's not that you needed to have absolutely decided each and every issue. It's that they are not allowed to test the waters. That's the standard. They are not allowed to have found out what your attitude is about any portion of the case. That's the Peterson case that says if --

THE COURT: I understand. But they tried to bring this lawsuit before me, a counterclaim, and I didn't let them.

MS. STONE: I understand, Your Honor. The point was, they did not renounce any legal rights that they might have by the fact that other parties entered into a Consent Judgment. We all understood that. The mere fact that they may have some legal rights, as a philosophical matter, does not mean that they necessarily have the right to file this precise document that they are trying to seek to file first in Law Division and now are desperately trying to get away from you. Because it is nothing more than a rehashing of what you have already ruled.

And the case law, Your Honor, makes it clear that if you have formed an attitude about some portion of the case -- it doesn't have to be the totality of the case -- some portion of the case, the right to change venue no longer exists. That's the Peterson case we've cited to you.

Now, with respect to your specific question about Wilsonville and Marshall Savings & Loan Association, those cases are on point, Your Honor. It is true that they were brought pursuant to the prejudice statute that was then in existence at the time as opposed to the substitution of right. With all due respect, Your Honor, that is a distinction

without a difference in this precise situation. And let me explain why.

The reasoning behind those cases is the exact same reasoning that applies in this situation. If, in fact, someone has had an opportunity to test the waters, to find out how a judge is likely to rule on any portion of his case, he cannot then invoke this statute -- whether it's under the rubric of prejudice or whether it's under the rubric of a substitution of right -- because that is to engage in nothing but unabashed forum shopping. And the case law is quite clear. Not just Marshall and Wilsonville, but the Barnes case, the Peterson case says that you can't use this rule to judge shop to find a jurist who is favorably disposed to your action. As Barnes said, that would subvert the entire trial system.

And, Judge, we have another aspect here. We not only have the attempt to really deal fair and square with what the substitution of judge rule does and doesn't allow, it allows you to change if it's a blank slate. It doesn't allow you to judge shop. It doesn't allow you to judge shop, even when the ruling has been made in a related case rather than the same

case.

In addition to all that, we have this other consideration which is the General Order 22, the related case for reasons of judicial economy. If you were to now allow them to substitute and go to another judge after Judge Gardner has said on the record that he believes this should go back to you -- and you can quote him -- and after Judge Mulhern, as acting interim Presiding Judge, Law Division, has determined that this case may be, quote, related if not identical, unquote, to now allow them to subvert the orders of those two jurists, and to subvert rule -- General Order 22 --

MR. CARROLL: 22 and 23.

MS. STONE: -- by allowing them to take it to someone else, would be to subvert the whole nature and rationale for the related back rule. The related back rule says, we understand our jurists are overworked. We understand there's a need for judicial economy. We understand the fact that Judge Kinnaird has dealt exhaustively with this case for a full year. I believe Mr. Novoselsky might have said something in error that he didn't think Your Honor had actually really worked on these issues.

Your Honor, I believe, indicated she spent her entire weekend reading every piece of paper they filed. Your Honor allowed us five hours of argument before her on the 24th of July. That was the third hearing you had given them on this same objection to the supposed illegality and coercion of the Consent Judgment that is the gravamen of this new lawsuit that they are attempting to file. Your Honor has dealt exhaustively with these issues. You have bent over backwards to give everyone an opportunity to be heard.

What we are saying is at this juncture, to allow them to start again, to go after the same issues in front of another judge would be, in fact, disrespectful to Your Honor because it would be allowing them to try to avoid what might very well be the collateral estoppel effect of what you've already ruled.

It doesn't have to be completely identical, Your Honor. The Marshall case and the Wilsonville case both had a different party in the second proceeding. And nevertheless, the courts found, even if there was an additional party, it was still related; and therefore, the ruling in one case meant

that it was untimely in the second case. That's precisely what we have here -- you have going on here.

The fact that it might have been under the prejudice standard as opposed to the of rights standard doesn't matter when the fundamental issue of timeliness is the same.

MR. NOVOSELSKY: Judge, under Daniel R., the judicial --

THE COURT: I'm working on this side now.

MR. NOVOSELSKY: I apologize. I'm merely responding to her comments, Your Honor.

THE COURT: Okay. The legislature has decided to give us a statute. A judge substitution as a matter of right. And as it gets applied, pretty much the first time somebody comes in on a case and says, you know, Judge, I want a substitution. We give it.

We do this all the time in declaratory judgments on insurance policies where I may have ruled on an issue in a dec action in another case and someone has the same dec action now that gets filed and by the luck of the draw, they get stuck with me. Well, they pretty much know how I'm going to rule on this issue. So they may come to me and they may ask

for a sub with the hope that one of my 13 colleagues might give them a different kind of an order. And as we see and we apply that statute, we grant those orders as a matter of right. Even if it is on the same identical issue. It can even almost be sometimes the same or related kinds of parties. And they have a right to try elsewhere.

Now, I'm not saying that there's any merit to their Count I. I'm not saying that that can be interpreted as anything other than a collateral attack on my decision. And I have been baffled in looking at the timing here. I look at a case that I made my decision on July 26 and there's no appeal and there's no Motion to Stay and I don't know -- I still don't know because I can't tell from these papers that I got for today if there was or there wasn't a Board meeting on August 1.

MS. STONE: There was, Your Honor.

MR. CARROLL: There was, Your Honor.

THE COURT: But then on July 31, instead of appealing, they filed the different lawsuit. And I'm not quite sure what happened between August 1 and August 14 or 13 because I was out of the country. But there's a meeting that was obviously scheduled

for August 14, because you gave me the agenda yesterday. There's a hearing on August 13 before Judge Gardner. It's a Motion for a Temporary Restraining Order to try to stop the meeting on the 14th. Somehow the meeting on the 14th doesn't go ahead. There's no Court order that says anything about that. And it isn't, then, until the end of August, August 22, that my case, the Chancery case, even gets appealed.

And to this date, I still don't know whether there's ever been a Motion to Stay presented in front of one of my colleagues or in front of the Appellate Court. And what is being asked in Count I here is essentially a Motion to Stay my decision.

MS. STONE: Right.

THE COURT: And that's what's being asked in the Motion for a Temporary Restraining Order, essentially. And I am -- you know, I'm baffled at the procedure. But nonetheless, you look at -- behind -- you look at the situation. The legislature says, automatic matter of right. And by the luck of the circumstances, they did. They filed it elsewhere. Against their objection, it gets transferred through the system. It's back to me.

Because of that, do they lose that automatic right?

MR. SCHUMAN: May I make a comment, please, Your Honor?

MS. STONE: Sure.

MR. SCHUMAN: I want to emphasize why Marshall is exactly on point notwithstanding the statute. The basis for moving cases from judge to judge has changed a little bit but the threshold of how you get there has remained the same in all the statutes. The issue of timeliness which is present here was the same then prior to Marshall, during Marshall, and after Marshall.

The linchpin of Marshall, in that case, they were talking prejudice because that was the test they had to meet. But the Court asked the question. Here's how we decide if we let you in that door. Has there been a substantive issue decided by a judge? And in Marshall, for example, there were three related cases. And the issue simply had to do with, has the Judge ruled on a substantive issue? And one of the defenses in saying we still get to move it is that there was one -- the third case had had no decision. The first two had. Interestingly, the third case had different parties. Mostly the same,

but a couple of different ones. This circumstance precisely.

And the Court went into the exact analysis which we have asked you to follow which is entirely unchanged throughout the entire juris prudence as this statute has changed, which is, and there are two or three key sentences here that they observe. "All three cases primarily involve the same custodial taking." That was the issue in Marshall. "To insist that they are not related seems to be unrealistic." It asks the question are they related. Identical wasn't essential. Are they related.

They go on slightly later. "FSLIC was not named in the first two cases, but is included as one of the defendants in the case at Bar." And then they go on. "As counsel for FSLIC points out, except for different courtroom numbers, this case, the custody case, the liquidation case, and the case presently on appeal to this Court are one integrated series of legal disputes." That's what you have here. Involving generally the same parties and issues. Even though FSLIC was not a named party in the first two proceedings.

The point is, this case, what is here before

you, is the Marshall case. The Marshall case was approved and confirmed 13 years later. You've got two different districts of this -- the First and the Fourth District saying the exact same thing. None of this has ever been changed. What has happened is, is what the law is under this. And it is logical, when you think about why all these -- it's the only way to reconcile all of these rules. The rule about relatedness would be entirely out the door. The rule about inconsistent verdicts would be entirely out the door. The rule that would -- that would prohibit parties from simply taking a voluntary non-suit and refiling because all of a sudden the slate is wiped clean would be entirely out the door.

What has happened here is that the issue of timeliness is before you and it's identical to Marshall because the point is, it's no longer timely once you have ruled on issues in this case. Which you did for one year.

MS. STONE: And, Your Honor, no one is disagreeing with Your Honor's general statement that the substitution of right is an important rule. If you were to rule today that they should proceed in front of you, you would not be destroying the

substitution of right rule. You would not be preventing someone in an insurance declaratory judgment case from taking a substitution of right in front of you for whatever reason.

All you would be saying is that in this precise situation, in this case, where you've spent a year on Terra I, where you had eight hours of arguments spread over three different court hearings on the question of coercion and -- alleged coercion and alleged illegality in the Consent Judgment, and what the Consent Judgment does or doesn't do in terms of the powers afforded to the Foundation, that to allow them, now that they have tested the waters with you and have seen your attitude, to forum shop by going to a different judge would be improper. That's all you're ruling would be doing.

So I don't think you need to be concerned that you're somehow flying in the face of the substitution of right rule. You're not. You're adhering to it precisely. The substitution of right rule requires that it be done timely. That it be done when it is truly a blank slate. We are not a blank slate, Your Honor. We're a year into this. We're millions of dollars into this.

THE COURT: How do they get a blank slate in the new lawsuit that I asked them -- or not asked them. I told them they could file?

MS. STONE: No, you --

THE COURT: How do they get a blank slate?

MS. STONE: But with all due respect, Your Honor, you didn't say take your counterclaim and slap -- take out the word "counter" and put the word Complaint and go file it in the Law Division. You never did that.

What you said was, there's nothing to be counter to at this point in time, gentlemen. Mr. Cummins, you're coming in with a counterclaim on the very day I'm dismissing a case. If I dismiss the underlying case, there's nothing for you to be counter to. Now, I'm not saying that you are without legal rights. You may do whatever you choose to do. That's all you said.

You did not invite them to take this precise pleading that merely rehashes all the arguments they presented to you at length, exhaustively, on July 24 and prior, and to go and try them in front of a different judge. You didn't invite them to take a collateral attack on your ruling. They have the

appeal process.

THE COURT: Did I make a decision about whether or not there was a breach of fiduciary duty?

MR. CUMMINS: No, Judge, you did not.

THE COURT: I'm just asking this side over here still.

MR. CUMMINS: Okay.

THE COURT: I'm looking for the prayer for relief in Count 1. And obviously I approved the settlement. So I don't believe the settlement is unlawful. I said that I don't believe that it's a product of conflict of interest. And that's the second thing they want in Count I. I'm not quite certain whether I dealt with the fiduciary duty issue. I think you might have argued it --

MR. CARROLL: Certainly issues in the case and in our Complaint, Your Honor. But in the mediation and settlement, we didn't reach that.

THE COURT: But in approving the settlement --

MS. STONE: Excuse me. I think with respect to Stephanie Pace Marshall and Ted Stebbins, I don't know if you precisely used the term breach of fiduciary duty. I'd have to go back and look at the transcript again.

But surely you rejected the notion that they sold out their soul or they sold out the Foundation or that they breached their fiduciary duty by deciding, for whatever reasons they decided, to enter into the Consent Judgment. So I think you did address that, Your Honor.

THE COURT: And I don't believe -- you also want me -- they want me to make a declaration in this case that there was unlawful interference by the Attorney General. And I did not reach any 1983 issues or anything like that, but I felt that the conduct of the Attorney General in the mediation and settlement process was not of such a nature that it should preclude the Court approving this settlement.

MS. STONE: That's right.

THE COURT: So to that extent --

MS. STONE: I believe you said it wasn't even a close case. I believe you used that comment, Your Honor.

THE COURT: And certainly I did not -- they're asking in this case for me to say that the settlement was incompatible with the Foundation's purpose to propagate American art in the United States and abroad. And I thoroughly went through that one.

MS. STONE: Correct.

THE COURT: And thoroughly said that that is not incompatible with the purpose. And we went ad nauseam through what the Foundation can continue to do throughout the United States and abroad.

MS. STONE: It was quite helpful. It wasn't ad nauseam, Your Honor.

THE COURT: So I know that most of the issues that -- if not all of them in Count I, I've adjudicated already. And even -- and so let's just say, even saying that, I'm troubled by another issue. And I know that the plaintiffs don't want me to get behind this and even talk about this. They want to come in with the statute and say matter of right, we get to go someplace else. Okay?

But I'm troubled by another issue. And that is having both cases on this calendar. I'm in a position right now where a Chancery case is decided and all I have is fee petitions. And I'm going to be spending months trying to adjudicate what is now in excess, I believe, of $3 million in fee petitions.

In order for me to do that, I'm going to see, in camera, all of Sidley & Austin's bills. I'm going to see them unredacted. I'm going to see other

unredacted bills. I'm going to see a lot of things that may or may not impact this second case. Why should -- and I don't know what this second case is going to end up looking like. I would think quite a lot of what this second case has that has been filed should be summarily dismissed. But there may be a second case that they may be able to convince some other judge should withstand the time of a Motion to Dismiss and would go ahead. I'm going to see a lot of this stuff, am I not? And isn't it going to be extraordinarily difficult for me to jockey both cases?

MR. CUMMINS: Your Honor, could we --

THE COURT: Wait one second.

MR. CARROLL: Your Honor, you cannot avoid what the statutes are and what the law is to -- in the name of avoiding judicial economy. You are the judge that heard the other cases. I think it's imperative, and for the sake of judicial economy, and also the fact that there could be inconsistent rulings that would come out of another court hearing in this case.

THE COURT: I understand that. And that -- that happens at sometimes. I don't want inconsistent rulings. And I don't want to have judicial resources

wasted. But that's why we have an Appellate Court to sort out any problems with an inconsistent ruling.

MR. CARROLL: That's an interesting point, too, Your Honor. They have filed a Notice of Appeal, but they haven't even filed their statutory fee nor have they filed their docketing statement. So I guess there's a question of whether they're going to pursue their appeal in the Appellate Court. They haven't complied.

MR. NOVOSELSKY: We are. And that's not jurisdictional, as counsel knows. And Mr. Quinlan used to sit in the Appellate Court and he's aware that it's not.

THE COURT: We don't have to do personal attacks.

MR. NOVOSELSKY: It's not personal, Your Honor.

THE COURT: Please, Mr. Novoselsky, let me finish with this side.

MR. CARROLL: And you have to come back to the statute that we're talking about here, Your Honor. It says, any substantial issue. And you have ruled on a substantial issue in this case. And therefore, under the plain language of the statute, they're not entitled.

Mr. Novoselsky keeps coming back to the

Daniel R. case. The Daniel R. case was decided on some facts that were very endemic to the judicial court, Your Honor. There was five separate petitions filed for five separate children for neglect and wardship. And the Court said this isn't a case of In Re: family of. This is the case of an individual. And that each one had to be decided on separate facts and couldn't be decided on the family issues.

So that's why that case was decided the way it was. It wasn't specifically based on relationship. It was because it was the juvenile court statute and the Juvenile Court Act and endemic to that system. And that's why that case was decided.

And coming back to the Wilsonville case exactly, Your Honor, at that point in time the statute, all you had to allege, was that there was prejudice on behalf of the judge. That's the same type of Act that's here now. We're entitled to it as a matter of right. Those two concepts are exactly the same. There was only an issue of whether there had been a substantial ruling or a ruling on any substantial issue in the case. And that's why Wilsonville, even the Attorney General was involved

in the Wilsonville case, Your Honor. There was absolutely no ruling in the second case. It was a brand new decision just like we're talking about here. It was a second case filed, it was a related case, it went to the same judge, and the judge said, even though there's been absolutely no ruling on the second case, any substantial ruling, you can't forum shop, Judge. It has to come back to me and I have to accept responsibility and take this case.

MS. STONE: May I make two points, Your Honor? The first one is I think Your Honor has gone through the first count trying to figure out where the overlap is between the proposed new lawsuit and the old lawsuit. And I would just reemphasize, Your Honor, that it is not necessary that the cases be absolutely identical. That's not what the standard is. It's merely if there has been some attitude formed or some opinion expressed on any portion of the case.

THE COURT: Let me try something else. Do they have a motion -- a right, an absolute right, under this statute to get a substitution from any judge in our system except me?

MS. STONE: No, Your Honor. At this point in

time --

THE COURT: Do they lose their right to get it from me by virtue of the fact that Judge Gardner sent it to Judge Evans who had Judge Mulhern hear it and who sent it back here? Do they lose that right?

MS. STONE: The reason they've lost the right for a substitution of judge now in front of any judge. Not just in front of you, but in front of any judge. The reason why it has to come back to you, is because of what they have filed in this proposed new lawsuit. This proposed new lawsuit is nothing more than a thinly disguised sideways appeal of your entry of the Consent Judgment.

THE COURT: And can't that argument, it's a sideways appeal, be easily made in front of another judge who says, look, I'll look at the Consent Decree, I'll look at the first case, I'll look at the second case, and, yes, this count, this count, this count goes. It's a sideway appeal. They want to stop a Board meeting. If they want to stop the new Foundation as consisted -- the Foundation as now consisted from proceeding, they've got to go the right way. A separate lawsuit is not the way to do it.

MS. STONE: But the point is you, above anyone else in this courthouse, knows whether or not it is, indeed, a collateral sideways appeal as we argue or whether it is a brand new lawsuit that they're entitled to bring as they argue. You know because you've spent the time. And both Judge Gardner and Judge Mulhern have recognized that. Your colleagues have said -- and I'm sorry they're dumping on you this way, Your Honor --

THE COURT: I don't feel dumped on. I'm just trying to follow the statute.

MS. STONE: All right. They have said that for reasons of judicial economy, for the very reason that we have a General Rule 22, that you are in the best position to make that decision.

And that brings me to my second point, Your Honor. I wanted to engage you on --

THE COURT: All right. But let's assume. Let's assume -- and I haven't seen the Amended Complaint. I have seen this Complaint. Some of this Complaint, maybe all of it, but some of it, will withstand a Motion to Dismiss. And there will be something, maybe here, on this Complaint. And I say it may be because I haven't evaluated it and I haven't looked

at the legal issues yet. But there may be something here. There may be something more here. You've all --

MS. STONE: Maybe. You don't know yet.

THE COURT: -- you've all mentioned that the plaintiffs want to bring in Winston & Strawn or they want to bring in the other Board members or whoever. I don't know who they want to bring in, and I don't know what their causes of action are going to be. But let's assume they do that.

There's going to be things I -- there have to be things that perhaps I haven't dealt with. And they have, under the statute, an automatic substitution as a matter of right. And what you're saying is, once it's in front of me, they lose that right. But if they had it in front of any other judge, they'd have that right.

MS. STONE: But the problem is it's not that you know too much. It's that they're regurgitating things that you've heard before. Perhaps throwing in something new. Perhaps not. But the gravamen of what they're doing is a rehash.

And I do want to engage with Your Honor on this issue that I think you're concerned about. I

think you're concerned that you, in essence, know too much. That you're going to have privy to information from Terra I and that's going to affect you and influence you on Terra II. That's precisely the point, Your Honor. That's not a detriment to you keeping the case. That's precisely the reason why you must keep the case. It's the fact that you have waded into this and spent hours of your life engaging in this. That you have listened to the allegations made against Stephanie Pace Marshall. Against Winston -- against Ted Stebbins. Against the Attorney General. Against whoever else they're throwing into their newest conspiracy theory. You've listened to that, and you've dealt with it. And, yes, that may very well influence your opinion on Terra II. It may. But that's what happens when people choose to do collateral attacks or rehashing of issues they've already brought in front of the judge. That's a collateral estoppel effect, Your Honor. It's not a fault that you know too much. It's not an undermining of the substitution of right rule. That's just the reality of what happens when they try on three occasions in front of you to say that this was a Consent Judgment brought about by

coercion, and you've said no, and they now bring a separate lawsuit.

Had they brought a lawsuit, let's say -- I don't want to dream up legal theories for them -- but had they really brought up a separate lawsuit against someone, anyone, that was truly new, where you were truly dealing with a blank slate, they would have a right to go in front of a new judge. They wouldn't get related back to you. But as two other respected judges have recognized, what they have done in this Terra II is, in the words of Judge Mulhern, related if not identical.

So that's why what you know in Terra I probably may very well influence what you do in Terra II. That's not your fault. That's not something you should be worried about. That's just the reality of a regurgitation lawsuit.

MR. SCHUMAN: Your Honor, one important point. When you asked the question about what other judge, this statute is very judge specific. The test is, we're going to look at the judge who is sitting here with the case, and we're going to ask the question, has she ruled or indicated a ruling on a substantive issue in the case? And that's where we are.

Now, the issue in play is, is it identical? Or what leeway is there? This case is the same. You can fudge over how many words are different, even over how many counts are different. But everybody in the world knows it's the same. Knows it's another attack. That's indisputable. And so the issue that all the case law that's been presented to you unrefuted says, is that when you have related cases of that kind, if you, the judge with the new case in front of you, have ruled on a substantive issue or indicated a position on a substantive issue, you must keep that case. That's what the case law says.

MR. CARROLL: And just to answer your question directly, Judge, could another judge hear this case and hear this motion? The answer is no because the State of Illinois, in its statutes, this court in its rules, have set up specific public policy that if a case is related to the case that's already been filed, it has to go back to that judge under the rules.

So even if this went to another judge and they made this motion, that judge would have to reconsider the relatedness issue and send it back to you. And that's exactly what's already happened

here. So to allow another judge to hear this would vitiate the entire relatedness statutes and the rules of this court which require this matter to go back to the same judge when it's related.

So the answer to your question is, no. Some other judge shouldn't hear this motion. It should be sent back to you under the rules. They chose the allegations of their Complaint. They're bound by those allegations of the Complaint specifically.

THE COURT: You said something about a related statute.

MR. CARROLL: Well, the relatedness.

THE COURT: You're talking about the relatedness Rule 22?

MR. CARROLL: The relatedness rules. Excuse me, Your Honor.

THE COURT: Can the Circuit Court relatedness Rule 22 trump the statute as a matter of right?

MS. STONE: We're not saying trump.

MR. CARROLL: We're not saying trump, Your Honor.

MS. STONE: Because the statute has a timeliness component to it. I'm sorry, I stepped on counsel's toes again.

MR. CARROLL: Go ahead.

MS. STONE: The substitution of right statute has a timeliness requirement. That statute, as interpreted, as interpreted by the courts, all say that you get substitution of right when it's a blank slate. You don't get it once you've tested the waters. The cases say, even if you had nothing more than a pre-trial conference with the judge, and the judge has expressed an opinion, that would be enough to preclude you to have a right to a substitution of judge. That's a timeliness point, Your Honor. And that's a mere pre-trial conference two or three months into the case as opposed to what happened here where I think we said 30 contested motions, by my last count -- I might be off, give or take a dozen -- where you've spent a year on it. You have waded far, far into this case.

So we're not talking about using the relatedness rule to trump the statute. We're saying, first start with the statute. The statute is first and foremost a timeliness requirement. It says, blank slate? Yes, you get it. Once it's no longer a blank slate, once there's writing on that slate, you don't get it.

We're saying the General Rule 22 is, in

addition, a secondary reason why you should keep it. Because to allow forum shopping here would be to vitiate that rule.

THE COURT: Let me just hear from Mr. Novoselsky briefly.

MR. CARROLL: Just one last point, Judge. There was many, many cases, too, that say the relatedness issue should go back to the judge. So that's the public policy of the State. It's in the law of the State. It's in the cases. So the rule of this court also supports the law of the State which is the public policy of the State.

THE COURT: Mr. Novoselsky?

MR. NOVOSELSKY: Your Honor --

THE COURT: As you can see, my 9:15 call is waiting.

MR. NOVOSELSKY: I know that. And they know they have a 10:00 meeting. They're trying to talk it to death.

I'll tell you exactly what the law says. This judicial economy argument, the related arguments, is the Daniel R. case. It's the exact same argument Mr. Murphy made. General Rule 22 doesn't --

THE COURT: Is that the Greiman case?

MR. NOVOSELSKY: Yes. General Rule 22 as a Circuit Court rule that doesn't have anything to do with a change of judge. It has nothing to do with it at all, Your Honor.

And let me correct something else that has been argued to you. You specifically said -- it is a Consent Judgment. They keep saying, Judge, you made these findings. You made these rules. They've induced you today. I heard part of what you said, and I apologize for it.

THE COURT: You keep saying they induced me. Nobody induced me to do anything.

MR. NOVOSELSKY: Fine, Your Honor. Your Honor, a Consent Judgment is not a finding of the Court. Your Honor mad a statement that, well, you know, I've already decided this issue. You very specifically in the transcripts, you permitted no discovery in Terra I. You permitted no filing of the counterclaim. And now to suggest you were very specific to say that somehow the counterclaim -- or they're saying, well, this is just the recaptioned counterclaim. You didn't permit that to be filed. You permitted no discovery whatsoever.

And for them to now suggest that somehow you're the only judge who can hear this because you've already resolved these issues in relation to my clients not only flies in the face of logic, but flies in the face of the very reason that they told you not to permit my clients to have their day in court.

That Consent Judgment was not signed by my clients. And to now suggest that it binds them in any fashion at all is really where we're not only losing Illinois, but we're losing basic fundamental due process.

THE COURT: Okay. Let's go back to the substitution issue.

MR. NOVOSELSKY: Rule 22. The substitution issue is absolute. I keep hearing this, well, it says there has to be a blank slate. It doesn't say that. It says, in the case. The relatedness cases they cite do not deal with this statute. They do not deal with the substitution of right.

The judicial economy argument has been dealt with very specifically not under the Juvenile Justice Act. Mr. Murphy tried to drag in the Juvenile Justice Act. Justice Greiman says, wait a minute.

We're dealing with a statute that is clear on its face. It doesn't say we can get around it for the purpose of judicial economy. It doesn't say, if it' related, relatedness statute trumps it.

They keep arguing policy. That's been rejected. They've not answered your question directly. Does the statute say that if there is a related matter, the statute doesn't apply? No, it doesn't. The statute is clear.

THE COURT: Okay, Mr. Novoselsky, I'm going to grant your motion.

MR. NOVOSELSKY: Thank you, Your Honor.

MR. CUMMINS: Thanks, Your Honor.

THE COURT: And I -- even though you didn't, quote, cite any cases to me, I read all the cases that you dropped off last night. And I believe that they are persuasive. And I believe that I have an obligation to grant this motion. Even though this has been sent to me as a related case, I have an obligation under the statute to grant it because I think that you have a right to take a substitution from the first judge that you bring it up to as a matter of right. And the fact that I heard the other case doesn't mean that you lose the right in front of

me but you have it in front of everybody else in the courthouse. And I'm troubled by that. The legislature has passed that statute. The courts seem to be saying -- seem to be going in your direction.

Looking at their cases, I realize that they are under the prior statute. And their cases are very persuasive when you look at them that way under the prior statute. I think your motion is timely. But I believe that this statute enacted after their cases doesn't talk about relatedness. The local rule says related, sends it back here.

But I anticipated when you were all here on August 29 or September 7 and you told me that you were going to Judge Evans and that Judge Gardner had sent this case over there and there was going to be a big argument, I said to myself right at that time, well, if they decide to consolidate the cases, I'll have 'em both. If they decide to send it as a related case, there's going to be a Motion for Substitution. And I anticipated there was going to be one. And I can understand why you may want to make one because I personally believe that this second lawsuit, at least what I have seen of it, except for perhaps the last count, is a collateral

attack on my decision.

I think these arguments should be in front of the Appellate Court. Not before another judge in the Circuit Court. I don't know what your Amended Complaint's going to say. But you have a right, if you get an order from a court granting you leave to file an Amended Complaint, you will have leave to file an Amended Complaint if someone says you can. And you have a right to take a substitution and you've used it up in this case and, well, this is only Mrs. Terra's motion. Is that correct?

MR. NOVOSELSKY: That's correct, Your Honor.

MR. CUMMINS: That's right.

MR. CARROLL: Defendants also have a right.

THE COURT: Well, I understand that. And this case is in the Chancery Division now.

MR. NOVOSELSKY: At this point.

THE COURT: And so it will be sent back to the Presiding Judge for reassigning.

MR. NOVOSELSKY: Thank you, Your Honor.

THE COURT: Thank you. And I don't know when it will get reassigned. That's not up to me.

I need to have you writ an order. I need a draft order that states that the Court has heard

argument on this. I'd like to have two orders. One order that says the Court has entertained argument of counsel for in excess of one hour and has considered the case law that has been supplied by all parties and the Motion for Substitution, as a matter of right, is granted for the reasons set forth on the record.

And then I need the second order transferring it to the Presiding Judge.

My apologies to my 9:15 call. As the foreclosure attorneys know, I try to get you all in and out of here so you can get to other courtrooms on time. I'm not going to be out for about another ten minutes. So if you need to check in elsewhere, please do so. I want to get these orders signed for these folks, and so they have to be drafted.

Thank you.

(Whereupon, the following proceedings were held before Judge Lester D. Foreman at 9:40 a.m.)

THE CLERK: 01 L 9112. Tucker versus Buntrock.

THE COURT: Good morning.

MR. NOVOSELSKY: Your Honor, this was sent here by Judge Kinnaird. Here is the underlying order

explaining the basis for the Court's ruling.

OFFICIAL REPORTER: Could I have counsel's names in the case, please?

MR. CUMMINS: Oh, I beg your pardon. Robert Cummins on behalf of plaintiffs.

THE COURT: I'll send it to the clerk's office for reassignment.

MR. NOVOSELSKY: Well, what we'd ask Your Honor to do, Judge Kinnaird very specifically asked us to add language -- in fact, she added the language to the order as to whether the matter should be sent by you to another judge in this division or whether it should be reassigned to the Presiding Judge of the Law Division.

We would ask the Court to reassign it to the Presiding Judge of the Law Division. It was originally filed as a Law division case. Judge Mulhern, sitting for Judge Evans, over our objection, transferred the Law Division case to Judge Kinnaird as related to the pending Chancery case.

Judge Kinnaird has now granted our motion for a change. Our position is, since it's a Law Division case, there is a jury demand, it was

transferred to this division by the Chief Judge of the Law Division based on the issue of relatedness.

Judge Kinnaird heard the arguments claiming that the relatedness required the two cases be heard together, rejected them, reassigned the matter here, and she added the language herself giving Your Honor the decision as to whether it should remain within Chancery or go back to Law Division. I would suggest it go back to Law Division. Their argument is Judge Mulhern decided that issue. I think Judge Mulhern should decide whether it should stay in Law Division or come back here for reassignment. Rather than have Your Honor act, in essence, as an Appellate Court to determine what Judge Mulhern --

THE COURT: But I've wanted to do that all my life.

MR. NOVOSELSKY: Your Honor, if Your Honor runs, I'll be more than happy to support you, although I'm not a resident of the State.

THE COURT: I think the first thing I have to determine, irrespective -- and I have all the respect in the world for Judge Kinnaird -- I have to decide is this a Chancery case or is this a Law case? The fact that you tell me it's a Law case doesn't make it

a Law case.

MR. NOVOSELSKY: We'd have to argue that, Your Honor.

THE COURT: You don't have to argue it. I don't need any arguments. All I need to do is look at the Complaint.

MR. NOVOSELSKY: The file was sent over here, Your Honor. I want to hear argument.

THE COURT: Are there any people here who think it's a Chancery case?

MS. STONE: Yes, Your Honor.

MR. CARROLL: Yes, Your Honor. No question. That's why we made the Motion to Transfer.

MS. STONE: Good morning, Your Honor. Susan Stone --

THE COURT: Wait a minute. Hold on. This isn't a circus. Everybody just better behave themselves.

MR. CUMMINS: Your Honor, I can -- I've got a copy of the Complaint, if you'd like.

THE COURT: Who are you?

THE CLERK: I brought the file over.

THE COURT: Oh, you're the carrier.

MS. STONE: Your Honor, Susan Stone, representing the Terra Foundation. If I may be heard for one

moment, Your Honor.

MR. NOVOSELSKY: Your Honor --

THE COURT: If I hear you, I'm being unfair to him because I said I was going to look at the Complaint.

MS. STONE: Okay.

THE COURT: If I wanted to hear argument, I would have heard his argument. If I sound testy, I'm sorry.

MR. CUMMINS: Your Honor, may I make one observation?

MR. NOVOSELSKY: Hold on.

THE COURT: Now, wait a minute.

MR. CUMMINS: Thanks, Judge.

MR. NOVOSELSKY: We apologize, Your Honor.

THE COURT: It's entitled, "Complaint at Law." I guess the thing I should be looking at is what's the relief that's being prayed for.

Well, I'm looking at Count I. It says declaratory relief. We generally think of that as being a Chancery proceeding, although it's a hybrid.

Well, if this is a Law case, why would the representation be made that there's no adequate remedy at law?

MR. NOVOSELSKY: Your Honor, I can answer the question. I don't want to be rude to the Court.

THE COURT: Yes, I want you to answer it.

MR. NOVOSELSKY: This was filed originally in the commercial litigation division. There is a request for damages and a jury demand. We have asked for injunctive relief as part of the case. No question about it, Your Honor. I'll stipulate that a portion of the case, a portion, is Chancery in nature. However, we do seek damages for breach of fiduciary conduct which as Your Honor knows is heard by the commercial litigation division.

THE COURT: I've decided this is a Chancery case. I'll assign you to another chancellor. It will have to be sent down to the clerk's office and looked at at the appropriate time.

MR. NOVOSELSKY: Those are our copies of the orders.

MR. CARROLL: That's my copy.

THE COURT: I think that the way this happens is I guess you get informed by the chief judge's office or somebody as to where it's assigned.

MR. CUMMINS: Well, Your Honor, we have -- yes. And we have an Emergency Temporary Restraining Order

relating to a matter that's going to take place at 10:00 this morning.

THE COURT: Before who?

MR. CUMMINS: Well, before whoever with get.

MR. NOVOSELSKY: Whoever this is assigned to.

THE COURT: I think that will go forward as soon as the computer can give you a judge.

MR. CUMMINS: I understand. And that's why --

THE COURT: Do you know how to handle that?

THE CLERK: Yes.

MR. NOVOSELSKY: Your Honor, those are our copies of the orders.

THE COURT: Please give these people all the courtesies to which they're entitled.

THE CLERK: You bet.

MR. NOVOSELSKY: That one, too, Your Honor. Thank you.

THE COURT: It's all yours.

THE CLERK: The original order I believe is up there. That's the original.

(Whereupon, the following proceedings were held before Judge Bernetta D. Bush at 10:25 a.m.)

MR. NOVOSELSKY: Let me try to make --

THE COURT: What is this here for?

MR. NOVOSELSKY: We may not need the file, Your Honor. Let me explain the situation.

This was originally filed in the Law Division. The defendants -- for the record, this is Tucker

MR. CUMMINS: Tucker.

MR. NOVOSELSKY: Tucker versus Buntrock. It was originally filed in the Law Division, Your Honor. The defendants asked the Presiding Judge of the Law Division to transfer it to this division as it related to a matter pending before Judge Kinnaird.

Judge Kinnaird, this morning, granted a motion -- our Motion for Substitution of Judge and it was then reassigned -- sent for reassignment to Judge Foreman. Judge Foreman sent it down to the randomizer, and the randomizer sent us to Your Honor.

THE COURT: Okay.

MR. NOVOSELSKY: We originally had a motion which we wanted to present this morning to you for a temporary restraining order to prevent a Board meeting that was supposed to take place at 10:00. Given the fact that the argument before Judge Kinnaird dragged on, the matter was reassigned,

my co-counsel and I, Mr. Cummins, feel that if we were asking Your Honor to enter a TRO now, which barely maintains the status quo for a meeting that was scheduled to begin 25 minutes ago, that we might be leading the Court into error, even if Court was inclined to rule on it. So rather than present that, we're not going to present that to the Court.

The only other matter that is pending in the case that I'm aware of is our Motion to Disqualify Sidley & Austin. They have not filed a response. I don't know if they want to file a response or we should simply set that matter down for hearing before the Court.

THE COURT: Okay. Let me have everybody, first of all, tell us who's here. Let's find out who is in this case.

MR. CUMMINS: Robert Cummins, on behalf of the plaintiffs, Your Honor.

THE COURT: Can I have the case number, please?

MR. CUMMINS: Yes, Your Honor.

MR. NOVOSELSKY: I apologize, Your Honor. This is Tucker versus Buntrock, 01 L 009112. These are my only copies. I apologize, Your Honor.

David Novoselsky. I'm also for the

plaintiffs before the Court.

THE COURT: Okay.

MR. SCHUMAN: Your Honor, William Schumann on behalf of two of the individual defendants, Dr. Stephanie Pace Marshall, Dr. Theodore Stebbins,

And I need to tell Your Honor at this point that on behalf Dr. Stephanie Pace Marshall, we are also exercising our right for substitution of judge.

THE COURT: That's fine.

MR. NOVOSELSKY: Excuse me. Hold on. I presume those motions should be in writing. Obviously we're not going to ask the Court to -- I assume you want him to submit a motion in writing. We're not asking Your Honor to rule on anything this morning. If they want to submit a written motion, I think it would be better for the purpose of the record. I'll leave it up to the Court.

THE COURT: Do you have your motion written down?

MR. SCHUMAN: Well, what happened was, Your Honor, in light of my fear that he might say that, I took their motion and I modified it as I was sitting on the bench, on the chair. I haven't shown it to anybody but Your Honor. However, it is exactly their motion but my client.

THE COURT: Well, what I will allow you to do, because -- what I will allow you to do is I'm not going to accept this, but I will allow you to do a handwritten motion for a substitution of judge, if that is what you wish to do. And I will -- I will assign it. Since whatever emergency you had this morning no longer exists, since you've apparently moved it over, but let me finish getting everything on the record. You're name?

MS. STONE: Susan Stone, Sidley, Austin on behalf of the Terra Foundation.

MR. IOPPOLO: Thomas Ioppolo, I-o-p-p-o-l-o, on behalf of Attorney General Ryan and Assistant Attorney General Floyd Perkins.

THE COURT: Okay. This is with the Terra Museum. Is that correct?

MR. CUMMINS: Yes, Judge.

THE COURT: Fine. What's your name?

MR. QUINLAN: William R. Quinlan on behalf of Mr. Buntrock and Mr. Gidwitz, et al.

MR. CARROLL: James Carroll also on behalf of those individual defendants.

THE COURT: I would have been happy to serve you, but I have no problem letting you go.

MR. NOVOSELSKY: Your Honor, the record will reflect that you appear shattered by this matter.

THE COURT: I am shattered. I am absolutely shattered.

There is another order there for a transfer. Do your motion. Fill out the second transfer. And I will sign it and then you guys can get where you need to be so this matter can go on.

MR. NOVOSELSKY: I presume it has to go back to Judge Foreman to go back to the randomizer.

THE COURT: To Foreman and then to the randomizer. That's correct.

MR. NOVOSELSKY: I should have brought my roller skates, Your Honor. Thank you.

(Whereupon, the following proceedings were held before Judge Lester D. Foreman at 11:10 a.m.)

THE COURT: Yes, sir. May I help you?

MR. NOVOSELSKY: We're back, Your Honor, on Tucker versus Buntrock. The matter, pursuant to Your Honor's instruction, was randomly reassigned by the clerk's office who assigned it to Judge Bush. One of the defendants took a change. The matter has been sent back to Your Honor by Judge Bush for further

reassignment.

THE COURT: I called Judge Bush's chambers, and her secretary is on the way here.

MR. CARROLL: She rode up on the elevator with us, Your Honor. I think she's right here.

THE COURT: See, I told you. That's very good service.

THE CLERK: Hi.

THE COURT: Okay. We're going to send you back down again. Thank you for coming up.

THE CLERK: You're welcome.

THE COURT: Why don't you save time. Can you take it down for me?

THE CLERK: They're ready to go?

THE COURT: Go down with them. That will save time.

THE CLERK: I'll wait.

THE COURT: We appreciate it very much.

MR. CUMMINS: Can we just --

MR. CARROLL: Do you want to let the courts take its course?

MR. NOVOSELSKY: Why don't we just have it reassigned. It's 11 --

MR. CUMMINS: Just let it happen now, Judge.

THE COURT: You don't want to do it right away?

MR. CUMMINS: No, sir. I don't think there's that --

THE COURT: Why don't you go down there?

MR. CUMMINS: We'll wait for the judge and then we'll decide who wants to do what when. That's fine.

THE COURT: Okay.

MR. NOVOSELSKY: Thank you, Your Honor.

(Which were all of the proceedings held in this cause at this time.)

* * * * *

STATE OF ILLINOIS)
) ss:
COUNTY OF DuPAGE)

LAURA L. KOOY, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County;

That she reported in shorthand and thereafter transcribed the foregoing proceedings;

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause before the Honorable DOROTHY KIRIE KINNAIRD, LESTER D. FOREMAN, and BERNETTA D. BUSH, Judges of the Circuit Court of Cook County.

Witness my official signature and seal as Notary Public in and for DuPage County, Illinois, on this 24th day of September, A.D. 2001.

Laura L. Kooy

LAURA L. KOOY, CSR, RDR & CRR
Notary Public
CSR No. 084-002467
200 North Dearborn Street
Suite 2903
Chicago, Illinois 60601
(312) 782-KOOY (5669)

OFFICIAL SEAL
LAURA L. KOOY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-2-2003

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Bantuch et al

NO. 01 L 009112

FILED
SEP 21 2001
DOROTHY BROWN
CLERK OF CIRCUIT COURT

~~ORDER~~

DEFENDANT STEPHANIE PACE MARSHALL'S MOTION FOR SUBSTITUTION OF JUDGE AS OF RIGHT

Pursuant to 735 ILCS 5/2-1001(a)(2), defendant Stephanie Pace Marshall ("Marshall") submits this Motion for Substitution of Judge As of Right, as follows:

(1) This action was filed on July 31, 2001.

(2) Marshall hereby timely exercises her right to substitution of judge without cause as a matter of right pursuant to §5/2-1001 of the Code of Civil Procedure.

(3) Section 5/2-1001(a)(2)(ii) states in pertinent part that "an application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge whom it is presented to has ruled on any substantial issue on the case..."

(4) According to In re Dominguez F., 145 Ill. 2d 311, 319, 583 N.E. 2d 555 (1991), the right is mandatory if made in apt time and in proper form and a trial judge has no discretion to deny it. No specific allegations of prejudice are required.

WHEREFORE, defendant Stephanie Pace Marshall respectfully requests that this Court enter an Order granting substitution of the Honorable Brunetta D. Bush and for an Order that the case be tried by some other judge pursuant to the statute.

Respectfully Submitted,
STEPHANIE PACE MARSHALL
By: William P. Schuman
One of Her Attorneys

Atty No. 90539

Name William P. Schuman Dated: Sept 21, 2001

Attorney for Def. Stephanie Pace Marshall

Address McDermott, Will & Emery 227 W. Monroe

City / Zip Chicago, Ill. 60606

Telephone 312-984-7716

ENTER:

Judge Judge's No.

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

ORIGINAL – COURT FILE

16di-004214

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et al

v.

Dean Buntrock, et al

NO. 01 L 009112

ORDER

This matter coming on to be heard before the Hon Bernetta Bush on Defendant Stephanie Pace Marshall's motion for substitution of Judge as of Right pursuant to 735 ILCS 5/2-1001(a)(2), and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

The motion for substitution is granted.

Atty No. 90539
Name William P. Schuman
Attorney for Def. Stephanie Pace Marshall
Address McDermott Will & Emery 227 W. Monroe
City / Zip Chicago, IL 60606
Telephone 312-984-7716

ENTERED

ENTER: SEP 21 2001

JUDGE BERNETTA D. BUSH - 1587

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-11/30/00(13480655)

16di-004215

TRANSFER ORDER WITHIN DIVISION (8/20/99) CCCH 0601

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Paul Hayes Tucker, et al

Vs. Dean Burkhart, et al

No. 01L 009112

The above-entitled and numbered cause having been previously assigned to Judge Bernetta D Bush, Chancery Calendar # _____, said Judge having

4311 ☒ granted a change of Judge.

8211 ☐ recused himself/herself.

For the following reason: Pursuant to motion of def. Stephanie Pace Marshall based on 735 ILCS 5/2-1001(a)(2)

4282 It is hereby transferred to Judge Albert Green, Presiding Judge of the Chancery Division for the purpose of reassigning said cause.

ENTERED
SEP 21 2001
JUDGE
BERNETTA D. BUSH - 1587

Judge Judge's No.

8202 IT IS HEREBY ORDERED that the above-entitled cause is hereby forwarded to DOROTHY BROWN, Clerk of the Circuit Court of Cook County for reassignment. IT IS FURTHER ORDERED that said Clerk shall draw a new calendar number by random electronic process from the category bank designated in the original pleading.

ALBERT GREEN No. 129
PRESIDING JUDGE
CHANCERY DIVISION

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-004217

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Tucker et al

Bentrock et al

NO. 01L009112

ORDER

The Court having heard one (1) hour of argument by Sidley + Austin; Quinlan + Carroll; McDermott, Will + Emery; David Novoselsky; & Cummins + Cronin & the Court having considered the case law cited by the parties & for the reasons stated on the record Judith Terra's Motion for Substitution pursuant to 735 ILCS 5/2 1001(a)(2) is granted.

Atty No. 24578
Name D. Novoselsky
Attorney for Judith Terra
Address 1 W. LaSalle
City / Zip Chgo 60602
Telephone 346-8930

ENTER:

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
SEP 21 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-11/30/00(13480655)

ORIGINAL – COURT FILE

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TELECOPIER TRANSMITTAL COVER SHEET

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Jessica Bartlow

TELECOPIER NO.: (202)326-7999

(202) 371-6279

FROM: Robert P. Cummins

DATE: September 24, 2001

TIME: 8:53 am

CLIENT/MATTER NO.: 283

OPERATOR: pw

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(8/20/99) CCCH 0601

TRANSFER ORDER WITHIN DIVISION

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

Tucker et al
Vs.
Buntrock et al

No. 01 L 009112.

The above-entitled and numbered cause having been previously assigned to Judge KINNARD, Chancery Calendar # _____, said Judge having

4311 ☒ granted a change of Judge.

8211 ☐ ~~recused himself/herself.~~

the Court having considered the cited authority & having heard argument for 1 hour

For the following reason: Pursuant 735 ILCS 5/2-1001(a)(2) The TERRA Motion filed by Judith Trona, a plaintiff, is granted this matter is D

4282 It is hereby transferred to Judge Albert Green, Presiding Judge of the Chancery Division for the purpose of reassigning said cause to a Judge within the Chancery Division or returning this cause to the Presiding Judge of the Law Division

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
SEP 21 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

Judge _____ Judge's No. _____

8202 IT IS HEREBY ORDERED that the above-entitled cause is hereby forwarded to AURELIA PUCINSKI, Clerk of the Circuit Court of Cook County for reassignment. IT IS FURTHER ORDERED that said Clerk shall draw a new calendar number by random electronic process from the category bank designated in the original pleading.

ALBERT GREEN
PRESIDING JUDGE
CHANCERY DIVISION

No. 129

DOROTHY BROWN
[redacted] CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	
v.	)	Judge Julia M. Nowicki
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

AGREED ORDER

This cause coming on to be heard by agreement of the partics, the court being advised in its premises, it is hereby ORDERED THAT:

1. Until resolution of the pending motion to disqualify scheduled for November 13, 2001, all pleadings are held in abeyance.

ENTERED ENTERED
Date: OCT 11 2001 [redacted]
JUDGE
AARON JAFFE - 1904 JUDGE
Enter: AARON JAFFE - 1904
Judge

Attorney No.: 38600
Quinlan & Carroll, Ltd.
Attorney for Defendants
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Doc:183621

Jessica

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TO:	K. Chris Todd, Esq. Neil M. Gorsuch, Esq. David E. Ross, Esq. John H. Longwell, Esq. Leonard Garment, Esq. Lawrence Levinson, Esq. David Novoselsky, Esq.	**TELECOPIER NO.:**	(202)326-7999 (202) 371-6279 (312)346-9453
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CHICAGO, ILLINOIS

October 11, 2001

VIA FACSIMILE

All Counsel of Record (See Attached Service List)

Re: ***Tucker v. Buntrock, 01 L 009112***

Dear Counsel:

Enclosed is an Agreed Order entered this morning by Judge Jaffe, hearing Judge Nowicki's call, in the above-referenced case.

Very truly yours,

Cheryl Niro

CN/e
Enclosure

cc: William R. Quinlan

Doc:183651

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RE: File No.: 40412-2264	NOTES:

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Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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Doc:183626

US OFFICE PRODUCTS

16di-004228

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	No. 01 L 009112
vs.	)	Judge Julia M. Nowicki
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	
Defendants.	)	

DR. STEBBINS' AND DR. MARSHALL'S MEMORANDUM
IN OPPOSITION TO
PLAINTIFFS' MOTION TO DISQUALIFY SIDLEY

Defendants Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall") are Directors of the Terra Foundation for the Arts ("the Foundation"). Dr. Stebbins and Dr. Marshall strongly oppose plaintiffs' motion to disqualify Sidley Austin Brown & Wood ("Sidley") from representing the Foundation and urge the Court to reject plaintiffs' motion. We understand that the Foundation is filing a comprehensive memorandum in opposition to plaintiffs' motion, which will explain in detail why plaintiffs' motion should be denied. However, Foundation directors Stebbins and Marshall seek here to emphasize two arguments which are particularly powerful in refuting plaintiffs' effort to disqualify Sidley. First, the operative Illinois ethical rules are unambiguous that Sidley represented only the Foundation, not Judith Terra, in the litigation pending before Judge Kinnaird from which the present case is copied. Second, the Foundation would be severely prejudiced, both financially and substantively, if it is not permitted to continue to retain the counsel of its choice.

I. DR. STEBBINS AND DR. MARSHALL ARE VITALLY INTERESTED IN, AND KNOWLEDGEABLE OF, THE ISSUES RAISED BY THE MOTION TO DISQUALIFY.

Dr. Stebbins and Dr. Marshall have served as directors of the Foundation since 1998. Dr. Marshall currently is Secretary, and is a past Treasurer, of the Foundation. As directors, Dr. Stebbins and Dr. Marshall have been closely involved in the litigation known as *Dean Buntrock, et al v. Judith Terra, et al.*, Case No. 00CH13859, pending before Judge Kinnaird in the Circuit Court of Cook County, Chancery Division ("the *Buntrock* case"), since that lawsuit was filed in September of 2000. The Foundation was named as a defendant in the *Buntrock* case. The plaintiffs in the present case, Judith Terra, Paul Tucker and Alan Simpson, each of whom were and continue to be directors of the Foundation, also were named as original defendants in the *Buntrock* case. *See* Affidavit of Dr. Theodore E. Stebbins, Jr. ("Stebbins Aff."), attached hereto as Exhibit A, ¶¶ 3-5; and Affidavit of Dr. Stephanie Pace Marshall ("Marshall Aff."), attached hereto as Exhibit B, ¶¶ 3-5.

During the course of the *Buntrock* case, Dr. Stebbins was elected by the Foundation's Board of Directors ("the Board") as one of two members of the Foundation's Independent Litigation Committee. In that role, he shared responsibility for directing the efforts of the Foundation's legal counsel, Sidley, and worked closely with Sidley, in the Foundation's defense of the *Buntrock* case. Stebbins Aff., ¶¶ 6-7.

The present case is practically identical to the *Buntrock* case. Stebbins Aff., ¶ 11; Marshall Aff., ¶ 9. *See also* discussion in the Foundation's Memorandum in Opposition to the Motion to Disqualify. In the present case, plaintiffs made Dr. Stebbins and Dr. Marshall co-defendants along with the Foundation. Accordingly, Dr. Stebbins and Dr. Marshall are perfectly situated to fully understand the importance of Sidley to the Foundation's defense in this action. As continuing directors of the Foundation, who have the responsibility to protect the Foundation,

Dr. Stebbins and Dr. Marshall want to let the Court know, as forcefully as they can, that they believe it would be wrong to disqualify Sidley.

II. THE ILLINOIS RULES OF PROFESSIONAL CONDUCT PROVIDE THE PRESUMPTION THAT SIDLEY REPRESENTED ONLY THE FOUNDATION, NOT JUDITH TERRA. PLAINTIFFS HAVE FAILED TO OVERCOME THIS PRESUMPTION.

A party moving for disqualification of the opposing party's counsel has the burden of showing the existence of facts requiring the disqualification. *In re Conticommodity Services, Inc. Securities Litigation*, MDL No. 644, 1988 WL 96179, at *2 (N.D. Ill Sept. 9, 1988). Here, plaintiffs' motion seeking the disqualification of Sidley is predicated on their contention that Sidley represented Ms. Terra in her individual capacity in the *Buntrock* case. However, Rule 1.13 of the Illinois Rules of Professional Conduct, entitled "Organization as Client," provides that when an organization such as the Foundation hires an attorney, the organization, not its directors, officers, or other constituents, is the client.

Rule 1.13(a) of the Illinois Rules of Professional Conduct states, in part:

> A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Rule 1.13(a). It is well settled that this rule, i.e., that an organization's lawyer represents the organization and not the organization's constituents, cannot be overcome merely by a director's assertion of her subjective belief that the organization's lawyer was simultaneously representing her in the same matter.

For example, in *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985), the court held that the subjective belief purportedly held by executives of a corporation that the corporation's attorneys represented them individually was insufficient to establish such a relationship. As the *Keplinger* court explained:

> [a]t least in the absence of any relatively clear indication by the potential client to the attorney that he believed he was being individually represented, we think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable.

Id. See also In re Conticommodity Services, Inc. Securities Litigation, MDL No. 644, 1988 WL 96179, at*1 (Sept. 9, 1988)("corporate employee's subjective belief that he is individually represented is not sufficient to create such representation"); *In re Grand Jury Proceedings, Detroit, Michigan, In the Matter of Lawrence S. Jackier*, 434 F. Supp. 648, 650 (E.D. Mich. 1977)(no attorney-client privilege exists "in the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company in giving and receiving communications from control group personnel").

The text of additional sub-sections of Rule 1.13 underscores the presumption that a lawyer representing an entity represents only the entity, not the entity's directors or other constituents. For example, Rule 1.13(b) explains the obligation of a lawyer representing an organization who becomes aware that a director or officer of that organization is acting in a manner which could result in substantial injury to the organization. Under such circumstances, the lawyer is required to "proceed as is reasonably necessary in the best interest of the organization." In other words, the Rule contemplates that potential conflicts may arise between the entity and the person with whom the lawyer is dealing in connection with the lawyer's representation of the entity. The lawyer is not paralyzed by such a circumstance or required to abdicate his representation of the entity. To the contrary, the lawyer is to continue to act in a way which protects the entity and which is in furtherance of the entity's interests. *Id.*

Similarly, Rule 1.13(e) discusses the limited circumstances under which a lawyer may simultaneously represent both an organization and the organization's directors or officers in

a particular matter. None of the Foundation's directors, however, sought such joint representation. To the contrary, it is unrefuted that Judith Terra, Paul Tucker and Alan Simpson hired separate, independent counsel, the Shefsky & Froelich firm, to represent their individual interests at the very beginning of the *Buntrock* case. Indeed, they did so because Sidley explained that it would not represent them personally. Stebbins Aff., ¶¶ 8-9; Marshall Aff., ¶¶ 7-8. For the same reasons, Dr. Stebbins subsequently hired independent counsel to represent him personally when he came under attack from the plaintiffs in the *Buntrock* case. Stebbins Aff., ¶ 10. Accordingly, the record in this case demonstrates plainly that the presumption that Sidley represented only the Foundation was understood and honored by everyone involved.

In the face of the undisputed facts, Ms. Terra's recently annunciated, subjective belief that Sidley represented her in the *Buntrock* case, even though she admittedly hired Shefsky & Froelich to represent her in that case precisely because of the potential conflict between her personal interests and the interests of the Foundation, is wholly unreasonable. Ms. Terra admits in her affidavit that "[t]he Foundation's Board subsequently agreed to retain Sidley & Austin to represent *the Foundation* in [the *Buntrock*] litigation." Judith Terra Aff., ¶ 5, (Emphasis Added). Ms. Terra admits that she retained other counsel, Shefsky & Froelich, to represent her individually. *Id.* at ¶ 7. Accordingly, any purported belief by Ms. Terra that Sidley represented her was, and is, unreasonable, and cannot provide a proper basis for disqualifying Sidley.

III. THE DISQUALIFICATION OF SIDLEY WOULD CAUSE SUBSTANTIAL WASTE OF THE FOUNDATION'S ASSETS AND DENY TO THE FOUNDATION ITS RIGHT TO SELECT ITS COUNSEL.

In ruling on a motion to disqualify counsel, courts are mindful that:

> [Disqualification] is a drastic measure which courts should hesitate to impose except when absolutely necessary and disqualification motions should be viewed with extreme caution for they can be misused as techniques of harassment.

16di-004233

In re Conticommodity Services, Inc., Securities Litigation, MDL No. 644, 1988 WL 96179, at *2 (N.D. Ill. Sept. 9, 1988)(internal quotations omitted). Here, not only is disqualification of Sidley inappropriate, because no conflicting representations have been established, but it also would be highly prejudicial, and unfairly so, to the Foundation. Disqualification of Sidley would cause substantial harm to the Foundation. This case is practically identical to the *Buntrock* case. The vast knowledge that Sidley has gained during the more than one year in which the *Buntrock* case has been pending, concerning the complicated factual and legal issues involved in both cases, cannot be adequately recreated in new lawyers. Requiring the Foundation to obtain new lawyers would require undue and enormously wasteful expense, and substantial duplication of work, that is not justified or justifiable. Stebbins Aff., ¶¶ 11-12; Marshall Aff., ¶¶ 9-10.

It is inevitable that any replacement counsel, operating as it must without the experience and history with this case possessed by Sidley, which is so essential to the representation of the Foundation given the identity between this case and the *Buntrock* case, simply could not be nearly as effective as Sidley. *Id.* At bottom, plaintiffs' motion is nothing more than a litigation tactic, conceived solely to give plaintiffs an unwarranted, strategic edge in this case.

It would be wrong to deprive the Foundation of its choice of counsel. The operative law and the undisputed facts require that plaintiffs' motion be denied.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Foundation's Memorandum, Defendants Dr. Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall respectfully request that the Court deny plaintiffs' motion to disqualify Sidley Austin Brown & Wood.

Dated: October 24, 2001

Respectfully submitted,

DR. THEODORE E. STEBBINS, JR. and
DR. STEPHANIE PACE MARSHALL

By: _____
One of Their Attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
Attorney No. 90539

16di-004236

Exhibit A

AFFIDAVIT OF DR. THEODORE E. STEBBINS, JR

I, Dr. Theodore E. Stebbins, Jr., on oath do hereby state the following.

1. I have personal knowledge of the facts set forth herein.

2. I am the Distinguished Fellow and Consultative Curator of American Art at the Fogg Art Museum at Harvard University. I reside in Brookline, Massachusetts.

3. I am, and since April, 1998 have been, a director of the Terra Foundation for the Arts ("the Foundation ").

4. In my capacity as a director of the Foundation, I have been very much involved in the litigation known as Dean L. Buntrock, et al. v. Judith Terra et al, Case No. 00 CH 13859, pending in the Circuit Court of Cook County, Chancery Division ("the Buntrock case"), since that lawsuit was filed in September of 2000.

5. In the Buntrock case, the Foundation was named as a defendant. Judith Terra, Paul Tucker and Alan Simpson, each of whom were and are directors of the Foundation, were also named as defendants.

6. During the course of the Buntrock case, I was elected by the Foundation's Board of Directors ("the Board") as one of two members of the Foundation's Independent Litigation Committee. In that role, I shared responsibility for directing the efforts of the Foundation's legal counsel, Sidley Austin Brown & Wood ("Sidley"), in the Foundation's defense of the Buntrock case.

7. In my capacities as a director of the Foundation and as a member of the Foundation's Independent Litigation Committee, I stayed abreast of all important developments in, and relating to, the Buntrock case. I spoke regularly with Stephen Carlson and Susan Stone,

the Sidley attorneys with primary responsibility for the defense of the Buntrock case, concerning a host of subjects relating to the litigation.

8. On several occasions, Mr. Carlson and Ms. Stone explained in telephone conferences and in-person meetings that Sidley attorneys represented, and were acting on behalf of, only the Foundation, not the individual directors, in connection with the Buntrock case and matters related thereto. They explained that the information Sidley obtained from the Board members relating to the Buntrock case would be received and used solely for the benefit of the Foundation and that the advice and legal counsel provided by Sidley in connection with the Buntrock case would be solely for the benefit of the Foundation.

9 Judith Terra never said anything in my presence which indicated that she believed that Sidley attorneys were acting as her legal counsel. To the contrary, on several occasions, Judith Terra referred to Brian Crowe of the Shefsky & Froelich law firm as her attorney. None of the other directors ever stated in my presence that he or she believed the Sidley attorneys were serving as his or her legal counsel.

10. During the course of the Buntrock case, allegations regarding my performance as Chairman of the Foundation's Collections Committee were made against me, personally, by the plaintiffs in that case. Susan Stone explained to me that this created the potential for a conflict of interest and that, as a result, I needed to retain independent counsel to advise me on the issues that pertained to me personally. Accordingly, I retained independent counsel. Ms. Stone explained that I should speak with my independent counsel concerning all issues relating to my personal interests, because Sidley represented only the Foundation's interests. I clearly understood that Sidley did not represent me personally. It was my distinct

16di-004238

and clear belief, based on my frequent discussions with, and/or that included, Judith Terra, that Judith Terra understood that Sidley did not represent her individually, either.

11. I believe that the present motion to disqualify Sidley in the new action that has been brought by Judith Terra, Paul Tucker and Alan Simpson against the Foundation and the Foundation's directors is being asserted for purely tactical reasons, i.e., to disadvantage the Foundation by depriving it of its very effective and able counsel. The Foundation would be substantially harmed if the disqualification motion is granted. This new case is practically identical to the Buntrock case. The vast knowledge that Sidley has gained during the more than one year in which the Buntrock case has been pending, concerning the complicated factual and legal issues involved in both cases, cannot be adequately recreated in new lawyers. Requiring the Foundation to obtain new lawyers would require undue and enormously wasteful expense, and substantial duplication of work, that is not justified or justifiable.

12. I believe that depriving the Foundation of its choice of counsel would be unfair in the extreme. As a continuing member of the Foundation's Board, and in my capacity as one of the two members of the Foundation's Independent Litigation Committee, it is my strong desire that Sidley continue as counsel to the Foundation in the new case as well as in the Buntrock case and all matters related thereto.

Further affiant sayeth not.

Theodore E. Stebbins, Jr.

SUBSCRIBED AND SWORN TO
before me this 23rd day of
October, 2001.

Notary Public

John F. DeFina
NOTARY PUBLIC
My commission expires Jan. 19, 2007

16di-004240

Exhibit B

AFFIDAVIT OF DR. STEPHANIE PACE MARSHALL

I, Dr. Stephanie Pace Marshall, on oath do hereby state the following:

1. I have personal knowledge of the facts set forth herein.

2. I am President of the Illinois Mathematics and Science Academy, located in Aurora, Illinois. I reside in Wheaton, Illinois.

3. I am, and since 1998 have been, a director of the Terra Foundation for the Arts ("the Foundation "). I am Secretary of the Foundation. I have also previously served as Treasurer of the Foundation.

4. In my capacity as a director and officer of the Foundation, I have been very much involved in the litigation known as Dean L. Buntrock, el al. v. Judith Terra et al. Case No. 00 CH 13859, pending in the Circuit Court of Cook County, Chancery Division ("the Buntrock case"), since that lawsuit was filed in September of 2000.

5. In the Buntrock case, the Foundation was named as a defendant. Judith Terra, Paul Tucker and Alan Simpson, each of whom were and are directors of the Foundation, were also named as defendants.

6. In my capacities as a director and officer of the Foundation, I stayed abreast of important developments in, and relating to, the Buntrock case. I spoke often with Stephen Carlson and Susan Stone, the attorneys from Sidley Austin Brown & Wood ("Sidley") who had primary responsibility for the defense of the Buntrock case, concerning a host of subjects relating to the litigation.

7. On several occasions, Mr. Carlson and Ms. Stone stated in telephone conferences and in-person meetings that Sidley attorneys represented, and were acting on behalf of, only the Foundation, not the individual directors, in connection with the Buntrock case and

matters related thereto. They explained that the information Sidley obtained from the Board members relating to the Buntrock case would be received and used solely to defend the Foundation and that the advice and legal counsel provided by Sidley in connection with the Buntrock case would be solely for the benefit of the Foundation.

8. Judith Terra never said anything in my presence which indicated that she believed that Sidley attorneys were acting as her legal counsel. To the contrary, on several occasions, Judith Terra referred to Brian Crowe of the Shefsky & Froelich law firm as her attorney. None of the other directors ever stated in my presence that he or she believed the Sidley attorneys were serving as his or her legal counsel.

9. I believe that the present motion to disqualify Sidley in the new action that has been brought by Judith Terra, Paul Tucker and Alan Simpson against the Foundation and the Foundation's directors will significantly harm and disadvantage the Foundation by depriving it of its most informed, effective and able counsel, thereby requiring the unnecessary outpouring of significant dollars. The Foundation would be substantially harmed if the disqualification motion is granted. This new case is practically identical to the Buntrock case. The vast knowledge that Sidley has gained during the more than one year in which the Buntrock case has been pending, concerning the complicated factual and legal issues involved in both cases, cannot be adequately recreated in new lawyers. Requiring the Foundation to obtain new lawyers would require undue and enormously wasteful expense, and substantial duplication of work, that is not justified, justifiable, or sound.

10. I believe that depriving the Foundation of its choice of counsel would be unfair in the extreme. As a continuing member and officer of the Foundation's Board, it is my

strong desire that Sidley continue as counsel to the Foundation in the new case as well as in the Buntrock case and all matters related thereto.

Further affiant sayeth not.

Stephanie Pace Marshall

SUBSCRIBED AND SWORN TO
before me this 24th day of
October, 2001.

Notary Public

"OFFICIAL SEAL"
MARY R. MCCRACKEN
COMMISSION EXPIRES 01/17/05

CH99 3804565-1.062707.0011

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on Wednesday, October 24, 2001, we filed Dr. Stebbins' and Dr. Marshall's Memorandum in Opposition to Plaintiffs' Motion to Disqualify Sidley, a copy of which is hereby served upon you.

THEODORE STEBBINS AND
STEPHANIE PACE MARSHALL

By: _____
One of Their Attorneys

William P. Schuman
Debra J. Tucker
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5097
(312) 372-2000
Firm I.D. No. 90539

CHI99 3805452-1.060885.0013

CERTIFICATE OF SERVICE

I, William P. Schuman, attorney for Theodore Stebbins and Stephanie Pace Marshall, state that I caused to be served a copy of the attached Dr. Stebbins' and Dr. Marshall's Memorandum in Opposition to Plaintiffs' Motion to Disqualify Sidley upon:

See Attached Service List

by facsimile and by causing it to be placed in a postage-paid envelope addressed to the foregoing and deposited in the United States Mail located at 227 West Monroe Street, Chicago, Illinois on Wednesday, October 24, 2001.

William P. Schuman

CHI99 3805452-1.060885.0013

SERVICE LIST

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
01 L 9112

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Thomas Ioppolo
Jeffrey Gray
Therese Harris
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US OFFICE PRODUCTS

16di-004247

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
	)	Judge Julia M. Nowicki
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	
Defendants.	)	

TERRA FOUNDATION FOR THE ARTS' OPPOSITION
TO PLAINTIFFS' "EMERGENCY" MOTION TO DISQUALIFY

The Terra Foundation for the Arts (the "Foundation") hereby submits its opposition to Plaintiffs' "Emergency" Motion to Disqualify. Plaintiffs seek to disqualify the Foundation's counsel of choice, Sidley Austin Brown & Wood ("Sidley"), who have represented the Foundation in the various highly contentious and emotionally-charged lawsuits filed in the never-ending struggle for control of the Foundation. Plaintiffs claim that Sidley had an attorney-client relationship with Mrs. Terra in the first lawsuit filed in the litigation war over control of

the Foundation and therefore should be disqualified as counsel in this case. That claim is untrue. There is no basis in law or in fact for plaintiffs' motion. Accordingly, this tired litigation tactic must not prevail and plaintiffs' motion to disqualify should be denied.

BACKGROUND

Sidley is counsel for the Foundation in the case of *Buntrock, et al. v. Terra, et al.*, No. 00 CH 13859, in the Circuit Court of Cook County, Chancery Division before Judge Dorothy Kirie Kinnaird. (Affidavit of Susan A. Stone ("Stone Aff."), ¶ 3, attached hereto as Exhibit 1). In the *Buntrock* matter, two members of the Foundation's Board of Directors, Ronald Gidwitz and Dean Buntrock, sued the Foundation, three of the Foundation's Directors (Judith Terra, Senator Alan Simpson, and Dr. Paul Tucker), as well as non-Board member Naftali Michaeli. (*Id.*) Throughout the course of the *Buntrock* litigation Sidley has only served as counsel for the Foundation and no other party to that case. (*Id.*)

The Foundation's Board of Directors retained Sidley to represent the Foundation in the *Buntrock* litigation in September 2000. (*Id.*, Ex. A). Sidley initially reported to the then-President of the Foundation, to which the Foundation's Board had delegated authority for any and all actions regarding the litigation except final settlement pursuant to a resolution passed by the Foundation's Board at its annual meeting in September 2000 (*Id.*) Judge Kinnaird subsequently ordered the Foundation's Board to form an Independent Litigation Committee ("ILC") to handle the litigation and consider again retention of counsel for the Foundation. (Stone Aff., ¶ 3). In December 2000, the subsequently formed ILC confirmed the retention of Sidley as counsel for the Foundation in the *Buntrock* matter. (*Id.*, Ex. B). Once the ILC was formed, it was in charge of the litigation and Sidley reported to and took direction from it. (Stone Aff., ¶ 3).

Sidley's engagement letter with the Foundation confirmed in writing that Sidley's "client in this matter will be the Terra Foundation for the Arts, an Illinois not-for-profit corporation" and that Sidley's representation was limited "solely to the representation of the Foundation in connection with the litigation Buntrock v. Terra, et al." (*Id.*, Ex. C). Accordingly, Sidley filed an appearance in the *Buntrock* case only on behalf of the Foundation and issued legal bills for services rendered only to the Foundation. (*Id.*, Ex. D).

Sidley never acted as counsel for Judith Terra. (Stone Aff., ¶ 4; Affidavit of Stephen C. Carlson ("Carlson Aff."), ¶ 4, attached hereto as Exhibit 2). Sidley did not enter an appearance on behalf of Mrs. Terra or perform any legal services for her. (Carlson Aff., ¶¶ 4, 6). Sidley never entered into an engagement agreement with Mrs. Terra or issued any legal bills to her. (Stone Aff., ¶ 4). Sidley never took any direction from Mrs. Terra. (*Id.*) Throughout the pendency of the *Buntrock* case, Mrs. Terra was represented by her own counsel, who entered an appearance on her behalf, performed legal services for her, and issued bills for those legal services to her. (Stone Aff., ¶ 5). In fact, the bills of the law firm that Mrs. Terra retained to represent her in connection with the *Buntrock* matter (Shefsky & Froelich, Ltd.) make clear that Mrs. Terra was in constant communication with her own lawyers. (*Id.*, Ex. F). Specifically, those bills identify almost 70 telephone conferences or meetings between Mrs. Terra and her lawyers. (*Id.*, Ex. F). Mrs. Terra was in weekly and sometimes even daily communication with her lawyers throughout the pendency of the *Buntrock* litigation. (*Id.*)

From the time Sidley was retained to represent the Foundation, Sidley made it clear to Mrs. Terra, as well as other members of the Foundation's Board, that the firm represented only the Foundation and not Mrs. Terra or any of the other Directors individually. (*Id.* at ¶ 6; Affidavit of Dr. Stephanie Pace Marshall ("Marshall Aff."), ¶ 7, attached as Exhibit A

to Dr. Stebbins' and Dr. Marshall's Memorandum in Opposition to Plaintiffs' Motion to Disqualify Sidley; Affidavit of Dr. Theodore E. Stebbins, Jr. ("Stebbins Aff."), ¶ 8, attached as Exhibit B to Dr. Stebbins' and Dr. Marshall's Memorandum in Opposition to Plaintiffs' Motion to Disqualify Sidley). Sidley specifically informed Mrs. Terra that she should obtain her own counsel because Sidley could only act as counsel for the Foundation. (Stone Aff., ¶ 6). Mrs. Terra did just that. In fact, throughout the course of the litigation, Mrs. Terra retained no less than six different law firms to represent her. (*Id.* at ¶ 7). Mrs. Terra's choice of counsel was never dictated by Sidley. (*Id.*; Carlson Aff., ¶ 9).

Although Sidley attorneys had communications with Mrs. Terra during the *Buntrock* case, these communications were no different in nature from the type of communications Sidley had with other members of the Board of the corporation Sidley represented. (*See* Stone Aff., ¶ 9; Carlson Aff. ¶ 11). Indeed, Sidley had more frequent communications with other members of the Board, particularly the ILC members. (*Id.*) Sidley communicated with Mrs. Terra in her role as a Director and as a potential witness – not as a client. (Stone Aff., ¶ 14). These communications were not secret or confidential, but were rather shared with other members of the Board, particularly the ILC. (Stone Aff., ¶ 12). Mrs. Terra repeated the substance of her conversation with Sidley at greater length in public court documents filed by her own attorneys and in newspaper articles. (Stone Aff., ¶ 14).

Until recently, Mrs. Terra has never claimed to have an attorney-client relationship with Sidley. (Marshall Aff., ¶ 8; Stebbins Aff., ¶ 9 ("Judith Terra never said anything in my presence which indicated that she believed that Sidley attorneys were acting as her legal counsel."). To the contrary, "on several occasions, Judith Terra referred to Brian Crowe of the Shefsky & Froelich law firm as her attorney." (*Id.*) In fact, Mrs. Terra herself

denied in a court pleading filed in the *Buntrock* case that any attorney-client relationship existed between her and Sidley. Specifically, she stated "Sidley & Austin has only appeared on behalf of the Terra Foundation for the Arts. . . . Plaintiffs' statements to the contrary are simply wrong and . . . could not have been believed to be well grounded in fact." (Opposition to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation, and/or Receiver, Ex. G to Stone Aff.). Mrs. Terra' recent attempt to disqualify Sidley is only being made after six other disqualification motions have failed. (*See* Exhibits 3-4). As Judge Kinnaird stated in rejecting Mrs. Terra's new lawyers' attempt to disqualify Sidley, "We've been through this Sidley issue so many times I don't even want to think about it . . . Sidley is here, they are representing the Foundation . . . and I don't see a conflict." (7/24/01 Transcript of Proceedings, pp. 14-15, attached hereto as Ex. H to Stone Aff.).

The Foundation will suffer substantial harm if plaintiffs succeed in disqualifying Sidley. (Marshall Aff., ¶ 9; Stebbins Aff., ¶ 11). This current litigation is practically identical to the *Buntrock* case. (*Id.*) The knowledge that Sidley has gained during the more than one year that it has represented the Foundation in the *Buntrock* and related litigation cannot easily be transferred to a new law firm. (*Id.*) The Foundation would incur an enormous amount of unnecessary expense and wasted time in educating new counsel if Sidley were unjustifiably disqualified at this juncture due to the litigation tactic of Mrs. Terra. (*Id.*)

ARGUMENT

Courts hesitate to disqualify a party's counsel of its own choosing "except when absolutely necessary." *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983). Attorney disqualification is a "drastic measure" which "destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." *Schwartz v.*

Cortellone, 177 Ill. 2d 166, 178, 685 N.E.2d 871, 877 (1997); *accord, Weil, Freiburg & Thomas v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 395, 577 N.E.2d 1344, 1353 (1st Dist. 1991). As the Illinois Supreme Court has admonished, "caution must be exercised to guard against motions to disqualify being used as tools for harassment." *Schwartz*, 177 Ill. 2d at 178, 685 N.E.2d at 877 (emphasis added). "Our courts disapprove of the use of disqualification motions as a tactical weapon in litigation insofar as such motions can be misused for purposes of harassment." *Weil, Freiburg & Thomas*, 218 Ill. App. 3d at 395, 577 N.E.2d at 1353. This is particularly true here, where motions to disqualify counsel have been repeatedly used as a harassing litigation tactic by disgruntled minority members of the Foundation's Board seeking to impose by force their will upon the Foundation. (*See* discussion *infra*, pp. 12 - 13). Such a legal maneuver must not be allowed to prevail.

I. NO ATTORNEY-CLIENT RELATIONSHIP EVER EXISTED BETWEEN SIDLEY AND MRS. TERRA.

In blatant violation of Illinois Supreme Court Rule 137, Mrs. Terra claims she had an attorney-client relationship with Sidley without any good faith basis for making any such allegation, as she herself has acknowledged in prior Court papers. No such relationship ever existed. (Stone Aff., ¶ 4; Carlson Aff., ¶ 6). Sidley has never acted as counsel for Mrs. Terra. (*Id.*). Sidley never sent Mrs. Terra an engagement letter; never entered an appearance on behalf of Mrs. Terra; never gave Mrs. Terra any legal advice; never issued legal bills to Mrs. Terra; never took direction from Mrs. Terra; and never filed any pleadings or made any arguments on her behalf. (Stone Aff., ¶4). Throughout the *Buntrock* litigation Mrs. Terra had her own set of capable attorneys to represent her. Mrs. Terra's own attorneys, whom she hired, filed appearances on her behalf; filed pleadings and made arguments on her behalf; rendered legal

services to her; and billed her for those services. (*See* Shefsky & Froelich bills, Ex. F to Stone Aff.). Mrs. Terra was in frequent communication with her lawyers – not Sidley. (*Id.*)

Astonishingly, Mrs. Terra herself has admitted in Court papers she filed that Sidley did not represent her or any of the other individual defendant directors in the *Buntrock* case. Specifically, in response to a previous motion to disqualify Sidley brought by plaintiffs Buntrock and Gidwitz in the *Buntrock* litigation,[1] Mrs. Terra filed an opposition to that motion stating:

> "I. SIDLEY & AUSTIN DOES NOT REPRESENT THE DEFENDANT DIRECTORS.
>
> In charging Sidley & Austin with ethical violations, Buntrock and Gidwitz ignore the appearances filed in this very matter and claim that Sidley & Austin represents the individual defendants. (Motion, at p. 7). The law firm of **Sidley & Austin has only appeared on behalf of the Terra Foundation for the Arts.** (Exhibit A). Separate counsel has appeared on behalf of the defendant directors. (Exhibit B). **Plaintiffs' statements to the contrary are simply wrong** and, given the appearances that have been filed, **could not have been believed to be well grounded in fact** at the time the statements were made."

(Opposition to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation, and/or Receiver, Ex. G to Stone Aff. (emphasis added)). Mrs. Terra's previous admission that Sidley did not represent her in the *Buntrock* litigation makes clear that her current claim is a recent fabrication. *See Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 297 Ill. App. 3d 304, 515, 696 N.E.2d 761, 769 (1st Dist. 1998) (admissions of a party in a pleading are evidence of the matter admitted). As she has admitted, Mrs. Terra never had an attorney-client relationship with Sidley and her current claim to the contrary cannot be believed to be well grounded in fact.

[1] This attempt to disqualify Sidley in the *Buntrock* case was rejected by both Judge Kinnaird and the Appellate Court; the Illinois Supreme Court refused to hear it.

II. NO IMPLIED ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN SIDLEY AND MRS. TERRA.

Mrs. Terra also fails to establish the existence of any implied attorney-client relationship with Sidley. The "general rule is that corporate counsel does not become counsel for the corporation's individual shareholders and directors." *Hoban v. Strata Marketing, Inc.*, 1991 WL 204965 *1 (N.D. Ill. Oct., 2, 1991); *see also* Illinois Rule of Professional Conduct 1.13. "There is normally no conflict of interest when a director sues a corporation represented by its corporate counsel." *Hoban*, 1991 WL 204965 *1. The reason for this rule is that anything the director previously told the attorneys for the corporation would ordinarily have been communicated to the attorney as counsel for the corporation. *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982). As a result a party trying to overcome this presumption has a heavy burden. Specifically, in order to establish an implied attorney-client relationship, Mrs. Terra must show that (1) she submitted confidential information to Sidley, and (2) she did so with the "reasonable belief" that Sidley was acting as her attorney. *See Stopka v. Alliance of American Insurers*, 1996 WL 204324 *3 (N.D. Ill. April 25, 1996).[2] Mrs. Terra cannot meet either of these criteria.

A. Mrs. Terra Never Shared Any "Confidential" Information With Sidley.

At no time did Mrs. Terra share any "confidential" information with any Sidley attorney. (Carlson Aff., ¶ 5; Stone Aff., ¶ 11). While Mrs. Terra states in her affidavit that she "shared confidential information on my legal status with Ms. Stone," such a vague, conclusory and unsupported statement (whatever it is supposed to mean) is simply not sufficient to meet her burden of proof. *See Stopka*, 1996 WL 204324 at *3. As laid out in the affidavits of Susan

[2] "Reliance on Federal cases [in interpreting the Illinois Code of Professional Responsibility] is appropriate." *Herbes v. Graham*, 180 Ill. App. 3d 692, 699, 536 N.E.2d 164, 167-68 (2nd Dist. 1989).

Stone and Stephen Carlson, the type of information that Mrs. Terra communicated to Sidley concerned factual matters relating to the Foundation's history – not confidential or secret information. (Carlson Aff., ¶ 12; Stone Aff., ¶ 14). This information was gathered by Sidley as part of its factual investigation of the allegations in the *Buntrock* case. (Stone Aff., ¶ 14). Obviously, as a long-standing Board member and the widow of the Foundation's founder Dan Terra, Mrs. Terra was an important witness to interview. (*Id.*) However, the type of conversations Sidley had with Mrs. Terra were not unique to her. Sidley also spoke with other members of the Foundation's Board in order to obtain any and all factual information relevant to the dispute. (Carlson Aff., ¶ 11; Stone Aff., ¶ 9). Indeed, Sidley communicated more frequently with other Directors. (Carlson Aff., ¶¶ 11, 14; Stone Aff., ¶ 9). Yet, none of these other Directors are now asserting that they magically became Sidley's clients merely as a result of these conversations.

Simply put, at no time did Mrs. Terra share any confidential information with Sidley which would transform Sidley inter her personal counsel. Mrs. Terra never had any conversations or other communications with Sidley other than in her capacity as a Director of the Foundation. At most, Sidley attorneys spoke to Mrs. Terra as they did with a number of the Foundation's Directors about certain factual matters, and Mrs. Terra provided certain factual information. (Carlson Aff., ¶ 12; Stone Aff., ¶ 14). That information was purposefully given to Sidley by Mrs. Terra to assist Sidley in representing the Foundation, and Sidley did indeed use in the litigation on behalf of its client, the Foundation. (Carlson Aff., ¶ 12). Moreover, Mrs. Terra herself has made this information public by including it in her complaint in this action. (*See* Complaint). Accordingly, Mrs. Terra could not have reasonably believed that this information was confidential. *See Hoban*, 1991 WL 204965 at *2 (finding that information shared with

corporate counsel that was also contained in complaint "cannot be reasonably construed as confidential.").

B. Mrs. Terra Could Not Possibly Have "Reasonably Believed" that Sidley Was Acting as Her Personal Counsel.

Even if Mrs. Terra were able to convince this Court that she provided Sidley with "confidential" information, in order to succeed on her motion to disqualify Mrs. Terra must also prove that she gave this confidential information with the "reasonable belief" that Sidley was acting as her personal lawyer. *See Stopka*, 1996 WL 204324 at *3. As a director of a not-for-profit corporation communicating with counsel for that corporation, Mrs. Terra's recently claimed supposed "belief" that Sidley was her own personal law firm is presumptively unreasonable. A director or officer conferring with corporate counsel is held to understand that anything revealed to that attorney is known by the corporation. *Id.*; *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982).

Illinois Rule of Professional Conduct 1.13 also presumes that a "lawyer employed or retained by an organization [only] represents the organization acting through its duly authorized constituents." Ill. R.P.C. 1.13(a). Obviously, lawyers cannot communicate with abstract legal entities. Sidley's client consists of the Foundation operating through its authorized directors, officers, and employees. As Rule 1.13 contemplates, of course Sidley would communicate with Mrs. Terra, but solely in her capacity as a "duly authorized constituent" – i.e., a Director – of the Foundation. Such communications do not transform Mrs. Terra as an individual into Sidley's client. If this were the case, every employee, officer or director of Foundation could claim such a relationship with counsel representing the Foundation, and could use this claim to disqualify the counsel of the Foundation's choosing. More broadly stated, an

acceptance of Mrs. Terra's claim could open the door to similar challenges by every employee, officer and director of every corporation represented by counsel. Such a result is exactly what Rule 1.13 prevents.

In addition to the well-settled law on this issue, Mrs. Terra cannot in good faith claim that she had a reasonable belief that Sidley represented her for several additional reasons. First, Sidley repeatedly told Mrs. Terra that it was not her counsel and that Sidley only represented the Foundation. (Stone Aff., ¶ 6). Mrs. Terra's understanding of this distinction is evidenced by the fact that she hired separate counsel to represent her. In fact, throughout the course of the *Buntrock* litigation, Mrs. Terra hired six different law firms to represent her. (Stone Aff., ¶ 7). As revealed by the billing statements of Shefsky & Froelich, Ltd., the first firm that Mrs. Terra hired to represent her, Mrs. Terra was in weekly and sometimes daily communication with Shefsky lawyers. (Stone Aff., ¶ 5). Given the thousands of hours Mrs. Terra's various law firms spent performing legal services on her behalf, it is obvious that she understood that she had her own counsel to represent her in the litigation, and that she never reasonably believed that Sidley acted as her private counsel.

Second, none of the other Foundation Directors or employees with whom Sidley communicated felt that Sidley was their own personal counsel. Contrary to Mrs. Terra's claim, she did not have a "special" relationship with Sidley. Sidley attorneys communicated with various members of the Foundation's Board – not just Mrs. Terra. Indeed, Sidley attorneys were in frequent communication not only with Mrs. Terra but also with many other Foundation Directors. (Carlson Aff., ¶ 11; Stone Aff., ¶ 12; Stebbins Aff., ¶ 7; Marshall Aff., ¶ 6). The unreasonableness of any claim by Mrs. Terra that any of those communications converted her into Sidley's client is highlighted by the Affidavits of Drs. Stebbins and Marshall, with whom

Sidley had frequent communications concerning the same matters that Sidley attorneys discussed with Mrs. Terra. (Stebbins Aff., ¶¶ 7, 8; Marshall Aff., ¶¶ 6, 7). Both Dr. Stebbins and Dr. Marshall state that they knew Sidley was acting only as counsel for the Foundation and not as their own personal attorneys. (Stebbins Aff., ¶ 8; Marshall Aff., ¶ 7).

Third, as discussed above, Mrs. Terra previously admitted that Sidley did not represent her. (*See* Ex. G. to Stone Aff. ("Sidley & Austin Does Not Represent the Defendant Directors")). Her new found "belief" that Sidley was acting as her attorneys is not only unreasonable, but obviously not made in good faith. Indeed, Mrs. Terra herself stated that such an accusation was not well-grounded in fact, implying that such an accusation violated Illinois Supreme Court Rule 137. (*Id.*)

Finally, Mrs. Terra's supposed belief that Sidley was serving as her personal counsel is belied by the history of this litigation in which disgruntled minority Directors have repeatedly raised disqualification motions as a tactical weapon against the Foundation. From the very inception of this litigation, motions to disqualify counsel have been used as ploys to delay and deflect attention from the merits (or lack thereof) of the underlying litigation. Specifically, in the related *Buntrock* litigation, there were approximately six attempts by Messrs. Buntrock and Gidwitz to disqualify Sidley as the Foundation's counsel. Those attempts were soundly rejected by Judge Kinnaird and the Appellate Court (*see* J. Kinnaird's 9/25/00, 10/20/00, 1/2/01 Orders; 1/19/01 and 2/16/01 Appellate Court Orders, attached hereto as Exhibit 3), and refused to be heard by the Illinois Supreme Court. (*See* 6/6/01 letter from Clerk of Ill. Sup. Ct., attached hereto as Exhibit 4). Plaintiffs' latest attack is hardly original, and is brought for the same improper purposes. (*See* Stebbins Aff., ¶ 11 ("the present motion to disqualify Sidley . . . is

being asserted for purely tactical reasons, i.e., to disadvantage the Foundation by depriving it of its very effective and able counsel.")).

Attacking Sidley's allegiance to the Foundation is apparently a litigation tactic of choice for whomever happens to be a minority faction on the Foundation's Board. In the initial motions to disqualify Sidley, Directors Buntrock and Gidwitz argued that Sidley was "really" acting as Dr. Tucker's lawyer; it was later falsely suggested that Sidley was acting as Dr. Stebbins' counsel. Now that the tide has turned and Mrs. Terra's views on certain matters are no longer those held by a majority of the Board, she is suddenly claiming that Sidley acted as her lawyer. The fact remains – as it always has – that Sidley did not and does not represent any individual Director of the Foundation. Sidley only represents the Foundation. Mrs. Terra, apparently fearing getting to the "merits" of her complaint here, is now simply mimicking the harassing and delay-causing tactics employed by her opposition in the *Buntrock* litigation. As Judge Shadur put it in denying a similar motion to disqualify counsel:

> "Well before appointment to the bench this Court had occasion to note the use of the meritless disqualification motion as a litigation tactic. That trend has not abated, and in this case it has had the usual effect of diverting the litigation from attention to the merits."

Bobbitt, 545 F. Supp. at 1127.

CONCLUSION

Mrs. Terra never had an attorney-client relationship with Sidley, either actual or implied. There is no legal or factual basis for plaintiffs' supposed "emergency" motion to disqualify. The Foundation should not be divested of counsel of its own choosing. Plaintiffs' motion to disqualify Sidley should be denied.

Respectfully submitted,

16di-004260

One of the Attorneys for Defendant
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 01 L 009112
vs.	)	
	)	Hon. Julia M. Nowicki
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF SUSAN A. STONE

The undersigned, under oath, does hereby depose and state as follows:

1. I, Susan A. Stone, am over 18 years of age and have personal knowledge of the facts attested to herein. If called as witness, I could competently testify as set forth herein.

2. I am a litigation partner in the law firm of Sidley Austin Brown & Wood ("Sidley"). I have worked at Sidley for over a decade, and have been a partner since 1995. Prior to joining Sidley, I was an Assistant United States Attorney in California. Prior to becoming a federal prosecutor, I served as a judicial clerk to Hon. William Orrick of the U.S. District Court for the Northern District of California. I am a member of the Illinois and California bars. I received my J.D. degree from Harvard Law School (cum laude), and my B.A. from Yale University (summa cum laude). In addition to working at Sidley, I also taught for many years at DePaul University College of Law. To the best of my recollection, in all of my years of practice prior to this case, I have never been counsel on a case where Sidley has been the target of a

disqualification motion or where Sidley's compliance with the Professional Rules of Conduct has been questioned.

3. Sidley is counsel of record for The Terra Foundation For The Arts ("Terra Foundation") in the litigation Dean Buntrock v. Judith Terra, et al., No. 00 CH 13859, Circuit Court, Cook County, Chancery Division (Judge Kinnaird). In that litigation, Board Members Dean Buntrock and Ron Gidwitz sued five separate defendants: (1) Terra Foundation; (2) Judith Terra; (3) Alan Simpson; (4) Paul Tucker; and (5) Naftali Michaeli. Throughout this litigation, Sidley has acted as counsel for only one of those defendants: the Terra Foundation, and only the Terra Foundation. Sidley was retained to represent the Terra Foundation by the Board of Directors of the Terra Foundation in September 2000. (See Minutes of Board Meeting, attached hereto as Exhibit A). In early December 2000 the Independent Litigation Committee ("ILC") which was formed by the Foundation's Board of Directors at the direction of Judge Kinnaird again decided to retain Sidley as counsel for the Foundation. (See Minutes of ILC meeting and ILC Resolution, attached hereto as Exhibit B). Sidley's engagement letter with the Terra Foundation specified that the Terra Foundation was Sidley's sole client in this matter. (See Engagement Letter, at p 2, ¶1, attached hereto as Exhibit C) ("Our client in this matter will be the Terra Foundation for the Arts, an Illinois not-for-profit corporation"). Sidley explicitly limited the scope of its engagement as relating "solely to the representation of the Foundation in connection with the litigation Buntrock v. Terra, et al." (Id.) Sidley filed an appearance in this matter only on behalf of the Terra Foundation. (See Appearance, attached hereto as Exhibit D). At all times in this litigation, Sidley filed pleadings and made arguments only on behalf of the Terra Foundation. Throughout this litigation, Sidley issued legal bills for services rendered only

to the Terra Foundation. Sidley originally took direction from the then-president of the Terra Foundation, pursuant to a resolution passed by the Foundation's Board of Directors at its Annual Meeting in September 2000, which granted the then-president the authority to take all actions in the litigation to protect the Foundation's interests (except for settlement). Once the ILC was formed, the ILC was in charge in all matters relating to the litigation except settlement (which matter was reserved to the full Board), and Sidley thereafter reported to and took direction from the ILC.

4. Sidley never acted as counsel for Judith Terra in her individual capacity. Sidley never entered an appearance for Mrs. Terra. Sidley never entered into an engagement letter with Mrs. Terra. Sidley never performed legal services for Mrs. Terra. Sidley never issued bills to Mrs. Terra. Sidley never took direction from Mrs. Terra. Sidley never filed pleadings or made arguments in favor or on behalf of Mrs. Terra.

5. During this litigation Mrs. Terra was represented by her own counsel, attorneys Brian Crowe and Jim Wilson at the law firm of Shefsky & Froelich ("Shefsky"). Shefsky acted as her counsel, entered an appearance on her behalf (see Shefsky Appearance, attached hereto as Exhibit E), filed pleadings on her behalf, made arguments on her behalf, rendered legal services to her, and billed her for those services. The bills filed in court by Shefsky make it clear that her lawyers were in constant communication with Mrs. Terra throughout this case. (See Shefsky Bills, attached hereto as Exhibit F.) Specifically, those bills reflect almost 70 telephone conferences or in-person meetings that are clearly identified as being with Mrs. Terra, and approximately 20 other telephone conversations with "client" or "clients" which may also refer

to communications with her. May entries show "lengthy," "extensive" or multiple telephone calls with her on a given day. The bills also reflect multiple written communications to and from Mrs. Terra. In addition to the several face-to-face meetings which Shefsky attorneys had with Mrs. Terra, Shefsky attorneys consistently talked to her several times a week – sometimes even daily – throughout this case.

6. From the very outset of this litigation, Sidley made it clear to Mrs. Terra that Sidley was not her counsel, but rather that Sidley represented only the Terra Foundation. Indeed, in my very first conversations with Mrs. Terra after the lawsuit was filed in September 2000, I told her she needed to retain her own counsel to represent her in this matter, and that Sidley could only act as counsel for the Terra Foundation. I repeated this statement to her on more than one occasion. I never told Mrs. Terra she needed to retain separate counsel solely "for the purposes of formality," and to my knowledge no one else at Sidley did either. I would not have made such a statement, because I do not even know what this statement means. I have never heard of anyone retaining counsel solely "for the purposes of formality;" a party in a lawsuit retains counsel to represent his, her or its own legal interests.

7. Mrs. Terra, Sen. Simpson, and Paul Tucker decided to retain Shefsky to represent them in this matter. They were of course free to choose any attorneys they wished to represent them. They have exercised this right freely in this case, as they have retained various sets of attorneys over time to represent them (six different law firms in total). Sidley never dictated the choice of counsel to Mrs. Terra.

8. At no time did Mrs. Terra ever say to me or indicate in any way that she believed Sidley represented her in her individual capacity. To the contrary, she affirmatively admitted in official court pleadings that "Sidley & Austin does not represent the individual defendants" and further stated that any accusations to the contrary were "not. . . well grounded in fact" and "simply wrong." See Opposition To Plaintiffs' Motion To Appoint An Independent Litigation Committee, at pp 2-3 (attached hereto as Exhibit G).

9. During the course of the Buntrock v. Terra litigation, Sidley had communications with all nine of the eleven directors of the Terra Foundation who were not suing the Terra Foundation. (Sidley obviously did not have communications with Messrs. Buntrock and Gidwitz, who were adverse to the Terra Foundation). Sidley's communications with Mrs. Daley, Sen. Simpson, and Ambassador Hartman were fairly limited. We had more regular conversations and communications with the other directors, in particular Dr. Stebbins, Dr. Marshall, Ambassador Andreani, Mrs. Terra, and Dr. Tucker. Many of these directors called my partner Steve Carlson and myself, both at the office and at our homes. We were of course willing to talk to any Board Member of the organization we represented. That fact does not mean we represented any of the directors in their individual capacities, including Mrs. Terra. We did not, and we made it clear we did not. We certainly had more frequent communications with some of the other directors, particularly the ILC members, than we ever did with Mrs. Terra.

10. Moreover, at no time during these communications with various Foundation directors did we ever give legal advice to any of these directors in their individual capacities. Instead, when asked, we would give our advice and recommendations about the applicable law

and the various legal options available to the Terra Foundation in the lawsuit. When asked by any of these directors, including Mrs. Terra, about matters relating to their own individual legal situations, we specifically told them to consult with their own attorneys. I can recall different occasions when I told Mrs. Terra, Dr. Tucker, or Dr. Stebbins to consult with their own attorneys about matters they were attempting to raise with me. For example, I recall an occasion when Mrs. Terra tried to introduce the topic of potential counterclaims she (as opposed to the Terra Foundation) might raise. I specifically told her to consult with her own attorneys on that matter.

11. Mrs. Terra alleges in a conclusory fashion in her affidavit that she supposedly "shared confidential information on my legal status with Mrs. Stone, and she in return provided me with legal advice." Mrs. Terra does not specify the purported facts on which this statement is based, and I have utterly no idea what she is talking about. I did not provide Mrs. Terra with any legal advice in her capacity as an individual defendant. She had her own highly-qualified attorneys, with whom she spoke frequently and I can only assume they gave her such advice. I did speak with Mrs. Terra about the applicable law and various legal arguments the Terra Foundation could advance, just as I did with other directors, and perhaps that is what she is referring to. Doing so did not transform Sidley into the personal counsel for Mrs. Terra, or for any other of the directors. At no time did Mrs. Terra share "confidential" information with me in her capacity as an individual defendant. Instead, in her conversations with me, Mrs. Terra generally referred to what was occurring in the litigation, on the Board, and at the Foundation. Nothing she said differed in kind from what the many other directors of the Terra Foundation told me, or from what any director of any corporation would typically share with litigation counsel for the corporation.

12. Even more astonishingly, Mrs. Terra claims that I supposedly engaged in certain "secret conversations" with her "that no one could know about," and that I supposedly encouraged her to speak to me privately outside the office. These fantastical allegations are simply not true. In response, the following facts should be noted:

First, completely contrary to what Mrs. Terra alleges, I actually specifically tried to discourage Mrs. Terra from calling me as often as she did, by telling her that frequent communications with me might create a mis-impression which could lend support to certain allegations being raised by Messrs. Buntrock and Gidwitz, and by encouraging her to call her own lawyers instead. I was polite when delivering this message – Mrs. Terra was after all a director of an organization I represented. Nevertheless, my message should have been unmistakable: please stop calling me so much. My politeness should not now be used as a basis for disqualifying Sidley. In short, far from encouraging Mrs. Terra to conduct "secret conversations" with me, I was actually telling her to talk to her own attorneys at Shefsky.

Second, we made it a regular practice to inform Mrs. Terra's own lawyers about conversations Sidley did have with her. Far from trying to cloak these conversations in secrecy, as Mrs. Terra alleges, we wanted to make sure that her own attorneys were aware of Sidley's communications with Mrs. Terra. Although we had the right to communicate with her as a director of an organization we represented, we wanted to make sure her own attorneys were aware of these communications.

Third, I also regularly informed ILC members about my conversations with Mrs. Terra, and my partner Steve Carlson did the same. Once again, there was no secrecy about our conversations with Mrs. Terra, or any other director or witness for that matter.

Fourth, I regularly discussed any conversations I had with Mrs. Terra and other directors with my partners, and they in turn did the same with me. I cannot imagine working on a case with colleagues and not sharing information in that way. If the implication of Mrs. Terra's affidavit is that I kept my conversations with her "secret" from my partners, that is simply wrong. I have never shielded information from other members of the team on any of the cases I have worked on, and I am hard-pressed to imagine how anyone, other than a sole practitioner, could practice law that way.

Fifth, the idea that I would encourage Mrs. Terra (or any other director) to call me at home is erroneous. As a working mother who is called upon to travel frequently for work (I estimate I was out of town for a total of approximately two out of the last twelve months), I cherish my limited private time at home with my family. While I certainly took phone calls from Dr. Stebbins, Dr. Marshall, Dr. Tucker, and Mrs. Terra at home, and while I tried to be cordial and professional in doing so, I never encouraged this practice.

Sixth, Mrs. Terra does not allege in her affidavit where or when these "secret conversations" supposedly took place, and given the lack of specificity, I am unable to respond more completely. I would note for the record that I was out of town or otherwise employed in other cases for much of the time this litigation was pending. I believe I made four or five one-week trips to London for another client. I was absorbed getting ready for trial for another client for more than a month. I spent several weeks preparing for and participating in an out-of-town arbitration/mediation for another client. I was also out of town for various other reasons for several weeks during this time period. During this time much of the day-to-day litigation work was handled by my partner Steve Carlson (and to a lesser extent my partner Bill Conlon). In

short, I was not even generally available to participate in "secret conversations" – not that I ever would.

13. Mrs. Terra also refers in her affidavit to a "close legal and confidential relationship with Ms. Stone and Mr. Carlson." I am not sure exactly what this phrase is intended to convey. I certainly had communications with Mrs. Terra, just as we did with all nine directors who were not then suing the Terra Foundation. I did not have an attorney-client relationship with Mrs. Terra, and I did not receive any confidential or privileged information from her, in her capacity as an individual defendant. My relationship with her did not differ from my relationship with many of the other directors of the Terra Foundation, none of whom are suddenly now claiming a supposed individual attorney-client relationship. From my observation, I do not believe the relationship Mr. Carlson had with Mrs. Terra differed in any material way from the relationship he had with other Board Members.

14. Mrs. Terra refers in her affidavit to a meeting early in the case at the offices of Sidley & Austin, at which Mrs. Terra discussed the history of the Terra Foundation and her understanding of Dan Terra's intent with respect to the Terra Foundation. Such a meeting did take place. Sidley clearly had the right on behalf of the Terra Foundation to engage in a factual investigation of the dispute, and Mrs. Terra, as a long-standing Board Member and widow of Dan Terra, was obviously an important witness to interview. During the litigation, Sidley also discussed the history of the Terra Foundation with other long-standing Board members and other potential witnesses. Once again, the fact that we talked with Mrs. Terra as a potential witness did not transform her into a client. Moreover, nothing Mrs. Terra said to us about her

understanding of Dan Terra's intent is different from what she has said publicly and at greater length on numerous occasions in filed court papers and to the press.

15. Mrs. Terra alleges in her affidavit that I supposedly advised her to cooperate with the mediation process. I did not give personal advice to Mrs. Terra about entering into mediation. In fact, it was Mrs. Terra's own attorney Brian Crowe who, during a meeting at which Sidley lawyers were present, advised Mrs. Terra, Dr. Tucker, and Sen. Simpson to pursue mediation, as has been indicated in open court. Sidley suggested mediation on behalf of the Terra Foundation, not on behalf of Mrs. Terra or any other individual defendant, and did so only after the Court itself had raised the subject and after being so directed by the ILC. Although Mrs. Terra claims that I supposedly "advised" that "no disposition would occur without [Mrs. Terra's] personal consent," I did not say this, and it is obvious that, at a minimum, Mrs. Terra misunderstood what I said. It was always possible for a majority of the Terra Foundation's directors to vote to settle this case on behalf of the Terra Foundation, over Mrs. Terra's objection, as did in fact happen. Perhaps Mrs. Terra is referring to the fact that she could not be forced as an individually named party to agree to enter into a settlement if she did not so choose. This statement is true, and it is possible that I may have made a comment to this effect, although I have no specific recollection of having done so. Once again, Mrs. Terra had her own attorneys to offer her legal advice and guidance on matters relating to mediation, and it is my understanding that she did in fact consult with them about this. Indeed, the bills Shefsky have filed make it clear that they spent extensive time preparing Mrs. Terra for mediation and discussing the mediation process with her, and that they were in constant communication with

her throughout the months-long mediation process. See Shefsky Bills, attached hereto as Exhibit F.

16. Mrs. Terra refers to a meeting during the mediation process at which Sidley lawyers and various Board members were present. I believe she is referring to an evening meeting at the Allerton Hotel, which was held after the first day of a two-day mediation session. This meeting was held so Sidley could discuss strategy with its client representative, the ILC. It is my understanding that members of the ILC invited several other directors to attend this meeting, and several non-ILC directors were present. Mrs. Terra's own lawyer, Jim Wilson, was also present. Without waiving any attorney-client privilege which may exist and without running afoul of the Court Order protecting the confidentiality of the mediation process, I can generally state that Mrs. Terra's account of that meeting is not accurate, particularly with regard to what she contends I said. What I said at that meeting was that I was troubled by many aspects of the mediation proposal as it then existed and if I were a Board member I would have a hard time voting in favor of that proposal. Obviously, I am not and never have been a Board member, and the decision about whether or not to agree to a given mediation proposal is a matter of business judgment to be exercised by each Board member. Moreover, without specifying details which might violate Judge Kinnaird's Order protecting the confidentiality of the mediation process, it should be noted that the mediation proposal as it then existed differed dramatically from the eventual settlement the Board agreed to enter into, which is memorialized in the Consent Judgment.

17. Mrs. Terra states in her affidavit that "Ms. Stone seemed to have great empathy for my position and the position of the then majority of the Foundation's Board," but then acknowledges that towards the end of the mediation process "[t]he board majority, for a variety of reasons, had shifted away from my view. . .." This acknowledgement is very telling. The position that the Terra Foundation ultimately took in this litigation, particularly with regard to the settlement of the litigation, was always dictated by the majority will of the Board of Directors, as is appropriate for a private foundation governed via a democratic Board process. In turn, Sidley's position on behalf of the Terra Foundation was also ultimately dictated by the will of the Board majority, as is appropriate. This basic fact of life could not have been a surprise to Mrs. Terra. In fact, I can recall telling Mrs. Terra early on in the litigation that if majority and minority positions on the Board were reversed by a vote of the Board, Sidley may very well be required to take a different posture in the litigation. While I believed the governing corporate documents strongly supported the Foundation's legal position, I never gave Mrs. Terra any "assurances," "promises," or guarantees that either the Foundation or she personally would prevail in this litigation. Given the inherent unpredictability of litigation, I have never given any director of any corporation I have represented any guaranty of success. Once again, Mrs. Terra was represented by highly competent counsel with whom she enjoyed open lines of communication, and those counsel were certainly qualified to give her advice about the possible outcomes in the case.

18. Mrs. Terra also alleges that it is her "impression" that certain actions taken by me and my partner Steve Carlson were "the direct result [of] pressure by other partners at their firm." Mrs. Terra does not allege any facts to support this conclusory statement about her

how to resolve this dispute. It is regrettable she feels "betrayed" by a law firm which she never retained and which never worked for her. Yet, any sense of "betrayal" which she now feels is misplaced and self-inflicted. The reality in this case is that the votes on the Board simply went against her – an outcome she may not like, but which stems from a democratic Board process which she should respect. The reality in this case is also that the Terra Foundation was never Judith Terra's personal foundation, and Sidley was never Judith Terra's personal counsel. Her attacks on other directors, on my firm, and on me are unwarranted and unjustified.

26. Under penalties as provided by law pursuant to Section 1-108 of the Illinois Code of Civil Procedure, I attest that the statements set forth in this affidavit are true and correct to the best of my knowledge and belief.

Susan A. Stone

Subscribed and Sworn to
before me this 22nd day of
October, 2001.

Barbara R. Jackson
Notary Public

My Commission Expires on:
9-10-02

"OFFICIAL SEAL"
BARBARA R. JACKSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 9/10/2002

Exhibit A

Terra Foundation
Board Meeting
Minutes
September 26, 2000

In Attendance:
Paul Tucker, Chair
Helene Ahrweiler
Jacques Andreani
Dean Buntrock
Maggie Daley
Ron Gidwitz
Arthur Hartman
Stephanie Pace Marshall
Theodore Stebbins
Judith Terra
Absent: Alan Simpson

By Invitation:
Mark Hearwole, Foundation Legal Counsel, Winston & Strawn

Staff:
Donald H. Ratner, Vice President Finance & Administration

The meeting was called to order at 10:00am.

Dr. Tucker indicated that the alteration of convening time (the meeting was originally scheduled to begin at 9:00 AM) was a result of needing to clarify the issues with respect to Board actions in response to the constraints imposed by the court action of September 25, 2000.

Mr. Hearwole reported that the court order relating to the lawsuit brought by Messrs. Buntrock and Gidwitz against the Foundation and the hearing on Monday, September 25, had two principal constraints on Board action:

1. The Board could not take any action to remove any Board members from either the Board or the Executive Committee against their will; and
2. The Board could continue with its normal business except that it could not take any action to transfer offices or assets out of Chicago. Mr. Hearwole indicated that both of these restrictions continue through October 12 when the next hearing will occur.

Mr. Hearwole indicated that the Board has two options:

1. Re-elect all Board members at this meeting; or
2. Adjourn the election of members to a later date.

The vote was called. The vote was as follows:

Ayes:	Helene Ahrweiler Jacques Andreani Arthur Hartman Stephanie Pace Marshall Ted Stebbins Judith Terra Paul Tucker	Nayes:	Dean Buntrock
		Abstain:	Margaret Daley Ren Gidwitz

The next item on the agenda was the minutes. Dr. Tucker said that we needed to follow the judge's court order to the letter. Since the court order had not allowed any votes from committees up until this point, the committees could not review and approve their minutes and therefore there was no possibility for Board approval. Therefore, Dr. Tucker recommended that we table the vote on the minutes until the next meeting.

Mr. Gidwitz moved and Ambassador Hartman seconded the tabling of the approval of the minutes.

Ambassador Hartman asked if not approving the minutes would affect the deaccessioning of works of art from the collection. Mr. Hearwole said that it would not.

The vote was taken and there was a unanimous vote in favor of tabling the minutes.

The next item was the election of Directors, Officers and Committee Chairs.

The Board had two alternatives: to elect all Directors as a slate or table a decision until the next meeting.

Dr. Tucker recommended that we proceed with the election and approve the current slate of Directors. Mme. Ahrweiler moved and Dr. Stebbins seconded the motion to approve the current slate of Directors.

Dr. Tucker then asked if anyone did not want to stand for re-election.

At this point Dr. Marshall asked Mr. Buntrock what his reasons were for bringing the lawsuit. He replied:

- That he believed the Board had a "different agenda".
- That he believed there was a conspiracy to move the museum out of Chicago.

Ayes:	Helene Ahrweiler Jacques Andreani Margaret Daley Arthur Hartman Stephanie Pace Marshall Ted Stebbins Judith Terra Paul Tucker	Nayes:	none
		Abstain:	Dean Buntrock Ron Gidwitz

The next vote taken was for Vice Chair. Dr. Tucker moved that Mrs. Terra be Vice Chair. Mme. Ahrweiler seconded.

Ayes:	Helene Ahrweiler Jacques Andreani Margaret Daley Arthur Hartman Stephanie Pace Marshall Ted Stebbins Judith Terra Paul Tucker	Nayes:	none
		Abstain:	Dean Buntrock Ron Gidwitz

The next vote was for Secretary and Treasurer. Dr. Stebbins nominated Dr. Marshall for Secretary and Treasurer. Ambassador Andreani seconded it. Dr. Marshall indicated that she would be willing to serve as Treasurer for a short period of time if the Board commits to re-evaluating the situation after that limited period of time. The results of the vote were:

Ayes:	Helene Ahrweiler Jacques Andreani Margaret Daley Ron Gidwitz Arthur Hartman Ted Stebbins Judith Terra Paul Tucker	Nayes:	none
		Abstain:	Dean Buntrock Stephanie Pace Marshall

Mr. Gidwitz and Mr. Buntrock remained on the Executive Committee as members-at-large.

The Board then moved to Item IX on the Agenda, Executive Session. Dr. Tucker left the room. Vice Chairman, Mrs. Terra, presided indicating that the purpose of the Executive session was to discuss a salary increase for Dr. Tucker. Mme. Ahrweiler proposed a

bonus for Dr. Tucker. Dr. Stebbins moved that we double his compensation until a new President is hired. This motion was seconded by Mme. Ahrweiler.

Discussion followed.

Dr. Stebbins withdrew his motion.

Dr. Stebbins then moved to give Dr. Tucker a $25,000 bonus to recognize Dr. Tucker for the considerable additional time he spent on Foundation affairs over the past year. This was seconded by Ambassador Andreani.

The vote was taken. The results were:

Ayes:	Helene Ahrweiler Jacques Andreani Arthur Hartman Stephanie Pace Marshall Ted Stebbins Judith Terra	Nayes:	Dean Buntrock Margaret Daley
		Abstain:	Ron Gidwitz

Mrs. Daley indicated that her no vote was not a vote of no confidence on Dr. Tucker but that she believed a decision should have been deferred until after the lawsuit was settled.

The Executive Session was adjourned.

Dr. Tucker returned to the meeting and discussed the slate of committees and committee chairs. (See attached)

The Finance Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote was as follows:

Ayes:	Helene Ahrweiler Jacques Andreani Arthur Hartman Stephanie Pace Marshall Ted Stebbins Judith Terra Paul Tucker	Nayes:	Dean Buntrock
		Abstain:	Margaret Daley Ron Gidwitz

The Collections Committee and Chair was moved by Dr. Tucker, seconded by Mme. Ahrweiler. The vote in favor was unanimous.

The Education Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote in favor was unanimous.

The Strategic Planning Committee and Chair was moved by Dr. Tucker, seconded by Mrs. Terra. The vote in favor was unanimous.

At 2:10 PM the meeting was adjourned for lunch. At 2:40 the meeting resumed. The next item on the agenda was to review the estate. Mr. Heatwole did so and indicated that there were three issues that Winston & Strawn examined:

1. The transaction with Lawter
2. The transactions between Dan Terra and Jim Terra
3. The magnitude of the Bell, Boyd bills

Mr. Heatwole indicated Winston & Strawn had discussed the estate report with Bell, Boyd, BIK, Meyer, Brown & Platt, the Foundation Board and had reviewed all papers. Winston Strawn has concluded its review. He also indicated that the one open point was that Schiff, Hardin & Waite will be reviewing issues relating to Mercury Finance.

Winston & Strawn's conclusion was that, after thorough review, they found no reason for the Foundation not to accept the report of the Executor, except for Mercury Finance, which they have not reviewed.

He indicated that Bell, Boyd has not turned over the Mercury Finance papers to Schiff, Hardin and that we need to give them a waiver for Schiff, Hardin to get the papers. He noted that Jim Collins needed a letter from the Foundation to turn over the material to Schiff, Hardin.

A resolution with four components, which was as follows, was moved by Mme. Ahrweiler and seconded by Dr. Marshall:

1. Accept the Winston Strawn report as issued.
2. Approve that a letter be sent to Bell, Boyd to release the papers to Schiff, Hardin immediately so that Schiff Hardin may review the Mercury Finance issues expeditiously.
3. Report to the Executive Committee on the result of Schiff, Hardin's review of Mercury Finance.
4. Authorize the Executive Committee to close the estate.

The vote was taken unanimously in favor of this resolution.

The Finance Committee report was given by Mr. Ratner. He discussed results of the audit. He also discussed the four points raised in the Management Letter: Terra Museum Accounting, Endowment Income, Intercompany Activity and In-kind Contributions. Mr. Ratner addressed each of the points and indicated that a resolution of these points would be made. A motion to accept the Audit and Management Letter, subject to any footnotes relating to the current lawsuit, was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. Mr. Ratner then discussed the change of investment allocations within the equity portion. A memo on this matter is included in the Board book under the September 25 Finance Committee section. A motion to accept this reallocation was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. The third item was to review three new potential investment advisors: Kennedy, Ennis and Cambridge. Mr. Ratner recommended Kennedy which Mr. Gidwitz agreed with. The motion to approve was made by Dr. Stebbins and seconded by Dr. Marshall. The vote was unanimous in favor.

Dr. Stebbins then gave the Collection Committee report. The first item on the agenda was the motion by Dr. Stebbins to have the Board delegate the approval of the loans, exhibitions, donations, etc. to the Collections Committee to cover the report included in the Board book. Mme. Ahrweiler seconded. The motion was unanimously in favor. The next item was the Deaccession report. Dr. Stebbins indicated that, after careful review by the Committee and the outside advisors who made two trips to Chicago to examine the proposed deaccessions, the final list had been winnowed to 27 objects, with 16 of them not being included in the American Impressionist sale at Christie's on November 29, 2000.

Ambassador Hartman suggested that there should be some public relation's communications at the time about the deaccessioning. He suggested that it be made clear that these items are being sold to raise purchase funds for new additions to the collection. Dr. Stebbins also indicated that we have chosen Christie's and indicated some of the details of the contract and the reasons for selecting that venue as opposed to Sotheby's or Vance Jordan, a private dealer.

Mr. Gidwitz moved to approve the deaccessioning report and the selection of Christie's. Seconded by Ambassador Hartman. Unanimously in favor.

The Director's reports and VP of Finance reports were not given orally, but were included in the September 26, 2000 Board book.

Dr. Tucker suggested that he and Dr. Stebbins form a search committee for the new MAAG Director.

Mr. Ratner was instructed to change Sophie Levy's position at MAGG to Curator from Assistant Curator.

Mr. Ratner was asked to set-up both an Executive Committee conference call and a Board conference call after the court hearing on the 12th.

Dr. Marshall suggested that we need some formal communication structure perhaps in the form of a written newsletter every 3-4 weeks to keep the Board apprised of developments regarding the lawsuit. Mr. Ratner and Dr. Tucker were asked to coordinate.

The meeting was adjourned at 4:00pm.

Respectively submitted,

_____
Stephanie Pace Marshall
Secretary and Treasurer

TERRA FOUNDATION FOR THE ARTS
Committees/Committee Members
2000/2001

COLLECTIONS
Ted Stebbins, Chair
Helene Ahrweiler
Arthur Hartman
Judith Terra
Paul Tucker

Ex Officio Derrick Cartwright
Ex Officio John Hallmark Neff
Staff Donald Ratner

EDUCATION
Margaret Daley, Chair
Helene Ahrweiler
Jacques Andreani
Stephanie Pace Marshall
Judith Terra
Paul Tucker

Ex Officio Derrick Cartwright
Ex Officio John Hallmark Neff
Staff Donald Ratner

EXECUTIVE
Paul Tucker, Chair & President
Judith Terra, Vice Chair
Stephanie Pace Marshall, Secretary & Treasurer
Ron Gidwitz, At Large
Dean Buntrock, At Large

FINANCE
Stephanie Pace Marshall, Chair
Arthur Hartman
Alan Simpson
Judith Terra
Paul Tucker

Staff Donald Ratner

STRATEGIC PLANNING
Stephanie Pace Marshall, Chair
Jacques Andreani
Margaret Daley
Arthur Hartman
Ted Stebbins
Judith Terra
Paul Tucker

Staff Donald H. Ratner

16di-004285

Exhibit B

TERRA FOUNDATION FOR THE ARTS
INDEPENDENT LITIGATION COMMITTEE
MINUTES
December 4, 2000

In Attendance (Conference Call):

Ambassador Jacques Andreani
Dr. Ted Stebbins

Staff:

Donald Ratner

The meeting was called to order at 3:15pm.

There were three agenda items:

- Decide on Counsel for the lawsuit
- Discuss litigation strategy
- Approve legal bills

Dr. Stebbins made a motion to approve the retention of Sidley & Austin, seconded by Ambassador Andreani. After discussion, the attached resolution was approved unanimously.

Litigation strategy was then discussed. Susan Stone from Sidley & Austin was asked to join the call at this time. She discussed the possibility of Sidley & Austin investigating the allegations. Both members of the committee agreed with this idea and Ambassador Andreani made a motion to proceed with this and Dr. Stebbins seconded it. After discussion, the attached resolution was approved unanimously.

The September and October bills of Sidley & Austin were approved. The October bill from Shefsky and Froelich for services for Mrs. Terra, Dr. Tucker, and Senator Simpson were approved for payment subject to our corporate counsel approving the direct payment of these bills.

The meeting adjourned at 3:45pm.

Respectively submitted,

Donald H. Ratner
Assistant Secretary

Independent Litigation Committee
Resolution re: Retention of Counsel

WHEREAS, on or about September 22, 2000 there was filed in the Circuit Court of Cook County, Illinois, Chancery Division, cause no. 00 CH 13850 ("the Lawsuit");

WHEREAS, on September 26, 2000 the Board of Directors of the Terra Foundation for the Arts ("the Board") ratified the hiring of Sidley & Austin as Counsel for the Foundation for the Lawsuit;

WHEREAS, on November 30, 2000 pursuant to the Court Order, the Board of Directors of the Terra Foundation for the Arts ("the Board") established this independent litigation committee and authorized said committee to make all decisions surrounding actions relating to the Lawsuit;

WHEREAS, by way of its Order of November 13, 2000 the Court directed this independent litigation committee to consider the appointment of counsel; and

WHEREAS, one or more members of this independent litigation committee has interviewed Sidley & Austin, checked references, had discussions with Leonard Schrager, reviewed papers filed in connection with the lawsuit and considered the appointment of counsel;

1) This independent litigation committee hereby appoints and ratifies the retention of Sidley & Austin to represent the Foundation in connection with the Lawsuit;

2) This independent litigation committee hereby authorizes Sidley & Austin to take any and all action which in its professional judgment is appropriate in representing the Foundation in connection with the Lawsuit except for settlement and as stated below;

3) This independent litigation committee hereby reserves to itself final approval of the following: the filing of counterclaims in the Lawsuit, the taking of any interlocutory or final appeals from any Order or Judgment entered in the Lawsuit and any other matter which the Committee may from time to time decide to reserve to itself;

4) Notwithstanding anything stated above, settlement of the Lawsuit has been reserved by the Board to itself.

16di-004288

Exhibit C

SIDLEY & AUSTIN

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

DALLAS
LOS ANGELES
NEW YORK
SEATTLE
WASHINGTON, D.C.

BANK ONE PLAZA
10 S. DEARBORN STREET
CHICAGO, ILLINOIS 60603
TELEPHONE 312 853 7000
FACSIMILE 312 853 7036

FOUNDED 1866

HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(312) 853-2177

WRITER'S E-MAIL ADDRESS
astone@sidley.com

September 23, 2000

By Facsimile

Mr. Donald H. Ratner
Executive Director
Terra Foundation for the Arts

Re: Engagement Letter

Dear Mr. Ratner:

We are pleased that you have asked Sidley & Austin to serve as your counsel.

For over 100 years, our Firm commenced its relationship with each new client without formality. In recent years, however, the practice of law and the professional standards governing it have become increasingly complex. As a result, we, like other large firms, now follow the practice of entering into engagement letters with our clients. (As you may know, investment banking, consulting, accounting and other professional service firms adopted this practice years ahead of law firms.) Letters such as these serve the general purpose of setting forth the ground rules for our engagement. In addition, they address certain specific matters that are required to be set forth in writing by, or relate to rules of, the bar associations and other regulatory bodies under which we practice.

Although we have accepted this measure of formality with reluctance, we have nevertheless come to appreciate that it is preferable to have these matters understood and agreed to by our clients at the commencement of our representation. Accordingly, we submit for your approval the following provisions governing our engagement. If you are in agreement, please sign the enclosed copy of this letter in the space provided below. If you have any questions about these provisions, or if you would like to discuss possible modifications, do not hesitate to call. Again, we are pleased to have the opportunity to serve you.

I. Client; Scope of Representation. Our client in this matter will be the Terra Foundation for the Arts, an Illinois not-for-profit corporation (the "Foundation"), and we will advise the Foundation in connection with, and the scope of our engagement and duties to the Foundation shall relate solely to, the representation of the Foundation in connection with the litigation Dean Buntrock et al. v. Judith Terra et al., No. 00-CH-13859 (Circuit Court, Cook County, Illinois) (hereinafter the "representation"). You may limit or expand the scope of our representation from time to time, provided that any substantial expansion must be agreed to by us.

Term of Engagement. Either of us may terminate the engagement at any time for any reason by written notice, subject on our part to applicable rules of professional responsibility. In the event that we terminate the engagement, we will take such steps as are reasonably practicable to protect your interests in the above matter .

Unless previously terminated, Sidley & Austin's representation of the Foundation will terminate upon our sending you our final statement for services rendered. Following such termination, any otherwise nonpublic information you have supplied to Sidley & Austin which is retained by us will be kept confidential in accordance with applicable rules of professional responsibility. If, upon such termination, you wish to have any documents delivered to you, please advise us. Otherwise, all such documents will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any such documents retained by us.

You are engaging Sidley & Austin to provide legal services in connection with the specific representation as set forth above. After completion of the representation, changes may occur in the applicable laws or regulations that could have an impact upon your future rights and liabilities. Unless you actually engage us after the completion of the representation to provide additional advice on issues arising from the representation, Sidley & Austin has no continuing obligation to advise you with respect to future legal developments.

SIDLEY & AUSTIN CHICAGO

II. Fees and Expenses. Our fees will be based on the billing rate for each attorney and legal assistant devoting time to this matter. Our billing rates for attorneys currently range from $ 175 per hour for new associates to $ 550 per hour for senior partners. These billing rates are subject to change from time to time. We will include on our bills charges for performing services such as photocopying, messenger and delivery service, computerized research, travel, long-distance telephone, telecopy, word processing, and search and filing fees. Fees and expenses of others (such as consultants, appraisers, and local counsel) generally will not be paid by us, but will be billed directly to you. We anticipate billing you monthly and expect that our bills will be paid within 30 days after receipt.

III. Conflicts. As you know, Sidley & Austin has numerous clients. Many of these clients rely upon the Firm for general representation. Although we hope it never happens, it is possible that an adverse relationship (including litigation) may develop in the future between the Foundation and one of our other clients. If Sidley & Austin is not representing the Foundation in that matter and the matter in which the Foundation and another client have adverse interests is not substantially related to our representation of the Foundation as described above, the Foundation agrees that we may represent the other client. (You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.) You should be aware that Sidley & Austin has in the past done certain work for corporations and partnerships in which Ronald Gidwitz has had an interest but that (1) Ronald Gidwitz, personally, is not a client of Sidley & Austin, and (2) in a conversation with Sidley & Austin's Managing Partner Tomas Cole on September 23, 2000, Mr. Gidwitz acknowledged that he was not personally a client of Sidley & Austin and stated that he would not object to the Foundation's hiring of Sidley & Austin, even though he was aware that Sidley & Austin would vigorously represent and defend the Foundation in this matter.

Once again, we are pleased to have this opportunity to work with you. If you have any questions or comments during the course of our representation, please

call me at 312-853-2177.

Sincerely,

Susan A. Stone

AGREED TO AND ACCEPTED:

VP Finance + Administration. 9/24/00

SAS:sas

16di-004293

Exhibit D

1900 - Appearance & Jury Demand
0900 - Appearance Only
Appearance

(1-81) CCG-9

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

plaintiffs

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, et al.,

defendant

No. 00 CH 13859

The Honorable Dorothy Kirie Kinnaird

AMENDED
*APPEARANCE

The undersigned, as attorney, enters the appearance of the defendant

TERRA FOUNDATION FOR THE ARTS

Sidley & Austin

William F. Conlon
Stephen C. Carlson
Name Susan A. Stone/Sidley & Austin
Attorney for Defendant Terra Foundation for the Arts
Address Ten South Dearborn
City Chicago, IL 60603
Telephone 312/853-7000
Insurance Company
Atty No. 90761

*Strike demand for trial by jury if not applicable.

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Stephen C. Carlson

Attorney for Defendant
Terra Foundation for the Arts

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-004295

Exhibit E

1900 - Appearance & Jury Demand
0000 - Appearance Only
Appearance

(3-81) CCG-9

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, etc., et al.

V.

JUDITH TERRA, et al.

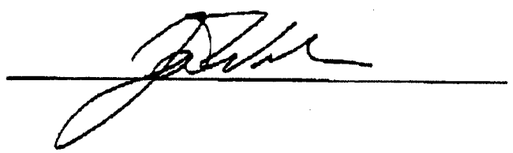
NO. 00 CH 13855

***APPEARANCE ~~AND JURY DEMAND~~**

The undersigned, as attorney, enters the appearance of the defendants

JUDITH TERRA, PAUL HAYES TUCKER and ALAN K. SIMPSON

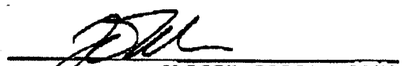
*Defendant demands trial by jury.



Name Brian L. Crowe, James D. Wilson
SHEFSKY & FROELICH LTD.
Attorney for Certain defendants
Address 444 N. Michigan
City Chicago, IL 60611
Telephone 312-527-4000
Atty No. 29143

*Strike demand for trial by jury if not applicable.

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.



Attorney for JUDITH TERRA, PAUL HAYES TUCKER and ALAN K. SIMPSON

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-004297

Exhibit F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	)	Hon. Dorothy Kirie Kinnaird

AFFIDAVIT OF BRIAN L. CROWE IN SUPPORT OF
SHEFSKY & FROELICH LTD.'S PETITION FOR FEES AND COSTS

I, Brian L. Crowe, under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, certify that the statements set forth in this Affidavit are true and correct.

1. I have knowledge of the facts contained in this Affidavit and if called as a witness could testify competently thereto.

2. I am a shareholder in the law firm of Shefsky & Froelich Ltd. ("Shefsky"). I am the attorney who was responsible for supervising the litigation work performed by this law firm during the period it represented the Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson ("Director Defendants") in this matter, October 2000 to June 29, 2001. I have been licensed to practice law in the State of Illinois since 1964 and have overseen and conducted numerous lawsuits.

3. For nearly twelve years, from 1975 to 1987, I served as a Judge of the Circuit Court of Cook County, and in that capacity I had occasion from time to time to review, and rule on, the reasonableness of attorneys fees awarded in various matters in which fees were an appropriate award.

4. From 1997 to 1999, I served as Corporation Counsel for the City of Chicago, and in that capacity I had occasion from time to time to review attorneys fees charged to the City of Chicago by outside counsel.

5. I have also, from time to time, been called and qualified to testify as an expert witness regarding the reasonableness of attorneys fees.

6. Each of the foregoing experiences has provided me with an informed basis to state my opinion that the fees and costs billed by Shefsky for its representation of the Director Defendants are reasonable.

7. Exhibit A to this Affidavit is a detailed explanation of the work performed by members and employees of Shefsky in connection with the above matter and the charges for that work. The

explanation includes the date of the service rendered, the identity of the person rendering the service, a detailed narrative of the service rendered, and the amount of time spent providing that service. For those persons who provided services both before and after November 1, 2000, two hourly rates are given because Shefsky's hourly rates increased on that date.

8. The billing rate for each person is as follows:

Person	***Position***	***Hourly Rate***
Brian L. Crowe (BLC)	Shareholder	335.00 (to October 31, 2000) 355.00 (as of November 1, 2000)
Michael J. Howlett, Jr. (MJH)	Shareholder	355.00
James D. Wilson (JDW)	Shareholder	275.00 (to October 31, 2000) 295.00 (as of November 1, 2000)
Alan T. Slagel (ATS)	Shareholder	295.00
Jack J. Hagerty (JJH)	Shareholder	260.00 (to October 31, 2000) 290.00 (as of November 1, 2000)
Gregory C. Ward (GCW)	Shareholder	210.00 (to October 31, 2000) 250.00 (as of November 1, 2000)
Patricia S. Spratt (PSS)	Shareholder	220.00 (to October 31, 2000) 230.00 (as of November 1, 2000)
Brett Nolan (BXN)	Associate	150.00 (to October 31, 2000) 175.00 (as of November 1, 2000)
Jared M. Wayne (JMW)	Associate	150.00
Ellen M. Avery (EMA)	Associate	155.00
Gary L. Nuzzi (GLN)	Paralegal	95.00
Thomas S. DalCompo (TSD)	Paralegal	90.00
Gabriel Reilly-Bates (GRB)	Paralegal	70.00 (to October 31, 2000) 75.00 (as of November 1, 2000)

Jennie B. Fisher (JBF)	Paralegal	70.00

9. As is correctly reported on Exhibit A, the attorneys' fees the Director Defendants incurred in connection with this matter through June 29, 2001 total $450,800.00.

10. In addition, the attached Exhibit A shows the costs incurred and disbursements made by Shefsky on behalf of the Director Defendants in relation to this matter.

11. As is correctly reported on Exhibit A, the costs incurred and disbursements made by Shefsky & Froelich Ltd. in connection with this matter through June 29, 2001, total $17,576.17.

12. The total of these amounts equals $468,376.17.

13. Based upon my experience, the amount charged in this matter for the services rendered and costs disbursed was reasonable and necessary. The charges are equivalent to the usual and customary charges that Shefsky charges its clients for similar work and are comparable to charges by other law firms in this area with similar experience and background for similar services.

Further affiant sayeth not.

Brian L. Crowe

707295.1

16di-004301

LAW OFFICES
SHEFSKY & FROELICH LTD.

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TELEPHONE (312) 527-4000
FACSIMILE (312) 527-5921
E MAIL sfltd@shefskylaw.com
FED ID# 36-2693453

FILE # 025134-00001-BLC
INV. # 14057

JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER JUNE 29, 2001
ATTN: JUDITH TERRA
3263 NORTH STREET, N.W.
WASHINGTON, D.C. 20007

REMITTANCE ADVICE

PREVIOUS AMOUNT OUTSTANDING..... .....$	0.00
TOTAL FEES THIS INVOICE.....$	450,800.00
TOTAL COSTS THIS INVOICE..... .....$	17,576.17
TOTAL AMOUNT THIS INVOICE.....$	468,376.17
TOTAL AMOUNT DUE..... .....$	468,376.17

PLEASE SHOW THIS NUMBER ON YOUR CHECK: 025134-00001-BLC

EXHIBIT
A

LAW OFFICES
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FED ID# 36-2693453

FILE # 025134-0[illegible]-BLC
INV. # 14057

JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER JUNE 27, 2001
ATTN: JUDITH TERRA
3263 NORTH STREET, N.W.
WASHINGTON, D.C. 20007

INVOICE FOR PERIOD THROUGH 06/29/01

LEGAL SERVICES REGARDING: BUNTROCK V. JUDITH TERRA

10/08/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH CLIENTS' ATTORNEYS FOR FOUNDATION; MEETING WITH CLIENTS AND ATTORNEYS FOR TERRA FOUNDATION AT O'HARE AIRPORT; TIME IN TRAVEL; REVIEW DOCUMENTS POST-MEETING.	6.30
10/08/00	GCW	REVIEW OF MATERIALS RECEIVED FROM SIDLEY & AUSTIN; INTER-OFFICE CONFERENCE WITH BRIAN CROWE REGARDING SAME; ATTEND MEETING TO DISCUSS RETENTION AND CASE RELATED ISSUES AT O'HARE.	5.10
10/09/00	BLC	CONFERENCE WITH STEVE CARLSON REGARDING STATUS AND PROCEDURE; CONFERENCE WITH COUNSEL REGARDING PROCEDURE; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	2.80
10/09/00	BXN	CONFERENCE WITH JAMES D. WILSON AND BRIAN L. CROWE (.10); REVIEW OF PLEADINGS (2.10); CIRCULATE AND MAKE COPIES OF PLEADINGS (.80) CONFERENCE WITH PATRICIA S. SPRATT (.10).	3.10
10/09/00	GCW	MEETING REGARDING STAFFING OF CASE; INTER-OFFICE CONFERENCES WITH JACK HAGERTY, PATRICIA SPRATT AND BRETT NOLAN REGARDING MEETING ON OCTOBER 8, 2000.	1.60

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10/09/00	JDW	CONFERENCE WITH BLC; JJH; BXN; GCW; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BLC; BEGIN REVIEW OF MATERIALS	6.10
10/09/00	PSS	OFFICE CONFERENCE WITH B. CROWE, J. WILSON, J. HAGERTY, G. WARD, AND B. NOLAN RE RESEARCH REGARDING FIDUCIARY DUTIES OF OFFICERS/DIRECTORS OF NOT-FOR-PROFIT CORPORATION, TO WHOM THOSE DUTIES ARE OWED, AND RE APPLICATION OF DEAD MAN'S ACT TO THE FACTS OF THIS CASE; RESEARCH ISSUES; OFFICE CONFERENCE WITH J. WILSON RE PREPARING MOTION TO DISMISS.	3.60
10/09/00	TSD	OBTAIN COPY OF STATE COURT DOCKET IN BUNTROCK SUIT.	.30
10/10/00	BLC	REVIEW DOCUMENTS REGARDING STATUS AND STRATEGY AND PROCEDURE.	2.00
10/10/00	JDW	CONTINUED REVIEW OF DOCUMENTS; CONFERENCE WITH BLC; PHONE CONFERENCE WITH JUDITH TERRA; BEGIN DRAFT OF INDEMNIFICATION REQUESTS	5.20
10/10/00	JJH	REVIEW COMPLAINT AND OTHER DOCUMENTS RELATIVE TO TRO; VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 25, 2000.	3.70
10/10/00	PSS	OFFICE CONFERENCE WITH B.CROWE RE MOTION TO DISMISS; OFFICE CONFERENCE WITH B.NOLAN RE VARIOUS THEORIES/BASES FOR MOTION TO DISMISS.	.70

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10/11/00	BLC	CONFERENCE WITH CLIENT, JUDITH TERRA, IN WASHINGTON, D.C.; REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STATUS, STRATEGY AND PROCEDURE.	12.00
10/11/00	BXN	CONFERENCE WITH PATRICIA S. SPRATT (.30); REVIEW CASES REGARDING FIDUCIARY DUTIES (.90); RESEARCH REGARDING CHARITABLE TRUST ACT (.60); RESEARCH REGARDING NOT-FOR-PROFIT ACT (1.10).	2.80
10/11/00	JDW	TRAVEL TO AND FROM WASHINGTON, D.C.; MEET WITH CLIENT	12.30
10/11/00	JJH	REVIEW MOTION TO APPOINT SPECIAL LITIGATION COUNSEL, JAMES D. TERRA'S EMERGENCY PETITION TO INTERVENE, DEFENDANT TERRA FOUNDATION'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT, AND DEFENDANT TERRA FOUNDATION'S OPPOSITION TO MOTION FOR A SPECIAL LITIGATION COMMITTEE; VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING SAME; TELEPHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION REGARDING DERIVATIVE ACTIONS GENERALLY AND SPECIAL LITIGATION COMMITTEES GENERALLY.	8.90
10/11/00	JMW	CONDUCT RESEARCH REGARDING SPECIAL LITIGATION COMMITTEE	
10/11/00	PSS	CONTINUE RESEARCH REGARDING BASES FOR A MOTION TO DISMISS; REVIEW PLAINTIFF'S MOTION TO APPOINT INDEPENDENT LITIGATION COMMITTEE; OFFICE CONFERENCE WITH J. HAGERTY AND B. NOLAN RE ALL.	7.80
10/12/00	BLC	PREPARE FOR AND APPEAR BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL POST-COURT HEARING.	4.00

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10/12/00	JBF	STARTED PLEADINGS INDEX	2.50
10/12/00	JDW	CONTINUED REVIEW OF FOUNDATION DOCUMENTS; REVIEW NOTICE OF DEPOSITION FOR MME. AHRWEILER; REVIEW PLEADINGS FILED BY PLAINTIFF; REVIEW DRAFT RESPONSE; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH MR. TUCKER	5.80
10/12/00	JJH	PREPARE FOR ORAL ARGUMENT ON VARIOUS MOTIONS; VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN REGARDING SAME; ATTEND HEARING; REVIEW EMERGENCY MOTION TO INTERVENE; PRELIMINARY RESEARCH REGARDING SAME; DRAFT RESPONSE TO MOTION TO INTERVENE.	9.40
10/12/00	PSS	CONTINUE RESEARCH IN PREPARATION FOR DRAFTING MOTION TO DISMISS; UPDATE AND SHEPARDIZE ALL CASES FOUND; REVIEW ADDITIONAL PLEADINGS PROVIDED BY SIDLEY & AUSTIN (MOTIONS, AG'S COMPLAINT, LEGAL MEMORANDA); OFFICE CONFERENCE WITH J. WILSON AND J. HAGERTY RE BACKGROUND FACTS OBTAINED FROM CLIENT INTERVIEWS AND RE COORDINATION OF ALL DISCOVERY MATTERS.	8.70
10/12/00	TSD	FILE APPEARANCE AND NOTICE OF FILING SAME WITH THE CLERK OF THE CIRCUIT COURT; DELIVER SAME TO BRIAN CROWE AT COURT.	.70
10/13/00	BLC	CONFERENCE WITH JOHN ENGLISH AND REVIEW DOCUMENTS AT UNGARETTI & HARRIS OFFICE; CONFERENCE WITH CLIENT, JUDITH TERRA; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	2.60

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10/13/00	BXN	CONFERENCE WITH PATRICIA S. SPRATT (.60); RESEARCH REGARDING FIDUCIARY DUTIES OWED TO STATE (1.90); REVIEW PLEADINGS AND NEW MOTION (.90); RESEARCH REGARDING INDEMNIFICATION UNDER BYLAWS AND ILLINOIS LAW (1.20); DRAFT MOTION TO DISMISS (2.30).	6.90
10/13/00	JBF	COPIED EXHIBITS PULLED CASES OFF OF WEST LAW	2.30
10/13/00	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION; CONFERENCE WITH JJH, BLC, PSS; REVIEW ORDERS; REVIEW PLEADINGS; CONTINUED REVIEW OF FOUNDATION DOCUMENTS; REVIEW PLAINTIFFS' MOTION FOR SPECIAL LITIGATION COMMITTEE; PHONE CONFERENCE WITH CLIENT	5.10
10/13/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN; REVIEW AND REVISE RESPONSE TO EMERGENCY PETITION TO INTERVENE; REVIEW VARIOUS DISCOVERY REQUESTS; MEETING WITH JOHN ENGLISH AND BRIAN CROWE AT UNGARETTI & HARRIS REGARDING ESTATE ISSUES; REVIEW RESPONSE FROM SIDLEY & AUSTIN TO MOTION FOR INDEPENDENT COUNSEL; RESEARCH REGARDING SAME; TELEPHONE CONFERENCE WITH JIM WILSON AND CORPORATE COUNSEL FOR THE FOUNDATION REGARDING SPECIAL LITIGATION COMMITTEES AND DERIVATIVE ACTIONS.	6.70
10/13/00	PSS	CONCLUDE RESEARCH; BEGIN DRAFT OF MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS; REVISE AND EDIT SAME.	8.50
10/14/00	BLC	REVIEW DOCUMENTS REGARDING MEDIA COVERAGE AND INDEMNIFICATION ISSUES; REVIEW PLEADINGS.	1.50

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FED ID# 36-2693453

10/16/00	BLC	CONFERENCE WITH WILLIAM CONLON AND TELEPHONE CONFERENCE WITH ATTORNEY GENERAL'S OFFICE; CONFERENCE WITH COUNSEL AND REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR COURT HEARINGS; REVIEW CASES AND DOCUMENTS REGARDING SPECIAL LITIGATION COMMITTEES; CONFERENCE WITH COUNSEL RELATIVE THERETO.	2.30
10/16/00	BXN	RESEARCH REGARDING SPECIAL LITIGATION COMMITTEES PER JDW (1.70); DRAFT MOTION TO DISMISS (2.00); CONFER WITH JH REGARDING MOTION (.40); CONFERENCES WITH PSS REGARDING MOTION (.40); CONFER WITH JDW REGARDING SPECIAL LITIGATION COMMITTEES (.20)	4.70
10/16/00	JDW	DRAFT RESPONSE TO MOTION FOR SPECIAL LITIGATION COMMITTEE; CONFERENCE WITH JJH; REVIEW CASE LAW AND CONTINUED RESEARCH RE: SPECIAL LITIGATION COMMITTEE	6.50
10/16/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, PATRICIA SPRATT AND BRETT NOLAN; REVIEW AND REVISE MEMORANDUM IN SUPPORT OF MOTION TO DISMISS; FURTHER RESEARCH REGARDING INTERVENTION AND SPECIAL LITIGATION COMMITTEES; FURTHER DRAFTING OF MEMORANDUM IN OPPOSITION TO PETITION TO INTERVENE; FILE SAME; TELEPHONE CONFERENCE WITH COUNSEL FOR THE FOUNDATION REGARDING SPECIAL LITIGATION COMMITTEES.	8.70
10/16/00	PSS	FURTHER REVISE DRAFT MEMO IN SUPPORT OF MOTION TO DISMISS.	1.80
10/16/00	TSD	FILE RESPONSE IN OPPOSITION TO PETITION TO INTERVENE WITH THE CLERK OF THE CIRCUIT COURT.	.60

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10/17/00	BXN	CONFERENCES WITH PSS (.30); CONFERENCES WITH JH (.30); RESEARCH PER JH REGARDING CHARITABLE TRUSTS AND FIDUCIARY DUTIES OWED (1.50)	2.10
10/17/00	JBF	ORDERED FILE INSERTS ORGANIZED DOCUMENTS FOR THE FILE	1.20
10/17/00	JDW	REVIEW/REVISE OPPOSITION TO SPECIAL LITIGATION COMMITTEE; REVIEW TERRA FOUNDATION'S OPPOSITION TO TRO; CONFERENCE WITH BLC	3.60
10/17/00	JJH	TELEPHONE CONFERENCE WITH JIM WILSON AND STEPHEN CARLSON REGARDING SLC'S GENERALLY; REVIEW REPLY REGARDING INDEPENDENT LITIGATION COMMITTEE; TELEPHONE CONFERENCE WITH STEPHEN CARLSON REGARDING SAME; REVIEW AND REVISE MOTION TO DISMISS FOR INDIVIDUAL DEFENDANTS.	3.20
10/17/00	TSD	FILE RESPONSE IN OPPOSITION TO SPECIAL LITIGATION COMMITTEE WITH THE CLERK OF THE CIRCUIT COURT.	.60
10/18/00	BLC	CONFERENCE WITH SIDLEY & AUSTIN LAWYERS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR HEARING.	2.30
10/18/00	JBF	BEGAN DISCOVERY INDEX, UPDATED PLEADINGS INDEX	1.60
10/18/00	JDW	MEETING WITH BLC AND JJH RE: STRATEGY FOR HEARING; MEETING AT SIDLEY AND CONFERENCE CALL WITH ALL COUNSEL; REVIEW ALL PLEADINGS FOR ARGUMENT RE: SPECIAL LITIGATION COMMITTEE	6.50

LAW OFFICES
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10/18/00	JJH	MEETING WITH BRIAN CROWE AND JIM WILSON REGARDING STRATEGY FOR FRIDAY'S HEARING; DRAFT CORRESPONDENCE TO CLIENTS REGARDING DISCOVERY REQUESTS; CONFERENCE CALL WITH COUNSEL FOR THE FOUNDATION REGARDING VARIOUS MOTIONS FILED BY PLAINTIFFS; REVIEW SAME; FURTHER REVIEW AND REVISIONS TO MOTION TO DISMISS.	4.90
10/18/00	PSS	REVIEW ALL DISCOVERY SERVED BY ALL PLAINTIFFS ON ALL DEFENDANTS; OFFICE CONFERENCE WITH J. HAGERTY RE COORDINATING OUR DISCOVERY RESPONSES; DRAFT LETTER TO CLIENTS FOR J. HAGERTY RE ASSEMBLING RESPONSIVE DOCUMENTS; REVIEW BUNTROCK'S AND GIDWITZ'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY S&A.	1.40
10/18/00	TSD	DELIVERED COURTESY COPIES TO JUDGE KENARD'S CHAMBERS	.50
10/19/00	BLC	CONFERENCE WITH FLOYD PERKINS OF ATTORNEY GENERAL'S OFFICE AT STATE OF ILLINOIS BUILDING; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; CONFERENCE WITH SIDLEY & AUSTIN ATTORNEYS AND REVIEW CASE LAW TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD.	4.50
10/19/00	BXN	DRAFT AND REVISE MOTION TO DISMISS	1.80
10/19/00	JBF	UPDATED PLEADINGS INDEX AND DISCOVERY INDEX AND ORGANIZED DOCUMENTS IN FILE	2.70
10/19/00	JDW	PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH BLC; CONTINUE PREPARATIONS FOR COURT; CONTINUED REVIEW OF RESEARCH; PREPARE FOR AND MEET WITH MR. PERKINS AND BLC; REVIEW PLEADINGS; PREPARE FOR ORAL ARGUMENT	9.10

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10/19/00	PSS	DRAFT ANSWER FOR DR. TUCKER; REVISE AND EDIT SAME; TELEPHONE CONFERENCE WITH DR. TUCKER AND J. WILSON RE SAME; REVIEW ADDITIONAL DISCOVERY SERVED ON US; LETTER TO CLIENTS RE SAME; REVIEW CORRESPONDENCE REGARDING THIRD-PARTY PRODUCTION PURSUANT TO SUBPOENA, REGARDING SUBPOENA SERVED ON MME. AHRWEILER, AND J. TERRA'S INTENTION TO SEEK LEAVE TO FILE AMENDED PETITION TO INTERVENE; OFFICE CONFERENCE WITH J. WILSON RE ALL.	8.90
10/20/00	BLC	PARTICIPATION IN HEARINGS BEFORE JUDGE KINNAIRD AND COURT-ORDERED CONFERENCE WITH JUDGE KINNAIRD.	2.30
10/20/00	JBF	ORGANIZED FILE AND UPDATED INDEXES	2.40
10/20/00	JDW	PHONE CONFERENCE WITH PROFESSOR TUCKER; MEETING WITH COUNSEL; PREPARE FOR HEARING; DRAFT OUTLINE; ATTEND HEARING; PHONE CONFERENCE WITH JUDITH TERRA; REVIEW ANSWER; MEET AND CONFER WITH COUNSEL FOR FOUNDATION	10.30
10/20/00	JJH	CONFERENCES WITH JIM WILSON; PATRICIA SPRATT AND BRETT NOLAN; RESEARCH REGARDING RECEIVERSHIPS GENERALLY; PREPARE FOR HEARING ON EMERGENCY MOTIONS; ATTEND SAME; TELEPHONE CONFERENCE WITH CLIENTS REGARDING SAME.	6.80
10/20/00	PSS	CONCLUDE REVISIONS TO ANSWER/AFFIRMATIVE DEFENSES FOR DR. TUCKER; TELEPHONE CONFERENCE WITH J. ENGLISH RE REVIEWING UNGARETTI & HARRIS RECORDS RE REPRESENTATION OF J. TERRA VS. THE ESTATE; CONCLUDE PREPARATIONS FOR HEARING; ATTEND HEARING.	8.60

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10/22/00	BLC	REVIEW DOCUMENTS TO PREPARE FOR STRATEGY FOR DISCOVERY AND SUGGESTED COURT PROCEDURE.	.80
10/23/00	BLC	CONFERENCE WITH PAUL TUCKER AND JIM WILSON; REVIEW DOCUMENTS; CONFERENCE WITH STEVE CARLSON OF SIDLEY & AUSTIN AND CONFERENCE WITH JUDITH TERRA; CONFERENCE WITH PROF. PAUL TUCKER AND REVIEW DOCUMENTS.	1.30
10/23/00	JBF	ORGANIZED PLEADINGS AND DISCOVERY INDEXES MADE COPIES	3.20
10/23/00	JDW	CONFERENCE WITH JJH; PHONE CONFERENCE WITH STEVE CARLSON; STRATEGY SESSION BETWEEN BLC, JJH, JDW; CONFERENCE CALL WITH CLIENTS; REVIEW ANSWER; REVIEW ISSUES FOR MOTION TO DISMISS FOR SENATOR SIMPSON	3.80
10/23/00	PSS	TELEPHONE CONFERENCE WITH MRS. TERRA RE PREPARATION OF DISCOVERY RESPONSES; PARTICIPATE IN CONFERENCE CALL WITH J. WILSON, B. CROWE, J. TERRA, AND P. TUCKER.	.70
10/24/00	BLC	CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.80
10/24/00	JBF	COPIED PLEADINGS TO SEND TO MRS. TERRA	.80
10/24/00	JDW	FURTHER STRATEGY DISCUSSIONS; PHONE CONFERENCE WITH CLIENT; PHONE CONFERENCE WITH STEVE CARLSON RE: DERIVATIVE ISSUES; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH MR. MICHAELI; PHONE CONFERENCE WITH PROFESSOR TUCKER RE: SLC	5.10

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10/24/00	PSS	RESEARCH ILLINOIS NOT FOR PROFIT CORPORATIONS ACT FOR REFERENCES TO THE MINIMUM NUMBER OF PERSONS WHO MUST BE ON COMMITTEES, AND THE RATIO OF DIRECTORS TO NON-DIRECTORS; ADVISE J. WILSON RE SAME.	.40
10/25/00	BLC	REVIEW AND ANALYZE DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING BOARD MEETING IN BOSTON AND POTENTIAL MOTIONS BEFORE JUDGE KINNAIRD AND GENERAL STRATEGY.	1.50
10/25/00	JBF	UPDATED DISCOVERY INDEX AND ORDERED MORE FILE INSERTS	.80
10/25/00	JDW	CONFERENCE WITH BLC RE: STRATEGIES; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENT; REVIEW PROBATE ISSUES; REVIEW CASE LAW RE: DERIVATIVE ISSUES AND CAUSES OF ACTION	4.10
10/25/00	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW AND REVISE DRAFT ANSWERS.	1.90
10/25/00	PSS	TELEPHONE CONFERENCE WITH DR. TUCKER RE ASSEMBLING DOCUMENTS IN ADVANCE OF PREPARING RESPONSES TO DISCOVERY REQUESTS; DRAFT ANSWER FOR J. TERRA TO BUNTROCK'S AND GIDWITZ'S COMPLAINT; BEGIN TO DRAFT WRITTEN DISCOVERY RESPONSES FROM ATTORNEY GENERAL AND FROM BUNTROCK & GIDWITZ.	6.10
10/26/00	BLC	REVIEW DOCUMENTS REGARDING THEORIES OF DEFENSE AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	1.30
10/26/00	JBF	ORGANIZED CORRESPONDENCE FOLDER AND ORDERED MORE INSERTS	.50

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10/26/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON; REVIEW DRAFT ANSWER; REVIEW DRAFT MOTION TO DISMISS; REVIEW COMPLAINT; PHONE CONFERENCE WITH CLIENT	3.70
10/26/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW PLEADINGS AND THE FOUNDATION'S MOTION TO DISMISS; CONFERENCE WITH BRETT NOLAN REGARDING SAME.	2.10
10/27/00	BLC	CONFERENCE WITH COUNSEL; CONFERENCE WITH SIDLEY & AUSTIN LAWYER AND REVIEW DOCUMENTS REGARDING BOARD OF DIRECTOR MEETINGS AND COURT STRATEGY.	.50
10/27/00	BXN	RESEARCH PER JH REGARDING FIDUCIARY DUTY AND CHARITABLE TRUSTS (.80); REVISE FIDUCIARY SECTION OF MOTION TO DISMISS PER JH (1.10)	1.90
10/27/00	JBF	COPIES	.50
10/27/00	JDW	EXTENDED CONFERENCE WITH BLC; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH JJH; REVIEW MEMO AND ORDERS RE: ISSUES FOR BOARD MEETING	2.80
10/27/00	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	1.60
10/27/00	PSS	OFFICE CONFERENCE WITH J. WILSON RE DOCUMENTS IDENTIFIED AT UNGARETTI & HARRIS; SAME WITH J. HAGERTY; DRAFT ANSWER AND AFFIRMATIVE DEFENSES FOR DR. TUCKER TO ATTORNEY GENERAL'S COMPLAINT; REVISE AND EDIT SAME; BEGIN DRAFT OBJECTIONS AND ANSWERS TO WRITTEN DISCOVERY FROM BUNTROCK & GIDWITZ AND FROM ATTORNEY GENERAL.	7.90
10/28/00	BLC	REVIEW PLEADINGS AND EXHIBITS.	1.00

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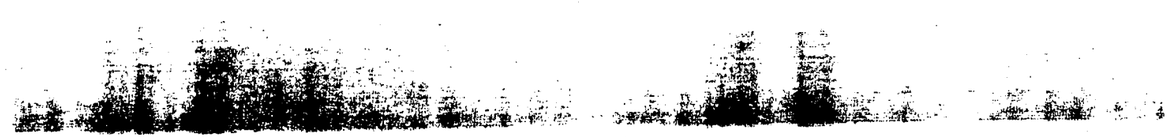
10/29/00	JDW	LEGAL RESEARCH RE: BREACH OF FIDUCIARY DUTY AND DERIVATIVE ACTIONS; REVIEW ANSWER TO ATTORNEY GENERAL'S COMPLAINT	2.90
10/30/00	BLC	CONFERENCE WITH CLIENT AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY, BOARD MEETING AND COURT APPEARANCES.	2.00
10/30/00	JBF	UPDATED PLEADINGS INDEX ORDERED INSERTS UPDATED MINUTES INDEX	1.80
10/30/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON RE: BOARD MEETING; PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE WITH PSS; CONFERENCE WITH BLC RE: STRATEGY; CONFERENCE WITH JJH RE: SAME; REVIEW AND EDIT ANSWER	5.80
10/30/00	PSS	CONTINUE DRAFT OBJECTIONS AND RESPONSES TO WRITTEN DISCOVERY AND ANSWERS FOR MRS. TERRA TO BOTH COMPLAINTS.	3.80
10/31/00	BLC	REVIEW DOCUMENTS REGARDING MOTIONS TO PREVENT BOARD OF DIRECTORS MEETING IN BOSTON AND CONFERENCE WITH COUNSEL RELATIVE THERETO; CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY FOR MEETING.	2.00
10/31/00	BXN	REVIEW ATTORNEY GENERAL'S COMPLAINT (.90); RESEARCH REGARDING FACT-PLEADING AND SECTION 2-615 MOTION (1.00); BEGIN DRAFTING MEMORANDUM IN SUPPORT OF MOTION TO DISMISS (2.00)	3.90
10/31/00	JBF	UPDATED PLEADINGS AND DISCOVERY INDEXES ORGANIZED CORRESPONDENCE FILE	1.50



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10/31/00	JDW	PHONE CONFERENCE WITH MARK HEAWOLE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCES WITH STEVE CARLSON; REVIEW JOINDER MOTION FROM QUINLAN RECEIVED AT 4:10; REVIEW EMERGENCY MOTION OF ATTORNEY GENERAL RECEIVED AT 3:55; CONFERENCE WITH BLC AND PSS; STRATEGIZE FOR COURT HEARING IN MORNING	5.10
10/31/00	PSS	CONCLUDE DRAFTS OF ALL RESPONSES TO DISCOVERY FOR ALL DEFENDANTS AND ANSWERS TO COMPLAINTS FOR MRS. TERRA; TELEPHONE CONFERENCE WITH MRS. TERRA AND N. MICHAELI RE ALL DRAFTS AND ASSEMBLING RESPONSIVE DOCUMENTS; LETTER TO SAME CONFIRMING; MESSAGE TO DR. TUCKER RE DOCUMENTS; OFFICE CONFERENCE WITH B. CROWE AND J. WILSON RE TWO LATEST "EMERGENCY" MOTIONS RE BOARD MEETING TO ESTABLISH LITIGATION COMMITTEE.	3.20
11/01/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE FOR COURT HEARING; CONFERENCE WITH COUNSEL AND CONFERENCE WITH CLIENTS POST-HEARING.	1.00
11/01/00	BXN	DRAFTING MOTION TO DISMISS SIMPSON (3.40); REVISIONS PER JH (.70)	4.10
11/01/00	JBF	DELIVERED CURTESY COPIES TO THE JUDGE AND FILED DOCUMENTS AT THE DALEY CENTER	.90
11/01/00	JBF	ORGANIZED CORRESPONDENCE FOLDER	1.00

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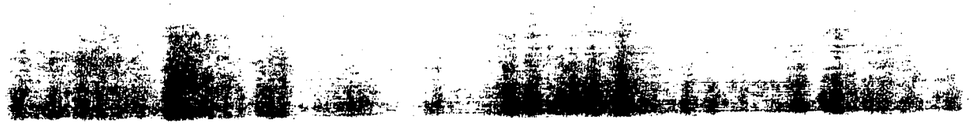
11/01/00	JDW	PREPARE FOR AND ATTEND COURT HEARING ON EMERGENCY MOTION; DRAFT RESPONSE; PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON	9.90
11/01/00	JJH	CONFERENCE WITH JIM WILSON REGARDING EMERGENCY MOTIONS; ATTEND HEARING ON SAME; VARIOUS TELEPHONE CONFERENCES WITH JOINT DEFENSE COUNSEL; TELEPHONE CONFERENCE WITH CLIENTS REGARDING SAME.	5.10
11/01/00	PSS	COMMENT ON, REVISE, AND EDIT DRAFT RESPONSE TO EMERGENCY MOTION RE BOARD MEETING; REVIEW SIDLEY & AUSTIN'S RESPONSE TO SAME; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE EVENTS IN COURT TODAY; TELEPHONE CONFERENCE WITH J. WILSON, B. CROWE, DR. TUCKER, AND MRS. TERRA RE SAME.	1.80
11/02/00	BLC	STRATEGY SESSION WITH JIM WILSON AND JACK HAGERTY; CONFERENCE WITH WILLIAM CONLON OF SIDLEY & AUSTIN; CONFERENCE WITH SIDLEY & AUSTIN ATTORNEYS AND CONFERENCE WITH QUINLAN & CRISHAM ATTORNEYS; PREPARE FOR HEARING AND ATTENDANCE AND PARTICIPATION IN HEARING BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL POST-HEARING; REVIEW DOCUMENTS.	4.50
11/02/00	BXN	DRAFT MOTION TO DISMISS (SEN. SIMPSON) (3.00); REVIEW EMERGENCY MOTION OF AG (.50)	3.50
11/02/00	GCW	INTER-OFFICE CONFERENCE WITH BRIAN CROWE REGARDING INITIAL CLIENT MEETING AND PARTICIPATION OF THE DILENSCHNEIDER GROUP.	.30



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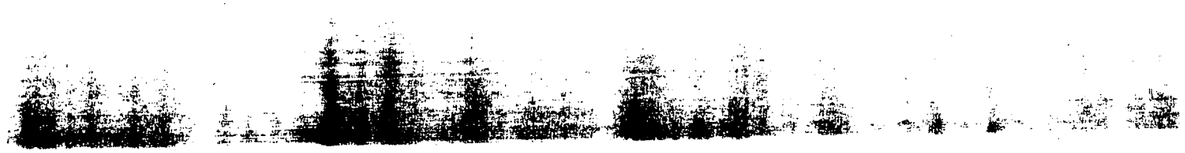
11/02/00	JBF	UPDATED PLEADINGS INDEX	.30
11/02/00	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE CALL WITH BILL CONLON; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE CALL WITH BRIAN CROWE, STEVE CARLSON AND JIM WILSON; PHONE CALL TO PAUL TUCKER; REVIEW MOTION FOR WINSTON & STRAWN; COURT APPEARANCE	8.50
11/02/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; VARIOUS TELEPHONE CONFERENCES WITH COUNSEL FOR THE FOUNDATION REGARDING SAME.	2.70
11/02/00	PSS	OFFICE CONFERENCES WITH J. WILSON AND B. CROWE RE REGENSTEIN FOUNDATION LITIGATION AND PARALLELS TO THIS CASE; OBTAIN COPY OF DOCKET FOR SAME AND OF COMPLAINT FOR SAME; REVIEW BOTH; OFFICE CONFERENCES WITH J. WILSON AND B. CROWE RE ALL.	2.30
11/02/00	TSD	SEARCH COURT RECORDS FOR REGENSTEIN FOUNDATION SUIT.	.40
11/02/00	TSD	COPY REGENSTEIN COMPLAINT AT THE CIRCUIT COURT.	.60
11/03/00	BLC	CONFERENCE WITH FOUNDATION LAWYERS AND SIDLEY & AUSTIN REGARDING SELECTION OF ATTORNEY FOR SPECIAL LITIGATION COMMITTEE AND REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND SELECTION OF LAWYER FOR SPECIAL LITIGATION COMMITTEE.	3.00
11/03/00	JBF	ORDERED INSERTS ORGANIZED CORRESPONDENCE AND PLEADINGS DELIVERED LETTER TO THE JUDGE AT THE DALEY CENTER	2.30



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11/03/00	JDW	CONFERENCE WITH BRIAN CROWE AND JACK HAGERTY AT SIDLEY & AUSTIN RE: INDEPENDENT COUNSEL ISSUES; DRAFT CORRESPONDENCE TO COURT RE: INDEPENDENT COUNSEL; DRAFT ISSUES MEMO	3.10
11/03/00	JJH	ATTEND MEETING WITH BRIAN CROWE AT SIDLEY & AUSTIN; REVIEW AND REVISE CORRESPONDENCE; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	3.60
11/05/00	BLC	REVIEW DOCUMENTS RELATIVE TO BOARD OF DIRECTORS' MEETING; REVIEW PLEADINGS AND ANALYZE DISCOVERY REQUESTS; DISCOVERY PLAN OF PLAINTIFFS AND RESPONSES AND STRATEGY.	1.30
11/06/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; COURT APPEARANCE BEFORE JUDGE KINNAIRD.	2.00
11/06/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PAUL TUCKER; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON; REVIEW QUINLAN MOTION; COURT APPEARANCE ON APPOINTMENT OF LITIGATION COUNSEL; PREPARE ANSWER	8.60
11/06/00	PSS	ATTENTION TO PLAINTIFFS' BUNTROCK AND GIDWITZ' EMERGENCY MOTION RE CONTRACT WITH PUBLIC RELATIONS FIRM; OFFICE CONFERENCE WITH JDW RE SAME.	.50
11/07/00	JBF	ORGANIZED FILE	1.50

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11/07/00	JDW	CONFERENCE WITH JACK HAGERTY RE: SIDLEY ACTION; REVIEW FAX FROM Q&C; PHONE CONFERENCE WITH MR. KENNEDY; PHONE CONFERENCE WITH PROFESSOR TUCKER; PHONE CONFERENCE WITH MR. CARLSON; DRAFT REVISIONS TO ORDER; DRAFT CORRESPONDENCE RE: REVISIONS TO SAME; REVIEW DRAFT OBJECTIONS TO DISCOVERY	6.50
11/08/00	BLC	CONFERENCE WITH CLIENT, P. TUCKER, AND CONFERENCE WITH D. RATNER; CONFERENCE WITH DILENSCHNEIDER OFFICIALS AND CONFERENCE WITH SIDLEY AUSTIN; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	2.30
11/08/00	BXN	CONFER WITH JDW REGARDING MOTION TO DISMISS	.20
11/08/00	JBF	ORGANIZED CORRESPONDENCE	1.00
11/08/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR MEETING AT QUINLAN & CRISHAM; PREPARE FOR MEETING WITH ARTHUR ANDERSEN; MEETING AT Q&C; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DOCTOR TUCKER; CONFERENCE WITH BRIAN CROWE RE: GREATER CHICAGO CHAMBER OF COMMERCE; PHONE CONFERENCE WITH CHRIS ROBLING; MULTIPLE CONFERENCES PHONE CONFERENCES WITH DR. TUCKER	6.10
11/08/00	PSS	ATTENTION TO CORRESPONDENCE FROM PLAINTIFF'S COUNSEL RE DRAFT ORDER; OFFICE CONFERENCE WITH J. WILSON RE STATUS OF OUR DISCOVERY RESPONSES.	.40
11/09/00	BLC	CONFERENCES WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH PAUL TUCKER AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	2.00

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11/09/00	BXN	REVIEW EMERGENCY MOTION AND RESPONSE BRIEF REGARDING DILENSCHNEIDER CONTRACT	.50
11/09/00	JBF	UPDATING PLEADINGS INDEX TRANSFERRED CORRESPONDENCE INTO BINDERS	1.60
11/09/00	JDW	REVIEW TRANSCRIPT OF COURT PROCEEDINGS; DRAFT CORRESPONDENCE TO JOHN KENNEDY; CONFERENCE WITH JACK HAGERTY; CONFERENCES WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. RATNER; REVIEW AND EDIT DISCOVERY AND EDIT MOTION	8.10
11/09/00	PSS	ATTENTION TO VARIOUS LETTERS RE SCHEDULING BOARD MEETING TO ELECT SLC.	.30
11/10/00	BXN	COMPILE DISCOVERY SERVED UPON INDIVIDUAL DIRECTORS (1.00); DRAFT DISCOVERY (.70)	1.70
11/10/00	JBF	UPDATED PLEADINGS INDEX FILED NEW CORRESPONDENCE	1.30
11/10/00	JDW	PHONE CONFERENCE WITH JOHN KENNEDY; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; COMPLETE EDITS TO DRAFT ORDER; REVIEW/REVISE MOTION TO DISMISS	1.90
11/10/00	JDW	PHONE CONFERENCE WITH JXG; REVIEW MOTION AND EDIT SAME	.90
11/10/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING INDEPENDENT LITIGATION COMMITTEE AND COMPOSITION OF SAME; REVIEW CORRESPONDENCE BETWEEN SIDLEY & AUSTIN AND QUINLAN & CRISHAM.	1.60

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11/13/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH BOARD ATTORNEYS.	.50
11/13/00	JBF	ORGANIZING TERRA FILE	.50
11/13/00	JDW	CONFERENCE WITH BRIAN CROWE RE: MEETING TUESDAY AT SIDLEY & AUSTIN; REVIEW FAX	3.60
11/14/00	BLC	MEETING WITH WILLIAM CONLON, STEVE CARLSON AND SUSAN STONE AT SIDLEY & AUSTIN; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE AND TELEPHONE CONFERENCE WITH SIDLEY & AUSTIN.	2.00
11/14/00	BLC	TELEPHONE CONFERENCE WITH STEVE CARLSON AND TELEPHONE CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING INDEPENDENT LITIGATION COMMITTEE.	1.00
11/14/00	BXN	REVIEW WEEK'S COMPILATION OF PLEADINGS, MEMORANDA AND OTHER MATERIALS	.40
11/14/00	JBF	UPDATED PLEADINGS INDEX	.20
11/14/00	JDW	MEETING AT SIDLEY & AUSTIN; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; DRAFT MEETING AGENDA; REVIEW ORDER	2.90
11/14/00	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON, BILL CONLON, STEPHEN CARLSON AND SUSAN STONE REGARDING INDEPENDENT LITIGATION COMMITTEE; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	1.70

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11/15/00	BLC	CONFERENCE WITH LEN SCHRAGER, ADVISOR TO INDEPENDENT LITIGATION, AND CONFERENCE WITH STEVE CARLSON OF SIDLEY & AUSTIN; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY FOR BOARD OF DIRECTORS MEETING.	1.50
11/15/00	JDW	CONFERENCE WITH BRIAN CROWE; MEETING WITH PROFESSOR SCHRAGER; PHONE CONFERENCE WITH BRIAN CROWE RE: MEETING AND NEWSPAPER ARTICLES; PHONE CONFERENCE WITH STEVE CARLSON AND JACK HAGERTY; DRAFT OUTLINE FOR CONDUCT OF MEETING; CONFERENCE WITH JACK HAGERTY	4.70
11/15/00	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON AND COUNSEL FOR INDEPENDENT LITIGATION COMMITTEE REGARDING SCHEDULING AND NOTICE TO BOARD OF DIRECTORS; REVIEW AND REVISE DRAFT NOTICE; TELEPHONE CONFERENCE WITH JIM WILSON AND STEPHEN CARLSON REGARDING NOTICE, OUTLINE AND RESOLUTIONS.	2.90
11/16/00	BLC	TELEPHONE CONFERENCE WITH WILLIAM CONLON AND SEARCH FOR POTENTIAL COMMITTEE MEMBER; CONFERENCE WITH COUNSEL REGARDING SPECIAL COUNSEL AND REVIEW TRANSCRIPT.	1.50
11/16/00	JBF	FILED NEW DOCUMENTS	.70
11/16/00	JDW	REVIEW/REVISE OUTLINE; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH PROFESSOR SCHRAGER; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; STRATEGIZE	5.10

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11/17/00	JDW	REVIEW/REVISE OUTLINE; CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE; PHONE CONFERENCE WITH MR. SCHRAGER; REVIEW COMMUNIQUE; EDIT SAME	3.50
11/20/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING BOARD OF DIRECTORS' MEETING, TECHNIQUES OF PLAINTIFFS' ATTORNEYS AND STATUS UPDATE.	.50
11/20/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PROFESSOR SCHRAGER; DRAFT LETTER TO MR. QUINLAN; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH JACK HAGERTY	3.10
11/20/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; REVIEW AND REVISE DRAFT RESOLUTIONS; REVIEW AND REVISE MEETING OUTLINE; REVIEW CORRESPONDENCE FROM OPPOSING COUNSEL AND COUNSEL FOR THE FOUNDATION; REVIEW AND REVISE RESPONSES TO SAME.	2.90
11/21/00	JBF	UPDATING CORRESPONDENCE FOLDER	.20
11/21/00	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW JOHN KENNEDY RESPONSE; DRAFT REPLY; CONFERENCE WITH JJH; FURTHER PHONE CONFERENCE WITH MR. CARLSON RE: KENNEDY LETTER	5.10
11/21/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; FURTHER REVIEW AND REVISIONS TO MEETING OUTLINE.	1.20
11/21/00	PSS	OFFICE CONFERENCE WITH J. WILSON RE STATUS OF OUR CLIENT'S PRODUCTION OF DOCUMENTS AND RE COORDINATING TRANSFER OF DOCUMENTS.	.30

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11/22/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; TELEPHONE CALL TO PAUL TUCKER.	1.30
11/22/00	BXN	REVIEW OF RECENT PLEADINGS AND CORRESPONDENCE	.50
11/22/00	JDW	REVIEW/REVISE LETTER TO MR. KENNEDY; CONFERENCE WITH BRIAN CROWE AND JACK HAGERTY; REVIEW TERRA MEMO; PHONE CONFERENCE WITH STEVE CARLSON (X3); PHONE CONFERENCE WITH PROFESSOR SCHRAGER; REVIEW PROPOSED DISCOVERY RESPONSE	3.50
11/22/00	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.70
11/23/00	JDW	REVIEW CORRESPONDENCE AND MEMO FROM S. CARLSON	1.40
11/27/00	JDW	COURT APPEARANCE; DRAFT CORRESPONDENCE TO ALL COUNSEL; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW DRAFT RESOLUTIONS; PHONE CONFERENCE WITH CARLSON; PHONE CONFERENCE WITH PAUL TUCKER	3.10
11/27/00	JJH	FURTHER REVIEW AND REVISIONS TO MEETING OUTLINE; VARIOUS CONFERENCES WITH JIM WILSON REGARDING SAME; REVIEW CORRESPONDENCE FROM OPPOSING COUNSEL; FURTHER REVIEW OF DRAFT RESOLUTIONS.	3.10
11/28/00	JBF	ORGANIZING FILE	.80
11/28/00	JDW	REVIEW AND REVISE RESOLUTIONS; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW PERKINS LETTER; CONFERENCE WITH JACK HAGERTY PHONE CONFERENCE WITH DR. TUCKER	3.30

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11/28/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY; FURTHER REVISIONS TO MEETING OUTLINE.	1.80
11/29/00	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROGRESS REGARDING BOARD OF DIRECTORS MEETING.	.30
11/29/00	JBF	UPDATING CORRESPONDENCE BINDER	.30
11/29/00	JDW	REVIEW/REVISE OUTLINE FOR MEETING ; CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MS. STONE; REVIEW PLEADINGS	.80
11/29/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING STATUS AND STRATEGY	1.10
11/30/00	BLC	CONFERENCE WITH COUNSEL REGARDING BOARD OF DIRECTORS MEETING.	.30
11/30/00	JDW	MULTIPLE PHONE CONFERENCES WITH DR. TUCKER; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH SUSAN STONE;	3.40
11/30/00	JJH	VARIOUS CONFERENCES WITH JIM WILSON REGARDING BOARD MEETING.	.80
12/01/00	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS AND STRATEGY; REVIEW DOCUMENTS RELATIVE THERETO; REVIEW CORRESPONDENCE.	1.00
12/01/00	JDW	REVIEW TAPES OF BOARD MEETING; PHONE CONFERENCE WITH MR. CARLSON; CONFERENCE WITH CLIENT; CONFERENCE WITH MR. RATNER; PHONE CONFERENCE WITH MR. SCHRAGER	5.90

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12/01/00	JJH	CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY; TELEPHONE CONFERENCE WITH S. CARLSON REGARDING INDEPENDENT LITIGATION COMMITTEE MEETING.	1.20
12/03/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SPECIAL LITIGATION COMMITTEE; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.00
12/03/00	JDW	REVIEW MEMOS RE: STAY OF PROCEEDINGS; LEGAL RESEARCH RE: SAME; PROVIDE SAME TO MR. CARLSON; PHONE CONFERENCE WITH MR. CARLSON RE: STRATEGY; PHONE CONFERENCE WITH MS. STONE; REVIEW MESSAGES RE: BOARD MEETING; REVIEW/REVISE MOTION TO STAY; CONFERENCE WITH BRIAN CROWE RE: STATUS AND SPECIAL LITIGATION COMMITTEE	3.90
12/04/00	JBF	ORGANIZED CORRESPONDENCE FOLDER AND UPDATED PLEADING'S INDEX	.40
12/04/00	JDW	DRAFT CORRESPONDENCE TO MR. CARLSON, MR. RATNER AND MS.. STONE; REVIEW BOARD TAPES	4.10
12/04/00	JJH	REVIEW AND REVISE MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING SAME.	3.20
12/05/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	.50
12/05/00	JBF	UPDATED PLEADINGS INDEX	.30
12/05/00	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH DON RATNER; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW/REVISE NEWEST VERSION OF MOTION TO STAY; FURTHER PHONE CONFERENCES WITH CLIENTS	2.10

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12/05/00	JJH	FURTHER REVISIONS TO MEMORANDUM IN SUPPORT OF 2-619.1 MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	1.90
12/06/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; COURT APPEARANCE BEFORE JUDGE KINNAIRD; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL POST-HEARING.	2.80
12/06/00	JDW	REVIEW FAXED MOTION TO CONTINUE STAY; PHONE CONFERENCE WITH QUINLAN'S OFFICE; COURT APPEARANCE	4.50
12/06/00	JJH	FURTHER REVISIONS TO MOTION TO DISMISS; CONFERENCE WITH JIM WILSON REGARDING STATUS.	1.40
12/07/00	BXN	REVIEW EMERGENCY TRO AND RELATED MATERIALS; LEGAL RESEARCH PER JACK HAGERTY; REVISIONS TO MOTION TO DISMISS (SIMPSON).	1.60
12/07/00	JBF	ORGANIZING FILE	1.20
12/07/00	JDW	CONFERENCE WITH PAT SPRATT RE: TRO MOTION; CONFERENCE WITH BRIAN CROWE RE: STRATEGY; CONFERENCE CALL; REVIEW TRO MOTION; PHONE CONFERENCE WITH STEVE CARLSON	5.10
12/07/00	PSS	REVIEW PLAINTIFF'S EMERGENCY MOTION RE APPOINTMENT OF RECEIVER AND TO OVERRIDE DECISIONS OF INDEPENDENT LITIGATION COMMITTEE; RESEARCH RE INDEMNIFICATION OF DIRECTORS AS TO ATTORNEYS FEES.	1.10

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12/08/00	BLC	REVIEW DOCUMENTS AND CASE LAW REGARDING S.L.C. AND REVIEW DOCUMENTS; CONFERENCE WITH COUNSEL FOR PENDING HEARING AND CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL.	1.50
12/08/00	JBF	UPDATING PLEADINGS INDEX	.50
12/08/00	JDW	PHONE CONFERENCES WITH STEVE CARLSON; REVIEW TAPES; DRAFT CORRESPONDENCE; LEGAL RESEARCH; BEGIN DRAFT OF RESPONSE TO EMERGENCY MOTION FOR RECEIVER, ETC.; PHONE CONFERENCES WITH CLIENTS; CONFERENCE WITH PAT SPRATT; REVIEW BRIEFS RE: ADVANCES	4.70
12/08/00	PSS	DISTILL FACTUAL ALLEGATIONS AGAINST OUR CLIENTS FROM BOTH COMPLAINTS IN PREPARATION FOR DRAFTING AN ARGUMENT; OFFICE CONFERENCE WITH J. WILSON RE SAME; BEGIN DRAFT OF SAME.	3.40
12/10/00	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. MICHAELI; REDRAFT DOCUMENTS; REVIEW STATUTES AND BY-LAWS; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENTS	5.10
12/11/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND MODIFY PLEADINGS TO BE SUBMITTED TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD.	1.00
12/11/00	BXN	RESEARCH FOR JIM WILSON REGARDING ADVANCEMENT OF FEES AND EXPENSES; CONFER WITH JIM WILSON REGARDING SAME .	2.50
12/11/00	JBF	ORGANIZING FILE	.40

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12/11/00	JDW	PHONE CONFERENCE WITH JUDITH TERRA; DRAFT RESPONSE TO TRO; PHONE CONFERENCE WITH STEVE CARLSON; ADDITIONAL CONFERENCES RE: EDITS TO OUR RESPONSE TO THE TRO; MULTIPLE REVISIONS TO SAME.	8.50
12/11/00	PSS	DRAFT FACT SECTION OF OUR RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR APPOINTMENT OF RECEIVER AND FOR STAY; REVISE AND EDIT SAME; REVIEW COMPLETED RESPONSE AND EDIT/COMMENT ON SAME.	3.20
12/12/00	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL TO PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; REVIEW CASE LAW.	1.50
12/12/00	BXN	REVIEW SIDLEY & AUSTIN'S MEMORANDUM IN OPPOSITION BRIEF	.50
12/12/00	JBF	UPDATED PLEADINGS INDEX, ORGANIZING FILE.	1.60
12/12/00	JDW	CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH PAT SPRATT; DRAFT CORRESPONDENCE; CONFERENCE WITH JACK HAGERTY; DRAFT CORRESPONDENCE RE DILENSCHNEIDER GROUP; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENTS; PHONE CONFERENCE WITH MR. KENNEDY; REVIEW TRANSCRIPTS OF BOARD MEETING 11/30/00; CONFERENCE WITH BRIAN CROWE	4.90
12/12/00	PSS	REVIEW SIDLEY & AUSTIN'S RESPONSE TO BUNTROCK'S AND GIDWITZ'S MOTION FOR TRO REGARDING CONFLICT OF SIDLEY AND AUSTIN AND RE PAYMENT OF LEGAL FEES AND TERRA FOUNDATION'S MOTION TO STRIKE PROFESSOR BREEN'S AFFIDAVIT.	.50

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12/12/00	TSD	FILE EMERGENCY MOTION TO APPOINT RECEIVER, FOR TEMPORARY RESTRAINING ORDER, AND OBJECTION TO MOTION FOR STAY WITH THE CLERK OF THE CIRCUIT COURT.	.60
12/12/00	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.50
12/13/00	JBF	ORGANIZED FILE	.20
12/13/00	JDW	REVIEW REPLY; PHONE CONFERENCE WITH MR. KENNEDY; CONFERENCE WITH JACK HAGERTY, PAT SPRATT AND BRIAN CROWE; DRAFT OUTLINE FOR ORAL ARGUMENT; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MR. RATNER; CONFERENCE WITH BRIAN CROWE	3.80
12/13/00	PSS	REVIEW PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY MOTION REGARDING ILC; ATTORNEYS FEES, AND DILENSCHEIDER CONTRACT; OFFICE CONFERENCE WITH J. WILSON RE SAME; OFFICE CONFERENCE WITH J. WILSON RE PREPARATION OF PRECISE OF ALLEGATIONS MISMANAGEMENT BY INDIVIDUAL DIRECTOR DEFENDANTS.	.50
12/14/00	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD - PREPARE OUTLINE AND REVIEW CASE LAW; HEARING BEFORE JUDGE KINNAIRD.	2.00
12/14/00	JBF	COPYING COMPLAINTS	1.90
12/14/00	JDW	PHONE CONFERENCE WITH MR. CONLON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENT; PHONE CONFERENCE WITH MR. CARLSON; PREPARE FOR AND ATTEND COURT HEARING; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JUDITH TERRA	4.90

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12/14/00	PSS	OFFICE CONFERENCE WITH B. CROWE, J. WILSON, AND J. HAGERTY RE TODAY'S HEARING ON EMERGENCY MOTIONS.	.20
12/15/00	JBF	COPYING PLEADINGS ORGANIZING FILE	.70
12/15/00	JJH	REVIEW EMERGENCY MOTION; DRAFT RESPONSE TO TRO; VARIOUS CONFERENCES WITH JIM WILSON REGARDING SAME.	2.90
12/15/00	PSS	REVIEW BOTH COMPLAINTS AND HIGHLIGHT ALLEGATIONS REGARDING MISMANAGEMENT OF TERRA FOUNDATION OR MUSEUM; MEMO TO J. WILSON RE SAME.	.70
12/18/00	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL; TELEPHONE CALL TO PAUL TUCKER REGARDING ISSUES INVOLVED IN CLAIMS OF WASTE AND MISMANAGEMENT.	1.00
12/19/00	BLC	REVIEW DOCUMENTS PLAN AND STRATEGY FOR PENDING MOTIONS.	1.00
12/19/00	JBF	ORGANIZED FILE	.90
12/20/00	ATS	MEET WITH CLIENT REGARDING EMPLOYMENT ISSUE; CONFER WITH JACK HAGERTY AND BRIAN CROWE REGARDING SAME	.30
12/20/00	BLC	CONFERENCE WITH PAUL TUCKER REGARDING LITIGATION ISSUES; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	2.30
12/20/00	JDW	REVIEW DR. TUCKER FAX; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH CLIENT; REVIEW MOTIONS IN PREPARATION FOR HEARING.	4.10

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12/28/00	BLC	REVIEW DOCUMENTS AND CASE LAW REGARDING PENDING MOTIONS.	1.00
12/28/00	JBF	REVISED PLEADINGS INDEX.	1.60
12/28/00	JDW	PHONE CONFERENCE(S) WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON; REVIEW APPELLATE RULES; REVIEW ARGUMENTS RE: TRO; REVIEW NEW MOTION; EDIT MOTION	4.80
12/29/00	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING COURT RULINGS ON PENDING MOTIONS.	.50
12/29/00	EMA	RESEARCH RE: MICHAEL A. FICARO AS SPECIAL ASSISTANT ATTORNEY GENERAL AFTER 1992. IN OFFICE CONFERENCES WITH JIM WILSON ON SAME.	.40
12/29/00	JBF	SEARCHED WESTLAW FOR CASES; ADDITIONS TO PLEADINGS INDEX.	2.10
12/29/00	JDW	PREPARE FOR AND PARTICIPATE IN COURT HEARING; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCES WITH COUNSEL; MEETING WITH COUNSEL FOR FOUNDATION; CONFERENCE WITH MR. RATNER	9.10
12/30/00	JDW	PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. RATNER; PHONE CONFERENCE WITH CLIENTS; REVIEW/REVISE LETTER TO COURT	2.60
12/31/00	JDW	PHONE CONFERENCES WITH MRS. TERRA, DR. TUCKER; REVIEW/REVISE LETTER TO JUDGE KINNAIRD; RESEARCH RE: MR. FICARO; PHONE CONFERENCE WITH MR. CROWE; PHONE CONFERENCES WITH MR. CARLSON AND MR. CONLON	5.10

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01/02/01	BLC	PREPARE FOR COURT HEARING BEFORE JUDGE KINNAIRD; APPEARANCE BEFORE JUDGE KINNAIRD; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS POST-HEARING.	6.00
		RESEARCH AND REVIEW DELAWARE CORPORATE LAW MEMORANDUM FOR JIM WILSON.	.30
	JBF	XEROXED JOURNAL ARTICLE AT THE DALEY CENTER LAW LIBRARY; ORGANIZING FILE; XEROXED COPIES OF THE COMPLAINT	2.40
01/02/01	JDW	REVIEW AND REVISE CORRESPONDENCE TO COURT; CONFERENCE WITH BRIAN CROWE; DELIVER LETTER TO JUDGE;REVIEW/REVISE DRAFT ORDER FROM 12/29; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCES WITH MR. CARLSON; PHONE CONFERENCE WITH CHRIS ROBLING; PREPARE FOR AND ATTEND COURT HEARING BEFORE JUDGE KINNAIRD; REVIEW DRAFT ORDER; FURTHER CONFERENCES WITH MESSRS. CARLSON AND KENNEDY; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCES WITH PAT SPRATT ON APPEAL ISSUES; CONFERENCE WITH JACK HAGERTY	10.30
01/02/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT REGARDING APPELLATE BRIEF; RESEARCH REGARDING MANDATORY PRELIMINARY INJUNCTIONS; DRAFT APPELLATE BRIEF REGARDING SAME; REVISIONS TO SAME.	11.80
01/02/01	PSS	REVIEW REQUIREMENTS FOR INTERLOCUTORY APPEAL FROM ENTRY OF TRO; OFFICE CONFERENCE WITH J. HAGERTY, B. CROWE, AND J. WILSON RE PREPARATION OF SAME;RESEARCH STANDARD OF REVIEW OF ENTRY OF TRO; PREPARE NOTICE OF APPEAL; PREPARE PETITION	13.80

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		FOR APPEAL; PREPARE MULTIPLE SECTIONS OF MEMORANDUM IN SUPPORT (INTRODUCTION, QUESTIONS PRESENTED, JURISDICTIONAL STATEMENT, RELEVANT FACTS, STANDARD OF REVIEW); IDENTIFY DOCUMENTS TO BE INCLUDED IN SUPPORTING RECORD; DRAFT AFFIDAVIT AUTHENTICATING SAME FOR J. WILSON; REVISE AND EDIT DRAFTED PORTIONS OF MEMORANDUM; REVIEW J. WILSON'S AND J. HAGERTY'S SECTIONS; FURTHER REVISE MEMORANDUM.	
01/03/01	BLC	REVIEW PLEADINGS AND REVIEW COURT ORDERS; CONFERENCE WITH MICHAEL SHAKMAN AND CONFERENCE WITH WILLIAM CONLON; CONFERENCE WITH COUNSEL REGARDING SLC.	1.50
01/03/01	JBF	BATES STAMPING; ORGANIZING FILE; MAKING LABELS FOR BINDERS; FILING AT THE APPELLATE COURT AND DELIVERING COPIES TO MR. PERKINS AND MR. KENNEDY.	3.20
01/03/01	JDW	DRAFT AND REVISE APPELLATE BRIEF; CONFERENCES WITH BRIAN CROWE, PAT SPRATT AND JACK HAGERTY; PHONE CONFERENCE WITH MR. MICHAELI; COMPLETE APPELLATE COURT PLEADINGS	11.30
01/03/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT REGARDING APPELLATE BRIEF; FURTHER REVISIONS TO SAME; FILE AND SERVE SAME.	3.90
01/03/01	PSS	CONCLUDE REVISIONS TO ALL PLEADINGS AND APPELLATE BRIEF, AND CONCLUDE ASSEMBLY OF SUPPORTING RECORD; CONFERENCES WITH J. WILSON AND J. HAGERTY RE REVISIONS; FILING DIRECTIONS TO T. DALCOMPO.	6.50

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01/03/01	TSD	FILE INTERLOCUTORY APPEAL AND NOTICE OF FILING SAME WITH THE CLERK OF THE CIRCUIT COURT; FILE PETITION FOR INTERLOCUTORY APPEAL, SUPPORTING MEMORANDUM, SUPPORTING RECORD, AND NOTICES OF FILING SAME WITH THE CLERK OF THE APPELLATE COURT; SERVE COPIES OF SAME ON QUINLAN'S OFFICE AND THE ATTORNEY GENERAL'S OFFICE.	1.00
01/04/01	ATS	PREPARE FOR AND MEET WITH BRIAN CROWE, JIM WILSON AND JACK HAGERTY REGARDING STATUS AND STRATEGY; REVIEW BACKGROUND MATERIALS AND INFORMATION	2.50
01/04/01	BLC	CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW BRIEFS; CONFERENCE WITH COUNSEL REGARDING SLC; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND APPEAL; CONFERENCE WITH WILLIAM CONLON REGARDING AG AND SLC.	1.80
01/04/01	BXN	MEETING WITH BRIAN CROWE, JIM WILSON, JACK HAGERTY, ALLAN SLAGEL AND PAT SPRATT; REVIEW NEW FILINGS; LETTER TO STEVE CARLSON; CONFERENCE WITH JACK HAGERTY REGARDING SIMPSON MOTION TO DISMISS; REVISIONS TO MOTION TO DISMISS.	4.70
01/04/01	JBF	ORGANIZING FILE; COPY DISCOVERY DOCUMENTS.	1.80
01/04/01	JDW	REVIEW PLAINTIFFS' BRIEF; PHONE CONFERENCE WITH ALL COUNSEL; PHONE CONFERENCES WITH MR. CARLSON; REVIEW DRAFT PLEADINGS; REVIEW/REVISE MOTION TO DISMISS; REVIEW DISCOVERY RE: RECEIVER	10.20

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01/04/01	JJH	VARIOUS CONFERENCES WITH BRIAN CROWE, JIM WILSON, ALLAN.SLAGEL, PATRICIA SPRATT, BRETT NOLAN AND ELLEN AVERY REGARDING STATUS AND STRATEGY; REVIEW AND REVISE MOTION TO DISMISS FOR SEN. SIMPSON; REVIEW DISCOVERY FROM PLAINTIFFS.	3.10
01/04/01	PSS	ATTENTION TO EXPEDITED DISCOVERY MATTERS; RESEARCH NOT FOR PROFIT CORP. ACT RE APPOINTMENT OF PROVISIONAL DIRECTOR; CONFERENCES WITH J. WILSON, J. HAGERTY, B. CONLON AND S. CARLSON (X2) RE STRATEGY, APPOINTMENT OF INDEPENDENT THIRD PERSON TO SLC, IDENTIFY OF SAME, AND SETTLEMENT OPTIONS; RESEARCH ISSUE RE RULE 137 AND SIGNATURE OF ATTORNEY ON PLEADINGS V. SOMEONE ELSE SIGNING A PLEADING ON HIS OR HER BEHALF.	5.80
01/04/01	TSD	DELIVER ADDITIONAL COPIES OF SUPPORTING RECORD TO THE ILLINOIS APPELLATE COURT.	.60
01/05/01	ATS	PREPARE FOR AND MEET WITH BRIAN CROWE, JIM WILSON AND JACK HAGERTY REGARDING STATUS AND STRATEGY; REVIEW BACKGROUND MATERIALS AND INFORMATION	2.00
01/05/01	BLC	REVIEW PLEADINGS, BRIEFS AND DOCUMENTS; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE AND TELEPHONE CONFERENCE WITH QUINLAN & CRISHAM.	2.50
01/05/01	BXN	REVISE SIMPSON MOTION TO DISMISS; RESEARCH REGARDING FIDUCIARY DUTIES OF TRUSTEES/DIRECTORS; CONFERENCE WITH JACK HAGERTY.	2.80

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01/05/01	JBF	CREATED APPELLATE COURT PLEADINGS INDEX COPIED PLEADINGS TO DISTRIBUTE TO TERRA TEAM ORGANIZED FILE	2.60
01/05/01	JDW	CONFERENCE WITH BRIAN CROWE REGARDING WINSTON & STRAWN DOCUMENTS; PHONE CONFERENCE WITH MARK HEATWOLE; CONFERENCE WITH BRIAN CROWE; PAT SPRATT AND JACK HAGERTY; FURTHER CONFERENCE WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCES WITH PAUL TUCKER; REVIEW PLAINTIFFS' BRIEF ON TRO	9.30
01/05/01	JJH	FURTHER REVISIONS TO SEN. SIMPSON'S MOTION TO DISMISS; REVIEW APPELLATE BRIEF FILED BY PLAINTIFFS; CONFERENCE WITH JIM WILSON REGARDING STATUS AND STRATEGY.	2.60
01/05/01	PSS	MULTIPLE OFFICE CONFERENCES WITH J. HAGERTY AND J. WILSON RE STRATEGY ON DISCOVERY.	.90
01/05/01	TSD	PICK UP ORDER FROM ILLINOIS APPELLATE COURT.	.70
01/07/01	ATS	REVIEW AND REVISE DISCOVERY; CONFER WITH JIM WILSON REGARDING SAME	.50
01/07/01	JDW	PHONE CONFERENCE WITH CLIENTS; EXCHANGE VOICE MAIL MESSAGES WITH MR. CARLSON; REVIEW DISCOVERY REQUESTS; REVIEW PLAINTIFFS' BRIEF REGARDING THE TRO	2.60
01/08/01	ATS	REVIEW AND REVISE DISCOVERY; CONFER WITH JIM WILSON REGARDING SAME	1.00
01/08/01	BXN	CONFERENCE WITH JACK HAGERTY REGARDING SIMPSON MOTION; RESEARCH REGARDING CHARITABLE TRUST ACT; REVISE SIMPSON MOTION TO DISMISS.	2.80

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01/08/01	JDW	REVIEW QUINLAN BRIEF; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY AND ALLAN SLAGEL; PHONE CONFERENCE WITH MRS. TERRA; CONFERENCE WITH ALLAN SLAGEL RE: DISCOVERY	3.90
01/08/01	JJH	REVIEW PLAINTIFFS' DISCOVERY; FURTHER REVIEW OF APPELLATE FILINGS; CONFERENCE WITH JIM WILSON REGARDING STATUS.	2.20
01/08/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES.	.30
01/08/01	TSD	FILE DEFENDANTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS WITH THE CLERK OF THE CIRCUIT COURT.	.60
01/09/01	ATS	REVIEW MOTION TO DISMISS CLAIMS AGAINST SEN. SIMPSON AND BACKGROUND MATERIALS; CONFER WITH JIM WILSON REGARDING SAME	1.50
01/09/01	BLC	CONFERENCE WITH CLIENTS AND CONFERENCE WITH COUNSEL; PREPARE FOR AND ATTEND COURT BEFORE JUDGE KINNAIRD; CONFERENCE WITH CLIENTS POST-COURT HEARING.	6.00
01/09/01	JBF	EXPAND PLEADINGS INDEX; ORGANIZE FILE.	2.10
01/09/01	JDW	CONFERENCE WITH BRIAN CROWE AND PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA AND SENATOR SIMPSON; CONFERENCE CALL ON DISCOVERY; PREPARE FOR AND MAKE COURT APPEARANCE; MEETING WITH CLIENTS; PHONE CONFERENCES WITH CLIENTS	9.40

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01/09/01	PSS	TELEPHONE CONFERENCE WITH ALL COUNSEL RE EXPEDITED DISCOVERY; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE DISCOVERY AND SETTLEMENT STRATEGIES; ATTENTION TO ALL OUTSTANDING DISCOVERY SERVED ON US AND PREPARATION OF RESPONSES THERETO.	6.80
01/09/01	TSD	OBTAIN COPY OF ORDER FROM APPELLATE COURT.	.60
01/10/01	ATS	REVIEW MOTION TO DISMISS CLAIMS AGAINST SEN. SIMPSON	1.00
01/10/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW STATE'S DOCUMENTS AND REVIEW PLEADINGS; CONFERENCE WITH S. STONE AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS; CONFERENCE WITH ATTORNEY GENERAL PERKINS AT STATE OF ILLINOIS BUILDING; CONFERENCE WITH COUNSEL WILLIAM CONLON POST-MEETING.	2.30
01/10/01	BXN	REVIEW OF INTRODUCTORY APPEAL BRIEFS.	.70
01/10/01	EMA	RESEARCH RE: BREACH OF A FIDUCIARY DUTY INVOLVING A STATEMENT OR OTHER NON-CONDUCT. ALSO, IN OFFICE CONFERENCES WITH GABE RILEY-BATES AND JIM WILSON ON SAME.	1.10
01/10/01	GRB	RESEARCH DUTY OF LOYALTY, DUTY OF CARE AND A DIRECTOR OF A NONPROFIT CORPORATION'S FIDUCIARY DUTY.	9.00
01/10/01	JDW	CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH CLIENTS	5.10

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01/10/01	PSS	REVISE AND EDIT ALL RESPONSES TO ALL OUTSTANDING DISCOVERY ADDRESSED TO OUR CLIENTS; REVIEW AND COMMENT ON SIDLEY & AUSTIN'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO TERRA FOUNDATION; OFFICE CONFERENCES WITH J. WILSON (X3) RE DISCOVERY ISSUES.	5.20
01/11/01	ATS	CONFER WITH JIM WILSON REGARDING SEN. SIMPSON MOTION TO DISMISS; REVIEW AND REVISE SAME	1.20
01/11/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING PENDING MOTIONS AND STRATEGY AND PROCEDURE.	.80
01/11/01	GCW	RESEARCH AND WORK ON DRAFT OF MOTION TO DISMISS SEN. SIMPSON; INTER-OFFICE CONFERENCE WITH JIM WILSON AND ALLAN SLAGEL REGARDING SAME.	1.50
01/11/01	GLN	REVIEWED, PROOF READ, "CITE-CHECKED" AND "SHEPARDIZED" MEMORANDUM IN SUPPORT OF INTERLOCUTORY APPEAL.	3.60
01/11/01	JBF	MADE COPIES OF MOTIONS, ORGANIZED FILE.	2.20
01/11/01	JDW	REVIEW NEW MOTION; CONFERENCE WITH BRIAN CROWE RE: EXPERT STRATEGIES; CONFERENCE WITH JACK HAGERTY RE: JOINDER ISSUE; REVIEW/REVISE NOTICE OF JOINDER DRAFT; CONFERENCE WITH PAT SPRATT; COMPLETE MOTION TO DISMISS AND JOINDER MOTION	10.30
01/11/01	PSS	DRAFT NOTICE OF JOINDER IN TERRA FOUNDATION'S MOTION FOR JUDGMENT ON THE PLEADINGS; FINAL REVIEW OF MOTION TO DISMISS ON BEHALF OF SEN. SIMPSON; OFFICE CONFERENCE WITH J. WILSON RE COORDINATING DOCUMENT REVIEW AND DOCUMENT PRODUCTION.	3.00

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01/12/01	BLC	REVIEW ART INSTITUTE PROPOSAL; CONFERENCE WITH JIM WILSON REGARDING PLAN FOR COURT HEARING AND SLC MEETING; REVIEW MOTIONS OF QUINLAN & CRISHAM.	1.00
01/12/01	JDW	PREPARE FOR AND ATTEND COURT HEARING ON MOTION TO DISMISS SEN. SIMPSON; CONFERENCE WITH COUNSEL; PHONE CONFERENCE WITH DR. TUCKER (X2); CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH CHRIS ROBLING; PHONE CONFERENCE WITH DR. TUCKER AND DON RATNER; MEETING WITH DR. TUCKER; PREPARE ANSWERS TO INTERROGATORIES	8.90
01/12/01	PSS	FURTHER REVISIONS TO: MRS. TERRA'S RESPONSE TO AG'S FIRST DOCUMENT REQUEST; MRS. TERRA'S RESPONSE TO AG'S FIRST SET OF INTERROGATORIES; MRS. TERRA'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; MRS. TERRA'S RESPONSE TO PLAINTIFFS & AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; MRS. TERRA'S RESPONSE TO PLAINTIFFS & AG'S INTERROGATORIES; DR. TUCKER'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; DR. TUCKER'S RESPONSE TO PLAINTIFFS & AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; DR. TUCKER'S ANSWERS TO PLAINTIFFS AND AG'S INTERROGATORIES; SEN. SIMPSON'S RESPONSE TO PLAINTIFFS FIRST DOCUMENT REQUEST; SEN. SIMPSON'S RESPONSE TO PLAINTIFFS AND AG'S SECOND DOCUMENT REQUEST AND AG'S SUPPLEMENTAL DOCUMENT RIDER; AND DR. TUCKER'S ANSWERS TO PLAINTIFFS AND AG'S INTERROGATORIES; OFFICE CONFERENCES (MULTIPLE) WITH J. WILSON RE ALL.	6.30

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01/12/01	TSD	FILED NOTICE OF JOINDER, SIMPSON'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT AND NOTICE OF FILING SAME WITH CLERK OF THE CIRCUIT COURT OF COOK COUNTY	.60
01/14/01	PSS	REVIEW DOCUMENTS PROVIDED BY DR. TUCKER AND IDENTIFY ALL RESPONSIVE TO EXPEDITED REQUESTS TO PRODUCE FROM PLAINTIFFS AND THE ATTORNEY GENERAL SPECIFIC TO TRO RECEIVER HEARING ON FEBRUARY 20 AND FOLLOWING.	7.20
01/15/01	BLC	CONFERENCE WITH COUNSEL REGARDING BOARD OF DIRECTORS MEETING AND DISCOVERY; REVIEW DOCUMENTS REGARDING DISCOVERY ISSUES.	1.00
01/15/01	BXN	REVIEW OF DISCOVERY RESPONSES AND BRIEFS RELATING TO APPEALS.	.70
01/15/01	JBF	ORGANIZED FILE	.80
01/15/01	JDW	REVIEW/REVISE ANSWERS TO INTERROGATORIES; CONFERENCE CALL WITH MESSRS. RATNER AND ROBLING; CONFERENCE WITH BRIAN CROWE; CONFERENCES WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCES WITH CLIENTS; COMPILE ANSWERS TO INTERROGATORIES FOR CLIENTS; REVIEW/REVISE DOCUMENT REQUEST RESPONSES; PHONE CONFERENCE WITH MR. CARLSON	4.70

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01/15/01	PSS	CONCLUDE REVIEW OF DR. TUCKER'S DOCUMENTS; REVISE/EDIT ALL RESPONSES TO TRO DISCOVERY; DRAFT RESPONSES FOR DR. TUCKER, MRS. TERRA, AND SEN. SIMPSON TO PLAINTIFFS AND ATTY GENL'S THIRD DOCUMENT REQUEST; OFFICE CONFERENCE WITH J. WILSON RE DR. TUCKER'S DOCUMENTS, MRS. TERRA'S DOCUMENTS, AND SEN. SIMPSON'S DOCUMENTS; TELEPHONE CONFERENCE WITH MRS. TERRA RE DOCUMENTS.	7.50
01/16/01	BLC	CONFERENCE WITH COUNSEL AND REVIEW DOCUMENTS REGARDING DISCOVERY AND THEORY OF DEFENSE.	.50
01/16/01	JBF	PICKED UP DOCUMENTS FROM THE TERRA MUSEUM ORGANIZED FILE	.80
01/16/01	JDW	REVIEW MATERIALS REGARDING THE ART INSTITUTE; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH LORI ROESER; REVIEW FOUNDATION'S ANSWERS TO DISCOVERY; CONFERENCE WITH PAT SPRATT; CONFERENCES WITH BRIAN CROWE; PHONE CONFERENCE WITH PAUL TUCKER	5.60
01/16/01	PSS	DRAFT ANSWERS TO PLAINTIFFS AND ATTORNEY GENERAL'S RULE 213(F) AND (G) INTERROGATORIES; TELEPHONE CONFERENCES (2) WITH L. ROESER RE ALL DEFENDANTS' DISCOVERY RESPONSES; REVISE SEN. SIMPSON'S AND DR. TUCKER'S INTERROGATORY ANSWERS PER THEIR COMMENTS; TELEPHONE CONFERENCES (2) WITH J. TERRA RE HER DOCUMENTS; OFFICE CONFERENCE WITH J. WILSON RE STRATEGY AT 2/20 HEARING.	3.20
01/17/01	BLC	REVIEW DISCOVERY RESPONSES.	.50
01/17/01	BLC	REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY AND FUTURE COURT HEARINGS.	1.30

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01/17/01	BLC	REVIEW DISCOVERY RESPONSES. REVIEW PLEADINGS; REVIEW DOCUMENTS TO PREPARE FOR DISCOVERY AND FUTURE COURT HEARINGS. CONFERENCE WITH COUNSEL RELATIVE THERETO.	.00
01/17/01	BXN	CONFERENCE WITH JDW; RESEARCH RE: BIFURCATION OF DEPOSITIONS; RESEARCH RE:ILLINOIS SUPREME COURT RULE 206(D); DRAFT RESPONSE RE: PLAINTIFF'S MOTION TO BIFURCATE.	6.20
01/17/01	JBF	COPIED AND DISTRIBUTED ARTICLE IN NEWSPAPER AND NEW PLEADINGS UPDATED PLEADINGS INDEX MADE LABELS FOR NEW BINDERS	2.60
01/17/01	JDW	CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON AND PAT SPRATT; PREPARE DOCUMENTS FOR MR. CARLSON; PHONE CONFERENCES WITH COUNSEL RE: DISCOVERY; PHONE CONFERENCES WITH CLIENTS REGARDING DISCOVERY	7.30
01/17/01	PSS	REVIEW DOCUMENTS PROVIDED BY MRS. TERRA AND IDENTIFY THOSE RESPONSIVE TO REQUESTS RELATING TO THE 2/20 HEARING; COPYING AND PRODUCTION INSTRUCTIONS TO IKON; REVIEW PLAINTIFFS AND ATTORNEY GENERAL'S RESPONSES TO TRO DISCOVERY; OFFICE CONFERENCE WITH J. WILSON RE SAME; REVIEW TERRA FOUNDATION'S DISCOVERY RESPONSES; TELEPHONE CONFERENCE WITH J. KENNEDY RE 201(K) CONFERENCE; E-MAIL TO SAME CONFIRMING; RESEARCH RE WHETHER MRS. TERRA CAN BE REQUIRED TO TRAVEL TO FRANCE FOR THE SOLE PURPOSE OF COLLECTING AND PRODUCING HER DOCUMENTS THERE OR WHETHER PLAINTIFFS WILL BE REQUIRED TO TRAVEL THERE TO REVIEW SAME; OFFICE CONFERENCE WITH J. WILSON RE SAME; REVISE/EDIT ALL REMAINING DISCOVERY RESPONSES.	6.10

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01/18/01	BLC	REVIEW DOCUMENTS REGARDING DISCOVERY THEORY OF DEFENSE AND CONFERENCE WITH SUSAN STONE; CONFERENCE WITH STEVE CARLSON AND CONFERENCE WITH ART SULLIVAN; CONFERENCE WITH COUNSEL.	2.00
01/18/01	BXN	DRAFT MOTION FOR FEE APPLICATION; CONFERENCE WITH PSS; CONFERENCE WITH JDW.	3.50
01/18/01	JDW	REVIEW/REVISE RESPONSE TO ATTORNEY GENERAL'S MOTION REGARDING DISCOVERY; PHONE CONFERENCE WITH COUNSEL RE: DISCOVERY	3.90
01/18/01	PSS	RESEARCH RE IRPC RULE 4.2 ISSUE RAISED BY QUINLAN'S ATTEMPTED COMMUNICATIONS OF TERRA DIRECTORS AND EMPLOYEES; SHEPARDIZE AND UPDATE CASES FOUND; OFFICE CONFERENCE WITH J. WILSON RE SAME; TELEPHONE CONFERENCE OF D. STANNER OF QUINLAN AND CRISHAM RE PLAINTIFFS' AND ATTORNEY GENERAL'S OVERDUE DISCOVERY RESPONSES; PREPARE FOR 201(K) CONFERENCE; TELEPHONE CONFERENCE WITH S. CARLSON RE ALL ISSUES TO BE DISCUSSED IN 201(K) CONFERENCE; OFFICE CONFERENCE WITH J. WILSON RE SAME; PARTICIPATE IN 201(K).	6.20
01/19/01	BXN	DRAFT MEMORANDUM IN SUPPORT OF FEE APPLICATION (1.90).	1.90
01/19/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MRS. TERRA RE: FORMER EMPLOYEE LIST; REVIEW/REVISE OPPOSITION TO ATTORNEY GENERAL BIFURCATED DEPOSITION MOTION; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; CONFERENCE WITH PSS	4.10

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01/19/01	PSS	TELEPHONE CONFERENCE WITH MRS. TERRA RE DISCOVERY ISSUES; REVIEW AND COMMENT ON RESPONSE TO AG'S MOTION TO BIFURCATE DEPOSITIONS AND FOR MORE THAN 3 HOURS; E-MAIL D. STANNER RE OVERDUE DISCOVERY; OFFICE CONFERENCE WITH J. WILSON RE ALL.	1.80
01/21/01	BLC	CONFERENCE WITH CLIENT.	.30
01/21/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON	1.00
01/22/01	BLC	COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING PENDING MOTION AND HEARINGS AND SETTLEMENT ISSUES.	2.30
01/22/01	BXN	CONFERENCE WITH PSS; CONFERENCE WITH JDW AND PSS; DRAFT AND RESEARCH MEMORANDUM RE: BIFURCATION.	3.40
01/22/01	JBF	UPDATED PLEADINGS INDEX	.50
01/22/01	JDW	CONFERENCE WITH JACK HAGERTY; PHONE CONFERENCE WITH ALAN SIMPSON; PHONE CONFERENCE WITH STEVE CARLSON; COURT APPEARANCE ON ATTORNEY GENERAL'S MOTION FOR BIFURCATED DEPOSITIONS; CONFERENCE WITH JACK HAGERTY ON OUTCOME OF COURT HEARING; STRATEGY; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH STEVE CARLSON	3.90
01/22/01	JJH	CONFERENCE WITH JIM WILSON REGARDING STATUS HEARING; ATTEND SAME.	2.20

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01/22/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES AND RE PREPARATION OF A MOTION TO COMPEL SPECIFIC PERFORMANCE ON CONTRACTUAL UNDERTAKING TO ADVANCE FEES; OFFICE CONFERENCE WITH B. NOLAN RE SAME.	.60
01/23/01	ATS	CONFER WITH JH AND JDW ON STRATEGY REGARDING MOTION FOR BLC REGARDING SAME	.50
01/23/01	BLC	REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING DISCOVERY AND PENDING MOTIONS; REVIEW DOCUMENTS FROM SIDLEY & AUSTIN AND QUINLAN & CRISHAM REGARDING DISCOVERY AND PENDING HEARING; CONFERENCE WITH SUSAN STONE AND CONFERENCE WITH COUNSEL REGARDING SELECTION OF SLC.	1.00
01/23/01	BXN	DRAFT MOTION FOR APPLICATION OF ATTORNEYS FEES	1.50
01/23/01	JBF	COPIED AND DISTRIBUTED NEW PLEADINGS ORGANIZED PLEADINGS AND CORRESPONDENCE	2.80
01/23/01	JDW	CONFERENCE WITH BRIAN CROWE; REVIEW ATTORNEY GENERAL'S REPLY RE: RECEIVER; CONFERENCE WITH JACK HAGERTY; DRAFT CORRESPONDENCE TO DON RATNER; REVIEW FAX FROM SUSAN STONE; PHONE CONFERENCE WITH JOHN KENNEDY; CONFERENCE WITH JACK HAGERTY AND ALLAN SLAGEL RE: STRATEGIES; CONFERENCE WITH PAT SPRATT RE: DISCOVERY; PHONE CONFERENCE WITH CHRIS ROBLING; BEGIN REVIEW OF TAPES	6.70
01/23/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DISCOVERY ISSUES RAISED BY S. CARLSON; ATTENTION TO LETTER FROM J. KENNEDY REGARDING FURTHER 201(K) CONFERENCE ON 1/14.	.50

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01/24/01	BXN	DRAFT MOTION FOR APPLICATION OF FEES	2.60
01/24/01	JDW	CONTINUE REVIEW OR TAPES; PHONE CONFERENCES WITH JOHN KENNEDY; CONFERENCES WITH BRIAN CROWE RE: ATTORNEY NAMES; 201(K) CONFERENCE WITH ALL COUNSEL AND PAT SPRATT; CONFERENCE WITH PAT SPRATT; PHONE CONFERENCE WITH STEVE CARLSON	5.90
01/24/01	PSS	PREPARE FOR, AND PARTICIPATE, IN FURTHER 201(K) CONFERENCE; OFFICE CONFERENCE WITH J. WILSON FOLLOWING SAME.	2.40
01/25/01	BXN	DRAFT RESPONSE BRIEF TO MOTION TO BIFURCATE; RESEARCH RE: BIFURCATION AND LENGTH OF DEPOSITIONS.	5.00
01/25/01	GLN	REVIEWED, ASSEMBLED, ORGANIZED AND COPIED VARIOUS ORIGINAL DOCUMENTS TO BE PRODUCED BY SENATOR SIMPSON (PER PPS).	2.60
01/25/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRIAN CROWE; MEETING WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; 201(K) CONFERENCE WITH ALL COUNSEL; REVIEW DOCUMENTS FOR EXCHANGE	7.40
01/25/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE PREPARATION OF ADDITIONAL DOCUMENT REQUESTS AND INTERROGATORIES TO PLAINTIFFS AND TO ATTORNEY GENERAL; DRAFT SAME; REVISE, EDIT SAME; TELEPHONE CONFERENCE WITH P. TUCKER RE RESPONSES TO REMAINING DISCOVERY; OFFICE CONFERENCE WITH B. NOLAN RE DRAFT MOTION REGARDING FEES.	1.50

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01/26/01	BLC	CONFERENCE WITH COUNSEL REGARDING ART INSTITUTE COMMITTEE; CONFERENCE WITH CLIENT AND CONFERENCE WITH COUNSEL REGARDING DOCUMENT ACQUISITION; REVIEW DISCOVERY REQUESTS AND MOTIONS.	1.30
01/26/01	BXN	DRAFT AND REVISE RESPONSE BRIEF; REVISIONS TO SAME PER JDW; CONFERENCES WITH JDW; RESEARCH RE: VERIFICATION OF PLEADINGS.	5.50
01/26/01	JBF	FILE MAINTENANCE	1.60
01/26/01	JDW	CONFERENCE WITH PAT SPRATT; REVIEW DISCOVERY;PHONE CONFERENCE WITH PAUL TUCKER; STRATEGIZE WITH BRIAN CROWE; CONFERENCE WITH BRETT NOLAN; REVIEW/REVISE MOTION FOR ADVANCEMENT; PHONE CONFERENCE WITH STEVE CARLSON; FURTHER PHONE CONFERENCE WITH PAUL TUCKER AND DON RATNER; CONFERENCES WITH PAT SPRATT; FURTHER CONFERENCES WITH BRIAN CROWE	8.50
01/26/01	PSS	CONCLUDE REVIEW SEN. SIMPSON'S DOCUMENTS AND IDENTIFY THOSE RESPONSIVE TO DOCUMENT REQUESTS; CONCLUDE PREPARATION OF SEN. SIMPSON'S RESPONSES TO ALL DOCUMENT REQUESTS; BEGIN REVIEW OF P. TUCKER'S DOCUMENTS FOR THOSE RESPONSIVE TO INITIAL DOCUMENT REQUEST.	4.80
01/26/01	TSD	FILE MOTION FOR ADVANCEMENT OF FEES, MEMORANDUM IN SUPPORT OF MOTION OF ADVANCEMENT OF FEES, AND NOTICE OF MOTION WITH THE CLERK OF THE CIRCUIT COURT; DELIVER COURTESY COPIES OF SAME TO JUDGE KINNAIRD'S CHAMBERS.	.60
01/27/01	JDW	REVIEW PLAINTIFF SUPPLIED DOCUMENTS	6.10

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01/28/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH STEVE CARLSON; PREPARE FOR SAME	1.30
01/28/01	PSS	TRAVEL TO WASHINGTON, D.C., FOR MEETING WITH MRS. TERRA ON 1/29 TO REVIEW DOCUMENTS.	3.50
01/29/01	BLC	CONFERENCE WITH COUNSEL REGARDING STEBENS HEARING PLANS FOR POTENTIAL SETTLEMENT; REVIEW DOCUMENTS; REVIEW PLEADING AND EXHIBITS AND PREPARE FOR HEARINGS BEFORE JUDGE KINNAIRD.	2.50
01/29/01	JBF	COPIED AND DISTRIBUTED MOTION TO COMPEL FEES UPDATED PLEADINGS INDEX AND APPELLATE PLEADINGS INDEX ORDERED INSERTS COPIED DOCUMENTS PRODUCED TO TUCKER AND SIMPSON	1.70
01/29/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE CALL WITH CHRIS ROBLING, DON RATNER AND STEVE CARLSON; PHONE CONFERENCES WITH PAUL TUCKER; REVIEW NEWSPAPER ARTICLE; REVIEW SIDLEY FAX RE: LETTER TO JUDGE KINNAIRD AND LETTER TO ATTORNEY GENERAL AS WELL AS FAX RECEIVED BY TED STEBBINS FROM MRS. DALEY; FURTHER PHONE CONFERENCES WITH STEVE CARLSON; DOCUMENT REVIEW.	6.20
01/29/01	PSS	MEET WITH MRS. TERRA TO REVIEW DOCUMENTS AND DISCUSS LITIGATION ISSUES AND STRATEGY; RETURN TRAVEL TO CHICAGO.	9.20
01/30/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-HEARING.	3.80
01/30/01	JBF	COPIED PLEADINGS RECEIVED ON 01/26/01 FILE MAINTENANCE	1.70

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01/30/01	JDW	CONTINUED REVIEW OF PLAINTIFF DOCUMENTS; CONFERENCE WIJH BRIAN CROWE; DRAFT CORRESPONDENCE TO JOHN KENNEDY; COURT APPEARANCE; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH PAT SPRATT; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA	8.90
01/30/01	PSS	REVIEW DOCUMENTS PRODUCED BY TERRA FOUNDATION; FINALIZE ALL OF MRS. TERRA'S WRITTEN DISCOVERY RESPONSES PER DISCUSSIONS WITH HER; TELEPHONE CONFERENCE WITH W. CONLON, S. CARLSON, J. WILSON AND B. CROWE RE VARIOUS SETTLEMENT IDEAS; OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE DISCUSSIONS WITH MRS. TERRA YESTERDAY; OFFICE CONFERENCE WITH J. WILSON RE JUDGE KINNAIRD'S MEDIATION IDEA; BEGIN REVIEW OF DOCUMENTS PRODUCED BY BUNTROCK AND GIDWITZ.	6.20
01/31/01	BLC	PREPARE FOR MEETING WITH SIDLEY & AUSTIN AND CONFERENCE WITH COUNSEL REGARDING SETTLEMENT AND MEDIATOR ISSUES; CONFERENCE AT SIDLEY & AUSTIN WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING MEDIATION AND SETTLEMENT ISSUE AND DISCUSSION AS TO THEORIES OF DEFENSE.	3.00
01/31/01	BXN	REVIEW PETITION TO INTERVENE (.30).	.30
01/31/01	JBF	UPDATED PLEADINGS INDEX AND APPELLATE PLEADINGS INDEX ORDERED INSERTS AND FILE FOLDERS	2.30

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01/31/01	JDW	REVIEW FAX FROM TALI MICHAELI; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH BRIAN CROWE; CONFERENCE WITH BRIAN CROWE AND PAT SPRATT RE: MS. SPRATT'S REVIEW OF JUDITH TERRA'S DC DOCUMENTS AND COMPLAINTS; PHONE CONFERENCE WITH PAUL TUCKER; FURTHER CONFERENCE WITH PAT SPRATT; MEETING BETWEEN MESSRS. CARLSON, CONLON, CROWE AND WILSON; CALL REGARDING MEDIATORS; DRAFT CORRESPONDENCE TO OUR CLIENTS	6.10
01/31/01	PSS	FURTHER OFFICE CONFERENCE WITH J. WILSON AND B. CROWE RE 1/29 WITH J. TERRA, HER THEORY OF THE CASE, AND DOCUMENTS PROVIDED BY HER; FINALIZE AND SERVE ALL REMAINING OUTSTANDING DISCOVERY RESPONSES; E-MAIL MESSAGE TO ALL COUNSEL RE SAME AND RE SUPPLEMENTAL PRODUCTION ANTICIPATED NEXT WEEK; REVIEW J. TERRA ADDITIONAL DOCUMENTS AND IDENTIFY THOSE FOR SUPPLEMENTAL PRODUCTION; BEGIN REVIEW OF P. TUCKER DOCUMENTS FOR SAME.	5.50
02/01/01	BLC	REVIEW DOCUMENTS REGARDING DISCOVERY ISSUES AND CONFERENCE WITH COUNSEL RELATIVE THERETO; REVIEW AND ANALYZE PLEADINGS.	.80
02/01/01	JBF	BATES STAMPED DOCUMENTS UPDATED INDEXES AND CORRESPONDENCE FILE ORDERED INSERTS	1.60
02/01/01	JDW	CONFERENCE WITH BLC AND PSS RE: MEDIATION OBJECTIVES; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH COUNSEL; RESEARCH QUALIFICATIONS OF MEDIATIONS.	9.50
02/01/01	MJH	CONFERENCE WITH JIM WILSON AND BRIAN CROWE RE: MEDIATOR OPTIONS	.40

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02/01/01	PSS	CONCLUDE REVIEW OF DOCUMENTS PROVIDED BY PROF. TUCKER FOR SUPPLEMENTAL DOCUMENT PRODUCTION RESPONSE; OFFICE CONFERENCES (X2) WITH B. CROWE AND J. WILSON RE MEDIATION ISSUES, POTENTIAL CONFLICTS BY MEDIATORS PROPOSED BY PLAINTIFFS AND ATTORNEY GENERAL, AND IN PREPARATION FOR CONFERENCE CALL WITH CLIENTS; PARTICIPATE IN CONFERENCE CALL WITH B. CROWE, J. WILSON, MRS. TERRA, PROF. TUCKER, AND SEN. SIMPSON RE ALL ISSUES.	7.20
02/01/01	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.60
02/02/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL REGARDING SELECTION OF MEDIATOR.	.50
02/02/01	BXN	CONFERENCE WITH JDW; CONFERENCE WITH EMA; RESEARCH REGARDING THIRD PARTY BENEFICIARY LAW.	1.90
02/02/01	BXN	REVIEW LATEST PLEADING AND CORRESPONDENCE.	.60
02/02/01	EMA	IN OFFICE CONFERENCE WITH BXN RE: RESEARCH ABILITY TO SUE UNDER AGREEMENT.	.30
02/02/01	JBF	BATES STAMPED DOCUMENTS STAMPED DOCUMENTS CONFIDENTIAL	2.70
02/02/01	JDW	CONFERENCE CALL WITH JACK HAGERTY AND BRIAN CROWE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH JUDITH TERRA; MULTIPLE PHONE CONFERENCES WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO JUDGE; MULTIPLE PHONE CONFERENCES WITH STEVE CARLSON REGARDING MEDIATION; RESEARCH REGARDING SAME.	9.10

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02/02/01	MJH	FURTHER DISCUSSIONS WITH JIM WILSON REGARDING MEDIATOR STRATEGIES	.80
02/02/01	PSS	REVIEW PROPOSED PROTECTIVE ORDER RE CONFIDENTIALITY OF STRATEGIC PLANNING DOCUMENTS; IDENTIFY ALL CONFIDENTIAL DOCUMENTS PRODUCED TO DATE BY DIRECTOR DEFENDANTS AND INSTRUCT J. FISHER RE MARKING SAME; LETTER TO ALL COUNSEL RE DIRECTOR DEFENDANTS' SUPPLEMENTAL PRODUCTION; REVIEW ALL CORRESPONDENCE FROM ALL COUNSEL RE PROPOSED MEDIATORS; OFFICE CONFERENCE WITH J. WILSON RE SAME.	4.10
02/02/01	TSD	DELIVERY TO JUDGE KINNAIRD'S CHAMBERS.	.50
2/05/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING MEDIATION AND SELECTION OF MEDIATOR AND CONFERENCE REGARDING STRATEGY AND PROCEDURE; PREPARE FOR HEARING; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-APPEARANCE; REVIEW DISCOVERY AND DISCOVERY RESPONSES.	3.80
02/05/01	BXN	RESEARCH REGARDING THIRD PARTY BENEFICIARY ISSUES.	2.80
02/05/01	JBF	ORGANIZE DISCOVERY DOCUMENTS ORGANIZED PLEADINGS AND CORRESPONDENCE ORDERED INSERTS	2.30

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02/16/01	JDW	PHONE CALL TO SENATOR SIMPSON; CONFERENCE WITH MRS. TERRA; TELEPHONE CALLS WITH DR. TUCKER; TELEPHONE CALLS WITH MR. AUGUST; TELEPHONE CALLS WITH MR. CARLSON; REVIEW PROTECTIVE ORDER; REVIEW DRAFT COMPLAINT.	5.10
02/18/01	BLC	REVIEW DOCUMENTS TO PREPARE FOR MEETING WITH ATTORNEY GENERAL AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	.80
02/19/01	BLC	CONFERENCE WITH ATTORNEY GENERAL FLOYD PERKINS AND T. HARRIS; REVIEW DOCUMENTS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.50
02/19/01	JDW	PHONE CALL TO JUDITH TERRA; SPEAK WITH MR. MICHALI; MEETING WITH BRIAN CROWE AND FLOYD PERKINS; MEETING WITH BRIAN CROWE AND JACK HAGERTY; PHONE CONFERENCE WITH JUDITH, PHONE CONFERENCE WITH MEDIATOR OFFICE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH BRETT AUGUST; REVIEW ATTORNEY GENERAL PROPOSED SETTLEMENT.	7.10
02/20/01	JBF	FILED CORRESPONDENCE; UPDATED APPELLATE PLEADINGS INDEX	.90
02/20/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; CONFERENCE WITH LAURIE ROSER REGARDING SENATOR ALAN K. SIMPSON; DRAFT CORRESPONDENCE TO MEDIATOR; CONFERENCE WITH BRIAN CROWE REGARDING INTERVIEWS OF OUR CLIENTS WITHOUT US; REVIEW ORDER DENYING QUINLAN'S MOTION FOR RECONSIDERATION; TELEPHONE CALLS WITH CLIENTS.	4.60

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02/21/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; PREPARE CLIENTS FOR SETTLEMENT MEETING; REVIEW AND RESPONSES TO INTERROGATORIES.	3.60
02/22/01	JDW	PHONE CONFERENCE WITH MRS. TERRA (LENGTHY - PREPARE FOR MEETING); TELEPHONE CALL TO BRETT AUGUST; CALL TO THE SENATOR; REVIEW KENNEDY DRAFT AGREED MOTION TO EXTEND TEMPORARY RESTRAINING ORDER; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH BRETT AUGUST; PREPARATION OF MRS. TERRA.	4.60
02/22/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE DRAFTING REPLY IN SUPPORT OF ADVANCEMENT OF FEES.	.30
02/23/01	JBF	FILED CORRESPONDENCE	.80
02/23/01	JDW	TELEPHONE CONFERENCES WITH JUDITH, MR. MICHALI, BRETT AUGUST, STEVE CARLSON; LENGTHY CONFERENCE WITH PAUL TUCKER; MEETING WITH JUDITH TERRA; DRAFT CORRESPONDENCE TO LORI ROESER; TELEPHONE CALL WITH MR. AUGUST; PREPARE MRS. TERRA FOR INTERVIEW.	6.80
02/23/01	PSS	BEGIN DRAFT REPLY IN SUPPORT OF OUR MOTION FOR ADVANCEMENT.	1.30
02/25/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND APPELLATE MATTERS.	.50
02/25/01	JDW	TELEPHONE CALL WITH CLIENT; REVIEW NEW DOCUMENTS.	.80
02/26/01	BXN	REVIEW MOTION FOR CONTINUED TRO	.30
02/26/01	JBF	FAXED LETTERS TO MRS. TERRA	.20

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03/04/01	JDW	REVIEW MATERIALS IN PREPARATION FOR CLIENT MEETING; TELEPHONE CALL WITH BRETT AUGUST; TELEPHONE CALL WITH MR. CARLSON; TELEPHONE CALL WITH CLIENT; MEETING WITH CLIENTS AND COUNSEL FOR FOUNDATION.	5.50
03/05/01	BLC	REVIEW DOCUMENTS REGARDING FEE ARGUMENT AND CONFERENCE WITH COUNSEL REGARDING STATUS AND PROCEDURE ON MEDIATION.	1.00
03/05/01	JDW	TELEPHONE CALLS WITH MS. STONE; TELEPHONE CALL WITH MR. CARLSON; REVIEW SETTLEMENT OUTLINE; REVIEW OUTLINE OF SETTLEMENT REGARDING SMI; TELEPHONE CALLS WITH CLIENTS; REVIEW AND REVISE OUTLINE FOR NEW OFFER; EXTENDED MEETING WITH CLIENTS.	8.80
03/06/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH STEVE CARLSON AM AND PM; CONFERENCE WITH COUNSEL REGARDING MEDIATION, ATTORNEY GENERAL AND FEE PETITION.	1.30
03/06/01	JDW	EXTENDED CONFERENCE CALL WITH MRS. TERRA; PHONE CONFERENCE WITH STEVE CARLSON, PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH FLOYD PERKINS; PHONE CONFERENCE WITH JOHN KENNEDY; PHONE CONFERENCES WITH COURT CLERK; PHONE CONFERENCE WITH DR. TUCKER; REVIEW CORRESPONDENCE; REVIEW PROPOSAL; REVIEW AND CORRECT SAME	4.90
03/06/01	PSS	PARTICIPATE IN TELEPHONE CONFERENCE WITH B. CONLON, B. CROWE, AND J. WILSON RE PROPOSED SETTLEMENT TERMS ARRIVED AT IN MEDIATION.	.50

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03/07/01	JDW	REVIEW CORRESPONDENCE FROM MR. KENNEDY; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH COURT; DRAFT RESPONSE TO RULE 137 LETTER; DRAFT STATUS CORRESPONDENCE TO CLIENT; REVIEW DOCUMENTS; REVIEW RESPONSE IN PREPARATION FOR MOTION	5.60
03/08/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PREPARE FOR COURT APPEARANCE; COURT APPEARANCE; PHONE CALL TO MR. KENNEDY; EXTENDED CONFERENCE WITH CLIENTS; CONTINUED REVIEW OF DOCUMENTS	4.10
03/09/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES AND COURT PROCEEDINGS.	1.30
03/09/01	JBF	COPIED AND DISTRIBUTED NEW CORRESPONDENCE	.20
03/09/01	JDW	PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CARLSON; REVIEW MOTION AND RESPONSE IN PREPARATION FOR ARGUMENT ON MOTION	3.60
03/11/01	BLC	REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES AND PENDING MOTIONS.	.50
03/12/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING STATUS AND PROCEDURE; CONFERENCES WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING DETAILS OF SETTLEMENT NEGOTIATION AND FEE DISPUTE.	1.00
03/12/01	JBF	COPIED AND DISTRIBUTED APPELLATE PLEADINGS	.30

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03/12/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE CALL WITH BRIAN CROWE AND BILL CONLON; CONTINUE REVIEW OF DOCUMENTS	2.80
03/13/01	BLC	CONFERENCES WITH WILLIAM CONLON AND STEVE CARLSON; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND STRATEGY.	1.00
03/13/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE	.30
03/13/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS AND STRATEGY; REVIEW CORRESPONDENCE REGARDING MEDIATION.	1.00
03/14/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT DETAILS AND STRATEGY.	1.00
03/14/01	JBF	FILED NEW PLEADINGS AND CORRESPONDENCE	.40
03/14/01	JDW	CONFERENCE CALL WITH BRIAN CROWE, JIM WILSON AND BILL CONLON; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW STATUTE OF LIMITATIONS; FURTHER PHONE CONFERENCE WITH MR. AUGUST; REVIEW NEW SETTLEMENT PROPOSAL; PHONE CONFERENCES WITH CLIENTS REGARDING SAME	4.60
03/15/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH FLOYD PERKINS AND THERESA HAMES; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS.	1.50

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03/15/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER; REVIEW MEDIATOR LETTER; CONFERENCE CALL WITH BRIAN CROWE AND MR. CONLON; DRAFT CORRESPONDENCE TO JUDGE KINNAIRD; PHONE CONFERENCE WITH MRS. TERRA; PREPARE MEDIATION POSITION PAPER; PHONE CONFERENCE WITH MR. PERKINS; PHONE CONFERENCE WITH MR. CONLON	3.90
03/16/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JOHN KENNEDY; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH MR. MICHAELI ; PRINT NOTES REGARDING SAME.	2.80
03/16/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE EXPECTED AMENDED COMPLAINT FROM A.G.'S OFFICE AND PROSPECTS OF SETTLING.	.30
03/16/01	TSD	DELIVER ENVELOPE TO JUDGE KINNAIRD'S CHAMBERS.	.50
03/19/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH JACK HAGERTY; REVIEW SETTLEMENT PROPOSAL; REDRAFT SAME	2.60
03/21/01	JBF	UPDATED PLEADINGS INDEX; CORRESPONDENCE	1.40
03/21/01	JDW	PHONE CONFERENCE WITH CHRIS ROBLING; PHONE CONFERENCE WITH DR. TUCKER; COURT APPEARANCE; CONFERENCE WITH ATTORNEY GENERAL; CONFERENCE WITH MR. CARLSON; DRAFT CORRESPONDENCE TO CLIENTS; DRAFT CORRESPONDENCE TO STEVE CARLSON; LENGTHY PHONE CONFERENCE WITH MRS. TERRA; LENGTHY PHONE CONFERENCE WITH DR. TUCKER	4.10

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03/22/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW ATTORNEY GENERAL'S DRAFT COMPLAINT	.30
03/23/01	JDW	REVIEW PROPOSED SETTLEMENT; CONTINUED REVIEW OF ANSWER; PHONE CONFERENCE WITH MR. MICHAELI; PHONE CONFERENCE WITH CLIENT; CONFERENCE WITH BLC	1.90
03/29/01	BLC	REVIEW DOCUMENTS REGARDING PROGRESS OF MEDIATION AND PENDING MATTERS IN LITIGATION; CONFERENCE WITH WILLIAM CONLON OF SIDLEY AUSTIN.	1.30
03/30/01	JDW	REVIEW FAXES REGARDING MEDIATION	.20
04/01/01	BLC	REVIEW DOCUMENTS REGARDING MATTERS PENDING IN LITIGATION.	.80
04/02/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING ISSUES IN LITIGATION; CONFERENCE WITH COUNSEL REGARDING PROCEEDING BEFORE JUDGE.	1.50
04/02/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; REVIEW NOTICE OF PETITION FOR LEAVE TO APPEAL; PHONE CONFERENCE WITH CLIENT	1.10
04/03/01	BLC	CONFERENCE WITH PROFESSOR TUCKER AND CONFERENCE WITH COUNSEL TO PREPARE FOR COURT; COURT APPEARANCE BEFORE JUDGE KINNAIRD; CONFERENCE WITH WILLIAM QUINLAN AND FLOYD PERKINS POST-COURT PROCEEDINGS; CONFERENCE WITH COUNSEL.	2.00
04/03/01	JBF	ORGANIZED NEW CORRESPONDENCE AND APPELLATE PLEADINGS.	.80

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04/03/01	JDW	CONFERENCE WITH BRIAN CROWE; COURT APPEARANCE; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA; CONFERENCE WITH PSS	3.10
04/05/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH CLIENT	.60
04/06/01	BLC	CONFERENCE WITH COUNSEL REGARDING ATTORNEYS' MEETING TO NEGOTIATE REMAINING ISSUES.	.30
04/06/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA, PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW CORRESPONDENCE FROM CLIENT	2.30
04/08/01	BLC	REVIEW PLEADINGS AND DOCUMENTS TO PREPARE FOR LAWYERS' MEETING IN AID OF MEDIATION.	.50
04/09/01	JBF	ORGANIZED NEW CORRESPONDENCE	.80
04/09/01	JDW	REVIEW FILE MATERIALS; PHONE CONFERENCES WITH MR. CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENTS RE: MEDIATION STATUS; REVIEW CORRESPONDENCE	1.80
04/09/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.70
04/10/01	JDW	PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCES WITH CLIENTS	1.70

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04/11/01	JDW	PHONE CONFERENCE WITH CLIENTS; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MR. HILLIARD; REVIEW MARSHALL SETTLEMENT PROPOSAL; PHONE CONFERENCE WITH MR. CARLSON; CONFERENCE CALL WITH CLIENTS; CONFERENCE WITH BRIAN CROWE RE: SAME; PHONE CONFERENCE WITH MR. HILLIARD; SET UP MEETING FOR MONDAY	4.10
04/12/01	BLC	CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.30
04/12/01	JBF	ORGANIZED NEW PLEADINGS	.60
04/12/01	JDW	CONFERENCE WITH BRIAN CROWE; COORDINATE DRAFTING OF OUTLINE FOR MEETING MONDAY AND TRIAL PLAN FOR CLIENTS; REVIEW DECISION RE: AUDITORIUM THEATER; PHONE CONFERENCE WITH MR. CARLSON; REVIEW DR. MARSHALL PROPOSAL	1.90
04/13/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD	1.80
04/16/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND PLAN.	.50
04/16/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA; MEETING WITH STEVE CARLSON; MEETING WITH ALL COUNSEL AND DAVID HILLIARD; PHONE CONFERENCE WITH CLIENTS FOLLOWING SAME	3.70
04/16/01	PSS	READ FIRST APPELLATE DISTRICT'S 3/21 OPINION IN EYECHANER V. GROSS; OFFICE CONFERENCE WITH J. WILSON RE APPLICABILITY OF THAT CASE TO OURS.	2.00
04/17/01	BLC	REVIEW AND REVISE DOCUMENT; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.50

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04/17/01	JDW	PHONE CONFERENCE WITH BILL CONLON; DRAFT CORRESPONDENCE TO CLIENTS; CONFERENCES WITH BRIAN CROWE; CONFERENCE WITH JACK HAGERTY	2.70
04/18/01	JBF	FILED NEW CORRESPONDENCE	.30
04/18/01	JDW	PHONE CONFERENCE WITH BRETT AUGUST; MEETING WITH BRIAN CROWE; PHONE CONFERENCE WITH SUSAN STONE AND BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD	2.30
04/19/01	JDW	REVIEW CONLON FAX; PHONE CALL WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD; REVIEW NEW PROPOSALS; EDIT SAME	1.60
04/23/01	JBF	ORGANIZED NEW CORRESPONDENCE	.20
04/24/01	JBF	FILED NEW CORRESPONDENCE	.30
04/24/01	JDW	PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH DAVID HILLIARD; FURTHER PHONE CONFERENCE WITH MR. HILLIARD	1.60
04/25/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON	.20
04/30/01	JBF	COPIED AND DISTRIBUTED NEWS ARTICLE AND NEW CORRESPONDENCE TO TERRA TEAM	.30
04/30/01	JDW	REVIEW CARLSON FAX OF SETTLEMENT PROPOSAL; PHONE CONFERENCES WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; FAX AFFIDAVIT TO MRS. TERRA	1.60

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05/01/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND MATTERS TO BE CONSIDERED.	.80
05/01/01	JDW	COURT APPEARANCE ON STATUS; PHONE CONFERENCE WITH STEVE CARLSON	1.20
05/02/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; COURT APPEARANCE; PHONE CONFERENCE WITH STEVE CARLSON	1.00
05/02/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS.	.40
05/03/01	JBF	ORGANIZED PLEADINGS; COPIED PLEADINGS REGARDING ADVANCEMENTS.	.60
05/04/01	JDW	REVIEW CORRESPONDENCE; DRAFT CORRESPONDENCE; PHONE CONFERENCE WITH MEDIATOR; PREPARE OUTLINE FOR SETTLEMENT	1.30
05/04/01	PSS	BEGIN REVIEW OF ALL BRIEFS RE DIRECTOR DEFENDANTS' LEGAL FEES; BEGIN DRAFT OUTLINE FOR B. CROWE FOR ARGUMENT THEREON.	3.80
05/07/01	GLN	RESEARCH ASSISTANCE RELATING TO DEFENDANTS MOTION FOR ADVANCEMENT OF FEES AND DEFENDANTS REPLY IN SUPPORT OF THEIR MOTION FOR ADVANCEMENT OF FEES; ALSO ASSEMBLED AND COPIED MATERIALS FOR HEARING ON SAME MOTIONS.	2.20
05/08/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MRS. TERRA; PHONE CALL TO MEDIATOR; REVIEW DRAFT SETTLEMENT DOCUMENT.	2.30
05/08/01	PSS	ASSEMBLE APPENDIX OF CASES CITED FOR DELIVERY TO JUDGE KINNAIRD WITH COURTESY COPIES OF MOTION; CONTINUE PREPARATION OF OUTLINE FOR B. CROWE FOR ORAL ARGUMENT.	.80

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05/09/01	JDW	CONFERENCE WITH PSS REGARDING STATUS AND SETTLEMENT.	.60
05/09/01	PSS	CONCLUDE DRAFT OUTLINE FOR ORAL ARGUMENT ON MOTION FOR FEES; OFFICE CONFERENCE WITH J. WILSON RE SAME; RETRIEVE RECENT PENNSYLVANIA DISTRICT COURT CASE ON POINT; FURTHER CONFERENCE WITH J. WILSON RE SAME; REVISE DRAFT OUTLINE.	5.60
05/09/01	TSD	DELIVER COURTESY COPIES TO JUDGE KINNAIRD'S CHAMBERS.	.50
05/10/01	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MR. HILLIARD; REVIEW SETTLEMENT PROPOSAL	.60
05/11/01	JDW	PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH CLIENT; REVIEW AND EDIT OUTLINE FOR ARGUMENT	1.10
05/13/01	BLC	REVIEW AND ANALYZE DOCUMENTS AND CASE LAW TO PREPARE FOR PENDING MOTIONS.	1.50
05/14/01	BLC	REVIEW AND ANALYZE DOCUMENTS AND CASE LAW; CONFERENCE WITH COUNSEL REGARDING PENDING MOTIONS.	.50
05/14/01	JBF	FILED NEW CORRESPONDENCE	.30
05/14/01	JDW	PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH JUDITH TERRA REGARDING TENTATIVE SETTLEMENT AGREEMENT; PHONE CONFERENCE WITH FLOYD PERKINS; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA; CONFERENCE WITH BRIAN CROWE	3.80

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05/14/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS; REVIEW MEDIATED SETTLEMENT AGREEMENT.	.70
05/15/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND CONFERENCE WITH JUDGE KINNAIRD, ATTORNEY GENERAL FLOYD PERKINS AND WILLIAM QUINLAN.	.80
05/15/01	JDW	REVIEW DRAFT MEDIATED SETTLEMENT; PHONE CONFERENCES WITH STEVE CARLSON; CONFERENCE CALL WITH THE COURT AND THE PARTIES; MEETING WITH BRIAN CROWE; PHONE CONFERENCES WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CONFERENCE WITH BILL CONLON; FURTHER PHONE CONFERENCE WITH MR. CARLSON; COURT PREPARATION; PHONE CONFERENCE WITH BRETT AUGUST	5.60
05/16/01	BLC	CONFERENCE WITH SIDLEY & AUSTIN, WILLIAM CONLON, AND CONFERENCE WITH COUNSEL; REVIEW SETTLEMENT TERM SHEETS AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	.50
05/16/01	JDW	REVIEW ATTORNEY GENERAL'S LETTER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. CONLON; CONFERENCE WITH PSS; PHONE CONFERENCES WITH JUDITH TERRA; COURT APPEARANCE; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH JUDITH TERRA	3.60
05/17/01	JDW	REVIEW ARTICLES; PHONE CONFERENCE WITH MR. CARLSON; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; REVIEW NEW MEMO TO NON-PARTY BOARD MEMBERS FROM MR. CARLSON; FAX SAME TO CLIENTS	3.10

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05/17/01	JJH	VARIOUS TELEPHONE CONFERENCES WITH STEVE CARLSON REGARDING "INTERESTED" DIRECTORS; RESEARCH REGARDING SAME; CONFERENCE WITH JIM WILSON REGARDING SAME.	2.60
05/18/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.50
05/18/01	JDW	REVIEW ATTORNEY GENERAL CORRESPONDENCE; CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH JUDITH TERRA; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW NEWEST ATTORNEY GENERAL PROPOSAL; FURTHER PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH WALL STREET JOURNAL REPORTER	3.90
05/20/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.30
05/20/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA	.60
05/21/01	BLC	CONFERENCE WITH COUNSEL AND CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON REGARDING STRATEGY AND PROCEDURE FOR COURT HEARING.	.50
05/21/01	JDW	REVIEW NEWSPAPER ARTICLES; PHONE CONFERENCE WITH DR. TUCKER; COURT APPEARANCE; CONFERENCE WITH MR. CARLSON; PHONE CONFERENCES WITH DAVID HILLIARD; PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH MR. CARLSON	4.10
05/22/01	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS AND PROCEDURE.	.30
05/23/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	.50

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05/23/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE; UPDATED PLEADINGS INDEX	.90
05/23/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH BRETT AUGUST; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH MRS. TERRA; REVIEW CORRESPONDENCE FROM MEDIATOR AND FROM SIDLEY, AUSTIN, BROWN & WOOD	3.10
05/24/01	JDW	PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DR. TUCKER AND DON RATNER; PHONE CONFERENCE WITH BRIAN CROWE; REVIEW AND EDIT CLIENT PROPOSAL; PHONE CONFERENCE WITH DAVID HILLIARD; PHONE CONFERENCE WITH MR. AUGUST.	2.90
05/25/01	JDW	PHONE CONFERENCES WITH DR. TUCKER; REVIEW SETTLEMENT PROPOSALS; PHONE CONFERENCE WITH MR. CARLSON	1.60
05/26/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES.	.30
05/29/01	BLC	CONFERENCE WITH COUNSEL; REVIEW AND ANALYZE DOCUMENTS REGARDING SETTLEMENT ISSUES, PENDING MOTION AND STRATEGY AND PROCEDURE.	.50
05/29/01	JDW	PHONE CONFERENCE WITH MR. CONLON; REVIEW CORRESPONDENCE FROM MEDIATOR; REVIEW CORRESPONDENCE FROM AMBASSADOR ANDREANI; REVIEW CORRESPONDENCE FROM MRS. AHRWEILER; COMPARE PAST PROPOSALS TO LANGUAGE IN NEW ONE RE: CONSENT	4.90

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05/30/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; MEETING AT SIDLEY & AUSTIN WITH WILLIAM CONLON, SUSAN STONE AND STEVE CARLSON; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE POST-MEETING.	1.50
05/30/01	JBF	COPIED AND DISTRIBUTED CORRESPONDENCE TO THE TERRA TEAM	.30
05/30/01	JDW	PHONE CONFERENCE WITH PAUL TUCKER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH BRETT AUGUST; MEETING WITH CARLSON, ET AL. AND BRIAN CROWE; PHONE CONFERENCES WITH PAUL TUCKER	2.10
05/31/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA AND MR. MICHAELI; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; FURTHER PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE CALL WITH BRIAN CROWE AND STEVE CARLSON; PHONE CONFERENCES WITH CLIENTS; PHONE CONFERENCE WITH MR. CONLON	2.90
06/01/01	BLC	CONFERENCE WITH COUNSEL REGARDING PLAN FOR FURTHER LITIGATION; REVIEW AND MODIFY CORRESPONDENCE AND CONFERENCE WITH COUNSEL RELATIVE THERETO.	.50
06/01/01	JDW	DRAFT CORRESPONDENCE TO CLIENTS; CONFERENCE WITH BLC; DRAFT MOTION; PHONE CONFERENCE WITH COUNSEL FOR FOUNDATION	1.90
06/04/01	JDW	PHONE CONFERENCE WITH BRIAN CROWE; FINAL EDITS TO LETTER TO CLIENTS; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH PSS; SECOND LETTER TO CLIENTS RE: PROPOSED DIRECTORS	2.30

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JUDITH TERRA, ALAN K. SIMPSON & PAUL TUCKER — JUNE 29, 2001
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06/05/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH BILL CONLON; PHONE CONFERENCE WITH STEVE CARLSON	.80
06/05/01	JJH	CONFERENCE WITH BRIAN CROWE REGARDING STATUS; REVIEW DRAFT SETTLEMENT PROPOSALS.	1.60
06/06/01	BLC	CONFERENCE WITH WILLIAM CONLON AND CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STATUS AND PROCEDURE.	.50
06/06/01	JDW	PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH BRETT AUGUST; REVIEW FAX FROM JUDITH TERRA; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW EMERGENCY MOTION; PREPARE DEFENSE TO SAME	3.10
06/07/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING TRO AND CONFERENCE WITH WILLIAM CONLON AND STEVE CARLSON; COURT APPEARANCE BEFORE JUDGE KINNAIRD AND CONFERENCE WITH COUNSEL POST-HEARING.	2.50
06/07/01	JDW	CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW FAX; COURT APPEARANCE; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH JUDITH TERRA; FURTHER CONFERENCE WITH BRIAN CROWE	3.20
06/08/01	BLC	REVIEW PLEADING AND CONFERENCE WITH COUNSEL RELATIVE THERETO; CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.00
06/08/01	GRB	DELIVERED DOCUMENTS TO THE DALEY CENTER.	.70
06/08/01	JBF	HAND-DELIVERED DOCUMENTS TO COURT	1.30

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06/08/01	JDW	PHONE CONFERENCE WITH DR. TUCKER; PHONE CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON	.60
06/08/01	JJH	VARIOUS TELEPHONE CONFERENCES WITH JIM WILSON REGARDING TRO; PREPARE FOR SAME; ATTEND COURT HEARING ON TRO; VARIOUS CONFERENCES REGARDING SAME.	5.90
06/10/01	BLC	REVIEW DOCUMENTS REGARDING SETTLEMENT ISSUES AND PENDING MOTIONS.	.50
06/11/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE	1.40
06/11/01	JDW	CONFERENCE WITH JACK HAGERTY; CONFERENCE WITH BRIAN CROWE; DRAFT CORRESPONDENCE TO CLIENTS ENCLOSING COURT ORDERS FROM JUNE 8; CONFERENCE CALL WITH BRIAN CROWE AND PAUL TUCKER	1.90
06/11/01	JJH	CONFERENCE WITH BRIAN CROWE AND JIM WILSON REGARDING STATUS AND STRATEGY.	.80
06/12/01	BLC	CONFERENCE WITH LEE FREEMAN AND CHRIS GEER REGARDING CASE HISTORY; CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE; RESPOND TO REQUEST FOR EMERGENCY MOTION; CONFERENCE WITH COUNSEL RELATIVE THERETO.	2.30
06/12/01	JDW	CALL TO SUSAN STONE; PHONE CONFERENCE WITH STEVE CARLSON ; CALLS RE: CONFERENCE CALL TONIGHT; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH CLIENTS; PHONE CONFERENCE WITH MR. FREEMAN	1.80

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06/13/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS REGARDING STRATEGY AND PROCEDURE.	1.30
06/13/01	JDW	PHONE CONFERENCE WITH JUDITH TERRA RE: NEWSPAPER ARTICLE; CONFERENCE WITH BRIAN CROWE RE: SAME; CALL TO STEVE CARLSON; PHONE CONFERENCE WITH MR. CARLSON; LENGTHY PHONE CONFERENCE WITH DR. TUCKER RE: SANCTIONS MOTION VIS A VIS AN INVESTIGATION BY THE STATE'S ATTORNEY'S OFFICE; REVIEW MOTION; PHONE CONFERENCE WITH DR. TUCKER; REVIEW ARTICLE	3.80
06/13/01	JJH	REVIEW DRAFT SETTLEMENT AGREEMENT; REVIEW CORRESPONDENCE REGARDING SAME.	1.10
06/14/01	BLC	REVIEW CASE LAW REGARDING FEE ISSUES AND CONFERENCE WITH COUNSEL REGARDING STRATEGY AND PROCEDURE.	1.30
06/14/01	JDW	PREPARE FOR COURT APPEARANCE; COURT APPEARANCE; PHONE CONFERENCE WITH SENATOR SIMPSON; PHONE CONFERENCE WITH STEVE CARLSON; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH DAVID HILLIARD; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH LORI ROSEN; REVIEW NEWEST SETTLEMENT AGREEMENT DRAFT; CONFERENCE WITH BRIAN CROWE; DRAFT MOTION RE: LEAKED FACTS	4.80
06/15/01	BLC	CONFERENCE WITH COUNSEL REGARDING STATUS, STRATEGY AND PROCEDURE	.50

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JUDITH TERRA; ALAN K. SIMPSON & PAUL TUCKER JUNE 29, 2001
FILE # 025134-00001-BLC
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06/15/01	JDW	COURT APPEARANCE; PHONE CONFERENCE WITH STEVE CARLSON; PHONE CONFERENCE WITH PAUL TUCKER; PHONE CALL TO LORI ROSEN; PREPARE MOTION FOR STATE'S ATTORNEY INVESTIGATION; PHONE CONFERENCE WITH JUDITH TERRA; CALLS TO SENATOR SIMPSON	2.80
06/15/01	JJH	CONFERENCE WITH JDW REGARDING HEARING; REVIEW SETTLEMENT AGREEMENT.	1.10
06/15/01	TSD	OBTAINED COPY OF STATE COURT DOCKET; TELEPHONE CALL TO JUDGE KINNAIRD'S CLERK REGARDING MONDAY'S HEARING.	.50
06/16/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINAIRD.	1.30
06/18/01	BLC	PREPARE FOR HEARING BEFORE JUDGE KINNAIRD ON ISSUE OF ADVANCEMENT OF FEES AND EXPENSES; COURT APPEARANCE BEFORE JUDGE KINNAIRD.	4.80
06/18/01	JBF	FILED THE EMERGENCY PETITION TO EXCUSE DIRECTOR ALAN K. SIMPSON AND PAUL TUCKER FROM PHYSICAL PRESENCE AT MEDIATION SESSIONS; LOCATED AND COPIED NEWS ARTICLE FROM WALL STREET JOURNAL	1.40
06/18/01	JDW	REVIEW/REVISE MOTION FOR INVESTIGATION; PHONE CONFERENCE WITH FLOYD PERKINS; PHONE CONFERENCES MRS. TERRA; PHONE CONFERENCE WITH BRETT AUGUST; CONFERENCE WITH BRIAN CROWE; PAT SPRATT AND JACK HAGERTY; PHONE CONFERENCE WITH PAUL TUCKER; REVIEW/REVISE LETTER; PHONE CONFERENCE WITH STEVE CARLSON; REVIEW PETITION FILED BY THE ATTORNEY GENERAL ON BEHALF OF MRS. DALEY; PHONE CONFERENCE WITH PAUL TUCKER; COURT APPEARANCE; CONFERENCE WITH BRIAN CROWE RE: MOTION FOR AN INVESTIGATION; PHONE CONFERENCE WITH PAUL TUCKER RE: SAME;	3.90

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06/18/01	JJH	CONFERENCE WITH BRIAN CROWE, JIM WILSON AND PATRICIA SPRATT.	.50
06/18/01	PSS	OFFICE CONFERENCE WITH J. WILSON RE STATUS OF MEDIATION AND OUR CLIENTS' POSITIONS RELATIVE TO SAME; CONCLUDE PREPARING B. CROWE FOR ARGUMENT ON FEES MOTION; ATTEND COURT ON SAME.	3.20
06/18/01	TSD	CHECK JUDGE KINNAIRD'S MOTION CALL FOR STATUS.	.40
06/19/01	BLC	REVIEW CORRESPONDENCE AND MEMORANDA; TELEPHONE CALL TO WILLIAM CONLON AND CONFERENCE WITH COUNSEL IN CALIFORNIA; REVIEW DOCUMENTS.	.50
06/19/01	JBF	ORGANIZED PLEADINGS AND CORRESPONDENCE	2.20
06/19/01	JDW	REVIEW CORRESPONDENCE FROM MRS. TERRA; PHONE CONFERENCE WITH MR. HILLIARD; PHONE CONFERENCE WITH MR. AUGUST; CONFERENCE WITH BRIAN CROWE; MULTIPLE PHONE CONFERENCES WITH MRS. TERRA	2.30
06/19/01	TSD	FILED MOTION FOR ORDER REFERRING MATTER TO STATE'S ATTORNEY FOR INVESTIGATION AND NOTICE OF MOTION WITH THE CLERK OF THE CIRCUIT COURT.	.50
06/20/01	BLC	CONFERENCE WITH COUNSEL; REVIEW DOCUMENTS AND CONFERENCE WITH WILLIAM CONLON; REVIEW COURT ORDERS.	.80
06/20/01	JDW	REVIEW ORDER; REVIEW FINAL AGREEMENT; PHONE CONFERENCE WITH MRS. TERRA; PHONE CONFERENCE WITH DR. TUCKER; CONFERENCE WITH BRIAN CROWE; PHONE CONFERENCE WITH DAVID HILLIARD	2.90
06/20/01	PSS	REVIEW TERMS OF AGREED SETTLEMENT; OFFICE CONFERENCE WITH J. WILSON RE SAME.	.30

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ATS	ALLAN T. SLAGEL	10.50	hours at $	295.00	=	3,097.50
BLC	BRIAN CROWE	154.50	hours at $	355.00	=	54,847.50
BLC	BRIAN CROWE	55.20	hours at $	335.00	=	18,492.00
BXN	BRETT NOLAN	63.90	hours at $	175.00	=	11,182.50
BXN	BRETT NOLAN	27.20	hours at $	150.00	=	4,080.00
EMA	ELLEN AVERY	2.10	hours at $	155.00	=	325.50
GCW	GREGORY C. WARD	1.80	hours at $	250.00	=	450.00
GCW	GREGORY C. WARD	6.70	hours at $	210.00	=	1,407.00
GLN	GARY L. NUZZI	8.40	hours at $	95.00	=	798.00
GRB	GABRIEL REILLY-BATES	0.70	hours at $	75.00	=	52.50
GRB	GABRIEL REILLY-BATES	9.00	hours at $	70.00	=	630.00
JBF	JENNIE B. FISHER	117.10	hours at $	70.00	=	8,197.00
JDW	JAMES D. WILSON	712.90	hours at $	295.00	=	210,305.50
JDW	JAMES D. WILSON	103.80	hours at $	275.00	=	28,545.00
JJH	JACK J. HAGERTY	88.90	hours at $	290.00	=	25,781.00
JJH	JACK J. HAGERTY	57.90	hours at $	260.00	=	15,054.00
JMW	JARED M. WAYNE	1.50	hours at $	150.00	=	225.00
MJH	MICHAEL J. HOWLETT, JR.	1.20	hours at $	355.00	=	426.00
PSS	PATRICIA S. SPRATT	216.50	hours at $	230.00	=	49,795.00
PSS	PATRICIA S. SPRATT	72.00	hours at $	220.00	=	15,840.00
TSD	THOMAS S. DAL COMPO	14.10	hours at $	90.00	=	1,269.00

PLEASE SHOW THIS NUMBER ON YOUR CHECK: 025134-00001

16di-004378

Exhibit G

IN THE CIRCUIT COUNTY OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts. Plaintiffs, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, TERRA FOUNDATION FOR THE ARTS, et al., Defendants.	)	10-17-00
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al. Defendants.	)	No. 00 CH 13859 Hon. Dorothy Kirie Kinnaird

OPPOSITION TO PLAINTIFFS' MOTION TO APPOINT AN INDEPENDENT LITIGATION COMMITTEE AND INDEPENDENT LITIGATION COUNSEL FOR TERRA FOUNDATION, AND/OR RECEIVER

Defendants Judith Terra, Paul Hayes Tucker, and Alan K. Simpson, by their attorneys, Shefsky & Froelich Ltd., respectfully submit this Memorandum in Opposition to Plaintiffs' Motion

Received Oct 17 04:50PM (05:26) on SBA line [5] for 'WCONLON' WORKSRV4 printed OPE39ECB4DF190B on Oct 18 08:38AM 2000 * Pg 6/23
10-17-00 16:52 From-SHEFSKY & FROELICH LTD. T-618 P 06/23 F-418

to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation for the Arts, and/or Receiver.

INTRODUCTION

Apparently afraid of their opposition, plaintiffs Buntrock and Gidwitz have taken to attempting to disqualify anyone who would defend against their claims, arguing for legal remedies that do not and cannot logically exist, misstating the facts and misrepresenting the remedies they seek. This response to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation, and/or Receiver (the "Motion") supplements and adopts the Terra Foundation's response to the Motion. It does not attempt to counter each and every misstated fact and fallacious argument of law but only tries to set the record straight as to who represents whom, explain what the Board of Directors of the Terra Foundation, did in appointing its Acting President and Chairman of the Board as the point person for the newly retained Sidley & Austin lawyers and to provide the Court with some legal precedent as to when a special litigation committee is appropriate, who may appoint such a committee and who may select counsel.

I. SIDLEY & AUSTIN DOES NOT REPRESENT THE DEFENDANT DIRECTORS.

In charging Sidley & Austin with ethical violations, Buntrock and Gidwitz ignore the appearances filed in this very matter and claim that Sidley & Austin represents the individual defendants. (Motion, at p. 7). The law firm of Sidley & Austin has only appeared on behalf of the Terra Foundation for the Arts. (Exhibit A). Separate counsel has appeared on behalf of the defendant directors. (Exhibit B). Plaintiffs' statements to the contrary are simply wrong and, given the appearances that have been filed, could not have been believed to be well grounded in fact at the

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time the statements were made. Thus, Buntrock and Gidwitz' request to disqualify Sidley & Austin should be rejected by this Court.

II. THE BOARD DID NOT CREATE A SPECIAL LITIGATION COMMITTEE

By mixing terms as if they had no recognized legal meanings, Buntrock and Gidwitz claim that Dr. Paul Tucker has somehow been appointed as "litigation director," or "director of litigation" (*see* Motion at pp. 2, 6, 7, 8, 9, 10, 12, 13, 14), or a "litigation committee." (Motion, at p. 10.)[1] Those phrases, which Buntrock and Gidwitz place in quotes, never appear in the minutes or resolution providing Dr. Tucker, the Acting President and Chairman of the Board of Directors of the Terra Foundation, with the limited power to defend the Foundation against the charges made by plaintiffs. (Exhibit C).

An overwhelming majority of the directors, including five of the six non-litigant directors voted in favor of that resolution. Only Director Buntrock voted against it. (Exhibit C). Plaintiffs' disingenuous use of quotes, misstatements regarding the authority of Dr. Tucker is nothing more than an unseemly attempt to deceive this Court as to the actions of the Board.

III. THIS COURT CANNOT APPOINT A SPECIAL LITIGATION COMMITTEE OR ITS COUNSEL

Plaintiffs request this Court appoint a special litigation committee and further appoint counsel for the committee. (Motion, at pp. 8-14.) What plaintiffs ignore is that the decision,

---

[1] Buntrock, at least, should understand the importance of a Special Litigation Committee after having appointed such a committee when he was accused of insider trading in ChemLawn stock while Chairman of the Board of the now defunct Waste Management, Inc.. *Spiegel v Dean L. Buntrock, et al.*, 571 A.2d 767 (Del., 1990).

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single case in which a special litigation committee was appointed by a court. *Cf. Welland, Zapata, Auerbach, Houle* and *Alford*. It is the prerogative of the board of directors, not a court hearing a derivative case to make such an appointment. *Id.*

Here, there has not even been an allegation of misconduct against Hélène Ahrweiler, Jacques Andréani, Arthur Hartman, Stephanie Pace Marshall, Theodore E. Stebbins or Margaret Daley, a majority of the Board. Thus, the Board of Directors could, at any time, decide to appoint a special litigation committee composed of disinterested members if it so chooses. There is no reason nor is there any authority for this Court to appoint a special litigation committee.

Finally, despite having themselves cited two cases which directly reject the proposition that an Illinois court may appoint independent counsel, Buntrock and Gidwitz claim the law is otherwise and ask this Court for such relief. (Motion at pp 1,2, 6-14.) Appointments of counsel in derivative litigation are not the province of a court. *Lower v. Lanark Mutual Fire Insurance Company, et al.*, 114 Ill. App. 3d 462, 469-470, 448 N.E.2d 940, 946 (2nd Dist. 1983). As the Illinois Appellate Court stated:

> Plaintiff's motion requested that the court appoint counsel to represent the defendant corporation. We disagree. The defendant corporation may select its own counsel even though some or all of the defendant directors may make the selection. Certainly new counsel will recognize the duty to represent solely the interests of the corporate entity.

See also Cannon v U.S Acoustics Corp, 898 F.Supp.209 (N.D. Ill. 1975. The *Lower* case sits as binding precedent to this Court. Counsel should be chosen by the Board of Directors, not the court.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Terra Foundation for the Arts

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16di-004382

Response to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation and/or Receiver, should be denied.

DATED: October 17, 2000

JUDITH TERRA, PAUL HAYES TUCKER, and ALAN K. SIMPSON

By: _____
One of their Attorneys

Brian L. Crowe
James D. Wilson
Shefsky & Froelich Ltd.
444 North Michigan, Suite 2500
Chicago, Illinois 60611
(312) 527-4000
Attorney No. 29143
674756 1

Received Oct 17 04:50PM (05:26) on S&A line [5] for 'WCONLON' WORKSRV4 printed OPE39ECB4DF190B on Oct 18 08:38AM 2000 * Pg 11/23
10-17-00 16:53 From-SHEFSKY & FROELICH LTD., T-618 P 11/23 F-413

1900 - Appearance & Jury Demand
0900 - Appearance Only
Appearance (3-81) CCG-9

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,

plaintiff

v.

JUDITH TERRA, a Director for the Terra Foundation for the Arts, et al.,

defendant

No. 00 CH 13859

The Honorable Dorothy Kirie Kinnaird

AMENDED
*APPEARANCE

The undersigned, as attorney, enters the appearance of the defendant

TERRA FOUNDATION FOR THE ARTS

Sidley & Austin

William F. Conlon
Stephen C. Carlson
Name Susan Al Stone/Sidley & Austin
Attorney for Defendant Terra Foundation for the Arts
Address Ten South Dearborn
City Chicago, IL 60603
Telephone 312/853-7000
Insurance Company
Atty No. 90761

*Strike demand for trial by jury if not applicable.

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Attorney for Defendant
Terra Foundation for the Arts

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

1900 - Appearance & Jury Demand
0000 - Appearance Only
Appearance (3-81) CCG-9

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, etc., et al.

V.

JUDITH TERRA, et al.

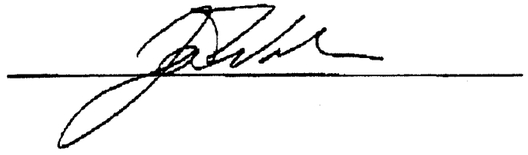
NO. 00 CH 13859

*APPEARANCE ~~AND JURY DEMAND~~

The undersigned, as attorney, enters the appearance of the defendants

JUDITH TERRA, PAUL HAYES TUCKER and ALAN K. SIMPSON

~~demands trial by jury.~~



Name Brian L. Crowe, James D. Wilson
SHEFSKY & FROELICH LTD.
Attorney for Certain defendants
Address 444 N. Michigan
City Chicago, IL 60611
Telephone 312-527-4000
Atty No. 29143

*strike demand for trial by jury if not applicable.

I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Attorney for JUDITH TERRA, PAUL HAYES TUCKER and ALAN K. SIMPSON

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Terra Foundation
Board Meeting
Minutes
September 26, 2000

In Attendance:
Paul Tucker, Chair
Helene Ahrweiler
Jacques Andreani
Dean Buntrock
Maggie Daley
Ron Gidwitz
Arthur Hartman
Stephanie Pace Marshall
Theodore Stebbins
Judith Terra
Absent: Alan Simpson

By Invitation:
Mark Hearwole, Foundation Legal Counsel, Winston & Strawn

Staff:
Donald H. Ratner, Vice President Finance & Administration

The meeting was called to order at 10:00am.

Dr. Tucker indicated that the alteration of convening time (the meeting was originally scheduled to begin at 9:00 AM) was a result of needing to clarify the issues with respect to Board actions in response to the constraints imposed by the court action of September 25, 2000.

Mr. Hearwole reported that the court order relating to the lawsuit brought by Messrs. Buntrock and Gidwitz against the Foundation and the hearing on Monday, September 25, had two principal constraints on Board action:

1. The Board could not take any action to remove any Board members from either the Board or the Executive Committee against their will; and
2. The Board could continue with its normal business except that it could not take any action to transfer offices or assets out of Chicago. Mr. Hearwole indicated that both of these restrictions continue through October 12 when the next hearing will occur.

Mr. Hearwole indicated that the Board has two options:

1. Re-elect all Board members at this meeting; or
2. Adjourn the election of members to a later date.

Dr. Tucker then asked for a motion to move Item X on the Agenda, "Other Business", to Item U. Ted Stebbins moved and Judith Terra seconded the motion. The motion carried by a unanimous vote.

The two items requiring action in Item X were:

1. The ratification of the selection of Sidley & Austin to represent the Foundation in the lawsuit; and
2. The authorization of the Chairman to deal with all matters regarding the litigation and to defend the Foundation against the charges brought by Mr. Bumrock and Mr. Gidwitz. Dr. Tucker indicated that, with respect to the second motion, he would bring any settlement proposal back to the Board for final approval.

Discussion ensued, followed by a consensus to call the question.

The vote to move the 10th item "other business" to the 2nd item on the agenda was unanimous.

The first item (the ratification of hiring Sidley & Austin as Counsel for the Foundation for the lawsuit) was moved by Dr. Stebbins and seconded by Dr. Marshall. There was no discussion. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	None
	Jacques Andreani		
	Dean Bumrock	Abstain:	Ron Gidwitz
	Margaret Daley		
	Arthur Hartman		
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next item (giving authorization to the Chair for any and all actions regarding the lawsuit except for the settlement) was moved by Mrs. Terra and seconded by Mme. Ahrweiler.

Mrs. Daley stated that since Dr. Tucker was named as a defendant in the lawsuit, she wondered if it was appropriate for Dr. Tucker to have this authority to act for the Foundation. Mr. Hesewole affirmed that there was no conflict in this matter.

The vote was called. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		
	Arthur Hartman	Abstain:	Margaret Daley
	Stephanie Pace Marshall		Ron Gidwitz
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next item on the agenda was the minutes. Dr. Tucker said that we needed to follow the judge's court order to the letter. Since the court order had not allowed any votes from committees up until this point, the committees could not review and approve their minutes and therefore there was no possibility for Board approval. Therefore, Dr. Tucker recommended that we table the vote on the minutes until the next meeting.

Mr. Gidwitz moved and Ambassador Hartman seconded the tabling of the approval of the minutes.

Ambassador Hartman asked if not approving the minutes would affect the deaccessioning of works of art from the collection. Mr. Hearwole said that it would not.

The vote was taken and there was a unanimous vote in favor of tabling the minutes.

The next item was the election of Directors, Officers and Committee Chairs.

The Board had two alternatives: to elect all Directors as a slate or table a decision until the next meeting.

Dr. Tucker recommended that we proceed with the election and approve the current slate of Directors. Mme. Ahrweiler moved and Dr. Stebbins seconded the motion to approve the current slate of Directors.

Dr. Tucker then asked if anyone did not want to stand for re-election.

At this point Dr. Marshall asked Mr. Buntrock what his reasons were for bringing the lawsuit. He replied:

- That he believed the Board had a "different agenda".
- That he believed there was a conspiracy to move the museum out of Chicago.

- That he had had frustrations with the fact that he had written to Dr. Tucker numerous times about employees being treated poorly, about Senator Simpson's "agenda", about Ambassador Hartman's proposed resolution, about the estate review, about his own suggested resignation, that he did not feel Dr. Tucker responded by bringing closure/ resolution to these issues, about his frustration with the deterioration of the Chicago museum and with his perception of the lack of focus on the educational aspect of the potential partnerships.

Dr. Marshall indicated that she could support the re-election of the Directors if everyone could commit to an openness of discussion.

Mme. Ahrweiler then withdrew her motion. Ambassador Andreani then moved not to take the vote at this time but to defer it to a later session of the annual meeting. Dr. Stebbins seconded Ambassador Andreani's motion.

Dr. Tucker reviewed the discussion of Sunday, September 24. Mr. Gidwitz had said that he could make a dispassionate decision on where the site of the museum and Foundation should be in the best interests of the Foundation, as he understood it.

Dr. Tucker asked if everyone could commit to being open and objective to the alternatives presented to the Foundation and could commit to honestly, fairly and without prejudice evaluating all proposals about the Foundation's specific future.

Mr. Gidwitz indicated that he would be willing to work toward a position of trust. Ambassador Andreani's motion was then withdrawn.

Dr. Stebbins then moved to vote to re-elect the current slate of Directors and Mme. Ahrweiler seconded. The vote was taken. The results were:

Ayes:	Helene Ahrweiler	Nayes:	none
	Margaret Daley		
	Ron Gidwitz	Abstain:	Dean Buntrock
	Arthur Hartman		Jacques Andreani
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next order of business was to elect the Officers. It was decided to take each position individually. The first office was Chairman. Mrs. Terra nominated Dr. Tucker. Dr. Stebbins seconded. The vote was taken.

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Arthur Hartman		Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next vote taken was for Vice Chair. Dr. Tucker moved that Mrs. Terra be Vice Chair. Mme. Ahrweiler seconded.

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Arthur Hartman		Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The next vote was for Secretary and Treasurer. Dr. Stebbins nominated Dr. Marshall for Secretary and Treasurer. Ambassador Andreani seconded it. Dr. Marshall indicated that she would be willing to serve as Treasurer for a short period of time if the Board commits to re-evaluating the situation after that limited period of time. The results of the vote were:

Ayes:	Helene Ahrweiler	Nayes:	none
	Jacques Andreani		
	Margaret Daley	Abstain:	Dean Buntrock
	Ron Gidwitz		Stephanie Pace Marshall
	Arthur Hartman		
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

Mr. Gidwitz and Mr. Buntrock remained on the Executive Committee as members-at-large.

The Board then moved to Item IX on the Agenda, Executive Session. Dr. Tucker left the room. Vice Chairman, Mrs. Terra, presided indicating that the purpose of the Executive session was to discuss a salary increase for Dr. Tucker. Mme. Ahrweiler proposed a

bonus for Dr. Tucker. Dr. Stebbins moved that we double his compensation until a new President is hired. This motion was seconded by Mme. Ahrweiler.

Discussion followed.

Dr. Stebbins withdrew his motion.

Dr. Stebbins then moved to give Dr. Tucker a $25,000 bonus to recognize Dr. Tucker for the considerable additional time he spent on Foundation affairs over the past year. This was seconded by Ambassador Andreani.

The vote was taken. The results were:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		Margaret Daley
	Arthur Hartman	Abstain:	Ron Gidwitz
	Stephanie Pace Marshall		
	Ted Stebbins		
	Judith Terra		

Mrs. Daley indicated that her no vote was not a vote of no confidence on Dr. Tucker but that she believed a decision should have been deferred until after the lawsuit was settled.

The Executive Session was adjourned.

Dr. Tucker returned to the meeting and discussed the slate of committees and committee chairs. (See attached)

The Finance Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote was as follows:

Ayes:	Helene Ahrweiler	Nayes:	Dean Buntrock
	Jacques Andreani		
	Arthur Hartman	Abstain:	Margaret Daley
	Stephanie Pace Marshall		Ron Gidwitz
	Ted Stebbins		
	Judith Terra		
	Paul Tucker		

The Collections Committee and Chair was moved by Dr. Tucker, seconded by Mme. Ahrweiler. The vote in favor was unanimous.

The Education Committee and Chair was moved by Dr. Tucker and seconded by Mrs. Terra. The vote in favor was unanimous.

The Strategic Planning Committee and Chair was moved by Dr. Tucker, seconded by Mrs. Terra. The vote in favor was unanimous.

At 2:10 PM the meeting was adjourned for lunch. At 2:40 the meeting resumed. The next item on the agenda was to review the estate. Mr. Heatwole did so and indicated that there were three issues that Winston & Strawn examined:

1. The transaction with Lawter
2. The transactions between Dan Terra and Jim Terra
3. The magnitude of the Bell, Boyd bills

Mr. Heatwole indicated Winston & Strawn had discussed the estate report with Bell, Boyd, BIK, Mayer, Brown & Platt, the Foundation Board and had reviewed all papers. Winston Strawn has concluded its review. He also indicated that the one open point was that Schiff, Hardin & Waite will be reviewing issues relating to Mercury Finance.

Winston & Strawn's conclusion was that, after thorough review, they found no reason for the Foundation not to accept the report of the Executor, except for Mercury Finance, which they have not reviewed.

He indicated that Bell, Boyd has not turned over the Mercury Finance papers to Schiff, Hardin and that we need to give them a waiver for Schiff, Hardin to get the papers. He noted that Jim Collins needed a letter from the Foundation to turn over the material to Schiff, Hardin.

A resolution with four components, which was as follows, was moved by Mme. Ahrweiler and seconded by Dr. Marshall:

1. Accept the Winston Strawn report as issued.
2. Approve that a letter be sent to Bell, Boyd to release the papers to Schiff, Hardin immediately so that Schiff Hardin may review the Mercury Finance issues expeditiously.
3. Report to the Executive Committee on the result of Schiff, Hardin's review of Mercury Finance.
4. Authorize the Executive Committee to close the estate.

The vote was taken unanimously in favor of this resolution.

The Finance Committee report was given by Mr. Ratner. He discussed results of the audit. He also discussed the four points raised in the Management Letter: Terra Museum Accounting, Endowment Income, Intercompany Activity and In-kind Contributions. Mr. Ratner addressed each of the points and indicated that a resolution of these points would be made. A motion to accept the Audit and Management Letter, subject to any footnotes relating to the current lawsuit, was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. Mr. Ratner then discussed the change of investment allocations within the equity portion. A memo on this matter is included in the Board book under the September 25 Finance Committee section. A motion to accept this reallocation was made by Ambassador Hartman and seconded by Mr. Gidwitz. The vote was unanimously in favor. The third item was to review three new potential investment advisors: Kennedy, Ennis and Cambridge. Mr. Ratner recommended Kennedy which Mr. Gidwitz agreed with. The motion to approve was made by Dr. Stebbins and seconded by Dr. Marshall. The vote was unanimous in favor.

Dr. Stebbins then gave the Collection Committee report. The first item on the agenda was the motion by Dr. Stebbins to have the Board delegate the approval of the loans, exhibitions, donations, etc. to the Collections Committee to cover the report included in the Board book. Mme. Ahrweiler seconded. The motion was unanimously in favor. The next item was the Deaccession report. Dr. Stebbins indicated that, after careful review by the Committee and the outside advisors who made two trips to Chicago to examine the proposed deaccessions, the final list had been winnowed to 27 objects, with 16 of them not being included in the American Impressionist sale at Christie's on November 29, 2000.

Ambassador Hartman suggested that there should be some public relation's communications at the time about the deaccessioning. He suggested that it be made clear that these items are being sold to raise purchase funds for new additions to the collection. Dr. Stebbins also indicated that we have chosen Christie's and indicated some of the details of the contract and the reasons for selecting that venue as opposed to Sotheby's or Vance Jordan, a private dealer.

Mr. Gidwitz moved to approve the deaccessioning report and the selection of Christie's. Seconded by Ambassador Hartman. Unanimously in favor.

The Director's reports and VP of Finance reports were not given orally, but were included in the September 26, 2000 Board book.

Dr. Tucker suggested that he and Dr. Stebbins form a search committee for the new MAAG Director.

Mr. Ratner was instructed to change Sophie Levy's position at MAGG to Curator from Assistant Curator.

Mr. Ratner was asked to set-up both an Executive Committee conference call and a Board conference call after the court hearing on the 12th.

Dr. Marshall suggested that we need some formal communication structure perhaps in the form of a written newsletter every 3-4 weeks to keep the Board apprised of developments regarding the lawsuit. Mr. Ratner and Dr. Tucker were asked to coordinate.

The meeting was adjourned at 4:00pm.

Respectively submitted,

_____
Stephanie Pace Marshall
Secretary and Treasurer

TERRA FOUNDATION FOR THE ARTS
Committees/Committee Members
2000/2001

COLLECTIONS
Ted Stebbins, Chair
Helene Ahrweiler
Arthur Hartman
Judith Terra
Paul Tucker

Ex Officio Derrick Cartwright
Ex Officio John Hallmark Neff
Staff Donald Rattner

EDUCATION
Margaret Daley, Chair
Helene Ahrweiler
Jacques Andreani
Stephanie Pace Marshall
Judith Terra
Paul Tucker

Ex Officio Derrick Cartwright
Ex Officio John Hallmark Neff
Staff Donald Rattner

EXECUTIVE
Paul Tucker, Chair & President
Judith Terra, Vice Chair
Stephanie Pace Marshall, Secretary & Treasurer
Ron Gidwitz, At Large
Dean Buntrock, At Large

FINANCE
Stephanie Pace Marshall, Chair
Arthur Hartman
Alan Simpson
Judith Terra
Paul Tucker

Staff Donald Rattner

STRATEGIC PLANNING
Stephanie Pace Marshall, Chair
Jacques Andreani
Margaret Daley
Arthur Hartman
Ted Stebbins
Judith Terra
Paul Tucker

Staff Donald H. Rattner

16di-004396

Exhibit H

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT-CHANCERY DIVISION

DEAN BUNTROCK,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	00 CH 13859
	)	
TERRA MUSEUM,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable DOROTHY KINNAIRD, Judge of said court, on the 24th day of July, 2001.

APPEARANCES: MESSRS: JAMES CARROLL, JOHN F. KENNEDY and WILLIAM R. QUINLAN, on behalf of Plaintiffs;

MESSRS: FLOYD PERKINS and THOMAS IOPPOLO, Assistant Attorney Generals.

MISS SUSAN STONE, on behalf of the Terra Foundation;

MESSRA: ROBERT CUMMINS and CHRIS TODD, on behalf of Defendants.

Josephine Raines
Official Court Reporter
Circuit Court of Cook County
County Department-Chancery Division

Foundation the Foundation does assert attorney client privilege over any communications going either way from an attorney for the Foundation, which Mr. Collins was at this point in time, to Mr. Terra who was then chairman of the Terra Museum.

THE COURT: I don't want to get hung up on this letter forever. Mr. Cummins, how did you all get this?

MR. CUMMINS: I can't answer that question, Judge. I'll find out. One of the preliminary things I was going to address, and I am relying largely on papers that were previously filed by Mr. Quinlan on behalf of his clients Buntrock and Gidwitz. I'm going to object to anything Sidley and Austin does in this case today because based upon the assertions of Mr. Quinlan and his clients they are conflicted in this proceeding. That is one of the reasons we want to adjourn it. We believe Winston and Strawn is conflicted, We believe Sidley is conflicted. And we think that these are serious issues that have to be addressed by the Court as a premise to this entire proceeding.

I just want to make that of record.

THE COURT: It's on the record. And to the extent it's an objection, it's going to be overruled.

We have been through the Sidley issue so many times I don't even want to think about it. The Appellate Court reviewed it. I know that Mr. Quinlan probably totally agrees with you generally on the whole subject matter, but maybe today he disagrees.

But Sidley is here, they are representing the Foundation and they have not been removed and I don't see a conflict so let's just move on.

I'm going to keep this letter, it really doesn't do much. I've read it all, I'm going to keep it sealed for now. If you want to come in later and have it unsealed. If you concede that this was somehow in the public domain, attached to a pleading, that somewhere along the line the attorney client privilege got waived we'll open it up. For those of you who have not seen this letter, it's really nothing heavy anyway.

The next thing, Exhibits 9, 10,11, 12, 13 are all documents that relate to Dan Terra. intent. They were declarations filed in Federal Court. They should all be unsealed.

Fourteen I want to unseal. That's a mailing address announcement. The Simpson declaration in Federal Court is 15. That should be unsealed.

MS. STONE: I believe it's necessary to respond to the last salvo by counsel for the objectors.

Sidley, Austin, Brown & Wood solely represented the Foundation. We do not represent any of the defendants in their -- any of the directors in their individual capacity. We do not represent Dr. Stebbins in his individual capacity. He has another lawyer for that purpose.

We do not represent Dr. Marshall in her individual capacity. We represent merely the Foundation. We give advice to the six non-named, nonparty directors. That includes Dr. Stebbins and Dr. Marshall.

There is no conflict by Sidley, Austin, Brown & Wood at any point in this case. There is no conflict anywhere.

Thank you.

MR. QUINLAN: Judge, I would like to reserve my comments for the lounge across the street after the proceedings here.

Thank you.

THE COURT: We are in recess. Thank you.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	Hon. Julia M. Nowicki
Defendants.	)	

AFFIDAVIT OF STEPHEN C. CARLSON

The undersigned, upon oath, does hereby depose and state as follows:

1. I, Stephen C. Carlson, am over 18 years of age and have personal knowledge of the facts attested to herein.

2. I am a partner at the law firm of Sidley Austin Brown & Wood and practice in the Chicago office of the firm at Bank One Plaza. I am one of the attorneys who has represented The Terra Foundation for the Arts in the litigation brought against it by Dean Buntrock and Ronald Gidwitz in September, 2000 and by Paul Hayes Tucker, Judith Terra and Alan K. Simpson in July, 2001.

3. I have read the "Affidavit of Judith Terra" attached to "Plaintiffs' Emergency Motion to Disqualify" and the motion faxed to counsel for the parties on the morning of Monday, September 17, 2001 along with a Notice of Motion, purporting to notice the motion to be heard that morning.

4. Contrary to the "Emergency Motion to Disqualify," at no time in either of the above-described lawsuits did Sidley Austin Brown & Wood ever "act as counsel to Mrs. Terra in her individual capacity."

5. Contrary to that motion, at no time did Mrs. Terra "share" any "confidential information" with me or with any attorney from Sidley Austin Brown & Wood in my presence, nor to my knowledge did she ever provide any confidential information to any Sidley attorney.

6. Contrary to that motion, at no time did I, or any attorney from Sidley Austin Brown & Wood in my presence, "provide legal advice to Mrs. Terra", nor to my knowledge did any Sidley attorney ever provide her legal advice in either of the above-described lawsuits.

7. Mrs. Terra's affidavit claims (par. 8) that "because the [Buntrock and Gidwitz] lawsuit was brought against the Foundation's Board, it was necessary to maintain a close legal and confidential relationship with Ms. Stone and Mr. Carlson, and we continued to work closely with them, particularly Ms. Stone." Mrs. Terra is wrong. I never had a "close legal and confidential relationship" with Mrs. Terra, nor did Ms. Stone.

8. Perhaps Mrs. Terra's confusion results from her mistaken and unreasonable belief (par. 8) that the Buntrock and Gidwitz lawsuit was somehow "brought against the Foundation's Board." On the contrary, that lawsuit was brought against the Foundation and only three members of the Foundation's eleven person Board, namely Mrs. Terra, Dr. Paul Hayes Tucker and Senator Alan Simpson (as well as a non-Board member, Naftali Michaeli). Mrs. Terra, Dr. Tucker and Sen. Simpson were never represented by Sidley, but had separate counsel, of their own choosing, Judge Brian Crowe and his colleagues at Shefsky & Froelich. Mr. Michaeli represented himself.

9. Mrs. Terra was, of course, always free to retain whatever other or additional counsel she felt she wanted to retain to represent her and she has, of course, now been represented in connection with both of the above-described lawsuits by at least five different law firms in addition to Judge Crowe's firm, and never by Sidley Austin Brown & Wood.

10. At no time did I, or any other Sidley attorney in my presence, ever say anything to Mrs. Terra from which she could have reasonably believed that Sidley represented her or any party to either of the above-described lawsuits other than the Foundation which had retained us and to which we submitted our statements for professional services. At no time did Mrs. Terra ever suggest to me or to any Sidley attorney in my presence nor to my knowledge to

any Sidley attorney that she thought that Sidley represented her in her individual capacity or that she ever intended to pay Sidley for any legal services.

11. During the course of the Buntrock and Gidwitz litigation, to my knowledge, Sidley Austin Brown & Wood, as counsel for the Foundation, communicated at various points in time, with all nine of the non-plaintiff members of the Foundation's Board of Directors. Our principal contacts were with Dr. Theodore Stebbins and Ambassador Jacques Andréani, whom the Board of the Foundation appointed in late November, 2000 as an Independent Litigation Committee to oversee the litigation.

12. While I participated in a few discussions with Mrs. Terra during the course of the Buntrock and Gidwitz litigation, I had no "regular and detailed conversations about the status of the litigation" or "strategies going forward" with her. While she claims to have "shared" with me her "most personal concerns and hopes," my substantive discussions with her concerned certain factual matters relating to the Foundation's history, as she admits in paragraph 5 of her affidavit. Nothing she ever told me was even arguably confidential (and indeed it was communicated to become and did, to the degree it was helpful, become part of obviously nonconfidential Court papers). None of what she told me was communicated to obtain any legal advice. She knew I was one of the attorneys for the Foundation and that she had counsel of her own to provide her with whatever legal advice she needed in an individual capacity in connection with the Buntrock and Gidwitz litigation.

13. I believe I was present during the meeting Mrs. Terra seems to refer to in paragraph 10 of her affidavit. I believe one of Mrs. Terra's lawyers, Jim Wilson, from Shefsky & Froelich, was also present. Mrs. Terra's recollection of that meeting is incorrect. Among

other things, at no time did anyone in my presence even remotely suggest to her that she had some sort of unique personal veto power over any mediated settlement. Indeed, no one in my presence ever suggested to Mrs. Terra that she was anything other than one vote out of eleven or that the Foundation's ultimate position on any mediated settlement would be determined by anything other than a vote of the Foundation's Directors. Moreover, nothing that occurred during that meeting could reasonably have led Mrs. Terra to believe that Sidley Austin Brown & Wood represented her in her individual capacity.

14. My discussions with Mrs. Terra were far less frequent than my discussions with other members of the Terra Foundation's Board of Directors or other of its employees, but at no point in time did my few communications with her change in any appreciable way as she apparently claims in paragraph 11 of her affidavit, nor did I ever take or ever need to take any "actions" to "shut her out" of anything.

15. Under penalties as provided by law pursuant to Section 1-108 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this affidavit are true and correct.

Stephen C. Carlson

10/24/01

Executed by me this 24th
day of October, 2001.

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock
et al
plaintiffs
v.
Judith Terra
et al
defendants

NO. 00 CH 13559

ORDER

This matter coming before on Plaintiffs' Emergency Motion for TRO, Plaintiffs' motion to disqualify Sidley & Austin as counsel for Terra Foundation, Plaintiffs' motion to file Corrected Emergency Motion for TRO and Plaintiffs' Motion for Expedited Discovery, The Court being fully advised and counsel for Terra Foundation being present, it is hereby ordered:

(1) Plaintiffs' motion to Disqualify Sidley & Austin is denied without prejudice;
(2) Plaintiffs are granted leave to substitute a Corrected Emergency Motion for Temporary Restraining Order

Atty No. 33745
Name Quinlan & Crishan
Attorney for Plaintiffs
Address 30 W. LaSalle #2900
City / Zip Chgo., IL 60602
Telephone (312) 263-0900

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

DEAN L. BUNTROCK
et al
plaintiffs
v.
JUDITH TELLA,
et al.
defendants

2 of 5

NO. 00 CH 13859

PAGE TWO
ORDER

(3) Plaintiffs' Motion for Expedited Discovery is granted and Plaintiffs are granted leave to serve discovery upon defendants immediately; AND Defendants are grant reciprocal leave to serve the Plaintiffs;

(4) The Emergency Motions for TRO filed by Plaintiffs and People of the State of Illinois by The Illinois Attorney General are granted with the Court making the following findings:

A. Plaintiffs have established a protectible right in need of protection

B. Plaintiffs have established that they and the public will suffer irreparable injury if injunctive relief is not granted

Atty No. 33745
Name QUINLAN & CRUSHAM
Attorney for PLAINTIFFS
Address 30 N. LaSalle Street Suite 2900
City / Zip CHICAGO IL 60602
Telephone (312) 263-0900

ENTER:

Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

16di-004409

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et al
Plaintiffs
v.
Judson Terra et al
defendants

3 of 5

NO. 00 Ch 13859

Page 3 **ORDER**

C. Plaintiffs have established that ~~no~~ there is no adequate remedy at law if injunctive relief were not granted

D. Plaintiffs and The People of The State of Illinois have raised a fair question as to their likelihood of success on the merits

E. On a balance of hardship, The Court finds that Plaintiffs and The People of Illinois would be ~~more~~ harmed ~~by~~ if injunctive relief were not granted whereas any harm to defendants by the entry of a TRO is not as great

Atty No. 33745
Name Quinlan and Crisman
Attorney for Plaintiff
Address 30 N. LaSalle Ste 2900
City / Zip Chicago, IL 60602
Telephone (312) 263-0900

ENTER:

_____, _____

_____
Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

16di-004410

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et al. Plaintiffs
v.
Judson Terra et al Defendants

4 of 5

NO. 00 ch 13859

Page 4 **ORDER**

(5) The Court therefore orders that defendants are enjoined from:

A. Taking any action at the annual Board of Directors meeting scheduled for Tuesday September 26, 2000, to remove any member of the Board of Directors or the Executive Committee against their will [redacted]

B. Taking any final action to close the Terra Museum of American Art in Chicago and from taking any final action to remove or transfer the bulk of any assets or artwork of the Terra Museum or the Terra Foundation outside the State of Illinois [redacted]

Atty No. 33745
Name Quinlan and Carlson
Attorney for Plaintiff
Address 30 N LaSalle St. #2900
City / Zip Chicago, IL 60602
Telephone (312) 263-0900

ENTER:

Judge **Judge's No.**

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420184)

16di-004411

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

5 of 5

Dian L Buntrock et al
v.
Jud. Th Terra et al

NO. 00 CH 13559

Page 5 ORDER

~~Plaintiff~~

(6) The temporary restraining order shall remain in effect until October 12, 2000 at 5:00 p.m. unless otherwise extended by The Court

(7) Bond is waived for good cause shown because of public interest is involved

(8) The matter is set for October 12, 2000 at 11:00 a.m. for the purpose of continuing the TRO, discussing dates for responses to discovery requests, set date for preliminary injunction hearing and for status on J. in Terra's ~~Pla~~ Petition to intervene

(9) THIS ORDER IS ENTERED September 25 2000 AT [illegible] P.M. CENTRAL DAYLIGHT TIME

Atty No. 33745
Name Quinlan & Crisham
Attorney for Plaintiffs
Address 30 N. LaSalle #2500
City / Zip Chgo, IL 60602
Telephone (312) 263-0500

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
SEP 25 2000
JUDGE DOROTHY KINNARD #276
DEPUTY CLERK

ENTER

Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-NOO2-150M-12/29/99(03420164)

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L. Buntrock et al.

v.

Judith Terra

NO. 00 Ch 13859

ORDER

This Cause coming to be heard on Plaintiffs' Motion To Appoint Independent Litigation Counsel et al. and Motion to ~~Appoint~~ Enforce The TRO ~~[illegible]~~, due notice having been given and the Court being fully advised, and for the reason set forth on the record IT IS ORDERED.

The TRO remains in full force and effect through November 2, 2000 at 5:00 p.m.

The October 13, 2000 Order remains in full force and effect

Plaintiffs Motion To Appoint Litigation Counsel et al. is granted in part and denied in part. Defendant Tucker is removed as litigation director. The board of directors of the Foundation shall meet and appoint a special litigation committee. The defendants and plaintiffs may participate in the discussion but may not vote on the members of the special litigation committee. The special litigation committee may be composed of any and/or members of the board of directors who are not parties to the litigation and/or all of

non members of the board of directors ~~[illegible]~~ as the voting members may determine. The special litigation committee may consider whether Sidley Austin remains as counsel for the Foundation.

~~The [illegible]~~

Atty No. 33745

Name John F. Kennedy

Attorney for Plaintiffs

Address 30 N. LaSalle

City / Zip Chicago Il.

Telephone 263.0900

ENTER:

Judge Judge's No.

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

P. 1 of 2

CCG-N002-150M-12/29/99(03420164)

6di-004414

ORDER CCG-N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Dean L Buntroch et al.

v.

Judith Terra et al

NO. 00 CH 13859

ORDER

2. (Cont.) The Motion to Appoint Special Litigation Counsel et. al. is denied without prejudice with respect to disqualification of Winston & Strawn and Sidley + Austin. Motion to Appoint Receiver is Denied.

) The Motion to Enforce the TRO is denied without prejudice

) The Foundation's ~~and Defendant~~ 52-615 ~~[illegible]~~ Motion to Dismiss the Plaintiffs Complaint and Attorney General's Complaint are dismissed without prejudice.

) The Report of Proceedings of October 20, 2000 ~~are~~ are incorporated herein. ~~by reference herein~~

7.) Plaintiffs are granted leave to file the "Supplement" to the Motion to Enforce et. al. and Reply in Support of Motion to Enforce the TRO.

Atty No. 33745

Name John F. Kennedy

Attorney for Plaintiffs

Address 30 N LaSalle

City / Zip Chicago Il. 60602

Telephone 263-0900

ENTER:

ENTERED
CLERK OF THE CIRCUIT COURT
AURELIA PUCINSKI
OCT 20 2000
JUDGE DOROTHY KIRKAIRO #276
DEPUTY CLERK

Judge Judge's No.

P 2 of 2

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG-N002-150M-12/29/99(03420164)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 00 CH 13859
JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*	)	
Defendants.	)	

ORDER

This cause coming to be heard on Plaintiffs' Emergency Motion to Appoint Receiver and for Temporary Restraining Order and Opposition to Stay ("Plaintiffs Emergency Motion for Temporary Restraining Order") and Plaintiffs' Emergency Motion for Temporary Restraining Order to Enjoin Further Implementation of the Dilenschneider Contract ("Plaintiffs Emergency Motion for Temporary Restraining Order to Enjoin Implementation of the Dilenschneider Contract"), and for scheduling of the Attorney General's and Plaintiffs' Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver, due notice having been given, the Court having heard argument of counsel and having reviewed the briefs of the parties, and for the reasons set forth on the record, IT IS ORDERED:

A. **Denial of Temporary Restraining Order**

(1) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Terra Foundation's Independent Litigation Committee from continuing to retain Sidley & Austin as counsel is denied, the Court considering the motion as a renewed motion to disqualify counsel and not a proper motion for temporary restraining order;

(2) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Terra Foundations Independent Litigation Committee from taking action to authorize or direct Sidley & Austin to perform the subject investigation is denied;

(3) Plaintiffs' Emergency Motion for Temporary Restraining Order to Enjoin Implementation of the Dilenschneider Contract is denied;

B. Granting of Temporary Restraining Order

(4) That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Independent Litigation Committee and the Terra Foundation from paying the legal bills of Sidley and Austin and Shefsky and Froelich to date is granted. This Temporary Restraining Order shall remain in full force and effect until January 30, 2001 at 5:00 p.m. In the event the Board meets as set forth in Paragraph C, this Order may be modified upon motion before January 30, 2001.

In granting this Temporary Restraining Order the Court makes the following findings:

a. Plaintiffs have established a protectible right in need of protection;

b. Plaintiffs have established that they and the public will suffer irreparable injury if injunctive relief is not granted;

c. Plaintiffs have established that there is no adequate remedy at law if injunctive relief were not granted;

d. Plaintiffs have raised a fair question as to their likelihood of success on the merits;

e. To the extent such a finding is necessary, the hardships favor plaintiffs.

The Court therefore orders that the Foundation and the Independent Litigation Committee are enjoined from paying any legal bills of Sidley and Austin and Shefsky and Froelich until

January 30, 2001 at 5:00 p.m. This Temporary Restraining Order is entered with notice, as of 5:00 ~~a.m.~~/p.m. on January 2, 2001. This case is continued to January 30, 2001 at 10:30 a.m. for the Court to determine whether this Temporary Restraining Order should be continued, and whether a preliminary injunction hearing shall be scheduled.

C. **Board Meeting Regarding Attorney Fees and Costs**

(5) Further, the Court orders during the pendency of this Temporary Restraining Order that no attorney fees or costs of Sidley and Austin and/or Shefsky and Froelich shall be paid unless the Terra Foundation's board of directors meets to consider the issues relating to such fees and costs. If the board of directors elects to meet, the meeting shall take place in Chicago, Illinois at the Foundation's headquarters, and as follows:

a. A purpose of the meeting is to advise the Board as to the issues of the review and payment of the legal bills of Sidley and Austin and Shefsky and Froelich;

b. The Board shall make a specific statement as to whether or not: (1) the Board is delegating the authority to review and pay the subject legal bills to the independent litigation committee; or (2) whether the Board retains the authority to review and pay the subject legal bills for itself; or, (3) whether the Board establishes another mechanism to review the subject legal bills, as it may have done when the Terra Foundation was involved in other litigation;

c. The Board shall be informed of the total expense of this litigation to date, including the total amount of attorney fees and costs incurred by Sidley and Austin and Shefsky and Froelich to date; ℄ as it relates to any such advancement

d. No Board member who seeks advancement of attorney fees or costs may vote on the issues set forth in section (b) above, namely, Mrs. Terra, Dr. Tucker, or Senator Simpson;

e. The meeting shall be called upon no less than five business days written notice to each board member. The Foundation shall use its best efforts to schedule the meeting at a time mutually convenient to all board members

to ensure maximum board member participation in the meeting. The Foundation shall survey in writing each board member to determine the date for the meeting before the notice for the meeting is issued to each board member. The Foundation shall communicate the full results of the survey to all counsel of record at least 24 hours before the notice is mailed; and

f. The notice for the meeting shall include the following:

i). A copy of this Order;

ii). The total amount of Sidley and Austin's and Shefsky and Froelich's bills, with each attorneys' hourly rates and total number of hours billed monthly;

iii). The undertakings executed by Mrs. Terra, Dr. Tucker and Senator Simpson.

D. **Attorney General's Motion to Enjoin the Terra Foundation's Use of the Current Special Litigation Committee and for Appointment of a Receiver to Conduct the Independent Investigation**

(6) The defendant Terra Foundation shall respond to the Attorney General's Motion to Enjoin by January 8, 2001.

(7) The Attorney General's Emergency Motion to Compel Discovery is granted in part, and the parties may commence immediate expedited discovery as it relates to the allegations involving Dr. Stebbins.

(8) The Emergency Motion is set for status on discovery on January 9, 2001 at 2:00 p.m.

E. **Terra Foundation's Motion to Continue Stay of Proceedings Pending Independent Litigation Committee Investigation**

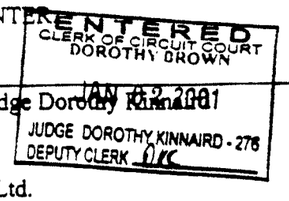
(9) The Foundation's motion to continue the stay of proceedings is denied and discovery may commence on all issues after counsel has met and conferred to determine an outline of discovery.

F. **The Plaintiffs' Emergency Motion to Stay**

(10) The Plaintiffs emergency motion to stay the enforcement of the orders entered in Paragraph A(1)(2) and (3) of this Order is denied.

(11) That portion of the Report of Proceedings of December 29, 2000, not held in the courtroom shall be under seal and the original shall be submitted to the Court. The court reporter's office shall not release a copy of the sealed transcript to anyone.

ENTER



Judge Dorothy Kinnaird

Prepared by
Atty No. 33745
Name John F. Kennedy; Quinlan & Crisham, Ltd.
Attorney for Plaintiffs
Address 30 North LaSalle
City/Zip Chicago, IL 60602
Telephone 263-0900
Reviewed as to Form by All Counsel of Record

16di-004419

No. 01-0034

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BUNTROCK and GIDWITZ, Plaintiffs, vs. TERRA, et al., Defendants.	Appeal from the Circuit Court of Cook County Chancery Division No. 00 CH 13859 Honorable Dorothy Kinnaird
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Intervenor, vs. TERRA, et al. Defendants.	

ORDER

This cause coming to be heard on Plaintiffs' Petition for Interlocutory Appeal Pursuant to Rule 307(d) and Memorandum of Law in support, due notice having been given and the Court being fully advised,

IT IS HEREBY ORDERED:

A. Plaintiffs' Petition for Interlocutory Appeal Pursuant to Rule 307(d) is ~~granted~~/denied.

B. Sections A (1), (2) and (3) of the Circuit Court's Order of January 2, 2001 are vacated.

C. A temporary restraining order is hereby entered, effective immediately, as follows:

1. The Terra Foundation's Independent Litigation Commitee is enjoined from continuing to retain Sidley & Austin as counsel;

2. The Terra Foundation's Independent Litigation Committee is enjoined from taking action to authorize or direct Sidley & Austin to perform the subject investigation, as defined in plaintiffs' petition and memorandum in support, is denied; and

3. The Terra Foundation, and the Foundation's Independent Litigation Committee is enjoined from taking any action to implement the Dilenschneider Contract, as defined in plaintiffs' petition and memorandum in support;

D. This cause is remanded to the circuit court for further proceedings consistent with this Order.

Justice

Justice

Justice

Prepared by William R. Quinlan
James R. Carroll
John F. Kennedy
Quinlan & Crisham, Ltd.
Attorney for Plaintiffs
Address 30 North LaSalle
City/Zip Chicago, IL 60602
Telephone 263-0900

Attorney Number 33745

ORDER ENTERED

JAN 19 2001

APPELLATE COURT, FIRST DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*, Plaintiffs-Appellants, v. JUDITH TERRA, a Director of the Terra Foundation for the Arts, *et al.*, Defendants-Appellees.	)	No. 1-01-0034

O R D E R

This cause coming to be heard on the Petition For Rehearing of the Plaintiffs-Appellants and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the Petition For Rehearing is DENIED.

ORDER ENTERED
FEB 16 2001
APPELLATE COURT, FIRST DISTRICT

Justice

Justice

Justice

DATED: _____

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

91161

June 6, 2001

Mr. Stephen C. Carlson
Sidley & Austin
One First National Plaza
Chicago, IL 60603

No. 91161 - Dean L. Buntrock, etc., et al., petitioners, v. Judith Terra, etc., et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 28, 2001.

16di-004424

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Bruce R. HOBAN, Plaintiff,
v.
STRATA MARKETING, INC., Roger Skolnik and Bruce Johnson, Defendants.

No. 91 C 5331.

Oct. 2, 1991.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** In this diversity action, plaintiff Bruce R. Hoban ("Hoban") sues defendants Strata Marketing, Inc. ("Strata"), Roger Skolnik ("Skolnik"), and Bruce Johnson ("Johnson") (collectively, "defendants") for breach of an oral contract. Hoban moves to disqualify James Gordon ("Gordon") and Edward Slovick ("Slovick") as defendants' counsel. Defendants oppose disqualification. [FN1]

BACKGROUND

The facts alleged by Hoban are as follows. [FN2] Hoban claims that defendants breached an oral agreement that Hoban would become a one-third owner of Strata. ¶ 1. The other major issue is the purpose and scope of Hoban's work on upgrading Strata's software. ¶ 9; Complaint ¶ 16. Attorneys Gordon and Slovick currently serve as defendants' counsel. ¶ 2. Although they are not affiliated by a formal partnership agreement, Gordon and Slovick share office space, telephone service, and profits. ¶ 3.

In 1990, prior to the filing of this action, Gordon served as Strata's counsel in an unrelated matter. ¶ 5. During that time, there were three presidents of Strata: Skolnik, Johnson, and Hoban. ¶ 6. All three presidents met with Gordon concerning the unrelated matter. During these meetings, Gordon received information concerning Hoban's position at Strata. Gordon also received information concerning Hoban's work on upgrading Strata's software. ¶¶ 7, 8. At the time of these meetings, Hoban looked upon Gordon as Strata's attorney. ¶ 10. Hoban confided in Gordon in accordance with his duties as an officer of Strata. ¶ 11.

Hoban claims that there is a substantial relationship between the information Gordon received in his prior representation of Strata and issues relevant to the current litigation. ¶ 13. For this reason, Hoban argues that Gordon should be disqualified as defendants' counsel. Hoban also argues that Slovick should be disqualified because he is in the same firm as Gordon. ¶ 14.

DISCUSSION

Disqualification of an attorney is a drastic measure that should only be imposed when absolutely necessary. *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir.1983). The moving party has the burden of showing that the opposing attorney had access to confidential or privileged information in the course of a prior representation. *Roth v. Continental Casualty Co.*, 676 F.Supp. 816 (N.D.Ill.1987).

The standard for disqualification is the "substantial relationship" test. *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 255 (7th Cir.1983). The test involves a three-part inquiry to determine whether a substantial relationship exists between the confidential information gained by the attorney in the previous representation and the issues in the current litigation. First, the court determines the scope of the prior representation. Second, the court determines whether it is reasonable to infer that the confidential information allegedly given would have been given to the attorney under those circumstances. Third, the trial court determines whether that information is relevant to the current litigation. *Id.* at 255-256. If the court determines that a substantial relationship exists, the attorney is presumed to have received confidential information during the prior representation. This presumption, however, may be rebutted. *Id.* at 256; *Schiessle*, 717 F.2d at 420.

***2** The substantial relationship test assumes a prior attorney/client relationship between the attorney at issue and the party seeking his disqualification. In other words, the moving party must show the existence of a prior attorney/client relationship as a preliminary matter. *Bridge Products, Inc. v. Quantum Chemical Corp.*, No. 88 C 10734, 1990 WL 70857, 1990 U.S. Dist. LEXIS 5019 (N.D.Ill. April 27, 1990); *See also Pain Prevention Lab, Inc. v. Electronic Waveform Labs, Inc.*, 657 F.Supp. 1486, 1495 (N.D.Ill.1987); *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. 1124, 1125 (N.D.Ill.1982); *DCA Food Industries Inc. v. Tasty Foods, Inc.*, 626 F.Supp. 54, 58-60 (W.D.Wis.1985) (applying Seventh

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Circuit precedent).

Here, Hoban does not assert that there was ever a formal attorney/client relationship between Gordon and himself. In fact, Hoban admits that Gordon was Strata's counsel, not his. Hoban's motion ¶¶ 5, 10, 13 and 14. Indeed, the general rule is that corporate counsel does not become counsel for the corporation's individual shareholders and directors. In other words, a director or officer conferring with corporate counsel should understand that anything revealed to that attorney is known by the corporation. There is normally no conflict of interest when a director sues a corporation represented by its corporate counsel. The reason is that anything the director previously told that attorney would ordinarily have been communicated to the attorney as counsel for the corporation. *Bobbitt,* 545 F.Supp. at 1126.

Rather, Hoban appears to contend that his dealings with Gordon created an implied attorney/client relationship. It is true that an attorney/client relationship does not have to be formal or express. *Westinghouse Electric Corp. v. Kerr-McGee Corp,* 580 F.2d 1311, 1318-1319 (7th Cir.1978), *cert. denied,* 439 U.S. 955 (1978). Thus, the question of whether an implied attorney/client relationship was created between Hoban and Gordon must be determined by the facts. *Bobbitt,* 545 F.Supp. at 1126; *Rosman v. Shapiro,* 653 F.Supp. 1441, 1445 (S.D.N.Y.1987). To establish an implied attorney/client relationship, Hoban must show (1) that he submitted confidential information to Gordon, and (2) that he did so with the reasonable belief that Gordon was acting as his personal attorney. *Pain Prevention Lab,* 657 F.Supp. at 1495; *DCA Food Industries,* 626 F.Supp. at 59-60.

Hoban fails both parts of this test. The alleged confidential information consists only of Hoban's position with Strata and his work on their software. This is the same information contained in Hoban's complaint and cannot be reasonably construed as confidential. Furthermore, Hoban admits that defendants Johnson and Skolnik were also present when much of this information was given to Gordon. Hoban's motion ¶ 7. Information freely given to defendants cannot be viewed as confidential. There is no evidence whatsoever that Hoban privately discussed with Gordon confidential matters that he expected would not be revealed to any of the defendants. *See Bobbitt,* 545 F.Supp. at 1127. [FN3]

*3 Nor is there any basis to conclude that Hoban reasonably believed that Gordon was acting as his personal attorney. Hoban acknowledges that Gordon represented only Strata. In fact, Hoban admits that he never consulted Gordon in any capacity other that as an officer, director or agent of Strata. Hoban's motion ¶ 11. Under these circumstances, there cannot be an implied attorney/client relationship between an officer or director and a corporate counsel. *Id.* at 1126. [FN4]

CONCLUSION

Hoban fails to show that he had a previous attorney/client relationship with Gordon. Thus, a substantial relationship inquiry is unnecessary. [FN5] Accordingly, Hoban's motion to disqualify defendants' counsel is denied.

FN1. The defendants' motion to dismiss plaintiff's motion to disqualify shall be treated as an opposing memorandum to Hoban's motion to disqualify.

FN2. All references in this section are to Hoban's motion to disqualify unless otherwise indicated.

FN3. Hoban argues that it does not matter whether Gordon's formal client was Strata or Hoban. But this is only true if Hoban gave *confidential* information to Gordon with the *reasonable* belief that Gordon was acting as his individual attorney. *Analytica, Inc. v. NPD Research, Inc.,* 708 F.2d 1263, 1268 (7th Cir.1983); *Kerr-McGee,* 580 F.2d at 1319- 1320. Thus, *Analytica* and *Kerr-McGee* may be distinguished because those cases involve circumstances where a party gave the kind of confidential information that the party would have furnished a privately retained lawyer. *Analytica,* 708 F.2d at 1268-1269.

FN4. *Rosman* may also be distinguished because it is narrowly limited to its facts: a close corporation consisting of only two 50% shareholders, created solely to facilitate the transaction that was the focus of the litigation. *Rosman,* 653 F.Supp. at 1445, fn. 8. The court finds the facts presented here more analogous to those in *Bobbitt.*

FN5. Since Hoban has not established a previous attorney/client relationship with Slovick, there is no basis to disqualify Slovick either.

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Jo Ann STOPKA, Plaintiff,
v.
ALLIANCE OF AMERICAN INSURERS, Rodger S. Lawson, C. Clarke Imbler, and Gregory W. Heidrich, Defendants.

No. 95 C 7487.

April 25, 1996.

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

*1 Plaintiff Jo Ann Stopka sues her current employer Alliance of American Insurers ("Alliance"), and three of her former supervisors, Roger S. Lawson, C. Clarke Imbler and Gregory W. Heidrich (the "individual defendants") (collectively "defendants") for violations of the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, and Illinois common law for intentional infliction of emotional distress. Stopka moves to disqualify defendants' attorneys Lawrence Cohen and Richard Pincus and their law firm Fox and Grove, Chtd. ("Fox & Grove") (collectively "defense counsel") from further representation of Alliance and the individual defendants in this matter. Defendants oppose Stopka's motion. Additionally, Alliance and defense counsel move to quash document and deposition subpoenas directed to Fox & Grove, Cohen and Pincus. Stopka opposes the motion to quash.

BACKGROUND

Stopka is a current Alliance employee on long term disability leave. Stopka has been employed for 12 years by Alliance. She held the position of vice president of the administration division allegedly between 1981 and October 1995. *See* Affidavit of Jo Ann Stopka ("Stopka Aff.") ¶ 2. Stopka's responsibilities included supervising Alliance's human resources department, including salary and benefits administration, employee relations and compliance with state and federal employment laws and regulations. *Id.* at ¶ 3.

Stopka sues defendants for disparate treatment and pattern and practice discrimination. Fox & Grove has been labor and employment relations counsel for Alliance for approximately 15 years. Cohen and Pincus are partners at Fox & Grove. To support her claims, Stopka intends to testify about conversations occurring at meetings she attended with the individual defendants and defense counsel allegedly about similar discrimination against other Alliance employees.

On March 22, 1996, Stopka served Fox & Grove, Cohen and Pincus with subpoenas for documents and testimony. *See* Def. Exs. A-C. In the subpoenas, Stopka seeks production of the following documents: (i) itemized billing statements or invoices from Fox & Grove to Alliance between August 1984 and July 1995; (ii) time sheets reflecting telephonic, in-person and written communications between Fox & Grove and Stopka between August 1984 and July 1995; (iii) notes, memoranda, correspondence, electronic mail or other communication between Fox & Grove and Stopka between 1984 and 1996, including carbon copies; and (iv) notes or recordings of conversations taken by Fox & Grove attorneys of conversations between themselves and Stopka. *See* Def. Exs. A-B to motion to quash.

DISCUSSION

I. *DISQUALIFICATION*

*2 Stopka raises four arguments in support of her motion to disqualify defense counsel: (i) she asserts Cohen and Pincus are potential witnesses, and thus should be disqualified under Rule 3.7 of the Rules of Professional Conduct for the Northern District of Illinois providing for disqualification when a conflict arises between a lawyer who may be both a witness and an advocate; (ii) Cohen and Pincus' prior role as Stopka's alleged legal advisors in her individual capacity and as Alliance vice president purportedly conflict with their role as defense counsel in violation of Rule 1.9; (iii) Cohen and Pincus' multiple representation of Alliance and the individual defendants in a case involving both corporate and individual liability may violate Rule 1.7; and (iv) Cohen and Pincus' disqualification should be imputed to Fox & Grove under Rule 1.10.

Defense counsel respond as follows: (i) Regarding Rule 3.7, Cohen and Pincus will not testify, asserting that the communications Stopka was privy to are

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protected by the attorney-client privilege between defense counsel and Alliance, and Stopka has not demonstrated with specificity that their testimony would substantially prejudice Alliance; (ii) Rule 1.9 is inapplicable because Stopka was never a client of Fox & Grove and the "substantial relationship" test is inapplicable because Alliance was privy to all information communicated to or by Stopka and Fox & Grove attorneys; (iii) Rule 1.7 is inapplicable because the individual defendants were all informed of potential conflict issues and consented to Fox & Grove's multiple representation; and (iv) Rule 1.10 is inapplicable to disqualifying Fox & Grove because there is no basis to disqualify Cohen and Pincus.

Disqualification of an attorney is a drastic measure that should only be imposed when absolutely necessary. *Hoban v. Strata Marketing, Inc.*, No. 91 C 5331, 1991 WL 204965, at *1 (N.D. Ill., Oct. 2, 1991); *Schiessle v. Stephens*, 717 F.2d 417, 420 (7th Cir. 1983). Disqualification motions should be viewed "with extreme caution for they can be misused as techniques of harassment." *Lanigan v. Resolution Trust Corp.*, No. 91 C 7216, 1992 WL 350688 (N.D. Ill. Nov. 23, 1992) (quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721-22 (7th Cir. 1982)).

A. *The Attorney-Client Relationship*

To succeed on her motion, the moving party must show that opposing counsel had access to confidential or privileged information in the course of a prior representation. *Hoban*, 1991 WL 204965, at *1. *See also* Rule 1.9 (concerning a "lawyer who has formerly represented a client in another matter"). Thus, a necessary precondition to disqualification is proving a prior attorney-client relationship. The attorney-client relationship may either be expressed or implied. *Hoban*, 1991 WL 204965, at *2 (citing *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318-1319 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978)).

***3** Stopka admits that she did not have an express attorney-client relationship with defense counsel. To establish an implied attorney-client relationship, Stopka must show: (1) that she submitted confidential information to opposing counsel and (2) that she did so with the reasonable belief that opposing counsel was acting as her personal attorney. *Hoban*, 1991 WL 204965 at *2 (citation omitted).

Stopka's motion to disqualify is premised on her assumption that Fox & Grove, Cohen and Pincus provided her with legal services and advice in her individual capacity. However, Stopka fails to establish that she had an implied attorney- client relationship. Stopka contends she was either the client or the agent of the client at the time of these communications. Stopka's affidavit filed *in camera* does not establish an attorney-client relationship between herself and defense counsel. She attests she had,

> numerous contacts both [by] telephone and in person with [defense counsel]. I relied on Messrs. Cohen and Pincus to provide legal advice and counsel regarding *various employment matters for which I had day-to-day responsibilities*. I believed that they were advising me in my individual capacity as a client as well as in my capacity as a Division Vice President. *I relied upon their legal advice in recommending routine as well as difficult personnel decisions* to avoid personal as well as corporate liability for such decisions.... Some of these conversations involved highly confidential *corporate personnel* matters.

Stopka Aff. ¶¶ 5-6 (emphasis added). Stopka describes numerous conversations she had with Fox & Grove attorneys in which other Alliance officials, and generally one or more of the individual defendants, also participated. *Id.* at ¶¶ 7-14.

In her motion, Stopka asserts without any support that "Messrs. Pincus and Cohen undoubtedly garnered information from Ms. Stopka during these numerous conversations which she considered confidential that could be used against her in cross-examination or during the course of the litigation." Pl. memorandum at 8. This conclusory and unsupported assertion is wholly unpersuasive. There is no basis for Stopka to reasonably believe that Fox & Grove acted as her personal attorney. Stopka only attests that she consulted with Fox & Grove in her capacity as an officer or agent of Alliance. A corporate officer "conferring with corporate counsel should understand that anything revealed to that attorney is known by the corporation." *Hoban*, 1991 WL 204965, at *2 (citing *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982)). Stopka simply fails to show that she had private and confidential communications with Fox & Grove that she expected would not be revealed to the corporation. *Id.* Indeed, all of the conversations described in her affidavit involved another Alliance officer or employee, and generally one or more of the individual defendants. "Information freely given to defendants cannot be viewed as confidential." *Id.* Under these circumstances, there cannot be an implied attorney-

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client relationship between a corporate officer and the corporation's outside counsel. Because Stopka fails to establish a prior attorney-client relationship, defense counsel may not be disqualified under Rule 1.9.

B. *Rule 3.7*

***4** Stopka's argument that defense counsel should be disqualified under Rule 3.7 because they may be called to testify is also unfounded. Rule 3.7(a) provides, "a lawyer shall not act as an advocate in a trial or evidentiary proceeding if a lawyer knows or reasonably should know that the lawyer may be called as a witness therein on behalf of the client ...." Stopka contends Pincus and Cohen should be disqualified if they intend to testify on behalf of their clients. However, defendants do not intend to call their counsel to testify, asserting the attorney-client privilege concerning previous legal advice given to Alliance. Thus, Rule 3.7 is inapplicable.

Rule 3.7(b) provides that a lawyer who reasonably should know he may be called as a witness other than on behalf of the client may act as an advocate in a trial or evidentiary proceeding unless the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client. Stopka bears the burden of demonstrating with specificity that Cohen and Pincus' testimony would substantially prejudice the defendants. *Lanigan,* 1992 WL 350688 at *4. Like the moving party in *Lanigan,* Stopka fails to specify how the attorneys' testimony could be prejudicial to their client. Stopka candidly acknowledges that she "does not know how [Cohen and Pincus] will testify about the various communications between themselves and her." Pl. memorandum at 4.

Moreover, Stopka has not clearly explained the need for Cohen and Pincus' testimony. Her allegations of prior acts of discrimination concern decisions made and carried out by Alliance and its officers. "Where evidence is easily available from other sources, attorneys who participate in a case should not be called as witnesses absent extraordinary circumstances or compelling reasons." *Lanigan,* 1992 WL 350688 at *4 (citing *United States v. Dack,* 747 F.2d 1172, 1176 n.5 (7th Cir. 1984)). Stopka fails to show that extraordinary circumstances or compelling reasons require Cohen and Pincus' testimony. Accordingly, defense counsel will not be disqualified under Rule 3.7

C. *Rule 1.7*

Rule 1.7 prohibits a lawyer from representing multiple clients under certain circumstances. The rule provides that a lawyer shall not represent a client, "if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation."

Stopka contends Fox & Grove's appearance on behalf of Alliance "will very likely be at odds now or during the course of litigation with the defense of the individual defendants who supervised Ms. Stopka." Pl. memorandum at 10. Stopka asserts that even if there presently is no conflict, the likelihood that conflict could arise militates strongly in favor of disqualification.

Stopka's argument is unpersuasive. Defendants explain that after they were informed of all potential conflict issues, the individual defendants consented to Fox & Grove's multiple representation. Moreover, defendants maintain their interests are aligned; Alliance does not contend the individual defendants acted without authority or inconsistent with their fiduciary responsibilities. Finally, the low probability that the litigation could be delayed in the future should a conflict arise does not outweigh the significant prejudice to defendants from having counsel of their choice disqualified.

***5** Thus, defense counsel will not be disqualified under Rule 1.7. Since Stopka fails to meet her burden of showing cause for disqualifying Cohen and Pincus, there is no basis to impute any reasons for disqualification to Fox & Grove under Rule 1.10. Accordingly, Stopka's motion to disqualify must be denied.

II. *MOTION TO QUASH*

Defense counsel move to quash subpoenas served on them by Stopka, arguing that Stopka seeks documents that are subject to the attorney-client privilege between Alliance and Fox & Grove. Defense counsel contends disclosure would reveal the nature and substance of Fox & Grove's legal advice to Alliance. Finally, Fox & Grove contends the purpose of deposing Cohen and Pincus is not because they are occurrence witnesses of Stopka's alleged discrimination, but rather to show that Fox & Grove should be disqualified. Fox & Grove maintains that if Cohen and Pincus are later needed to testify as

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occurrence witnesses about non-privileged, non-duplicative matters, they can be deposed at that time.

Stopka responds she is seeking documents and testimony that will prove the individual defendants and other Alliance employees participated in conferences with her in which unlawful termination of other Alliance employees allegedly was considered. She contends the Fox & Grove billing records and attorney notes will establish the date, time and place of the meetings, as well as who was in attendance and the substance of the employment matters discussed. She also seeks to probe Cohen and Pincus' recollections of the meetings, and statements made by defendants and other Alliance employees concerning their alleged intent to unlawfully terminate older, female or disabled employees. She agrees to modify her subpoena to encompass only records up to and including the date of her last written or verbal communication with Fox & Grove attorneys.

A. *Documents*

Rule 45(c)(3)(iii) of the Federal Rules of Civil Procedure provides that the court may quash or modify a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Defendants contend the documents Stopka seeks are all attorney-client privileged. Stopka claims any privilege was waived when her interest became adverse to the defendants' interests. Stopka further maintains that the crime- fraud exception to the privilege should apply because the intent of defendants' communications with their lawyers was to violate the anti-discrimination laws and to defraud Alliance employees into believing Alliance was an equal employment employer. *In re Special September 1978 Grand Jury,* 640 F.2d 49, 59 (7th Cir. 1980); *Cooksey v. Hilton Int'l Co.,* 863 F. Supp. 150, 151 (S.D.N.Y. 1994).

1. *The Attorney-Client Privilege*

The attorney-client privilege applies to communications made by corporate employees concerning matters pertinent to their corporate duties if sought by the corporation's attorney in order to formulate and render legal advice to the corporation. *Upjohn Co. v. United States,* 449 U.S. 383, 394 (1981).

> *6 The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. The managers, of course, must exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49 (1985) (internal citations omitted). Any privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer. *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 124 (3rd Cir. 1986) (citing *Weintraub,* 471 U.S. at 348). Based on the evidence submitted in support of the motions to disqualify and to quash, Alliance officers, including Stopka in her role and function as vice president of administration, sought legal advice from defense counsel on behalf of Alliance concerning Alliance employment matters.

Under these circumstances, Stopka may not waive Alliance's attorney-client privilege. Nor is her attempt to waive the privilege consistent with her fiduciary duties to Alliance because the attempted waiver clearly is in her own interests rather than for the benefit of the corporation. Finally, as discussed above, Stopka fails to establish a personal attorney-client relationship with Fox & Grove.

Accordingly, Fox & Grove has not waived the attorney-client privilege and Stopka may not waive the privilege. However, general application of the privilege to quash the subpoenas is inappropriate. The court must determine if the privilege applies to the documents and testimony sought by Stopka in the subpoenas.

a. *Itemized billing statements and time sheets*

Fox & Grove asserts that its itemized billing statements and attorney time sheets would identify the subject matter and substance of confidential conversations between attorney and client. It argues these records are privileged from disclosure. *Real v. Continental Group, Inc.,* 116 F.R.D. 211, 213-14 (N.D. Cal. 1986) ("The attorney-client privilege embraces attorney time, records, and statements to the extent that they reveal litigation strategy and the nature of the services provided"). Fox & Grove maintains the records would reveal the nature of the legal services provided. *See* Affidavit of Lawrence Cohen ("Cohen Aff.") ¶ 3; Affidavit of S. Richard Pincus ("Pincus Aff.") ¶ 3. *See also In re Grand Jury Witness,* 695 F.2d 359, 362 (9th Cir. 1982) (the attorney-client privilege protects correspondence between attorney and client and time records that reveal the client's motivation for creating the

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relationship or possible litigation strategy).

Stopka asserts billing and time records are not generally protected by work product doctrine because they are prepared in the regular course of business. *Leach v. Quality Health Services,* 162 F.R.D. 499, 502 (E.D. Pa. 1995). Moreover, the records should only be protected by the attorney-client privilege to the extent they reveal litigation strategy, and should be modified by redaction rather than non-production. *Id.* at 501-02.

***7** In *Leach,* the plaintiff moved to compel compliance with a subpoena directed to defendants' law firm seeking billing statements and time records to establish the ownership and control of various defendants. The court found the records were not protected by the work product doctrine because they were not prepared in anticipation of litigation. However, the description of the legal services found in the billing and time records were protected by the attorney- client privilege and non-discoverable. *Leach,* 162 F.R.D. at 501-02. The court ruled that the records should be produced with protected material redacted. The court would examine the records in question *in camera,* but only in the event disagreements over the scope of the privilege arose. *Id.* at 502; *see also In re Grand Jury Witness,* 695 F.2d at 362 (disfavoring blanket assertions of privilege and requiring *in camera* submission with an explanation of how the information is privileged).

Stopka cites *Gottlieb v. Wiles,* 143 F.R.D. 241, 247 (D. Colo. 1992), to support her argument that a former corporate officer cannot be denied access to documents created during her tenure although her interests are now adverse to the corporation's. However, *Gottlieb* has been criticized for making "a fundamental error by assuming that for a corporation there exists a collective corporate client which may take a position adverse to management for purposes of the attorney-client privilege." *Milroy v. Hanson,* 875 F. Supp. 646, 649 (D. Ne. 1995) (inner quotations omitted) (citing *Weintraub,* 471 U.S. at 348). *Milroy* explained that a dissident director "is by definition not 'management' and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of 'management."' *Id.* at 649-50. The court further noted that the plaintiff was not entitled to the documents because the suit was primarily for his personal benefit, at the expense of the corporation. *Id.* at 651-52. Accordingly, Stopka's reliance on *Gottlieb* is misplaced.

Fox & Grove's general assertion that the billing statements and time records should not be disclosed because they are privileged is unpersuasive. Cohen and Pincus attest the billing statements and attorney time sheets maintained by the law firm "would reveal the Alliance's motivation for seeking legal counsel and would reveal the nature of services provided by Fox and Grove to the Alliance in both this case and other matters." Cohen Aff. ¶ 3; Pincus Aff. ¶ 3. "A client's motive for seeking legal advice is undeniably a confidential communication." *Matter of Grand Jury Proceeding, Cherney,* 898 F.2d 565, 568 (7th Cir. 1990); *In re Grand Jury Witness,* 695 F.2d at 362. Accordingly, the substance of those meetings is privileged. However, billing statements and time records are not privileged insofar as they state when, where and for how long Fox & Grove attorneys met with Stopka or other Alliance officials.

b. *All communications between Fox & Grove and Stopka*

***8** Stopka seeks all notes, memoranda, correspondence and electronic mail between herself and Fox & Grove from 1984 to 1996. Fox & Grove contends all communications with Stopka were for the purpose of formulating or rendering legal advice. *See* Cohen Aff. ¶ 4; Pincus Aff. ¶ 4. It maintains disclosing these communications would necessarily disclose either confidential information or legal advice between the law firm and Alliance. As explained above, Stopka's assertion that the attorney-client privilege no longer applies to the communications between herself and the law firm is unavailing. Because the communications between Stopka and Fox & Grove were made for purposes of formulating or rendering legal advice, the communications are protected by the attorney-client privilege.

c. *All notes or recordings of conversations*

Fox & Grove argues that its notes or recordings of conversations between its attorneys and Stopka are subject to both the attorney-client and work product privilege. It asserts notes taken by Fox & Grove attorneys relate to legal risks of Alliance personnel policies or decisions. Cohen Aff. ¶ 5; Pincus Aff. ¶ 5. Fox & Grove contends the notes or recordings were prepared in anticipation of litigation and contain attorneys' mental impressions, conclusions, opinions, or legal theories. Fed. R. Civ. P. 26(b)(3). Furthermore, Fox & Grove maintains the work product privilege covers documents and other tangible

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things prepared in anticipation of litigation. *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 724 (N.D. Ill. 1978) (discussing the weight of modern authority); 8 Wright & Miller, *Federal Practice & Procedure* § 2024 at 200-1. Finally, Fox & Grove asserts the notes and recordings are protected by the attorney-client privilege because they contain the substance of specific legal services rendered by an attorney to his client. Stopka does not respond to these arguments.

Fox & Grove's arguments are persuasive. Notes and recordings made by attorneys concerning conversations between the attorneys and Stopka involving Alliance personnel decisions are protected by both the work-product doctrine and attorney-client privilege. Disclosure of these items will disclose attorneys' mental impressions or opinions as well as the substance of the legal services rendered. Accordingly, both privileges apply to the items requested in Stopka's subpoena request number four.

2. *The crime-fraud exception*

Stopka argues that even if the requested materials are privileged, the privilege does not extend to communications with an attorney to further a continuing or future crime, fraud or other misconduct. *Sound Video Unlimited, Inc. v. Video Shack, Inc.*, 661 F. Supp. 1482, 1486 (N.D. Ill. 1987); *In re Special September 1978 Grand Jury,* 640 F.2d 49, 59 (7th Cir. 1980). She maintains the crime-fraud exception has been applied in an employment discrimination lawsuit concerning communications with counsel where the objective was to mislead the plaintiff about the compensation disparity between herself and a male employee. *See, e.g., Cooksey v. Hilton Int'l Co.*, 863 F. Supp. 150, 151 (S.D.N.Y. 1994). Stopka insists the intent of defendants' communication with their lawyers was to violate the anti-discrimination laws, as evidenced by her affidavit submitted for the court's *in camera* review. Fox & Grove did not seek leave to file a reply brief addressing the crime-fraud exception.

***9** In *Sound Video,* the district court found the crime-fraud exception to the attorney-client privilege applies when a person consults an attorney to further a continuing or future crime, fraud or other misconduct. However, the court noted the privilege "remains intact" when a person consults an attorney in an effort to receive legal advice or assistance. *Sound Video,* 661 F. Supp. at 1486. Nor is a communication subject to disclosure "merely because it relates to a crime or fraud or because it would help to prove that one existed." *Id.* Rather, the party seeking disclosure must "first make a *prima facie* showing of a violation sufficient to defeat the privilege." *Id.* (citing *Clark v. United States,* 289 U.S. 1, 15 (1933); *In re Special September 1978 Grand Jury,* 640 F.2d at 60). The moving party must also establish "some relationship between the communications at issue and the alleged offense." *Id. Prima facie* evidence is a "lax standard" and "as in the law of discrimination, a *prima facie* case must be defined with regard to its function: to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation." *Matter of Feldberg,* 862 F.2d 622, 626 (7th Cir. 1988). "If the court finds the explanation satisfactory, the privilege remains." *Id.*

In overcoming the privilege, the court may conduct an *in camera* review of the alleged communications. In *United States v. Zolin,* 491 U.S. 554, 572 (1989), the Supreme Court held:

> ... a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege....
> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is not allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings.
> (inner citations omitted).

***10** Stopka contends that the crime-fraud exception should be applicable upon this court's *in camera* review of the conversations detailed in her affidavit. Stopka describes telephone conferences concerning

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personnel decisions. Not all of these meetings raise a reasonable inference necessary for this court to undertake a more exhaustive *in camera* review of the requested documents. Stopka describes occasions where a Fox & Grove attorney allegedly advised Alliance on proper procedure for terminating employees, including building paper trails to make the terminations defensible. *See* Stopka Aff. ¶¶ 9, 10, 12, 13. The advice on how to carry out a legally defensible termination does not raise a reasonable inference of misconduct necessary to either pierce the attorney-client privilege or to require the court to review the requested documents. In fact, it appears from the affidavit that the attorney actually recommended not firing one employee in the desired time frame because there was not enough time to thoroughly document defensible reasons for termination. *Id.* at ¶ 9.

Stopka attests without explanation that one of the individual defendants did not want a female Alliance officer retained as part of a reorganization. *Id.* at ¶ 10. The basis for the defendant's decision is not offered; nothing is mentioned about the officer's job performance. Moreover, Stopka describes how the attorney stated that a separate severance benefit could be designed and offered to the employee. Stopka simply asserts that the employee left Alliance shortly thereafter, apparently voluntarily. *Id.* Stopka does not raise a reasonable inference of misconduct or show that the attorney assisted in any wrongdoing when Alliance offered and an employee voluntarily accepted a severance package during a reorganization.

Similarly, Stopka's description of a defendant's desire to terminate a long- time female Alliance employee does not attribute the termination to the employee's age; rather, the defendant allegedly wanted to fire the employee even though he was aware of her age and tenure with Alliance. *Id.* at ¶ 13. The attorney's role was purportedly to offer advice on documenting the employee's performance on a new system. Finally, the employee was apparently never terminated, although she allegedly did not receive a salary increase. *Id.*

Finally, Stopka attests a male corporate officer was suspended without pay for violating corporate policies. *Id.* at ¶ 14. Stopka attests the officer is still employed at the salary level he held almost two years ago. *Id.* An allegation that Alliance imposed a significant penalty on a male officer and froze his salary at 1994 rates is not a reasonable basis for this court's further review into the crime-fraud exception.

Two events that may raise a reasonable inference of sufficient misconduct are contained in paragraphs 8-9 and 11-12. The first incident involved a defendant's purported desire to terminate a female employee who complained about salary discrepancies between female and male employees. Additionally, when Stopka reported the employee's age to defendants, defendants allegedly wanted to fire the employee before she turned 40. This conduct could raise a *prima facie* case of the crime-fraud exception as to this particular employee if the communications with defense counsel furthered or assisted the wrongdoing. *Sound Video,* 661 F. Supp. at 1488-90. However, Stopka attests defense counsel responded that Alliance needed to document defensible reasons for terminating the employee. Stopka Aff. ¶ 9. Moreover, the attorney advised offering the employee a small salary increase, which addressed the employee's complaint. *Id.* Finally, Stopka does not attest that the employee was actually terminated. Thus, it appears that the communication with defense counsel did not further the alleged violation of employment discrimination laws.

***11** Finally, in paragraphs 11 and 12, Stopka attests that defense counsel was contacted for advice on how Alliance could terminate an employee with alleged physical problems. This would appear to be a legitimate basis to seek counsel's advice; Stopka acknowledges that the communications involved difficult personnel decisions to avoid corporate liability. Stopka Aff. ¶ 5. While Stopka attests that an individual defendant did not wish to accommodate any of the employee's "problems" under the ADA, she does not claim that counsel was informed of this position. *Id.* at ¶ 11. Nor does the attorney's advice that Alliance create and enforce performance standards to "eventually build a paper trail that would be defensible," raise an inference of nefarious conduct. *Id.* at ¶ 12. However, Stopka attests that another individual defendant wanted to terminate the employee as soon as possible. *Id.* In response, the attorney allegedly advised eliminating the employee's position, having her duties absorbed by other employees for at least six months, and later hiring someone else for this position. *Id.* Although this solution was allegedly adopted to terminate the employee, Stopka does not attest that Alliance ever hired another employee to fill the position -- Stopka did not begin her current leave of absence until approximately a year and one-half had passed after the employee's termination. Moreover, while Stopka was responsible for supervising Alliance's human

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resources department, including employee relations and compliance with state and federal employment laws and regulations, she fails to articulate if she offered a recommendation concerning this employee and if her recommendation differed from the suggested solution.

Although there may be issues that preclude disclosure of the allegedly privileged documents relating to paragraphs 11 and 12, Stopka raises a reasonable inference that the court should make a careful *in camera* inquiry as to whether the privileged materials reveal sufficient evidence to establish the claim that the crime-fraud exception applies. *Zolin,* 491 U.S. at 572. The conduct described in paragraphs 11 and 12 may have a bearing on Stopka's ADA claim. Defendants and defense counsel must explain the conduct alleged in paragraphs 11 and 12. If their explanation is satisfactory, the privilege applies. *Matter of Feldberg,* 862 F.2d at 626.

Stopka fails to raise a *prima facie* case of fraudulent or other misconduct sufficient to generally pierce the attorney-client privilege. On the basis of four or five events occurring between 1991 and 1994, Stopka seeks access to all privileged communications between defense counsel and Alliance occurring between 1984 and 1995. Nothing in Stopka's affidavit permits such a broad intrusion into the attorney-client privilege.

Thus, defense counsel's motion to quash Stopka's request for documents must be granted in part. The subpoena request shall only require production of records up to and including the date of Stopka's last communication with Fox & Grove. Defense counsel shall comply with the subpoena request as to billing statements and time records, but may redact the description of the substance or purposes of any billings reflected in those records. Defense counsel's motion to quash Stopka's request for notes, memoranda, correspondence and electronic mail between Stopka and defense counsel, as well as notes and recordings of conversations between Fox & Grove and Stopka, is granted.

B. *Deposition Subpoenas*

***12** Fox & Grove contends Stopka served the deposition subpoenas on Cohen and Pincus only to establish cause for their disqualification. It asserts Stopka refused to appear for her own deposition, stating that it was inappropriate to depose her while the motion to disqualify was pending. *See* Def. Ex. C to memorandum in support (March 25, 1996 letter from Stopka's attorney to Fox & Grove). Fox & Grove argues the depositions of Cohen and Pincus would unnecessarily disrupt the litigation. *Marco Island Partners v. Oak Development Corp.,* 117 F.R.D. 418, 420 (N.D. Ill. 1987). It maintains that Cohen and Pincus may be deposed later in the litigation if non-privileged information is available by no other means. *Id.* at 419. Finally, it notes that Stopka only references Pincus in her affidavit. Based on the crime-fraud exception, Stopka responds she should be able to depose Cohen and Pincus concerning their recollections of the conversations alleged in her affidavit.

As discussed above, the crime-fraud exception might only apply to the events described in paragraphs 11 and 12 of Stopka's affidavit. Moreover, Stopka only discusses Pincus' involvement in those paragraphs (or anywhere in the affidavit). Thus, the deposition subpoena concerning Cohen shall be quashed.

As for Pincus, defendants must explain why the conduct alleged in paragraphs 11 and 12 does not meet the crime-fraud exception and submit relevant privileged documents for the court's *in camera* inspection. Thus, it is not apparent at this time that Pincus may be deposed concerning those events. Additionally, Stopka fails to show that she needs to depose Pincus. Stopka seeks Pincus' recollection of events described in paragraphs 11 and 12. However, Stopka attests she talked with the individual defendants concerning the underlying events in paragraphs 11 and 12 independent of telephone conferences with Pincus. Because the individual defendants can testify concerning that employee's termination, Pincus' deposition testimony would be duplicative. *Marco Island,* 117 F.R.D. at 419. Deposing an opposing side's attorney disrupts the opposing attorney's preparation for trial. *Id.* at 420. If Stopka demonstrates that Pincus' deposition would not be duplicative, this court will reconsider permitting a limited deposition. Accordingly, defendants' motion to quash Cohen and Pincus' deposition subpoenas must be granted.

CONCLUSION

Plaintiff's motion to disqualify defense counsel is denied. Defendants' motion to quash subpoenas is granted in part. Fox and Grove, Chtd. must disclose billing statements and time records up to and including their last conference with Stopka, after redacting privileged entries disclosing the substance of attorney-client communications. Defendants shall

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submit for the court's *in camera* inspection privileged documents concerning paragraphs 11 and 12 of Stopka's affidavit, along with their response to the conduct alleged in paragraphs 11 and 12, by May 1, 1996.

END OF DOCUMENT

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CERTIFICATE OF SERVICE

I, Stephen C. Carlson, certify that I caused a true and correct copy of the foregoing to be served on October 24, 2001 by United States mail upon the following counsel:

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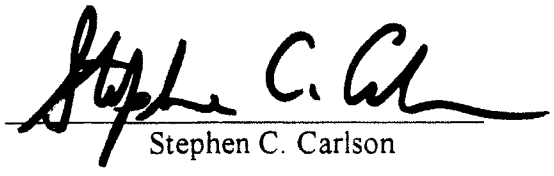

Stephen C. Carlson

39.	10/26/01	Order
40.	10/30/01	Plaintiffs' Memorandum in Support of its Emergency Motion to Conduct Limited Expedited Discovery
41.	10/30/01	Terra Foundation for the Arts' Response to Plaintiffs' Motion to Conduct Limited Expedited Discovery
42.	10/31/01	Motion for Leave to File First Amended Complaint
43.	11/05/01	Order
44.	11/15/01	Appearance
45.	11/20/01	Order
46.	01/02/02	Notice of Motion and Dr. Stebbins and Dr. Marshall's Motion for Leave to File Brief in Support of Their Motion to Dismiss in Excess of Fifteen Pages
47.	01/04/02	Order
48.	01/04/02	Sidley Austin Brown & Wood's Motion and Memorandum in Support of its Motion to Dismiss the First Amended Complaint as Against It
49.	01/04/02	Notice of Filing of Motion to Dismiss and State Defendants' Memorandum of Law in Support of Motion to Dismiss
50.	01/04/02	Notice of Motion of The Terra Foundation's Motion to Dismiss, or In the Alternative to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint, and Memorandum in Support of
51.	01/04/02	Notice of Filing of Section 2-619.1 Motion to Strike and Dismiss Counts I, II, IV and V of the Amended Complaint and Memorandum of Law in Support of Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint
52.	01/04/02	Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint
53.	01/04/02	Memorandum of Law in Support of Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint
54.	01/04/02	Notice of Motion and Dr. Stebbins' and Dr. Marshall;s Motion to Dismiss

		Pursuant to Section 2-615 and Section 2-619, or in the Alternative for a Stay
55.	01/04/02	Notice of Filing and Memorandum of Law in Support of Dr. Stebbins' and Dr. Marshall's Motion to Dismiss
56.	01/07/02	Notice of Filing of and Certificate of Service and Winston & Strawn's Motion to Dismiss
57.	01/07/02	Winston & Strawn's Memorandum in Support of its Motion to Dismiss
58.	01/08/02	A Compendium of Cases Cited in the Terra Foundation's Memorandum in Support of its Motion to Dismiss, or in the Alternative to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint
59.	01/18/02	Notice of Motion for Leave to File Terra Affidavit Under Seal
60.	01/18/02	Notice of Filing and Plaintiff's Consolidated Response in Opposition to Defendants' Motions to Dismiss
61.	01/24/01	Letter to Judge Nowicki enclosing Table of Contents
62.	02/01/02	Reply in Support of Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint
63.	02/01/02	Notice of Filing and The Terra Foundation's Reply Memorandum in Support of Its Motion to Dismiss
64.	02/01/02	Winston & Strawn's Reply Memorandum in Support of Its Motion to Dismiss
65.	02/01/02	Notice of Filing and Reply Memorandum in Support of Dr. Stebbins' and Dr. Marshall's Motion to Dismiss, or in the Alternative for a Stay
66.	02/01/02	Sidley Austin Brown & Wood's Reply in Support of Its Motion to Dismiss the First Amended Complaint as Against It
67.	02/01/02	Notice of Filing and State Defendants' Reply Memorandum of Law in Support of Motion to Dismiss

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Tucker et al

v.

Buntrock et al

No. 01 L 009112

ORDER

This matter coming on to be heard on Plaintiffs Emergency Motion to Conduct Limited Expedited Discovery,

It is ordered that a short concise memorandum dealing with the precise issue the propriety of the requested depositions in the context of opposing and conflicting testimony presented by the TERRA, Stone & Carlson affidavits shall be filed simultaneously on Tuesday 10/30. The Court will rule on Monday 11/5 at 11:15 am.

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Name Cummins & Cronin

Atty. for : Plaintiffs

Address : 77 W. Wacker Dr

City/State/Zip : Chgo 60601

Telephone : (312) 578-0500

ENTERED

OCT 26 2001

ENTER :

JUDGE
JULIA M. NOWICKI - 293

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

16di-004441

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October 26, 2001

VIA FACSIMILE

Barry S. Goldberg, Esq.
Assistant Attorney General Charitable
Trust Bureau
100 West Randolph Street
Chicago, IL 60601

Re: Tucker, et al. v. Buntrock, et al., No. 01 L 009112

Dear Barry:

Enclosed is a copy of the order entered by Judge Nowicki this morning.

Very truly yours,

Robert P. Cummins

RPC/pw
Enclosure
cc: K. Chris Todd, Esq. (w/encl.)
Leonard Garment, Esq. (w/encl.)
Lawrence Levinson, Esq. (w/encl.)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF ITS EMERGENCY MOTION TO CONDUCT LIMITED EXPEDITED DISCOVERY

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson (the "plaintiffs"), by their attorneys, hereby file this memorandum in support of its Emergency Motion to Conduct Limited and Expedited Discovery. The plaintiffs state as follows:

Preliminary Statement

Well-settled law makes clear that, in the face of conflicting affidavits, the parties should be permitted to explore each opponent's factual assertions through oral testimony with the opportunity to cross-examine. Indeed, the answer to the very question posed by this Court in its October 26, 2001 Order should be obvious. This Court has asked the parties to submit "short concise memoranda dealing with the precise issue [of] the propricty of the requested depositions in the context of opposing and conflicting testimony presented by the Terra, Stone and Carlson affidavits." Of course, the answer to this question is Yes – depositions of the affiants are entirely appropriate to test in the crucible of cross-examination the credibility of each affiant's assertions. Controlling case law – in addition to the plain interests of justice – require that such limited discovery proceed in order to assist the Court in its task of resolving the plaintiffs' motion to disqualify.

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For all these reasons, the plaintiffs respectfully submit that the depositions of Attorneys Stone and Carlson (and, if so desired, Judith Terra as well) should proceed without delay.

Argument:

Because The Submitted Affidavits Directly Conflict, Depositions Are Appropriate.

Section 2-1103 of the Illinois Civil Practice Act makes clear that, when any factual assertion is submitted by affidavit, the Court may in its discretion require oral examination of the witness.[1] This principle lies at the heart of the plaintiffs' request to depose Attorneys Stone and Carlson. Simply stated, the affidavits submitted by Stone and Carlson attempt to defeat the plaintiffs' motion to disqualify by practically shouting that "Sidley never acted as counsel for Judith Terra in her individual capacity."[2] Nonetheless, Stone concedes that she frequently met and/or spoke to Mrs. Terra without any other attorneys present.

Most importantly, Stone is artfully ambiguous as to the advice she gave to Mrs. Terra in certain meetings – statements that Mrs. Terra has asserted were confidential communications between a client and her attorney.[3] Beyond those ambiguities, Ms. Stone repeatedly responds to Mrs. Terra's sworn assertions with the dismissive statement that she "is not certain what [Mrs. Terra's statements] are meant to convey."[4] We respectfully submit that these failures of recollections and generalized

---

[1]See 735 ILCS § 5/2-1103.

[2]*See, e.g.*, Affidavit of Susan A. Stone at ¶ 4.

[3]*See, e.g., id.* at ¶ 15 (while Stone denies providing any legal advice she admits "that [she] may have made a comment to this effect [that Mrs. Terra could not be forced to join the settlement] although [she] ha[s] no specific recollection of having done so."). We respectfully submit that Ms. Stone's lack of "specific recollection" and other comparable vague disclaimers demand cross-examination.

[4]*See, e.g., id.* at ¶ 13. Similarly, at ¶ 6: "I do not even know what this statement means;" at ¶ 11: "I have utterly no idea what she is talking about;" and at ¶ 21: "Whatever that means. . . ." We respectfully submit that such a profuse lack of understanding is quite remarkable given the impressive credentials Ms. Stone avers.

16di-004446

denials of Mrs. Terra's version of events warrants focused discovery. Section 5/2-1103 makes clear that testing an affidavit's assertions through oral examination is perfectly appropriate.

Well-settled case law supports this conclusion. For instance, in *Wilson v. Wilson*, in which the pending motion involved a petition for relief from a judgment, the Court held that when the facts as set forth in the parties' affidavits are controverted, the proof should be established through examination of the witnesses.[5] Similarly, in situations that in which one party asserts that he was deprived of effective assistance of counsel, competing affidavits are insufficient to resolve the issue. Instead, an evidentiary hearing including oral examination of the witnesses, is appropriate.[6] Such results seem both logical and obvious; when affidavits cannot resolve disputed factual issues, the motion can only be resolved by permitting the parties to probe the opponent's assertion through cross-examination.

Such an opportunity is all the plaintiffs seek in their motion for limited and expedited discovery. The plaintiffs merely seek to probe the factual assertions – or, more accurately, the failed recollections and conclusory dismissals – of Ms. Stone and Mr. Carlson. The vocal indignation of the witnesses should ***not*** be permitted to defeat the plaintiffs' right to cross-examination. We respectfully submit that the Illinois Civil Practice Act, well-settled case law and the interests of justice require that the requested depositions be permitted to proceed.

---

[5]*See* 56 Ill. App. 2d 187, 195, 205 N.E.2d 636 (2nd Dist. 1965).

[6]*See, e.g., People v. Brumas*, 142 Ill. App. 3d 178, 491 N.E.2d 773 (3rd Dist. 1986).

Conclusion

For all the foregoing reasons, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson respectfully request that their Emergency Motion to Conduct Limited and Expedited Discovery be granted.

Dated: October 30, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General,	)	Judge Julia M. Nowicki
Defendants.	)	

TERRA FOUNDATION FOR THE ARTS' RESPONSE TO PLAINTIFFS' MOTION TO CONDUCT LIMITED EXPEDITED DISCOVERY

In response to "Plaintiffs' Emergency Motion to Conduct Limited Expedited Discovery" in connection with their "Emergency Motion to Disqualify" counsel representing the Terra Foundation for the Arts (the "Foundation") in this action, the Foundation hereby submits the following:

1. Plaintiffs' complaint herein filed on July 31, 2001 is nothing more than an improper collateral attack upon a Consent Judgment and Order entered by Judge Kinnaird on

July 24, 2001 after almost a year of litigation in the matter of Buntrock, et al. v. Terra, et al., No. 00 CH 13859.

2. Plaintiffs Terra, Tucker and Simpson were defendants in the Buntrock case, and on August 22, 2001 filed a Notice of Appeal of Judge Kinnaird's entry of the Consent Judgment and Order. Plaintiffs are currently pursuing that appeal and presumably the Appellate Court, at some point in time, will rule upon its merits. Nevertheless, Plaintiffs have decided for reasons of their own that, in addition to their appeal, they wish to try to also attack the Consent Judgment and Order through a collateral lawsuit filed in the same trial level court where the original Consent Judgment and Order was entered and try to present to another trial court judge matters that were already considered and rejected by Judge Kinnaird.

3. Plaintiffs' recent motion to "disqualify" is nothing more than an attempt by Plaintiffs to disadvantage the Foundation by interfering with the Foundation's choice to be represented in this action by the same counsel who have represented the Foundation throughout the course of the Buntrock matter. Such interference is not permitted under applicable Illinois law. See Schwartz v. Cortelloni, 177 Ill.2d 166, 178 (1997). Plaintiffs' motion to disqualify is an obvious cynical litigation ploy which the Foundation is confident it would ultimately defeat.[1] Nevertheless, because the Foundation has been subject for over a year to extraordinarily burdensome and expensive litigation brought against it by warring factions of its own Board of Directors, in an attempt to limit (to the degree possible) the continued burden and expense of that war, the Foundation in consultation with its counsel has chosen to simply substitute counsel in this action, rendering moot Plaintiffs' "Motion to Disqualify" and "Motion to Conduct Limited Expedited Discovery." The Foundation hopes that by avoiding this even further collateral

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argument over who its counsel in this lawsuit should be, that the Foundation will be able to get to the heart of this collateral attack upon the Consent Judgment and Order of July 24, 2001 with a minimum of time, expense and burden, and this Court will avoid being further diverted by Plaintiffs' litigation tactics.

4. Rather than address Plaintiffs' discovery motion and allow Plaintiffs to further divert this Court's attention from resolving this lawsuit on the merits by turning this case into another "disqualification" side-show such as has plagued the Foundation throughout the litigation inflicted upon it by its own Directors,[2] the Foundation simply requests it be given two weeks in order to allow the Foundation time to obtain substitute counsel and to file a motion for substitution of counsel.[3]

WHEREFORE, the Foundation respectfully requests that this Court grant the Foundation two weeks in which to obtain substitute counsel and to file a motion for substitution of counsel in this lawsuit.

---

[1] See generally Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency" Motion to Disqualify, filed on October 24, 2001.

[2] See Terra Foundation for the Arts' Opposition to Plaintiffs' "Emergency" Motion to Disqualify, pp. 12-13.

[3] In any event, Plaintiffs would not be permitted to take the depositions of opposing counsel in order to gather support for their "disqualification" motion. See The European Community v. RJR Nabisco, Inc., 134 F. Supp. 2d 297, 310 (E.D. N.Y. 2001) (proceedings relating to motion for disqualification of counsel were judicial in nature, and thus movant was not entitled to conduct discovery in support of its accusation). Taking the deposition of opposing counsel is "only permitted when it has been shown that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case." Williams v. Kopco, Inc., 162 F.R.D. 670, 673 (D. Kan. 1995). Plaintiffs have clearly made no such showing in this case and have admitted both in their "Emergency Motion to Conduct Limited Expedited Discovery" and argument in Court on October 26, 2001 that they have no actual need for any such discovery.

16di-004453

Respectfully submitted,

Lori L. Roeser

One of the Attorneys for Defendant
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	01 OCT 31 PM 2:46
	)	CIRCUIT COURT OF COOK
Plaintiffs,	)	COUNTY, ILLINOIS
	)	CHANCERY DIV.
	)	
v.	)	~~No. 01 L 009112~~ CLERK
	)	Transferred to Chancery
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Pursuant to 735 ILCS 5/2-616, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson (the "plaintiffs"), through their counsel, CUMMINS & CRONIN, LLC and NOVOSELSKY LAW OFFICES, respectfully request leave to file their First Amended Complaint, *Instanter*. In support of this motion, the plaintiffs state as follows:

1. On July 31, 2001, the plaintiffs filed their Complaint at Law against Defendants Dean Buntrock ("Buntrock"), Ronald Gidwitz ("Gidwitz"), Margaret Daley ("Daley"), Arthur Hartman ("Hartman"), Stephanie Pace Marshall ("Marshall"), Theodore Stebbins ("Stebbins"), The Terra Foundation for the Arts (the "Foundation"), James E. Ryan ("Ryan") and Floyd D. Perkins ("Perkins").

2. The First Amended Complaint, attached as Exhibit A, differs from the original complaint in the following respects: The First Amended Complaint names James R. Donnelley ("Donnelley"), Marshall Field V ("Field"), Kathleen A. Foster ("Foster"), Robert S. Hamada ("Hamada"), Frederick A. Krehbiel ("Krehbiel"), and the law firms Winston & Strawn and Sidley & Austin as additional defendants. These new individual defendants purport to be "new" directors of the Foundation but, as the plaintiffs assert, have never been properly elected to the Foundation's Board. The two law firms suffer

16di-004456

debilitating conflicts of interest which, among other things, require their disqualification from any further representation of the Foundation or its Directors.

3. In support of this request for leave to file, the plaintiffs state that all parties have previously been served with the First Amended Complaint and that Defendants Buntrock, Daley, Gidwitz, Hartmann, Stebbins, Ryan, Perkins, Marshall, Donnelley, Field and Krehbiel have appeared in this litigation.

4. Section 5/2-616 of the Illinois Civil Practice Act makes clear that amendments to the pleadings may be allowed on just and reasonable terms. *See* 735 ILCS § 5/2-616. It is well-settled that leave to amend should be liberally construed and any doubts concerning the propriety of allowing the amendment must be resolved in favor of the party seeking to make it. *See, e.g., Lykowski v. Bergman*, 299 Ill. App. 3d q57, 162, 700 N.E.2d 1064 (1st Dist. 1998).

For all these reasons, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson respectfully request leave to file the First Amended Complaint *instanter*.

Dated: October 31, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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Telephone: (312) 606-8605

David A. Novoselsky
Novoselsky Law Offices
120 North LaSalle Street, Suite 1400
Chicago, Illinois 60602
Telephone: (312)346-8930
Attorneys for Plaintiffs

16di-004457

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FILED

01 OCT 31 PM 2:46
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
CLERK

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	Transferred to Chancery
v.	)	
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on November 5 2001, at 9:15 m., we will appear before the Honorable Julia M. Nowicki, or any other judge sitting in her stead and then and there present Plaintiffs' Motion For Leave To File First Amended Complaint, a copy of said motion is attached hereto and served upon you.

Dated: October 31, 2001

One of the Attorneys for Plaintiffs

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Thomas C. Cronin
CUMMINS & CRONIN, LLC
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ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Vucker et al

v.

Buntrock et al

No. 01L009112

TRANSFERRED TO CHANCERY

ORDER

This matter coming on to be heard on Plaintiffs' Motion for leave to File First Amended Complaint,

It is ordered that:

The parties are given two (2) wks. to respond;

Sidley's Motion to withdraw is granted & the Foundation is granted two (2) weeks to engage substitute counsel; &

This matter is set for status at 10:45 AM on Tuesday 11/20/01.

Atty. No.:

Name: Cummins & Cronin

Atty. for: Plaintiffs

Address: 77 W. Wacker Dr.

City/State/Zip: Chgo

Telephone: (312) 578-0500

ENTERED

NOV - 5 2001

ENTER:

JUDGE
JULIA M. NOWICKI - 293

Judge

Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

16di-004460

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Acker et al

v.

Shattock et al

No. 01 L 009112

Transferred to Chancery

ORDER

This matter coming on to be heard on Plaintiffs' Motion for Leave to File First Amended Complaint,

It is ordered that:

The parties are given two (2) wks. to respond;

Sibley's Motion to withdraw is granted & the Foundation is granted two (2) weeks to engage substitute counsel; &

This matter is set for status at 10:45 AM on Tuesday 11/20/01.

Atty. No.:

Name: Cummins & Cronin

Atty. for: Plaintiff

Address: 77 W. Wacker Dr.

City/State/Zip: Chgo

Telephone: (312) 578-0500

ENTERED

NOV - 5 2001

JUDGE JULIA M. NOWICKI - 293

ENTER:

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

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ATTORNEYS AND COUNSELORS
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CHICAGO, ILLINOIS 60601
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ROBERT P. CUMMINS
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THOMAS C. CRONIN
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TELECOPIER TRANSMITTAL COVER SHEET

TO:	K. Chris Todd, Esq. Lawrence Levinson, Esq.	**TELECOPIER NO.:**	(202)326-7999 (202)371-6279
FROM:	Robert P. Cummins		
DATE:	November 7, 2001	**TIME:**	11:25 am
CLIENT/MATTER NO.: 283		**OPERATOR:**	pw
TOTAL NUMBER OF PAGES BEING SENT, INCLUDING THIS PAGE:			3

Message:

If you did not receive all pages, or if you have any questions, please call (312)578-0500.

THE INFORMATION CONTAINED IN THIS TELECOPIED MESSAGE, INCLUDING ANY ENCLOSURES, IS ATTORNEY PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE AS ADDRESSEE. THE REVIEW, DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION BY OR TO ANYONE OTHER THAN THE INTENDED ADDRESSEE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U. S. POSTAL SERVICE. THANK YOU.

NOV 2 1 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, and JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director for the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, and FLOYD D. PERKINS, Assistant Illinois Attorney General

Defendants.

No. 01 L 009112

Judge Julia M. Nowicki

FILED-4
2001 NOV 15 PM 3:04
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
CHANCERY DIV.
DOROTHY BROWN
CLERK

APPEARANCE

The undersigned as attorney, enters their appearance on behalf of Defendant The Terra Foundation for the Arts, an Illinois Not For Profit Corporation.

Respectfully Submitted,

Alan Nicgorski

Thomas R. Mulroy, Jr.
Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
55 East Monroe Street, Suite 3930
Chicago, IL 60603
(312) 580-2020 Atty. # 38050

I certify that a copy of the above instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead.

Alan Nicgorski

Attorney for the Terra Foundation for the Arts

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
Case No. 00 CH 13859

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	
v.	)	Judge Julia M. Nowicki
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

ORDER

This coming before the Court on Plaintiff's Motion for Leave to File First Amended Complaint, the Court being advised in its premises, it is hereby ORDERED THAT:

1. Plaintiff's Motion For Leave To File First Amended Complaint is granted;

2. Defendants shall answer or otherwise plead to the First Amended Complaint by January 4, 2002;

3. Plaintiff's response to defendants' motions to dismiss shall be filed by January 18, 2002;

4. Defendants' reply to plaintiffs' response shall be filed by February 1, 2002; and

5. A hearing is set on defendants' motions to dismiss on February 13, 2002 at 2:00 p.m. without further notice.

Dated: November 20, 2001

Enter: ENTERED

NOV 2 0 2001

JUDGE
JULIA M. NOWICKI - 2093

Judge

Prepared by:
Attorney No.: 38600
Quinlan & Carroll, Ltd.
Attorney for Defendants
30 North LaSalle Street
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(312) 263-0900

QUINLAN & CARROLL, LTD.

ATTORNEYS AT LAW

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WRITER'S DIRECT DIAL NO.

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NOV 26 2001

AFFILIATES:
EDWARD D. HEFFERNAN
WASHINGTON, D.C.

HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

November 20, 2001

All Counsel of Record (See Attached Service List)

Re: ***Tucker v. Buntrock, 01 L 009112***

Dear Counsel:

Enclosed is a copy of the order entered by Judge Nowicki this afternnon.

Very truly yours,

James R. Carroll

JRC/mb
Enclosure

cc: William R. Quinlan

Doc:184814

16di-004468

Paul Hayes Tucker, et al. v.
Dean Buntrock, et al.
No. 01 L 009112

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16di-004469

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

DR. STEBBINS' AND DR. MARSHALL'S MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS IN EXCESS OF FIFTEEN PAGES

Defendants Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall"), by their attorneys, respectfully move for permission to file a brief in support of their motion to dismiss in excess of fifteen pages. In support of this motion, Dr. Stebbins and Dr. Marshall state the following:

1. The amended complaint contains seven counts. Dr. Stebbins and Dr. Marshall are moving to dismiss all seven claims as against them, pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure.

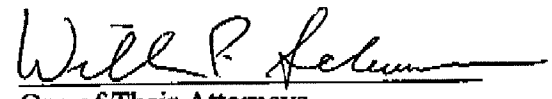
2. Counsel for Dr. Stebbins and Dr. Marshall have made every effort to be as concise as possible. In particular, Dr. Stebbins and Dr. Marshall are relying on, adopting and incorporating various aspects of the Motions to Dismiss and the supporting memoranda of the Foundation and the other defendants that are being separately filed, so as to avoid duplication.

3. However, several separate bases for dismissal exist for each count which need to be explained. In addition, the amended complaint is based on a lengthy litigation history which needs to be addressed.

4. Accordingly, Dr. Stebbins and Dr. Marshall ask the Court for leave to file their supporting memorandum up to 21 pages.

WHEREFORE, for the reasons set forth above, defendants Dr. Stebbins and Dr. Marshall respectfully request that the Court grant this motion and issue an Order permitting them to file their memorandum in support of their motion to dismiss in excess of fifteen pages, up to 21 pages.

DR. THEODORE E. STEBBINS, JR. and
DR. STEPHANIE PACE MARSHALL

By: 
One of Their Attorneys

William P. Schuman
Lizabeth A. Boyer
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5097
(312) 372-2000
Firm I.D. No. 90539

16di-004472

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al., Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al., Defendants.	)	Judge Julia M. Nowicki

NOTICE OF MOTION

To: **See Attached Service List**

On **Friday, January 4, 2002 at 9:15 a.m.** or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Julia M. Nowicki or any judge sitting in her stead, in the courtroom usually occupied by her in Room 2510` of the Richard J. Daley Center, Chicago, Illinois, and present Dr. Stebbins' and Dr. Marshall's Motion for Leave to File Brief in Support of Their Motion to Dismiss in Excess of Fifteen Pages, a copy of which is hereby served upon you.

Attorney for: **Defendants Dr. Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall**

William P. Schuman
Lizabeth A. Boyer
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606-5096
(312) 372-2000
Firm Id. No. 90539

PROOF OF SERVICE BY FACSIMILE

I, Lizabeth A. Boyer, certify that I caused to be served this notice and motion by causing a copy to be sent by facsimile to **See Attached Service List** on January 2, 2002, as set forth on the attached transmission sheet.

Lizabeth A. Boyer

CHI99 3841515-1.060885.0013

SERVICE LIST

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
01 L 9112

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Alan W. Nicgorski
Mulroy, Scandaglia, Marrinson, Ryan
55 East Monroe Street
Chicago, IL 60603

ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Paul Hayes Tucker, et. al.

v.

Dean Buntrock, et. al

No. 01 L 9112

ORDER

This matter coming to be heard on Dr. Theodore Stebbins' and Dr. Stephanie Pace Marshall's Motion for Leave to File a Brief in Support of their Motion to Dismiss in Excess of Fifteen Pages, due notice having been given, and the Court otherwise fully advised of the premises,

IT IS HEREBY ORDERED THAT:

1. Defendants Stebbins and Marshall's Motion is Granted;
2. The Terra Foundation and defendants Buntrock, Gidwitz, Daley and Hartman are also granted leave to file briefs in excess of 15 pages;
3. Plaintiffs are also allowed to file a brief in excess of 15 pages for their response
4. The Attorney General is also granted leave to file a brief in excess of 15 pages.

Atty. No.: 90539
Name: Lizabeth Boyer
Atty. for: Stebbins and Marshall
Address: 227 West Monroe St.
City/State/Zip: Chicago, IL 60606-5096
Telephone: 312 372 - 2000

ENTERED

ENTER: JAN - 4 2002

JUDGE JULIA M. NOWICKI - 293

Judge Judge's No.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

CCG N002-150M-6/6/01(13480670)

JAN 0 8 2002 JAN 0 8 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, JAMES R. DONNELLEY, an individual, MARSHALL FIELD V, an individual, KATHLEEN A. FORSTER, an individual, ROBERT S. HAMADA, an individual, FREDERICK A. KREHBIEL, an individual, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General, WINSTON & STRAWN, an Illinois Partnership, and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112
Hon. Julia M. Nowicki

SIDLEY AUSTIN BROWN & WOOD'S
MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AS AGAINST IT

16di-004478

Defendant Sidley Austin Brown & Wood ("Sidley"), formerly known as Sidley & Austin, moves this Court to dismiss the First Amended Complaint as filed against it by Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson. This motion is brought pursuant to 735 ILCS 5/2-615 as the First Amended Complaint's purported claim against Sidley is substantially insufficient in law and pursuant to 735 ILCS 5/2-619(a)(4) as it is barred by collateral estoppel. In support of its motion Sidley submits its accompanying memorandum of law and states as follows:

1. The Terra Foundation for the Arts (the "Foundation") is a not-for-profit corporation that oversees an approximately $175 million collection of American act. (First Am. Complaint, ¶ 7). Sidley is counsel for the Foundation in Buntrock, et al. v. Terra, et al., NO. 00 CH 13859 in the Circuit Court of Cook County, Chancery Division before Judge Dorothy Kirie Kinnaird. In the Buntrock case, two members of the Foundation's Board of Directors sued the Foundation as well as three other members of the Foundation's Board, Mrs. Terra, Dr. Tucker and Sen. Simpson (who are also the Plaintiffs in this case). To the dismay of the Plaintiffs here, the Buntrock case was eventually settled by a Consent Judgment and Order entered by Judge Kinnaird on July 26, 2001 (see id. ¶¶ 67, 73), which judgment they have appealed.

2. In an attempt to collaterally attack the Consent Judgment and Order entered in the Buntrock case, Plaintiffs filed this action now naming the Foundation, 11 members of the Foundation's Board (the six who voted in favor of the settlement, plus five who were added to the Board as part of the settlement), the Attorney General, Assistant Attorney General Floyd Perkins, the Foundation's corporate counsel, Winston & Strawn, and the Foundation's litigation counsel in the Buntrock case, Sidley as defendants.

3. Plaintiffs state in wholly conclusory terms that Sidley has supposedly engaged in the Foundation's representation "despite obvious and foreseeable actual and potential conflicts of interest." (First Am. Complaint, ¶ 87). The only relief Plaintiffs seek against Sidley is a declaration that Sidley is disqualified from representing either the Foundation or any of its Directors "in this litigation." (Id. at pp. 33-34). Such relief is nonsensical given the fact that Sidley does not represent the Foundation or any of its Directors in this litigation. While Sidley initially filed an appearance on behalf of the Foundation in this case, for reasons having nothing to do with any alleged "conflict of interest," on November 5, 2001, Sidley was granted leave to withdraw as counsel for the Foundation in this action (see 11/5/01 Order) and substitute counsel now represents the Foundation.

Plaintiffs' Complaint Against Sidley Should be Dismissed Pursuant to 735 ILCS 5/2-615 as Substantially Insufficient in Law for the Following Reasons:

4. Plaintiffs' complaint utterly fails to state any cognizable claim against Sidley. Plaintiffs state that Sidley violated Rules 1.1, 1.3, 1.4, and 1.7 of the Illinois Rules of Professional Conduct. (First Am. Complaint, ¶ 91). As the Appellate Court ruled in Hannan v. Watt, 147 Ill. App. 3d 456, 461, 497 N.E.2d 1307, 1310, there is no independent cause of action for alleged violation of the ethical rules and any attempt to state one is nothing more than a thinly veiled motion for disqualification.

5. Plaintiffs' wholly conclusory allegations fail to set forth sufficient specific facts as required under Illinois fact pleading standards. Plaintiffs' allegations that other Directors "accused" Sidley of a conflict of interest in another case, and Sidley supposedly represented Dr. Stebbins by merely informing Plaintiffs that he did not wish to submit himself for a voluntary interview regarding their allegations concerning coercion by Perkins and the Attorney General fail to specify particular facts upon which any cause of action could be based.

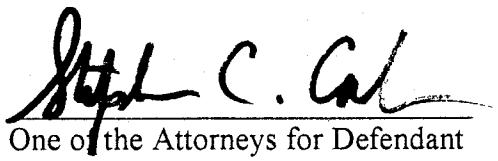
6. Moreover, Plaintiffs' cause of action for declaratory judgment against Sidley is moot. There is no "actual or justiciable controversy between the parties" as required to assert a cause of action for declaratory judgment. AG Farms, Inc. v. American Premier Underwriters, Inc., 296 Ill. App. 3d 684, 695 N.E.2d 882, 887 (4th Dist. 1998). Plaintiffs seek a declaration that Sidley is disqualified from further representing the Foundation or its Directors in this litigation. However, Sidley does not represent any party in this litigation. Plaintiffs' continued pursuit of their complaint against Sidley even after Sidley has withdrawn as counsel for the Foundation in this case has no basis in law or fact.

Plaintiffs' Complaint Against Sidley Should be Dismissed Pursuant to 735 ILCS 5/2-619(a)(4) as it is Barred by Collateral Estoppel for the Following Reason:

7. In any event, Plaintiffs' claims against Sidley are barred by collateral estoppel. The Plaintiffs in this case were all parties to the Buntrock case where the claims of Sidley's alleged "conflict of interest" and inability to continue to represent the Foundation were fully litigated and rejected by Judge Kinnaird and the Appellate Court on at least six occasions. Plaintiffs are collaterally estopped from wasting this Court's time and resources in an attempt to re-litigate that issue yet again in this Court.

WHEREFORE, for the reasons set forth in both this motion as well as the accompanying memorandum of law in support thereof, Sidley Austin Brown & Wood respectfully requests that this Court enter an order dismissing the First Amended Complaint against it with prejudice pursuant to 735 ILCS 5/2-615 and 5/2-619(a)(4), and grant such other relief that this Court deems appropriate.

Respectfully submitted,



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JAN 0 8 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, JAMES R. DONNELLEY, an individual, MARSHALL FIELD V, an individual, KATHLEEN A. FORSTER, an individual, ROBERT S. HAMADA, an individual, FREDERICK A. KREHBIEL, an individual, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General, WINSTON & STRAWN, an Illinois Partnership, and SIDLEY & AUSTIN, an Illinois Partnership, Defendants.	No. 01 L 009112 Hon. Julia M. Nowicki

SIDLEY AUSTIN BROWN & WOOD'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AS AGAINST IT

Defendant Sidley Austin Brown & Wood ("Sidley"), formerly known as Sidley & Austin, moves this Court to dismiss the First Amended Complaint as filed against it by Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson. Plaintiffs' complaint utterly fails to state any cognizable claim against Sidley. Moreover, Plaintiffs' wholly conclusory allegations fail to set forth sufficient specific facts as required under Illinois law. In addition, Plaintiffs' complaint against Sidley is both moot and barred by collateral estoppel. This motion is brought pursuant to 735 ILCS 5/2-615 as Plaintiffs' purported claim against it is substantially insufficient in law and pursuant to 735 ILCS 5/2-619(a)(4) as it is barred by collateral estoppel.

Factual Background

The Terra Foundation for the Arts (the "Foundation") is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. (First Am. Complaint, ¶ 7). The Foundation oversees an approximately $175 million collection of American art. (Id.) Sidley is counsel for the Foundation in the case of Buntrock, et al. v. Terra, et al., No. 00 CH 13859, in the Circuit Court of Cook County, Chancery Division before Judge Dorothy Kirie Kinnaird. In the Buntrock case, two members of the Foundation's Board of Directors, Ronald Gidwitz and Dean Buntrock, sued the Foundation and three members of the Foundation's Board of Directors (Judith Terra, Senator Alan Simpson, and Dr. Paul Tucker) claiming that neither the Foundation nor its Directors had the right to move either the Foundation or its assets out of the Chicago area. (See First Am. Complaint, ¶ 41).

The Buntrock case eventually proceeded to mediation. (First Am. Complaint, ¶ 49). On June 29, 2001, the Board held a special meeting to consider the terms of a proposed Consent Judgment and Order to settle the Buntrock litigation. (Id. at ¶ 67). At that meeting, by a vote of six to two (Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Ambassador Hartman, Dr. Marshall

and Dr. Stebbins voted in favor, and Mrs. Terra and Dr. Tucker voted against), the Board voted to accept the Consent Judgment and Order. (Id. at ¶ 73). The Consent Judgment and Order was approved and entered by Judge Kinnaird on July 26, 2001.

The Plaintiffs in this case were all defendants in the Buntrock case, and on August 22, 2001 filed a Notice of Appeal of Judge Kinnaird's entry of the Consent Judgment and Order. Plaintiffs are currently pursuing that appeal. Nevertheless, Plaintiffs Terra, Tucker and Simpson decided for reasons of their own, in addition to their appeal, that they wished to also try to collaterally attack the Consent Judgment and Order by filing this lawsuit. On July 31, 2001, Plaintiffs Terra, Tucker and Simpson filed a complaint in this case naming the Foundation, six of the Foundation's Directors, the Attorney General and Assistant Attorney General Floyd Perkins as defendants. (See, generally, Original Complaint). The complaint essentially attacked the validity of the Consent Judgment and the process by which it was entered. (See id.). On November 20, 2001, Plaintiffs were granted leave to file their First Amended Complaint which added as additional defendants five new members of the Foundation's Board, the Foundation's litigation counsel in the Buntrock case, Sidley, and the Foundation's corporate counsel, Winston & Strawn. (See First Am. Complaint).

Plaintiffs state in wholly conclusory terms in their First Amended Complaint that Sidley has "engaged in the Foundation's representation – and [has] . . . continued with that representation – despite obvious and foreseeable actual and potential conflicts of interest" and therefore supposedly may not represent the Foundation in this litigation. (First Am. Complaint, ¶¶ 87, 89). Plaintiffs seek only a declaration that "Sidley & Austin is, and has been, tainted by conflicts of interest . . . and that, as a result . . . Sidley & Austin [is] disqualified from any further representation of the Foundation or its directors in this litigation." (Id. at pp. 33-34). They seek

no other relief regarding Sidley. While Sidley did initially file an appearance on behalf of the Foundation in this case, Sidley does not presently represent the Foundation in this litigation. On November 5, 2001 Sidley was granted leave to withdraw as counsel for the Foundation in this action. (See 11/5/01 Order).[1] Mulroy Scandaglia Marrinson & Ryan subsequently filed an appearance as substitute counsel.

Argument

I. PLAINTIFFS' COMPLAINT FAILS TO STATE A COGNIZABLE CLAIM AGAINST SIDLEY.

Illinois is, of course, a fact-pleading jurisdiction. Vernon v. Schuster, 179 Ill. 2d 338, 344, 688 N.E.2d 1172, 1175 (1997). In order to avoid dismissal, a plaintiff must allege specific facts sufficient to bring his or her claim within the scope of a cognizable cause of action. Id. Those facts, if proven true, must be able to support a judgment. Miles Homes, Inc. of Ill. v. Mintjal, 17 Ill. App. 3d 642, 644, 307 N.E.2d 724, 726 (4th Dist. 1974). The legal sufficiency of a complaint requires more than "mere conclusions." Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 608, 440 N.E.2d 998, 1007 (1st Dist. 1982).

Plaintiffs' First Amended Complaint against Sidley simply does not and cannot meet Illinois' pleading standards. Plaintiffs' supposed "claim" against Sidley is nothing more than a motion for disqualification which they thinly disguise as a supposed cause of action. Their attempt to "disqualify" Sidley from representing the Foundation by naming Sidley as one of the Foundation's co-defendants has no basis in law and certainly does not state a cause of action. A simple reading of Count III – the only count directed toward Sidley – demonstrates its deficiency. Notably, Plaintiffs seek nothing more than a "declaration" that Sidley should be

[1] This Court may take judicial notice of Sidley's withdrawal as counsel for the Foundation in this case. See In re A.B., 308 Ill. App. 3d 227, 237, 719 N.E.2d 348, 356 (2nd Dist. 1999) (holding a court may take judicial notice of matters of record in its own proceedings).

"disqualified from any further representation of the Foundation . . . in this litigation." (First Am. Complaint, pp. 33-34). All Plaintiffs are really doing in naming Sidley as a defendant is using a complaint for the wholly improper purpose of seeking to disqualify opposing counsel.

"Both federal and state courts have viewed with disapproval a litigant's attempt to disqualify opposing counsel as a tactical weapon in litigation." Hannan v. Watt, 147 Ill. App. 3d 456, 461, 497 N.E.2d 1307, 1310 (1st Dist. 1986). As the Illinois Supreme Court has admonished, "caution must be exercised to guard against motions to disqualify being used as tools for harassment." Schwartz v. Cortellone, 177 Ill. 2d 166, 178, 685 N.E.2d 871, 877 (1997); accord, Weil, Freiburg & Thomas v. Sara Lee Corp., 218 Ill. App. 3d 383, 395, 577 N.E.2d 1344, 1354 (1st Dist. 1991). Not surprisingly, disqualification is regarded as a "drastic measure which courts should approach with continuance and grant only as a last resort." Hannan, 147 Ill. App. 3d at 461, 497 N.E.2d at 1310; see Schwartz, 177 Ill. 2d at 178, 685 N.E.2d at 877.

Not only are motions to disqualify counsel disfavored by the courts, the Illinois Appellate Court has specifically rejected an attempt – strikingly similar to what Plaintiffs are trying to do here – to disqualify opposing counsel by filing a lawsuit against them for the sole purpose of seeking disqualification. See Hannan v. Watt, 147 Ill. App. 3d at 461, 497 N.E.2d at 1310. In Hannan v. Watt, plaintiffs Republic airline pilots sought to disqualify the law firm of Cotton Watt Jones & King ("Cotton Watt") from representing pilots of Northwest airlines during seniority list integration proceedings stemming from the merger of the two airlines. 147 Ill. App. 3d at 457, 497 N.E.2d at 1308 . The plaintiffs sued Cotton Watt alleging that the firm suffered from a conflict of interest in violation of the Illinois Code of Professional Responsibility[2] and sought to enjoin the firm from representing the Northwest pilots. 147 Ill. App. 3d at 461, 497

[2] The Illinois Code of Professional Responsibility was the predecessor to the current Illinois Rules of Professional Conduct.

N.E.2d at 1310. In affirming the trial court's dismissal of the complaint, the Appellate Court held that the Illinois Code of Professional Responsibility "do[es] not by [its] own terms, create independent rights of action." Id. The court accordingly found that the plaintiffs had failed to base their complaint on an underlying substantive cause of action and that "this case is nothing more than an action to disqualify Cotton Watts from partaking in the current proceedings." Id.

The facts of this case are no different than Hannan v. Watt. Here, Plaintiffs are attempting to create a cause of action out of an alleged violation of the Illinois Rules of Professional Conduct. Plaintiffs state that Sidley supposedly violated Rules 1.1, 1.3, 1.4 and 1.7 (First Am. Complaint, ¶ 91) and ask the Court for a "declaration" that Sidley is "disqualified from any further representation of the Foundation or its directors in this litigation." (Id. at pp. 33-34). As the Hannan Court held, no such cause of action exists. See Hannan, 147 Ill. App. 3d at 461, 497 N.E.2d at 1310. Even if Plaintiffs had a valid basis for attempting to "disqualify" Sidley from serving as opposing counsel in this litigation, the proper way to address that issue would have been to file a motion – not to purport to name Sidley as a defendant,[3] which as Hannan holds has no basis in Illinois law. Hannan, 147 Ill. App. 3d at 461, 497 N.E.2d at 1310. Because Plaintiffs fail to allege any facts supporting a cognizable cause of action, their complaint against Sidley must be dismissed pursuant to 735 ILCS 5/2-615. See Vernon, 179 Ill. 2d at 344, 688 N.E.2d at 1175.

[3] There are, of course, multiple reasons which it is not necessary to address here why such a motion would itself have been baseless and improper. See Blanchard v. Edgemark Financial Corp., 1998 WL 988958, p. 21 (N.D. Ill.); Renard v. Columbia Broadcasting System, Inc., 126 Ill. App. 3d 563, 567, 467 N.E.2d 1090, 1094 (1st Dist. 1984) ("Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice.").

II. PLAINTIFFS' WHOLLY CONCLUSORY ALLEGATIONS FAIL TO SET FORTH SUFFICIENT SPECIFIC FACTS TO STATE A CAUSE OF ACTION IN ANY EVENT.

Even if this Court finds, contrary to the Appellate Court's holding in Hannan, that Plaintiffs might conceivably be able to state a cause of action against opposing counsel for alleged violations of the Illinois Rules of Professional Conduct, Plaintiffs have failed to plead sufficient, specific facts to support any such claim. Plaintiffs make only two allegations in support of their conclusory assertion of "actual and potential conflicts of interest" involving Sidley (First Am. Complaint, ¶ 87):

(1) Plaintiffs state that Sidley was previously "accused – by two defendant directors in this litigation – of breaching its responsibilities to the Foundation . . . [who] submitted an expert affidavit that concludes that Sidley & Austin is unable to provide the Foundation with independent professional advice given its conflicts of interest"; and

(2) Plaintiffs allege that Sidley "represented director Stebbins . . . and informed the other parties that director Stebbins would not submit for an interview regarding the allegations of Perkins and the Attorney General."

(First Am. Complaint, ¶ 89). These "mere conclusions" are not the type of specific factual allegations required to properly support a judgment under Illinois law. See Martin, 109 Ill. App. 3d at 608, 440 N.E.2d at 1007.

First, the claim that Sidley was "accused" by other Directors in another lawsuit of supposed conflicts of interest does not provide even an iota of factual support that Sidley has in fact violated any ethical obligations with respect to this litigation. Not surprisingly, Plaintiffs fail to inform this Court that while Buntrock and Gidwitz attempted to disqualify Sidley in the Buntrock case on approximately six different occasions, each of those attempts were soundly rejected by Judge Kinnaird and the Appellate Court and refused to be heard by the Illinois Supreme Court. (See J. Kinnaird's 9/25/00 Order ("Plaintiffs' Motion to Disqualify Sidley &

Austin is denied"), 10/20/00 Order ("The Motion to Appoint Special Litigation Counsel, et al. is denied without prejudice with respect to disqualification of Winston & Strawn and Sidley & Austin"), 1/2/01 Order ("That portion of plaintiffs' Emergency Motion for Temporary Restraining Order to enjoin the Terra Foundation's Independent Litigation Committee from continuing to retain Sidley & Austin as counsel is denied") and 1/19/01, 2/16/01 Appellate Court Orders).[4] Moreover, the allegation that Buntrock and Gidwitz submitted a supposed "expert affidavit" purportedly "concluding" that Sidley suffered from a conflict of interest in that case is similarly unsupportive of any basis for relief in this case. Plaintiffs did not attach this supposed "expert report" to their complaint, and notably, also did not attach the court orders twice rejecting the opinion contained in that "expert report." (See J. Kinnaird 10/20/00 and 1/2/01 Orders).[5] More significantly, the statement regarding a supposed "expert report" clearly does not itself allege any specific facts sufficient to establish the existence of any cause of action.

Second, Plaintiffs' conclusion that Sidley "represented director Stebbins" is also not supported by any factual allegation whatsoever. Plaintiffs do not, and could not, allege that Sidley was retained by Dr. Stebbins to represent him in connection with this or any other litigation, that Sidley billed Dr. Stebbins for legal services rendered, that Dr. Stebbins paid

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[4] This Court may take judicial notice of the orders entered in the Buntrock case. See Storm & Assoc., Ltd. v. Cuculich, 298 Ill. App. 3d 1040, 1047, 700 N.E.2d 202, 207 (1st Dist. 1998) (holding matters of record in a related action are the proper subject of judicial notice in considering a motion to dismiss); In re Marriage of DeBow, 236 Ill. App. 3d 1038, 1040, 602 N.E.2d 984, 985 (5th Dist. 1992) ("A trial court should take judicial notice of closely related proceedings."); Walsh v. Union Oil Co., 53 Ill. 2d 295, 291 N.E.2d 644 (1972) (holding judicial notice of other proceedings proper where the same parties are involved and the allegations from those proceedings have been proven).

[5] Similarly, Plaintiffs here totally ignore the obvious deficiencies in the "expert affidavit" (see Terra Foundation's Motion to Strike the Affidavits of Professor John M. Breen, filed on December 11, 2000 filed in the Buntrock case), the fact that there were contrary expert affidavits and that expert affidavits are not even properly admissible on motions to disqualify. See In re Masters 91 Ill. 2d 413, 425, 438 N.E.2d 187, 192 (1982).

Sidley for any such legal services, or any other factual allegation that could prove an attorney-client relationship between Sidley and Dr. Stebbins. McDermott Will & Emery has filed an appearance for Dr. Stebbins in this matter and is his personal counsel in connection with the matters referred to in Plaintiffs' First Amended Complaint. Plaintiffs' only shred of "factual" support that Sidley represented Dr. Stebbins is their allegation that Sidley "informed the other parties that director Stebbins would not submit for an interview regarding the allegations of Perkins and the Attorney General." (First Am. Complaint, ¶ 89). This "fact" can hardly prove an attorney-client relationship between Dr. Stebbins and Sidley, particularly given the fact that Dr. Stebbins was a member of the Foundation's Board and a "key figure" in the conduct of the Buntrock litigation as one of only two members of the Independent Litigation Committee ("ILC") formed, pursuant to Judge Kinnaird's Orders, to direct the Buntrock litigation. (First Am. Complaint, ¶ 56). Obviously, it is no surprise that the Foundation's counsel would be in direct contact with Dr. Stebbins in his capacity as a member of the ILC and as a member of the Foundation's Board. As counsel to the Foundation in the Buntrock case, Sidley's mere ministerial act of communicating to opposing counsel that one of the Foundation's Directors, who was a member of its ILC, chose not to voluntarily submit to an "interview" regarding Plaintiffs' allegations in this case, can hardly support a finding that Sidley "represented" Dr. Stebbins in his individual capacity.[6]

Plaintiffs' desperate attempt to turn their unfounded conclusions into factual allegations, in the hopes of winning a declaration that Sidley is disqualified in this litigation, is insufficient. A claim that Sidley was "accused" of a conflict of interest by other directors and the

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[6] Even if it were true (as it is not) that Sidley had been Dr. Stebbins' counsel, Plaintiffs allege no facts stating a cause of action arising out of any such representation or establishing that they have any right to attempt to state any such cause of action.

unsupported conclusion that Sidley "represented" Dr. Stebbins are simply not enough to meet Illinois' fact-pleading standards in order to support any claim against Sidley. Accordingly, the complaint against Sidley should be dismissed as substantially insufficient in law pursuant to 735 ILCS 5/2-615.

III. PLAINTIFFS' COMPLAINT IS BARRED BY COLLATERAL ESTOPPEL PURSUANT TO 735 ILCS 5/2-619.

The matters referred to in paragraph 89 of the First Amended Complaint have already been adjudicated as to the parties in this case. Plaintiffs may not re-litigate them before this Court. The Plaintiffs in this case, Mrs. Terra, Dr. Tucker and Sen. Simpson, were parties to the Buntrock case. They were each represented by counsel in the Buntrock case. They actively participated in all aspects of that case, including the many failed attempts by Directors Buntrock and Gidwitz to disqualify Sidley as counsel for the Foundation. In fact, Plaintiffs Terra, Tucker and Simpson specifically opposed the Buntrock and Gidwitz attempts to disqualify Sidley. (See, e.g., Opposition to Plaintiffs' Motion to Appoint an Independent Litigation Committee and Independent Litigation Counsel for Terra Foundation, and/or Receiver, filed by Terra, Tucker and Simpson in the Buntrock case on 10/17/00). Accordingly, Plaintiffs in this case are collaterally estopped from re-litigating those matters here.

The purpose of collateral estoppel is "to prevent repeated litigation of the same factual issue." Cree Development Corp. v. Mid-America Advertising Co., 324 Ill. App. 3d 534, 536, 755 N.E.2d 491, 493 (5th Cir. 2001); see also Nowak v. St. Rita High School, 197 Ill. 2d 381, 757 N.E.2d 471, 477 (2001). The doctrine of collateral estoppel applies when a party participates in two separate and consecutive causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in

the former suit by a court of competent jurisdiction. Nowak, 757 N.E.2d at 477. "The adjudication of the fact or question in the first cause will, if properly presented, be conclusive of the same question in the later suit." Id. The three requirements of collateral estoppel are: (1) the issues in the cases are identical; (2) there was a final judgment on the merits in the first case; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. Id. at 478.

Plaintiffs' supposed claim against Sidley in this case meets all the requirements for collateral estoppel. First, Plaintiffs' attempt to disqualify Sidley as counsel for the Foundation is identical to the prior failed attempts to disqualify Sidley in the Buntrock case. Indeed, Plaintiffs' rely on their allegation that Sidley was "accused" of conflicts of interest in the Buntrock case (see First Am. Complaint, ¶ 89) in order to prevail in their attempt to disqualify Sidley in this case. This effort only underscores the identity of those issues in the two cases. Second, as the numerous orders entered by Judge Kinnaird and the Appellate Court demonstrate, there was a final ruling that Sidley was not disqualified from representing the Foundation. Third, each of the Plaintiffs in this case were also parties in the Buntrock case. Accordingly, Plaintiffs are collaterally estopped from wasting this Court's time and re-litigating the tired issue of whether Sidley should be disqualified from representing the Foundation. See Nowack, 757 N.E.2d at 477-78. Plaintiffs' complaint should therefore be dismissed pursuant to 735 ILCS 5/2-619(a)(4) as it is barred by a prior decision entered in the Buntrock case.

IV. PLAINTIFFS' ALLEGED CAUSE OF ACTION FOR DECLARATORY JUDGMENT IS MOOT.

Even ignoring the fact that Plaintiffs have failed to state a claim for any cognizable cause of action, failed to allege sufficient, specific facts in support of their supposed

claim and are collaterally estopped from re-litigating this issue, Plaintiffs' complaint for a declaratory judgment against Sidley should nevertheless be dismissed as moot. The test of the sufficiency of a declaratory judgment action is whether the complaint "alleges facts showing an actual or justiciable controversy between the parties." AG Farms, Inc. v. American Premier Underwriters, Inc., 296 Ill. App. 3d 684, 689, 695 N.E.2d 882, 887 (4th Dist. 1998). Specifically, the elements of an action for declaratory judgment are: (1) a plaintiff with a tangible legal interest, (2) a defendant with an adverse interest, and (3) an actual controversy regarding that interest. Id. Courts are precluded from entering a declaratory judgment unless an actual controversy is presented. Village of Maywood Bd. of Fire and Police Comm'rs v. Dep't. of Human Rights, 296 Ill. App. 3d 570, 575, 695 N.E.2d 873, 877 (1st Dist. 1998).

An actual controversy exists if there is a legitimate dispute requiring an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute. First of America Bank, N.A. v. Netsch, 166 Ill. 2d 165, 173, 651 N.E.2d 1105, 1109 (1995). The "ripeness" doctrine prevents courts "from entangling themselves in abstract disagreements" and protects parties from judicial interference until a decision has been made and "its effects felt in a concrete way by the challenging parties." Village of Maywood, 296 Ill. App. 3d at 576, 695 N.E.2d at 877. Courts should not decide a case where the judgment would have a merely advisory effect. CGE Ford Heights, L.L.C. v. Miller, 306 Ill. App. 3d 431, 441, 714 N.E.2d 35, 42 (1st Dist. 1999).

There is no question that Plaintiffs' "claim" against Sidley is moot. Plaintiffs seek "a declaration" from this Court that Sidley is disqualified from "further representation of the Foundation or its directors in this litigation." (First Am. Complaint, pp. 33-34). Sidley does not represent the Foundation or any of its Directors in this litigation. Sidley initially appeared as

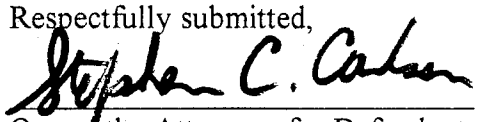
counsel for the Foundation in this case; however, for reasons that have nothing to do with any supposed violation of the Illinois Rules of Professional Conduct, the Foundation has obtained substitute counsel and Sidley has withdrawn from its representation of the Foundation in this case. For Plaintiffs to further pursue Count III is nonsensical. Plaintiffs are asking this Court to issue a purely advisory opinion as to the propriety of a legal representation that does not exist. The fact that Sidley previously represented the Foundation in this litigation is irrelevant. Plaintiffs must establish that there is a present, actual controversy in order to sufficiently plead a cause of action for a declaratory judgment. Village of Maywood Bd. of Fire and Police Comm'rs, 296 Ill. App. 3d at 575, 695 N.E.2d at 877. Plaintiffs' request that this Court declare Sidley disqualified from this litigation is no less inappropriate than if Plaintiffs had randomly chosen a law firm out of Sullivans or Martindale Hubble and asked the Court to find that law firm disqualified from representing the Foundation or its Directors in this case. Simply put, given the fact that Sidley does not represent any party in this litigation, any decision by this Court as to whether Sidley's representation of the Foundation or its Directors in this case would violate the Illinois Rules of Professional Conduct could be nothing but an improper advisory opinion. See CGE Ford Heights, L.L.C., 306 Ill. App. 3d at 441, 714 N.E.2d at 42. Accordingly, Plaintiffs' cause of action for declaratory judgment should be dismissed as a matter of law.[7]

[7] Considering the fact that Plaintiffs have chosen to employ the highly unusual tactic of naming former opposing counsel as a defendant in this lawsuit without any legal or factual basis for doing so, it may be particularly appropriate for this Court to consider the requirements of Illinois Supreme Court Rule 137. Rule 137 "authorizes the imposition of sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been imposed for an improper purpose." Baker v. Daniel S. Berger, Ltd., 323 Ill. App. 3d 956, 962, 753 N.E.2d 463, 469 (1st Dist. 2001) (internal citations omitted). The policy underlying the rule is to penalize a litigant "who pleads frivolous or false matters, or who brings a suit without any basis in the law." Baker, 323 Ill. App. 3d at 963, 753 N.E.2d at 469. Rule 137 imposes an affirmative duty on attorneys and litigants alike to

Conclusion

Plaintiffs have attempted to re-litigate an issue that has previously been decided by both Judge Kinnaird as well as the Appellate Court. Additionally, Plaintiffs fail to allege any facts supporting a cognizable cause of action against Sidley. Furthermore, Plaintiffs have asked this Court to issue an advisory opinion on a legal representation that simply does not exist. Plaintiffs' cause of action for a declaratory judgment is moot and not ripe. Accordingly, Sidley Austin Brown & Wood respectfully requests that this Court dismiss the First Amended Complaint with prejudice as against it pursuant to 735 ILCS 5/2-615 and 5/2-619(a)(4), and grant such other relief that this Court deems appropriate.

Respectfully submitted,



One of the Attorneys for Defendant
Sidley Austin Brown & Wood

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adequately investigate the facts and the law prior to filing an action, pleading, or other paper and to be sure that a basis exists for the claim. Century Nat'l Ins. Co. v. Tracy, 316 Ill. App. 3d 639, 651, 737 N.E.2d 353, 363 (2nd Dist. 2000). In this case, Plaintiffs have utterly failed to meet this standard. There is no basis in the law for a cause of action arising out of a supposed violation of the Illinois Rules of Professional Conduct. See Hannan, 147 Ill. App. 3d at 461, 497 N.E.2d at 1310. Plaintiffs and their counsel know full well that Judge Kinnaird ruled on the Buntrock and Gidwitz claims of "conflict of interest" and held there was no such conflict. The Amended Complaint clearly fails to allege sufficient, specific facts in support of any claim against Sidley. Moreover, as Plaintiffs are well aware, Sidley does not currently represent the Foundation or any of its Directors in this litigation. Continued pursuit of Count III is obviously baseless. Accordingly, Plaintiffs are equally aware that there is no present case or controversy that could possibly entitle Plaintiffs to a declaration that Sidley is disqualified as counsel in this litigation. The tactic of trying to name opposing counsel as a party to try to remove them from a case and of continuing to pursue them even after substitute counsel has appeared is obviously one which no court should condone and which suggests a need for careful review under Rule 137.

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I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on January 4, 2002 by United States mail upon the following counsel:

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	(transferred to Chancery)
v.	)	
	)	Judge Julia M. Nowicki
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

BACKGROUND

Because this case arises out of, and indeed is at most a continuation of, disputes that originated in earlier litigation, it is necessary to discuss the earlier Buntrock case (Buntrock I) before Judge Kinnaird, Buntrock v. Terra, 00 CH 13859.

Buntrock I began with a lawsuit by two members of the Terra Foundation's Board of Directors, Dean Buntrock and Ronald Gidwitz, against several other Board members including Judith Terra (widow of the late Daniel Terra), and the Terra Foundation itself. The Terra Foundation is an Illinois not-for-profit corporation, with several hundred million dollars of assets, created by Mr. Terra. Its main purpose is to preserve and display American art. The Foundation runs the Terra Museum of Art on Michigan Avenue in Chicago.

The Buntrock I plaintiffs alleged, in substance, that the Foundation was being mismanaged and losing money, and that some of the defendant Board members were not

fulfilling their fiduciary obligations to the Foundation, all with a purpose to create grounds to move the Museum and Foundation out of Illinois to Washington, D.C. It was alleged that these actions were ultra vires and a breach of fiduciary obligations.

Mrs. Terra and the other Board members named as defendants had legal representation separate from that of the Foundation. Mrs. Terra, Mr. Tucker, and former Senator Alan Simpson were represented by Brian Crowe and James Wilson of Shefskey & Froelich. The Foundation was represented by lawyers at Sidley Austin Brown & Wood. Various TRO motions and motions to disqualify Sidley were ruled upon. Sidley was permitted to remain as counsel for the Foundation.

The Illinois Attorney General's Office filed an intervenor's complaint against the defendants on behalf of the People, alleging that the Terra Museum was a charity in which the people of the state had an interest, and that, consistent with charitable trust principles, the Museum should remain in Illinois. The Attorney General has common law powers to institute the assets of charities and is authorized under the Charitable Trust Act, 760 ILCS 55/12, to institute "appropriate proceedings" to enforce the Act's regulatory requirements.

Numerous motions were filed, including motions to dismiss, disqualify, for TRO. In February, 2001, the case was postured for a preliminary injunction hearing when the defendants sought mediation, and the parties unanimously agreed to enter into mediation to attempt to resolve the controversy. Judge Kinnaird appointed David Hilliard, a Chicago attorney, as the mediator, on February 3, 2001. The parties all willingly participated in long and difficult mediation sessions beginning in March, 2001. Numerous meetings, settlement proposals and collectively thousands of hours of attorney and client time were expended. Finally, the Terra

Foundation, the plaintiff Board members, and the Attorney General's Office were able to agree on a settlement. The agreement provided that new Board members would be appointed, the majority of whom would be Illinois residents. The Terra Foundation would continue to base its collection here and agree not to move its headquarters out of Illinois for 50 years. The plaintiff directors and the People released the Terra Foundation, and all the board of directors, from all claims as part of the settlement. The Foundation also agreed to pay all reasonable attorneys' fees for Board members incurred in Buntrock I.

A quorum of board members voted to approve the settlement on June 29, 2001, in a recorded telephone conference call with 6 voting for and 2 voting against settlement. Board members Buntrock, Daley, Gidwitz, Hartman, Stebbins and Marshall voted to accept the settlement. Mrs. Terra and Mr. Tucker voted against it. Other Board members did not participate.

The three dissident Board members (Terra, Tucker and Simpson) made strenuous efforts before Judge Kinnaird to prevent the vote with a motion for a temporary restraining order, which was denied, and to nullify the action after the vote by filed Objections. Judge Kinnaird denied these motions and Objections. The dissident three Board members also sought to stop the Board meeting and vote with a federal lawsuit against Assistant Attorney General Floyd Perkins. As we will discuss in more detail later, the federal suit was also quickly dismissed.

Judge Kinnaird conducted an extensive hearing, lasting more than 5 hours, on July 24, 2001, to consider the Objections filed by Mrs. Terra, Tucker and Simpson. (See transcript submitted as part of the Terra Foundation's motion to dismiss). Judge Kinnaird rejected the Objectors' arguments that the settlement somehow unduly tied the collection to

Illinois or limited the Foundation's ability to share works of art in the collection with other museums around the country or world. Judge Kinnaird compared the Foundation's Articles and purpose with the terms of the settlement and found that the settlement provisions affecting the Foundation were permissible under the Articles of Incorporation. The Court specifically found that the settlement was not ultra vires and was a fair and equitable resolution of the case and in the best interests of the Foundation. Judge Kinnaird signed the consent judgment on July 26, 2001.

The Court also had no trouble rejecting another of the objector's main contentions - - that some of the Board members were unduly influenced into making the settlement. Those contentions concern Dr. Stephanie Marshall and Dr. Ted Stebbins who voted for the agreement. This allegation stemmed from the fact that the Illinois Attorney General's Office, in the course of its litigation preparation in the Buntrock I case, had served an administrative subpoena on Dr. Marshall seeking information about her position as President of the Illinois Math and Science Academy, but which led to no action being taken against Dr. Marshall as a consequence of the facts discovered. The dissidents also charge that Floyd Perkins had circulated a draft amended complaint (never filed) alleging possible conflict of interest against a second Board member, Dr. Stebbins. The facts concerning Dr. Stebbins had been of record and were the very same matters involving the preliminary injunction hearing in preparation when the defendants, including the individual defendants, urged mediation. Thus, the allegations in the unfiled amended complaint involving Dr. Stebbins was not new information, it was already in the pleadings. Judge Kinnaird considered allegations of coercion raised in the objections in Buntrock I and personally listened to the tape of the Board meeting at which the settlement was approved, heard the comments of all

Board members including Dr. Marshall and Dr. Stebbins at the meeting, and found absolutely no evidence whatever of coercion or undue influence that would lead her to conclude there was any reason to overturn the settlement. In the course of the hearing on the Objections, Judge Kinnaird commented that she did not consider this to be even a "close call." (Tr. 124) The affairs of the Terra Foundation are governed by majority vote of its Board, which voted to approve the settlement. Judge Kinnaird approved the consent decree, over which she retains jurisdiction. She also is currently in the process of deciding voluminous fee petitions submitted by counsel for the Board members. These significant fees include, of course, the considerable time spent by the dissident Board member's first set of attorneys for participating in the mediation and settlement, and their second set of attorneys in challenging and attempting to overturn the settlement. This is, of course, in addition to the attorney time being logged in this suit which can fairly be termed a collateral attack on the Buntrock I settlement. The objecting Board members have also appealed Judge Kinnaird's ruling approving the settlement to the Illinois Appellate Court.

THE FEDERAL SUIT

As noted earlier, Mrs. Terra and the other Board members made a last-ditch attempt to stop the crucial Board meeting of June 29, 2001, with an additional lawsuit in federal court, against Illinois Assistant Attorney General Floyd Perkins, Bureau Chief of the Charitable Trusts Division and lead counsel representing the State in the Buntrock litigation. This suit, brought under 42 U.S.C. §1983, raised similar allegations to those rejected later by J. Kinnaird - - that Mr. Perkins had used improper tactics to force through a settlement that would require the Foundation to stay in Illinois, and had somehow deprived the plaintiffs of their First Amendment

rights and Fourteenth Amendment property rights (claims similar to what are raised in this case). Plaintiffs sought a TRO to stop the Terra Board from voting on the settlement. Judge Elaine Bucklo quickly dismissed the suit on the grounds that there was no valid case or controversy against Mr. Perkins, based on the clearly-apparent point that enjoining him would have no legal effect on stopping the Terra Board from meeting the next day, since it was not named a party in the federal case. Judge Bucklo also found the case had to be dismissed on abstention grounds, and stated Assistant Attorney General Perkins had "undoubtedly legitimate authority" to file pleadings involving Dr. Stebbins and to investigate Dr. Marshall's school. Terra Foundation v. Perkins, 151 F.Supp. 2d 931, 937 (N.D. Ill.2001)

THE ALLEGATIONS OF THIS CASE (BUNTROCK II)

This case began in the Law Division, was transferred to Chancery, and eventually was assigned to the calendar of Judge Nowicki.

The allegations in the first amended complaint are a continuation of the objections raised in the earlier cases. Mr. Tucker, Mrs. Terra, and Mr. Simpson were parties in Buntrock I. They are now suing Mr. Buntrock and Mr. Gidwitz (plaintiffs in Buntrock I), as well as the other Terra Board members, including the new members who joined the Board as part of the settlement. The Terra Foundation itself is also named as a defendant. The amended complaint also names Sidley & Austin and Winston & Strawn as defendants. These firms were counsel to the Foundation. The state defendants are Attorney General Ryan and Floyd Perkins.

Counts I and II seek a declaratory judgment that the Buntrock I settlement approved by Judge Kinnaird was unlawful and that the new Board members elected to the Board under the

consent order be enjoined from participating on the Board. The remaining counts are all dependent on the allegation of unlawful coercion, breach of duty and ultra vires, conclusions asserted in Counts I and II. Count III seeks a declaratory judgment that Sidley & Austin and Winston & Strawn be disqualified from representing the Foundation. Count IV seeks damages, punitive damages, and an injunction on the grounds that the June 29, 2001, vote was ultra vires. Count V alleges that Board members who voted for the settlement breached their fiduciary duty, and seeks damages. Count VI alleges that the Attorney General and Mr. Perkins "colluded with" Board members to commit the breach of fiduciary duty, and seeks damages and punitive damages. Counts VII, a federal count brought under 42 U.S.C. §1983, alleges that Mr. Perkins deprived the Foundation of its property in violation of the Fourteenth Amendment; violated the Foundation's right under the interstate commerce clause Art. I, §8 of the U.S. Constitution; and impaired its contractual obligations under the Contracts Clause. Art. I §9. Plaintiffs seek damages in Count VII.

The state defendants join in the motions and arguments raised by the co-defendants in support of dismissal, of all Counts, including the grounds of res judicata and collateral estoppel. In addition to those arguments, the state defendants raise additional arguments specific to Counts VI and VII, which are directed at Attorney General Ryan and Floyd Perkins. State law immunities should bar Count VI, a state law claim, and federal law immunities should bar Count VII, a federal civil rights count brought under 42 U.S.C.§1983. As noted above, the Terra Foundation's resources are finite - - and attorneys' fees in another protracted litigation will be harmful to the Foundation. This lends additional urgency to the defendants' desire that this case be ended quickly on motions to dismiss.

ARGUMENT

I. COUNT VI FAILS TO STATE A CLAIM (735 ILCS 5/2-615)

Count VI alleges that the Terra Board members committed a breach of fiduciary duty when they voted for the settlement, and that Attorney General Ryan and Floyd Perkins "colluded" (par. 118) with these defendants and induced a breach of their fiduciary duties.

We have found no Illinois case which would support such a theory in any factual context remotely similar to what is presented here.

Illinois cases involving a claim of inducing a breach of fiduciary duty have held that a third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit from the fiduciary, is liable for restitution. In cases involving public officials, this principle usually comes into play where a public official (with a fiduciary duty to the public at large) is bribed by a third party. The third party who induced the breach cannot profit from the wrong. See, e.g., Chicago Park Dist. v. Kenroy, Inc., 78 Ill.2d 555, 564-65 (1980). Similarly, the public official who breaches his fiduciary duty by engaging in corruption may be forced to make restitution. Chicago, ex rel. Cohen v. Keane, 64 Ill.2d 559, 565-66 (1976). But there is no allegation here that a public official somehow personally benefitted monetarily from the settlement, or somehow induced a Board Member corruptly in a scheme which personally benefitted the Board Member or the public official.

The allegations in this case are vastly different. The Attorney General's Office, representing the people of the State, was granted leave to intervene. The lawsuit eventually was settled after a Court hearing. Plaintiffs here allege that the allegations in a pleading drafted by

the Attorney General's Office but never filed constituted some sort of breach of fiduciary duty. In the course of that litigation, the Attorney General's Office also served an administrative subpoena, pursuant to statutory authority in the Charitable Trusts Act, 760 ILCS 55/1 et seq., to one defendant to gather certain information which led to no enforcement action against that official. These litigation-related actions, which never prompted the slightest criticism from the trial judge who approved the settlement and who was aware of the Attorney General's Office litigation position, are now alleged to be wrongful on the theory of an inducement to breach a fiduciary duty. On this reasoning, any lawyer, even one in private practice, could be held liable for normal litigation activities - - serving a subpoena, filing a pleading - - which are the part and parcel of all litigation. The law favors settlements of disputed claims, In re Estate of Cooper, 125 Ill.2d 363, 370 (1988), and litigants often choose to settle. Plaintiffs' theory, were it allowed to stand, would permit a collateral attack in which one party could seek to overturn a settlement because it was "coerced" to settle by a motion to dismiss, or motion for summary judgment, or discovery request, or an allegedly extortionate settlement demand. [1]

The cause of action for inducing a breach of fiduciary duty comes from the law of restitution, to remedy unjust enrichment. It has no bearing whatsoever in the context of this case. Floyd Perkins was engaging in litigation activity as a lawyer representing the State of Illinois. Mr. Perkins representation of his client, the People of the State of Illinois in no way undermines the settlement or suggests the Attorney General's Office "colluded" with anyone or induced a

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[1]Both state and federal cases make clear that it is not "duress" to institute or threaten to institute legal actions. Towne v. Libertyville, 190 Ill.App.3d 563, 569 (1989); Fleury v. Clayton, 847 F.2d 1229, 1232 (7th Cir. 1988) ("an overbearing attorney does not violate the Due Process Clause by stressing the grave consequences that may attend failure to bargain.")

breach of fiduciary duty on the part of Terra Board members who were found explicitly by Judge Kinnaird to have entered into a valid settlement.

II. THE DOCTRINE OF STATE PUBLIC OFFICIAL IMMUNITY BARS THIS CLAIM. (735 ILCS 5/2619)

Illinois law has long provided public officials an absolute immunity from damages for governmental activities, to protect them from lawsuits that would interfere with the performance of their official duties. One of the Attorney General's core responsibilities is to represent the State's interests in civil litigation.

In Morton v. Hartigan, 145 Ill.App.3d 417 (1986), an attorney with the Illinois Attorney General's Office was terminated from his position. He filed a suit alleging retaliatory discharge, defamation, and invasion of privacy against the Attorney General and various supervisory officials in the Office. The court held that the Attorney General and supervisory staff were absolutely immune from money damages, as "essential in promoting the effective functioning of government." Id. at 424. The Court noted that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits," quoting Barr v. Mateo, 360 U.S. 564, 571 (1959), a defamation case brought against a public official.

The absolute immunity extends to all actions within the scope of the official's employment, which is broadly construed. Morton, 145 Ill.App.3d at 425. In Blair v.Walker, 64 Ill.2d 1 (1976), Gov. Walker was sued for defamation when he issued a press release criticizing an individual who purchased the home of a senior citizen at a tax sale. The Court held that the Governor's statement was within the scope of his duties and held that it was absolutely

privileged. Id. at 10-11.

The Attorney General was found to have a similar absolute immunity for a press statement in People, ex rel. Hartigan v. Knecht, 216 Il.App.3d 843 (2nd Dist. 1991). A consumer fraud case was brought by the Attorney General's Office; a press release about the case was issued by the Attorney General's Office which the defendant alleged contained defamatory statements, and a counterclaim was filed. The Court found the statements absolutely privileged:

> It is the function and responsibility of the Attorney General to bring consumer fraud actions. As such, he must be allowed to keep the public informed of his actions without fear of personal liability. Educating and informing the public is just as much a part of the Attorney General's function as prosecuting fraudulent and deceptive practices. We find that his actions were essentially governmental in character and thus protected under the immunity doctrine.

Id. at 862. The absolute privilege has been applied to other officials' public statements or media statements as well. See, e.g., Dolatowski v. Life Printing & Publishing Co., 197 Ill.App.3d 23, 28-29 (1st Dist. 1990) (police chief's public statements about arrest, citing Morton); Williams v. Fischer, 221 Ill.App.3d 117, 118 (5th Dist. 1991) (coroner's statements on death certificate, citing Morton). In each case the Court found that the statements were within the scope of the official's duties and immunized. The doctrine of absolute public official immunity has been applied in other contexts as well for discretionary acts performed by public officials. See, e.g., Mora v. State, 68 Ill.2d 223 (1977) (alleged failure by State Dept. of Transportation officials to establish no-passing zone); Lusietto v. Kingan, 107 Ill.App.3d 239 (1969) (highway repair considered discretionary); Larson v. Darnell, 113 Ill.App.3d 975 (1973) (immunizing parole officials for discharge of inmate who committed crime after release); People v. Patrick J. Gorman

Consultants, Inc., 111 Ill.App.3d 729 (1982) (Attorney General and Assistant Attorneys General absolutely immune for civil prosecution of charitable solicitation laws).

The only question to be decided is whether the activities which form the basis of the allegations against Floyd Perkins and Attorney General Ryan were within the scope of the office's duties.

The Attorney General's Office participated in the Buntrock I litigation as an intervening party for the State of Illinois; and served an administrative subpoena pursuant to 760 ILCS 55/9, which explicitly authorizes the Attorney General to do so. Of course these are "core" functions of the office - - if issuing a press release is within the Attorney General's job responsibilities, issuing a subpoena and participating in cases as lawyer for the State are all the more so. These are activities well within the Attorney General's Office common law and constitutional powers, see People, ex rel. Scott v. Briceland, 65 Ill.2d 485 (1976) (Attorney General is constitutional officer authorized to represent people of the State in litigation).

If this state claim were allowed to proceed, it would open the door to repeated ancillary litigation against the Attorney General and his staff attorneys, subjecting them to suits for money damages for discretionary litigation decisions, or discretionary decisions to issue administrative subpoenas (which are common in a number of bureaus of the Office, including Consumer Fraud and Charitable Trusts). The absolute immunity doctrine expressed in Morton, Knecht, Blair, Gorman, and other cases is essential to the functioning of the Attorney General's Office, and plaintiffs' efforts to sue Attorney General Ryan and Assistant Attorney General Perkins for

litigation activities at the core of the Office's functions should be rejected.[2]

III. JAMES RYAN AND FLOYD PERKINS ARE ENTITLED TO SOVEREIGN IMMUNITY (735 ILCS 5/2-619)

Plaintiff has brought this action against James Ryan, Attorney General of Illinois and Floyd Perkins, Assistant Illinois Attorney General, however sovereign immunity bars Plaintiffs from bringing a state-law against both of these Defendants. 745 ILCS 5/1.

Illinois case law creates a three-part test for determining whether a defendant is entitled to sovereign immunity. Sovereign immunity exists where (1) the defendant is an arm of the State; (2) the plaintiff's action constitutes a "present claim" with the potential to subject the State to liability; and (3) no exceptions to the application of the doctrine exist. *See* Healy v. Vaupel, 133 Ill.2d 295, 308 (1990).

The first step in deciding whether a defendant is entitled to sovereign immunity is to determine whether the defendant is an arm of the State. Ellis v. Board of Governors, 102 Ill.2d 387, 390-91 (1984). The determination of whether an action is in fact a suit against the State turns upon an analysis of the issues involved and the relief sought, rather than the formal designation of the parties. Healy v. Vaupel, 133 Ill. 2d 295 (1990). An action brought nominally

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[2]Illinois law also affords an absolute litigation privilege to all attorneys for anything said or written in a legal proceeding, even when malice is assumed to have motivated the attorney's statements. Scheib v. Grant, 22 F.3d 149, 156 (7th Cir. 1994); Libco Corp. v. Adams, 100 Ill.App.3d 314 (1981). The privilege also covers out-of-court communications between attorneys pertaining to proposed or pending litigation. Libco, 100 Ill.App. at 316-17. The pertinency requirement is applied fairly broadly and need not be limited to specific issues involved in litigation. Id. Thus, for all attorneys, whether governmental or private, statements made in litigation, in court papers, to opposing counsel in or out of court, in mediation sessions, etc., would be absolutely privileged.

against a State employee in his individual capacity will be found to be a claim against the State where a judgment for the plaintiff could operate to control the actions of the State or subject it to liability. Gocheff v. State Community College, 69 Ill. App. 3d 178 (1979). There is no question that the Attorney General and his assistants are an arm of the state. See 15 ILCS 205/4 et. seq.

Turning to the second element, it cannot be contested that this action is a "present claim" with the potential to subject the State to liability. Therefore, the second element in establishing sovereign immunity has been met.

Similarly, there are no exceptions which would preclude the adoption of sovereign immunity upon Attorney General Ryan or his assistant Floyd Perkins. They are therefore immune from this action in Count VI for monetary damages. Plaintiff is therefore barred from bringing this action against the Attorney General Ryan or his assistant Floyd Perkins.

IV. COUNT VII, ALLEGING FEDERAL CLAIMS UNDER 42 U.S.C. §1983, FAILS TO STATE A CLAIM AND IS BARRED BY THE DOCTRINE OF ABSOLUTE AND QUALIFIED IMMUNITY. (735 ILCS 5/2-619)

Count VIII alleges that Attorney General Ryan and Assistant Attorney General Perkins deprived the Foundation of property in violation of the Fourteenth Amendment and the Foundation's First Amendment rights to free speech. Count VII also alleges that the state defendants violated the Commerce Clause (presumably by the settlement terms which keep the foundation based in Illinois) and impaired the Foundation's contractual obligations, in violation of Article I, §9 of the Constitution. These federal counts fail to state a cause of action and are barred by federal doctrines of absolute immunity and qualified immunity.

A. THE INDIVIDUAL BOARD MEMBERS LACK STANDING TO ASSERT THE FOUNDATION'S RIGHTS. (735 ILCS 5/2-619)

It is an axiomatic principle, both under Illinois and federal law of standing, that a party must assert his or her own rights and not the rights of third parties. Amtech Systems Corp. v. Ill. Toll Highway Authority, 264 Ill.App.3d 1095, 1103 (1st Dist. 1994). Town of Northville v. Village of Sheridan, 274 Ill.App.3d 784, 786 (3rd Dist. 1995). See also Allen v. Wright, 468 U.S. 737, 752 (1984); Shimer v. Washington, 100 F.3d 506, 508 (7th Cir. 1996). Plaintiffs do not claim their own property rights or speech rights or contract rights were damaged. They assert the Foundation's rights. Dissenting Board members do not own the Foundation or have a property interest in it. Moreover the Plaintiffs have not pled their action as a derivative action on behalf of the corporation. Nor do they, on their own, have the power to decide where the Foundation's art should go, or what contracts the Foundation should enter into. Plaintiffs' position on the state law claims is subject to the same objection. Plaintiffs, in essence, have sustained no injury in fact to a legally recognized interest of their own. See In re Marriage of Rodriguez, 131 Ill.2d 273, 280 (1989). They lack standing to sue.

Property interests are created by state law. Before a person can claim to be deprived of property, he or she must show, based on state law, some legitimate claim of entitlement to the particular status (such as continued employment, where the issue often arises) or property at issue. Board of Regents v. Roth, 408 U.S. 564 (1972). The Due Process Clause will not protect a person's mere expectation or interest in a particular property:

> Property in the constitutional sense is what is securely and durably yours under state (or...Federal) law, as distinct from what you hold

> subject to so many conditions as to make your interest meager, transitory, or uncertain.

Simpkins v. Sandwich Community Hospital, 854 F.2d 215, 218 (7th Cir. 1988). No individual Board member has a property interest in the Foundation's property. The Foundation's art belongs to the Foundation, an Illinois not-for-profit corporation, not to Mrs. Terra or Mr. Tucker; the Foundation's contracts are the Foundation's. Likewise, its First Amendment rights cannot be asserted by individual Board members. Because a clear majority of the Board has voted and the majority will was ratified in a Court-approved settlement, the dissenting members have no standing to assert rights of the Foundation as their own in this situation. If the majority of the Board believed there was some inducement to breach a fiduciary duty or some violation of the Foundation's rights, it would have the power to redress its own rights. Count VIII fails at the threshold level of standing. (To the extent the state law claim seeks relief purely intended to benefit the individual plaintiffs, it too fails for lack of standing).

B. NO PERSONAL INVOLVEMENT IS ALLEGED BY ATTORNEY GENERAL RYAN. (735 ILCS 5/2-615)

Attorney General Ryan is sued individually under section 1983 for money damages, yet there are no specific allegations against him in the amended complaint. Liability in a section 1983 case cannot be based on a theory of respondeat superior or vicarious liability. Gossmeyer v. McDonald, 128 F.3d 481, 495 (7th Cir. 1997); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). The State's interests in the Buntrock I litigation were represented by Floyd Perkins and the Charitable Trusts Division of the Attorney General's Office. In the complete absence of any

allegations that the Attorney General himself committed any constitutional violation, he should be dismissed from the case with prejudice.

C. ABSOLUTE PROSECUTORIAL IMMUNITY BARS THE CLAIMS AGAINST THE ATTORNEY GENERAL DEFENDANTS. (735 ILCS 5/2-619)

Criminal prosecutors are absolutely immune from damages liability under 42 U.S.C. §1983 for actions taken in prosecuting a criminal case. Imbler v. Pachtman, 424 U.S. 409 (1976). The holding of Imbler has been extended to governmental attorneys litigating administrative or civil cases. Butz v. Economou, 438 U.S. 478 (1978). In Butz, attorneys representing the federal government in an administrative hearing were held to have absolute immunity for their activity in prosecuting the administrative case. Id. at 515. Butz has been cited repeatedly as authority in the lower courts for the principle of absolute immunity for governmental lawyers in administrative and civil cases. See, e.g., Sloan v. HUD, 231 F.3d 10 (D.C. Cir. 2000) (prosecution of administrative sanctions); Scott v.Hurn, 216 F.3d 897 (10th Cir. 2000) (presenting civil commitment proceeding); Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484 (10th Cir. 1991) (Colorado Attorney General lawyers absolutely immune for medical misconduct prosecution); Fry v. Melaragno, 939 F.2d 832 (9th Cir. 1991) (IRS attorneys).

Closer to home, the Illinois Appellate Court has explicitly adopted the Butz holding in a case factually similar to this one. In People v. Patrick J. Gorman Consultants, 111 Ill.App.3d 729 (1st Dist. 1982), the Illinois Attorney General's Office filed suit in 1976 for violations of charitable solicitation laws. A counterclaim was filed alleging federal civil rights violations against the Attorney General and three Assistant Attorneys General. The Court found that the

Attorney General and staff attorneys were absolutely immune from the federal civil rights claims, citing Butz v. Economou. Id. at 111 Ill.App.3d 732.

The Attorney General defendants are absolutely immune under these cases. The activities that form the basis of plaintiffs' allegations - - filing pleadings, participating in settlement discussions, serving an administrative subpoena - - all relate to the litigation process and are absolutely protected from civil liability. If they were not protected, it would have a major deterrent effect on the ability of governmental lawyers to do their jobs, in exactly the same way judges would be deterred if they faced civil liability for every difficult ruling they made.

D. QUALIFIED IMMUNITY PROTECTS ATTORNEY GENERAL RYAN AND ASSISTANT ATTORNEY GENERAL PERKINS. (735 ILCS 5/2-619)

Even if they were not protected by absolute immunity, the state defendants would be protected by the federal-law doctrine of qualified immunity. The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages. The doctrine is designed to accommodate competing values. An action for damages may provide citizens with their only means of vindication when an official violates their constitutional rights. Courts, however, must also protect against the danger that the fear of being sued will hamper officials in the proper discharge of their duties. Qualified immunity allows courts to quickly terminate insubstantial lawsuits, without denying worthy claimants their day in court. Harlow v. Fitzgerald, 457 U.S. 800, 814, 73 L.Ed. 2d 396, 102 S.Ct. 2727 (1982). Officials cannot receive qualified immunity, however, if their conduct violated clearly established constitutional rights of which a reasonable person would have known. Id. at 818.

The Court must apply a two-step approach in determining whether the defense of qualified immunity applies. The threshold issue is whether there is any constitutional right asserted at all. As discussed earlier, no viable Federal claims are stated, and the case ends on that basis. If there is a claim stated, the Court must then consider whether the right was clearly established at the time the alleged violation occurred. Siegert v. Gilley, 500 U.S. 226, 232 (1991); Delaney v. DeTella, 256 F.3d 679 (7th Cir. 2001).

Plaintiffs have the burden of demonstrating that the defendants violated a constitutional right that was clearly established. Davis v. Scherer, 468 U.S. 183, 197, 82 L.Ed.2d 139, 104 S.Ct. 3012 (1984); Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987). The Supreme Court has provided courts with guidance in determining whether the law was clearly established at the time of an alleged constitutional violation. It is not enough to allege at a high level of generality that a defendant violated a plaintiff's right to due process or freedom of speech:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S.635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

The Seventh Circuit has made the same point: The right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful. "[O]ur conclusion is that the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." Colaizzi v. Walker, 812 F.2d 304,, 308 (7th Cir. 1987) (quoting Azeez v. Fairman, 795 F.2d 1296, 1301 (7th Cir. 1986)).

In Count VII of their complaint, Plaintiffs have failed to demonstrate how any conduct on the part of the Attorney General deprived the Foundation of property without due process of law (Comp. ¶ 95); deprived the foundation of their right of freedom of speech (Comp. ¶ 96); or impaired the Foundation's contractual obligations (Comp. ¶ 97). Notwithstanding the fact that the Plaintiffs have stated conclusory allegations in violation of Illinois pleading standards (735 ILCS 5/2-615), Small v. Sussman, 306 Ill.App.3d 639, 642 (1st Dist. 1999), there is no clearly established law that demonstrates that any of the conduct alleged in the complaint constitutes a violation of the civil rights of the Foundation.

At no time could it be said that any conduct by Floyd Perkins in the Buntrock I litigation was anything approaching the standard of "apparent" unlawfulness in violation of clearly-established constitutional rights, i.e. that anything transpiring in Buntrock I was a violation of the Commerce Clause, Contract Clause, First Amendment, or Due Process Clause. If anything, the "clearly-established" legal principle was the line of cases giving him absolute prosecutorial immunity for litigation activities.

The doctrine of qualified immunity, in addition to absolute immunity, bars all damage claims against Attorney General Ryan and Floyd Perkins. Plaintiffs' constitutional claims are not even colorable and fall far short of the standard needed to survive a motion to dismiss.

CONCLUSION

Plaintiffs' claims against the Attorney General and Floyd Perkins are similar to those raised in federal court against Mr. Perkins which Judge Bucklo summarily dismissed for lack of standing and on abstention grounds. Judge Bucklo noted, in dismissing the suit, that the

Assistant Attorney General had "undoubtedly legitimate authority to name Dr. Stebbins in a complaint and to investigate Dr. Marshall's school...." 151 F. Supp.2d at 937. (Emphasis added). This "undoubtedly legitimate authority" of an Assistant Attorney General is protected by absolute immunity, under both Illinois law (as applied to the state law claims of Count VI) and federal law (as applied to the federal law claims of Count VII). Again, defendants adopt the res judicata and collateral estoppel arguments raised by the co-defendant, Terra Foundation.

The defendants, Attorney General Ryan and Assistant Attorney General Floyd Perkins, request that their motion to dismiss be granted, and that the plaintiffs' complaint against them be dismissed in its entirety and with prejudice.

Respectfully submitted,

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16di-004521

JAN 0 8 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	(transferred to Chancery)
v.	)	
	)	Judge Julia M. Nowicki
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on the 4th day of January, 2002, the attached MOTION TO DISMISS and STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS were filed with the Clerk of the Circuit Court of Cook County, County Department, Chancery Division, at the Richard J. Daley Center, Room 500, Chicago, Illinois 60602, a copy of which is attached hereto.

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Attorney General of Illinois

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon the named individuals, indicated on the attached Service List, at their addresses, by mail, postage pre-paid, by depositing same in the U.S. mail located at 100 West Randolph Street, Chicago, IL 60601, on the 4th day of January, 2002.

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Assistant Attorney General

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	(transferred to Chancery)
	)	
v.	)	Judge Julia M. Nowicki
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

The defendants, Attorney General James E. Ryan and Assistant Attorney General Floyd Perkins, move the Court, pursuant to Section 2-619.1 of the Code of Civil Procedure, to dismiss the amended complaint against them with prejudice.

In support of this motion, defendants state as follows:

1. The case is barred by the doctrines of res judicata and collateral estoppel. (Section 2-619).

2. The complaint, as to all Counts and particularly with respect to Counts VI and VII which are directed at these defendants specifically, fails to state a cause of action against these defendants. (Section 2-615).

3. Count VI is barred by the doctrine of public official immunity. (Section 2- 619).

4. Count VI is barred by the doctrine of sovereign immunity. (Section 2-619).

5. Count VII is barred because plaintiffs lack standing to sue for violation of their rights under 42 U.S.C. §1983. (Section 2-619).

6. Count VII is barred as to Attorney General Ryan because there are no allegations of his personal involvement sufficient to state a cause of action against him. (Section 2-615).

7. Count VII is barred by the doctrine of absolute prosecutorial immunity. (Section 2-619).

8. Count VII is barred by the doctrine of qualified immunity. (Section 2-619).

A memorandum of law is submitted in support of this motion.

WHEREFORE, defendants request that the complaint against Attorney General Ryan and Assistant Attorney General Floyd Perkins be dismissed with prejudice.

Respectfully submitted,

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16dr-004526

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	Transferred from Law Division

THE TERRA FOUNDATION'S
MOTION TO DISMISS, *OR IN THE ALTERNATIVE TO STAY*,
COUNTS I, II AND IV OF PLAINTIFFS' AMENDED COMPLAINT

Now comes defendant Terra Foundation For the Arts ("the Foundation"), by its attorneys and pursuant to 735 ILCS 5/2-619.1, and hereby moves to dismiss Counts I, II, IV of plaintiffs' Amended Complaint. In further support thereof, the Foundation states as follows:

1. Plaintiffs' Amended Complaint contains seven counts, three of which are directed toward the Foundation. **Each of the Counts directed toward the Foundation ask this Court to review and to vacate the Consent Judgment and Order entered by Judge Kinnaird in *Buntrock, et al. v. Terra et al.*, No. 00 CH 13859 ("*Buntrock I*" or "the first lawsuit").** In that proceeding, plaintiffs raised several objections to the Consent Judgment and Order and the underlying settlement. After the submission of voluminous briefs and a five-hour hearing, Judge Kinnaird rejected each of plaintiffs' objections and entered the Consent Judgment and Order, ending *Buntrock I.*

On August 22, 2001, plaintiffs' appealed Judge Kinnaird's ruling and that appeal is presently pending in the First District Appellate Court.

2. The three counts directed toward the Foundation in this proceeding are as follows: *First*, in Count I, the plaintiffs seek declaratory relief setting aside the Consent Judgment and Order entered by Judge Kinnaird on the ground that the settlement upon which that order is based was "the product of conflicts of interest, breaches of fiduciary duties and unlawful interference by the Attorney General" and was "antithetical" to the Foundation's purposes. (Am. Cmplt. at 31.) *Second*, in Count II, the dissenting directors incredibly ask the Court to nullify the election of the five new directors on the ground that they "have not been properly elected" under the Foundation's bylaws and the terms of same Consent Judgment and Order plaintiffs ask the Court to vacate in Count I. *Third*, in Count IV, the dissenting directors (presumably) seek to set aside the Consent Judgment and Order on the ground that the underlying settlement constituted an *ultra vires* act.

3. The Foundation moves to dismiss Counts I, II, IV on three independent grounds:

(a) *First,* because Counts I, II, and IV ask this Court to review and to vacate the Consent Judgment and Order based on the same objections rejected by Judge Kinnaird in *Buntrock I*, those counts are barred by doctrines of *res judicata* and collateral estoppel and should be dismissed pursuant to 735 ILCS 5/2-619(a)(4). This argument is set forth on pages 10 through 18 of the Foundation's supporting memorandum, which is attached hereto and incorporated herein.

(b) *Second*, because Counts I, II, and IV involve the "same parties" and "same cause" as the pending appeal of *Buntrock I*, those counts should be dismissed pursuant to 735 ILC 5/2-619(a)(3). *In the alternative,* although the immediate dismissal of this action on *res judicata*/collateral estoppel and other grounds would best serve the interest by justice by definitively terminating this improper collateral attack on Judge Kinnaird's Consent Judgment and Order, this Court may stay this litigation under Section 2-619(a)(3) pending resolution of the dissenting directors' appeal of *Buntrock I.* This argument is set forth on pages 18 and 19 of the Foundation's supporting memorandum, which is attached hereto and incorporated herein.

(c) *Third,* because Counts I, II, and IV fail to allege facts sufficient to state a cause of action upon which relief can be granted, those counts should be dismissed pursuant to 735 ILCS 5/2-615. This argument is set forth on pages 19 through 25 of the Foundation's supporting memorandum, which is attached hereto and incorporated herein.

WHEREFORE, for the foregoing reasons and those stated in its supporting memorandum, defendant Terra Foundation for the Arts respectfully moves this Court to dismiss Counts I, II, and IV of plaintiffs' Amended Complaint *with prejudice* pursuant to Section 2-619.1. *In the alternative,* this Court should stay this litigation under Section 2-619(a)(3) pending resolution of the dissenting directors' appeal of *Buntrock I.*

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: _____

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, *et al.*,	)	Judge Julia M. Nowicki
Defendants.	)	Transferred from Law Division

NOTICE OF MOTION

TO: Attached Service List

On Wednesday, February 13, 2002 at 2:00 p.m., or as soon thereafter as counsel may be heard, we shall appear before the Honorable Judge Julia M. Nowicki or any Judge sitting in her stead, and then and there present **The Terra Foundation's Motion to Dismiss, or *In the Alternative* to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint**, a copy of which (along with a supporting memorandum and exhibits thereto) is hereby served upon you.

One of the Attorneys for: THE TERRA FOUNDATION FOR THE ARTS

Alan Nicgorski

Mulroy, Scandaglia, Marrinson, Ryan (#38050)

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Alan W. Nicgorski, certify that I caused to be served this notice and motion, together with a supporting memorandum and exhibits, by delivering a copy via messenger or via federal express to each of the counsel of record in the above captioned matter (see attached service list) by 5 p.m. on Friday, January 4, 2001.

Alan Nicgorski

Alan W. Nicgorski

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
Case No. 01 L 009112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, and JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, JAMES R. DONNELLEY, an individual, MARSHALL FIELD V, an individual, KATHLEEN A. FOSTER, an individual, ROBERT S. HAMADA, an individual, FREDERICK A. KREHBIEL, an individual, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, and FLOYD D. PERKINS, Assistant Illinois Attorney General, WINSTON & STRAWN, an Illinois Partnership, and SIDLEY & AUSTIN, an Illinois Partnership, Defendants.	No. 01 L 009112 Judge Julia M. Nowicki Transferred from Law Division

THE TERRA FOUNDATION'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO DISMISS, OR *IN THE ALTERNATIVE*
TO STAY, COUNTS I, II AND IV OF PLAINTIFFS' AMENDED COMPLAINT

This lawsuit is the latest chapter in a much-publicized dispute about the future of the Terra Foundation for the Arts ("the Foundation") and the Terra Museum of American Art ("the Museum"). In June 2001, the Foundation's Board of Directors approved, by a vote of 6 to 2, a settlement to end a lawsuit filed by certain directors that was pending in this Court before Judge Kinnaird. When the Foundation moved for the entry of a Consent Judgment and Order before Judge Kinnaird, the directors who opposed the settlement ("the dissenting directors") objected and asserted that Judge Kinnaird should reject the Consent Judgment and Order on the grounds that it was the product of director conflicts of interest, unlawful interference and coercion by the Attorney General, and inconsistent with the Foundation's purpose (*i.e., ultra vires*). After reviewing the dissenting directors' voluminous submissions and entertaining their arguments at a five-hour hearing, Judge Kinnaird rejected their objections and entered the Consent Judgment and Order on July 26, 2001. The dissenting directors appealed Judge Kinnaird's decision on August 22, 2001 but have taken no action to advance their appeal.

Notwithstanding Judge Kinnaird's rejection of their claims and their pending appeal, the dissenting directors – in Counts I, II and IV of their Amended Complaint -- now ask this Court to sit as a lateral Court of Appeals and to review and vacate the Consent Judgment and Order based on the very same objections considered and rejected by Judge Kinnaird. As explained in detail below, this Court should dismiss Counts I, II and IV of plaintiffs' Amended Complaint on three independent grounds: (1) the claims asserted therein are barred by well established principles of *res judicata* and collateral estoppel, 735 ILCS 5/2-619(a)(4) (*see infra* at 10-17); (2) there is another action – plaintiffs' appeal of Judge Kinnaird's decision – pending between "the same

parties for the same cause," 735 ILCS 5/2-619(a)(3) (*see infra* at 18-19);[1] and (3) those counts fail to plead sufficient facts to vacate the settlement agreement on any of the grounds asserted by plaintiffs, 735 ILCS 5/2-615 (*see infra* at 19-25).[2]

BACKGROUND

The Terra Foundation for the Arts ("the Foundation") is an Illinois not-for-profit corporation established by Daniel J. Terra in 1978. (Amended Complaint ("Am. Cmplt.") ¶ 27.) In 1980, the Foundation, with Mr. Terra as President and Chairman of the Board, established the Terra Museum of American Art ("the Museum") in Evanston, Illinois. (*Id.* ¶ 28.) In 1987, the Foundation moved the museum to its present downtown Chicago location at 664 North Michigan Avenue. (*Id.*) In 1992, the Foundation established a second museum: the Musee d'Art Americain in Giverny, France, the rural home of Claude Monet. (*Id.*) Today, the Foundation oversees the $175 million Terra Collection of American Art and $250 million in other assets. (*Id.* ¶¶ 7, 28.)

After Mr. Terra's death in 1996, the Foundation – and its Board of Directors – became embroiled in a dispute over whether the future of the Foundation was best served by maintaining its main museum in Chicago or by relocating the Terra Collection to a different city. (Am. Cmplt. ¶¶ 35-40.) This dispute culminated in the filing of the first lawsuit.

---

[1] *In the alternative,* this Court may exercise its discretion to stay this lawsuit pursuant to Section 2-619(a)(3) pending resolution of the dissenting directors' appeal of Judge Kinnaird's order.

[2] The Foundation's Motion To Dismiss addresses only Counts I, II and IV because the other Counts are not directed at the Foundation but rather are directed at the defendant law firms (Count III), the individual directors who voted in favor of the proposed settlement (Count V), and the Attorney General (Count VII).

I. The First Lawsuit: *Buntrock I*

On September 22, 2000, Directors Dean Buntrock and Ronald Gidwitz (collectively "the *Buntrock I* plaintiffs") sued the Foundation, Directors Judith Terra, Paul Hayes Tucker, and Alan K. Simpson, and Naftali Michaeli in the Circuit Court of Cook County, Chancery Division: *Buntrock, et al. v. Terra, et al.,* No. 00 CH 13859 (hereinafter "*Buntrock I*" or "the first lawsuit") (Exh. A). The *Buntrock I* plaintiffs sought, *inter alia*, a court order prohibiting the Foundation from moving the Museum out of Chicago. The Illinois Attorney General intervened in *Buntrock I* on September 25, 2000, aligning with the *Buntrock I* plaintiffs in their effort to keep the Foundation and Musuem in Chicago. *Buntrock I* was assigned to Judge Kinnaird.

II. The *Buntrock I* Mediation

After a contentious start to the litigation marked by extensive motion practice, the parties agreed to submit to mediation. (2/5/01 Order, Exh. B hereto.) The Court, with the support of Directors Terra, Tucker, and Simpson, selected David C. Hilliard to mediate *Buntrock* I. On June 19, 2001, after five months of intense mediation, a settlement proposal was agreed to by six Directors of the Foundation's Board, including the *Buntrock I* plaintiffs, and the Attorney General. ("Agreement to Entry of Consent Judgment," attachment to 6/19/01 Hilliard Ltr. To Board, Exh. C.) Among other things, the settlement agreement provided that the Museum would remain in Chicago for fifty years and that the Foundation would add five new directors to its Board. (*Id.*) A special meeting of the Foundation's Board of Directors was scheduled for June 29, 2001 to vote on the proposed settlement.

16di-004536

III. The Second Lawsuit: Terra, Tucker and Simpson Sue in Federal Court

In an attempt to stop the Board vote on the proposed Settlement, Directors Terra, Tucker and Simpson ("the dissenting directors") filed suit in federal court against Assistant Attorney General Floyd Perkins alleging that Perkins had intimidated Directors Stephanie Pace Marshall and Theodore Stebbins into supporting the proposed settlement: *Terra Foundation v.* Perkins, No. 01 C 4976 (N.D. Ill. 2001). (The Complaint in the Second Lawsuit is Exh. D hereto.) Among other relief, the dissenting directors sought a temporary restraining order enjoining Directors Marshall and Stebbins from participating in the June 29th vote on the proposed settlement. (Exh. E, ¶ 3.) The federal court dismissed the second lawsuit, exercising its discretion to abstain in favor of the pending state court proceedings under the *Younger* doctrine. *See generally Terra Foundation v. Perkins*, 151 F. Supp. 2d 931 (N.D. Ill. 2001) (Exh. F). However, the federal court also dismissed the second lawsuit on the additional ground that Perkins' alleged actions (naming Stebbins in a prospective lawsuit and investigating Dr. Marshall's school) were within his "legitimate authority" and that Stebbins' and Marshall's decision to support the settlement was lawful. *See* 151 F. Supp. 2d at 937.

IV. Judge Kinnaird Rejects The Dissenting Directors Motion For TRO

Having failed in federal court, the dissenting directors sought to stop the June 29th vote on the proposed settlement by filing a motion for a temporary restraining order in *Buntrock I.* The dissenting directors argued that the scheduled vote should be stopped on the grounds that Perkins had coerced Stebbins and Marshall into supporting the proposed Settlement and that the settlement would result in the Foundation taking *ulra vires* actions in violation of the Illinois Not For Profit Corporation Act, 805 ILCS

105/103.15(a). (Exh. G, Dissenting Directors' Mot. for TRO.) Judge Kinnaird denied the dissenting directors' request for a TRO. (Exh. H.)

V. The June 29th Meeting: The Board of Directors Approves the Settlement

On June 29, 2001, the Foundation held a properly noticed and convened Board meeting at which eight directors – a number sufficient to constitute a quorum – were present. (Exh. I, 6/29/01 Board Meeting Minutes.) After attendance was taken, Stebbins moved for adoption of the resolutions approving of, among other things, the settlement agreement, and the addition of five new directors – namely, James R. Donnelley, Marshall Field V, Kathleen A. Foster, Robert S. Hamada, and Frederick A Krehbiel. (Exh. J, Resolutions.) After each of the directors, including Ms. Terra, had an opportunity to argue the merits of the settlement and prior to the vote, Foundation Counsel Mark Heatwole ("Heatwole") asked Directors Stebbins and Marshall to address the allegations made by the dissenting directors that Assistant Attorney General Perkins coerced them into supporting the settlement:

> I think it's important for each one of you to . . . indicate before you take this vote, that you are voting freely, and you are voting with your fiduciary obligations to this board and this institution and without . . . that pressure. . . . I think the board ought to be on record and everybody ought to be clear that this vote is being taken without that pressure, without that, um, impediment.

(Exh. K, Tr. of 6/29/01 Board Meeting at 11.)

Marshall responded to Heatwole first, firmly asserting that she had arrived at her decision to support the settlement of her own free will:

> I have always walked . . . my own path, and I have always spoken with my own voice . . . to represent the integrity of my own convictions. . . . I have done it throughout this arduous process, and I do so now, with full knowledge of my fiduciary responsibilities. It is true, that the attorney general's office has

> asked the Illinois mathematics and science academy to respond to a fact-finding investigation. This has not played a part in my decision making with respect to my fiduciary responsibilities, as a board member of this Foundation. I believe now, as I have said before, that this motion [to adopt the resolutions settling the case] and settlement to be in the best long-term and sustainable interest of this remarkable Foundation.

(*Id.* at 27.)

> Likewise, Stebbins affirmed that he too was voting his free will:
>
> I abhor the personalized suit brought by the plaintiffs [Buntrock and Gidwitz]. . . . I feel very, very sympathetic for Judith Terra. I lament the behavior of Senator Simpson. I'm very saddened by the behavior of Paul Tucker. I abhor the threatening tactics of the attorney general, but I am voting my own conscience, and for what I believe is the best interests of the Foundation for its future as an independent, viable force in Chicago, and in France. For the promulgation of American art.

(*Id.* at 27.)

After these statements, the Foundation approved the resolutions, which included the settlement and the election of five new directors, by a vote of 6 to 2. (*Id.* at 29.)

VI. The Dissenting Directors Seek Leave To File Written Objections

On July 2, 2001, the dissenting directors filed a motion seeking a "fairness hearing" to demonstrate that the "proposed settlement is substantively and procedurally unsound." (Exh. L, Motion at 2.) In response to the dissenting directors' motion, Judge Kinnaird indicated that the Court would "seriously consider" any objections to the proposed settlement prior to entering the proposed Consent Judgment and Order. (Exh. M, Tr. of 7/2/01 Hearing at 32, 102.) Accordingly, the Court ordered the Foundation to file by July 6, 2001 a motion for entry of the Consent Judgment and Order based on the settlement approved by the Board. (*Id.* at 103.) The Court further allowed the dissenting

16di-004539

directors to file written objections to the settlement and set a hearing on the matter for July 24, 2001. (*Id.* at 104.)

VII. The Dissenting Directors Object To the Proposed Settlement.

After the Foundation filed its Motion for Entry of Consent Judgment and Order (Exh. N), the dissenting directors filed a twenty-eight page brief laying out in detail their objections to the proposed settlement. (Exh. O, Objections.) In their brief, the dissenting directors urged Judge Kinnaird to set aside the settlement on at least three grounds: (1) Directors Marshall and Stebbins should have not have been allowed to participate in the vote because they had a conflict of interest due to the Attorney General's supposedly "threatening" actions towards them; (2) the Attorney General unlawfully coerced Directors Marshall and Stebbins into voting in favor of the settlement; and (3) the settlement required the supporting Directors to "abdicate their fiduciary duties" by endorsing a mission for the Foundation that was "antithetical" to the Foundation's purposes or "*ultra vires.*" (*Id.* at 13-23.) The dissenting directors asserted that the "evidence" presented in support of their objections was "more than enough to require the Court to reject [the settlement]." (*Id.* at 3.)

The Foundation, Directors Buntrock and Gidwitz (the *Buntrock I* plaintiffs), and the Attorney General separately filed responses to these objections. The dissenting directors then filed a reply brief in support of their objections. (Exh. P.) In total, over several hundred pages in briefing documents (including legal memoranda, exhibits, and case law), and a tape recording of the June 29, 2001 Board meeting were submitted to Judge Kinnaird in advance of the July 24th hearing.[3]

[3] In addition, on July 20, 2001, the dissenting directors sought leave to file counterclaims against Attorney General James Ryan, Assistant Attorney General Floyd Perkins, the Foundation, and each of the Directors

16di-004540

VIII. The July 24th Hearing: Judge Kinnaird Rejects the Dissenting Directors' Objections and Enters the Consent Judgment and Order.

On July 24, 2001, Judge Kinnaird held a five-hour hearing to consider the dissenting directors' objections to the proposed settlement. (*See* Tr. of 7/24/01 Hearing Volumes I and II, Exhs. S & T hereto.) Judge Kinnaird considered each of the dissenting directors' objections, noting that she had read all of the papers submitted by the objectors including their briefs, exhibits, and cases. (Exh. T at 123.) Judge Kinnaird ultimately rejected each of the dissenting directors' objections, holding that (1) neither Director Marshall nor Stebbins suffered from a "conflict of interest" and both properly participated in the vote on the proposal settlement (*id.* at 133-34); (2) the settlement was not the product of coercion or other unlawful acts by the Attorney General (*id.* at 126-27, 130); and (3) the settlement was not inconsistent with the Foundation's purpose (*id.* at 127-28.) The Court then entered the Consent Judgment and Order (Exh. U) and denied the dissenting directors' motions to join additional defendants, to file counterclaims, and to take additional discovery. Finally, Judge Kinnaird expressed her hope that with the entry of the Consent Judgment and Order, "the business of art will be able to go ahead, as opposed to the business of litigation." (Exh. T at 131.)

IX. The Dissenting Directors File This Lawsuit.

Judge Kinnaird's hopes were dashed a few days later when the dissenting directors filed this lawsuit: *Tucker et al. v. Buntrock et al.* (01 L 009112) (hereinafter *Buntrock II*). *Buntrock II*, which was later amended to join additional defendants, is substantially a restatement of the objections rejected by Judge Kinnaird. The Amended

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who voted in favor of the proposed settlement at the June 29th board meeting. The dissenting directors' proposed counterclaims in *Buntrock I* are nearly identical to their Complaint in *Buntrock* II. (*See* Proposed Verified Answers, Affirmative Defenses, and Counterclaims, Exhs. Q & R.)

16di-004541

Complaint names as defendants: the six directors who supported the settlement (Buntrock, Gidwitz, Marshall, Stebbins, Margaret Daley and Arthur Hartman); the five new directors named in the settlement and elected at the June 29 meeting (Marshall Field V, Kathleen A. Foster, Robert S. Hamada, Frederick Krehbiel, and James R. Donnelly); the Foundation; Attorney General Ryan; Assistant Attorney General Perkins; and the two law firms that represented the Foundation in *Buntrock I* (Winston & Strawn and Sidley & Austin).

The Amended Complaint alleges seven counts, three of which appear to be directed at the Foundation. *First*, in Count I, the dissenting directors seek declaratory relief setting aside the Consent Judgment and Order entered by Judge Kinnaird on the ground that the settlement upon which that order is based was "the product of conflicts of interest, breaches of fiduciary duties and unlawful interference by the Attorney General" and was "antithetical" to the Foundation's purposes. (Am. Cmplt. at 31.) *Second*, in Count II, the dissenting directors incredibly ask the Court to nullify the election of the five new directors on the ground that they "have not been properly elected" pursuant to the terms of same Consent Judgment and Order plaintiffs ask the Court to vacate in Count I. *Third*, in Count IV, the dissenting directors (presumably) seek to set aside the Consent Judgment and Order on the ground that the underlying settlement constituted an *ultra vires* act.

X. The Dissenting Directors File a Notice of Appeal in *Buntrock I*

On August 22, 2001, Directors Tucker, Terra, and Simpson filed their Notice of Appeal, asking the appellate court to "vacate the order of July 26, 2001" (*i.e.*, the Consent Judgment and Order) and "remand this cause for a new hearing, or . . . such

other relief that that Court shall deem just and proper." (Notice of Appeal at 2, attached as Ex. V.) Despite filing their Notice of Appeal five months ago, the dissenting directors have done nothing to advance their appeal.

ARGUMENT

I. Counts I, II and IV Should Be Dismissed As Barred By *Res Judicata* and Collateral Estoppel (735 ILCS 5/2-619(a)(4)).

The well-established doctrines of *res judicata* and collateral estoppel bar parties from relitigating claims and issues that were decided in an earlier lawsuit. Specifically, *res judicata* bars a second lawsuit when (1) the parties in the first and second case are the same; (2) the first case resulted in a final judgment rendered by a court of competent jurisdiction; and (3) the second lawsuit is based on the same claim, demand or cause of action as the first lawsuit. *See River Park v. City of Highland*, 184 Ill. 2d 290, 302 (1998). Likewise, collateral estoppel bars the relitigation of issues decided in a previous proceeding when (1) the party against whom estoppel is asserted was a party to the first proceeding; (2) the first suit resulted in a final judgment; and (3) the issue decided in the first lawsuit is identical to the issue presented in the second lawsuit. *See Taylor v. Peoples Gas Light & Coke Company*, 275 Ill. App. 3d 655, 660 (1st Dist. 1995).

Here, in Counts I, II, and IV of their Amended Complaint, the dissenting directors ask this Court to set aside the *Buntrock I* Consent Judgment and Order on the same grounds that were presented to and rejected by Judge Kinniard in that lawsuit. Because the doctrines of *res judicata* and collateral estoppel bar plaintiffs from

relitigating those same claims and issues here, Counts I, II and IV should be dismissed with prejudice. [4]

A. *Buntrock I* and this lawsuit involve the same parties.

The plaintiffs in this action – Tucker, Terra and Simpson – were parties in *Buntrock I*, as were defendants Buntrock, Gidwitz, Assistant Attorney General Perkins and the Foundation. Thus, for purposes of both *res judicata* and collateral estoppel, the "same parties" requirement is met.

B. *Buntrock I* resulted in a final judgment for *res judicata* and collateral estoppel purposes.

Buntrock I ended when Judge Kinnaird entered the Consent Judgment and Order that dismissed that action with prejudice. (Exh. U.) Under Illinois law, "a consent decree operates to the same extent for *res judicata* purposes as a judgment entered after contest and is conclusive with respect to the matters which were settled by the judgment or decree." *City of Matoon v. Mentzer*, 282 Ill. App. 3d 628, 635 (4th Dist. 1996). Likewise, collateral estoppel applies to Judge Kinnaird's rejection of the dissenting directors' objections to the settlement agreement at the July 24th hearing. *See DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 86 (2001) ("Collateral estoppel may apply to determinations made prior to the entry of a settlement agreement disposing of the underlying litigation."). Accordingly, the "final judgment" element is also met.

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[4] Essentially, plaintiffs are asking this Court to review and vacate the Consent Judgment and Order entered by Judge Kinnaird. Plaintiffs simply are not entitled to seek such so-called "declaratory relief" in a different lawsuit. Rather, plaintiffs may seek relief from the Consent Judgment and Order in two ways: (1) filing a 735 ILCS 5/2-1401 petition for relief from judgment in *Buntrock I* (which they have not done); or (2) filing an appeal (which they have done). Because plaintiffs must seek relief under Section 2-1401 in the "same proceeding in which the order or judgment was entered" (*i.e., Buntrock I*) and because this Court may not sit as a Court of Appeals in review of Judge Kinnaird's decision, plaintiffs are entitled to no relief in this proceeding and their Complaint should be dismissed.

16di-004544

C. Plaintiffs assert the same objections to the settlement in this lawsuit that were rejected by Judge Kinnaird in *Buntrock I*.

The final element required for the application of *res judicata* and collateral estoppel is also met because plaintiffs raise the "same claims" and "same issues" that were raised and rejected in *Buntrock I*. To determine whether a subsequent lawsuit is based on the "same claim" for *res judicata* purposes, Illinois courts apply the liberal "transactional" test. *See River Park*, 184 Ill. 2d at 311. Under that test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* The "same claim" therefore includes not only those contentions that were offered and rejected in the first proceeding, but includes any other contentions that might have been raised in the first proceeding. *See LaHood v. Couri*, 236 Ill. App. 3d 641, 645 (3rd Dist. 1992). In contrast to the liberal transactional test, the "same issue" element of the collateral estoppel doctrine is "narrowly tailored" and requires that the issue raised in the second proceeding be "identical" to the issue determined in the first proceeding. *See Nowak v. St. Rita School*, 197 Ill. 2d 381, ---, 757 N.E.2d 471, 478 (2001).

Here, Counts I and IV clearly satisfy either the "same claim" or "same issue" test because those counts not only arise from the "same operative group of facts" as the dissenting directors failed objections in *Buntrock I* but also involve the identical issues litigated in that proceeding. Accordingly, those counts are barred under either *res judicata* or collateral estoppel principles. Likewise, Count II is also barred by *res judicata* because the claims made therein either were raised or should have been raised in the first proceeding.

1. Because Counts I and IV Are Based on the Same Claims and Issues Raised and Rejected in *Buntrock I,* They Are Barred Under *Res Judicata* and Collateral Estoppel Principles.

In Count I, the dissenting directors' seek to set aside the Consent Judgment and Order entered by Judge Kinnaird in *Buntrock I* on three grounds: (1) Directors Marshall's and Stebbins' votes in favor of the settlement were "the product of conflicts of interest"; (2) the settlement was the product of the Attorney General's "unlawful interference," including the coercion of Marshall and Stebbins; and (3) the settlement is "incompatible with the Foundation's purpose." (Am. Cmplt. at 31.) Similarly, in Count IV, the dissenting directors seek relief on the ground that the settlement was *ultra vires* within the meaning of the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a), a contention which is essentially a restatement of the third ground asserted in Count I. (*Id.* at 34.) Judge Kinnaird rejected each of these contentions in *Buntrock I.*

a. In *Buntrock I,* Judge Kinnaird ruled that Directors Marshall and Stebbins did not suffer from conflicts of interest and legitimately participated in the June 29th vote in favor of the proposed settlement.

In *Buntrock I,* plaintiffs vigorously urged Judge Kinnaird to reject the proposed Consent Judgment and Order on the ground that Directors Marshall's and Stebbins' votes in favor of the settlement were invalid because they had a conflict of interest due to the Attorney General's supposedly "threatening" actions towards them. (*See, e.g.*, Exh. O at 2, 14-18, 22-24; Exh. P at 4-7; Exh. S at 36, 78-122; Exh. T at 10-63.) Judge Kinnaird, however, flatly rejected this objection, stating:

> I am not finding that under the Illinois Not-for-Profit Act that . . . there were interested Board members that should not have participated. . . .

> ***They could properly participate in this decision and they did properly participate in this decision.***

(Exh. T at 133-34) (emphasis added).

Nonetheless, in Count I here, the dissenting directors ask this Court to reverse Judge Kinnaird's decision and to set aside the Consent Judgment and Order on the ground that Marshall and Stebbins suffered from "conflicts of interest" due to the Attorney General's supposedly "threatening" tactics. (Am. Cmplt. ¶¶ 75-76, 99(a).) However, because this identical claim was raised and rejected in *Buntrock I,* the doctrines of *res judicata* and collateral estoppel bar plaintiffs from relitigating their "conflict of interest" claim in this case. Accordingly, to the extent Count I relies on the "conflict of interest" allegations, it should be dismissed.

b. In *Buntrock I*, Judge Kinnaird ruled that the Attorney General did not coerce Directors Marshall or Stebbins into supporting the settlement or otherwise act unlawfully.

In *Buntrock I,* the dissenting directors also argued that the settlement agreement should be set aside because the Assistant Attorney General Perkins had unlawfully inserted himself into the settlement process by using his official powers to coerce Directors Marshall and Stebbins into supporting the proposed settlement. (*See, e.g.*, Exh. O at 2, 10-14.) Again, Judge Kinnaird disagreed:

> [Dr. Marshall] was in control. She was running that [June 29, 2001] meeting and she was controlling some very difficult situations and early on in this meeting she said, without any hesitation, that if they made a change she wasn't going to go [vote] for this thing [Consent Judgment]. She didn't like the change that had been advanced by Dr. Stebbins and she wasn't going to go along with it. ***And this was not a lady who was being intimidated by anybody.***
>
> ***I also did not feel that there was intimidation of Dr. Stebbins in this case.*** . . . I just simply don't see it.

(Exh. T at 126-27) (emphasis added). Moreover, the Court dismissed the dissenting directors' generalized allegations of improper interference by the Attorney General's office:

> I do not see [this] as a case in which there has been abuse of power and I definitely don't see it as a case in which the State has tried and succeeded to take control of a charitable foundation. The Attorney General is not controlling this Foundation, as being alleged in the papers.

(*Id.* at 130.)[5]

Undeterred, plaintiffs now ask this Court to set aside the Consent Judgment and Order based on the same allegations of coercion and unlawful interference rejected by Judge Kinnaird. Accordingly, the doctrines of *res judicata* and collateral estoppel require dismissal of Count I to the extent it is based on allegations of coercion and unlawful interference by the Attorney General.

c. In *Buntrock I*, Judge Kinnaird rejected the dissenting directors' assertion that the settlement was contrary to the Foundation's purposes (*i.e., ultra vires*).

In *Buntrock I*, the dissenting directors also urged Judge Kinnaird to set aside the proposed settlement on the ground that the settlement was "antithetical" to the Foundation's purposes. (*See, e.g.*, Exh. O at 2, 14, 18-22.) Yet again, Judge Kinnaird rejected the dissenting directors' objection:

> And I don't see this settlement, as the objectors have said as being antithetical . . . to the Foundation's purposes. And that it precludes the Foundation from recruiting the best and brightest worldwide to serve on the Board. This is not a very limiting document as far as this Foundation is concerned. This Foundation is going to be able to pretty much operate the way that it has. It will be able to

[5] Additionally, in dismissing the dissenting directors' federal lawsuit ("the second lawsuit"), Judge Bucklo held that the Attorney General's actions (naming Stebbins in a prospective lawsuit and investigating Dr. Marshall's School) were within his "legitimate authority." *See* 151 F. Supp. 2d at 937 (Exh. F).

conduct its mission of providing education and art throughout the world.

(Exh. T at 127-28.)

Nonetheless, in Counts I and IV of their Amended Complaint, plaintiffs now ask this Court to revisit Judge Kinnaird's decision and set aside the Consent Judgment and Order as "incompatible with the Foundation's purpose" or "*ultra vires*." (Am. Cmplt. ¶¶ 99(a), 109.) However, the doctrines of *res judicata* and collateral estoppel prevent plaintiffs' from relitigating that claim (or issue) in this proceeding. Accordingly, to the extent Counts I and IV are based on *ultra vires* allegations, they should be dismissed.

2. Count II is also barred by *res judicata.*

In Count II, plaintiffs seek to vacate the election of the five new directors (Donnelley, Field, Foster, Hamada and Krehbiel) to the Foundation's Board on the grounds that those Directors were not properly elected under (1) the Foundation's bylaws and (2) the Consent Judgment and Order.

First, plaintiffs' contention that the addition of the new directors is contrary to the Foundation's bylaws is barred by *res judicata.* Because plaintiffs do not point to any specific bylaw in support of this contention, it is difficult to ascertain the precise nature of plaintiffs' claim in Count II. However, the Foundation's best guess is that plaintiffs are again asserting the conflict of interest theory raised in Count I, *i.e.,* that the election of the five new directors violated the bylaws because Directors Marshall and Stebbins participated in the vote despite a "conflict of interest." As discussed above, that claim is barred by the doctrines of *res judicata* and collateral estoppel because the

identical contention was rejected by Judge Kinniard in *Buntrock I.* (*See supra* at pp. 13-15.)

Moreover, even if plaintiffs intend to raise an objection based on the bylaws they did not raise in *Buntrock I,* they are barred from doing so here because they had ample opportunity to raise that objection – whatever it is -- in the first proceeding and failed to do so. *See LaHood,* 236 Ill. App. 3d at 645 (*res judicata* bars not only the relitigation of those contentions that were offered and rejected in the first proceeding, but also any other contentions that might have been raised in the first proceeding). Indeed, at the hearing on plaintiffs' objections, Judge Kinnaird specifically addressed the provision concerning the election of the five new directors and the dissenting directors' did not raise any objection to that provision. (Exh. S at 57-62.) Having failed to raise their objection then, *res judicata* bars plaintiffs from now challenging a provision of a valid Consent Judgment and Order entered by a court of competent jurisdiction. *See City of Matoon,* 282 Ill. App. 3d at 635 (*res judicata* bars relitigation of matters settled by consent judgment). Accordingly, to the extent Count II attempts to set aside the addition of the five new directors based on the Foundation's bylaws, it should be dismissed.

Second, even apart from the patent absurdity of plaintiffs' attempt to rely on the very Consent Judgment and Order they vehemently assert is invalid, plaintiffs' assertion that the addition of the new directors was not "in compliance with the Consent Judgment and Order" (Am. Cmplt. ¶ 103(a)) is not properly brought before this Court. Paragraph 13 of the Consent Judgment and Order expressly provides that:

> The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment and Order and for such further orders and directions as may be necessary or appropriate for the construction or effectuation of this Consent Judgment and Order.

(Exh. U .) Thus, if plaintiffs genuinely believe the Foundation is not complying with Judge Kinnaird's order *vis-à-vis* the election of the five new directors, their remedy is not the initiation of a new lawsuit, but rather an action asking Judge Kinnaird to enforce the terms of that order. Accordingly, to the extent Count II seeks enforcement of the Consent Judgment and Order, it should be dismissed.[6]

II. Counts I, II and IV Should Be Dismissed Pursuant To Section 2-619(a)(3) Because the Dissenting Directors' Pending Appeal in *Buntrock I* Involves the "Same Parties" and the "Same Cause." *In the Alternative*, this Lawsuit Should Be Stayed Pending Resolution of That Appeal.

In addition to dismissing Counts I, II and IV as barred by *res judicata* and collateral estoppel principles pursuant to Section 2-619(a)(4) of the Illinois Code of Civil Procedure, this Court should dismiss those counts pursuant to Section 2-619(a)(3) in light of the plaintiffs' pending appeal of *Buntrock I*. (Exh. V (Notice of Appeal).) Section 2-619(a)(3) provides that a lawsuit should be dismissed when "there is another action pending between the same parties for the same cause." The purpose of that section is to "foster orderly procedure by preventing a multiplicity of actions" and the Court's analysis "should be geared toward effectuating that purpose." *Illinois Central Gulf. R.R. v. Goad*, 168 Ill. App. 3d 541, 544 (4th Dist. 1988).

Here, this case and the *Buntrock I* appeal indisputably involve the "same parties." (*See supra* Argument Section I.A.) Likewise, this case and the *Buntrock I* appeal involve the "same cause." Indeed, much like the *res judicata* analysis above, two

[6] Given that a majority of the Board of Directors approved the proposed settlement, including the addition of the five new directors, at the June 29th Board meeting, plaintiffs' assertion that an additional election is required to effectuate the terms of the Consent Judgment and Order is absurd. Indeed, the Court's order ***requires*** the Foundation to name the five new directors; thus, any additional "election" would be a mere formality. Moreover, the Board subsequently ratified its actions at the June 29th meeting – including the election of the five new directors – at a Board meeting on August 1, 2001.

"causes" are the "same" for the purposes of section 2-619(a)(3) if they "arise out of the same transaction or occurrence." *Terracom Develop. Group v. Village of Westhaven*, 209 Ill. App. 3d 758, 762 (1st Dist. 1991). Put another way, "two actions are for the same cause where 'relief is requested on substantially the same set of facts.'" *Id.* (quoting *Skolnick v. Martin*, 32 Ill. 2d 55, 57 (1964)). As discussed in Section I.C above, the dissenting directors seek to set aside the Consent Judgment on the same grounds (conflict of interest, coercion/unlawful interference, *ultra vires*) in both this case and the *Buntrock I* appeal. Thus, dismissal of this action will serve Section 2-619(a)(3)'s purpose of promoting judicial economy. Moreover, Judge Kinnaird's decision to enter the Consent Judgment and Order over the dissenting directors' objections is properly reviewed by the Appellate Court, not by a different Judge of the same Court. Accordingly, Counts I, II and IV should be dismissed pursuant to Section 2-619(a)(3).[7]

III. Counts I, II and IV Also Should Be Dismissed Pursuant to Section 2-615 Because They Fail To State A Cause of Action.

Even if Counts I, II and IV could avoid dismissal under Sections 2-619(a)(3) and (a)(4), and they cannot, those counts nonetheless should be dismissed pursuant to Section 2-615 because they fail to state a viable cause of action. As discussed above, Count I asks this Court to set aside the Consent Judgment and Order entered by Judge Kinnaird on three grounds: (1) Directors Marshall's and Stebbins' votes in favor of the settlement were "the product of conflicts of interest"; (2) the settlement was the product of the Attorney General's "unlawful interference," including the coercion of

[7] Although the Foundation believes that dismissal of this action on res judicata/collateral estoppel and other grounds at this juncture would best serve the interest by justice by definitively terminating this improper collateral attack on Judge Kinnaird's Consent Judgment and Order, this Court may – *in the alternative* – stay this litigation under Section 2-619(a)(3) pending resolution of the dissenting directors' appeal of *Buntrock I*. *See Couri v. Korn*, 203 Ill. App. 3d 1091, 1093-94 (3rd Dist. 1990) (Court has to discretion stay proceedings under Section 2-619(a)(3)).

Marshall and Stebbins; and (3) the settlement is "incompatible with the Foundation's purpose" (*i.e., ultra vires*). (Am. Cmplt. at 31.) In Count II, as best the Foundation can tell, the dissenting directors seek to set aside the election of the five new directors on the first ground raised in Count I, *i.e.,* that Directors Marshall and Stebbins should have been barred from participating in the election of the new directors due to alleged "conflicts of interest." In Count IV, the dissenting directors seek additional relief on the third ground asserted in Count I: that the settlement was incompatible with the Foundation's purpose and thus *ultra vires* within the meaning General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a). (*Id.* at 34.) Because plaintiffs fail to allege sufficient facts to support their "conflict of interest," "coercion/unlawful interference" or *ultra vires* claims, Counts I, II and IV should be dismissed.

A. Counts I and II Should Be Dismissed To The Extent They Rely on Allegations Concerning Marshall and Stebbins Supposed Conflict of Interest.

Whether a director of a not-for-profit corporation has a "conflict of interest" regarding a matter before the Board is governed by section 108.60 of the Illinois' General Not For Profit Corporation Act of 1986 (the "Act"), 805 ILCS 105/108.60. Under this section, a director of a corporation has a conflict of interest if he is either "directly or indirectly a party to the transaction." 805 ILCS 105/108.60(c). There is no dispute that Directors Marshall and Stebbins were not direct parties to the settlement agreement that resulted in Judge Kinnaird's Consent Judgment and Order or to the *Buntrock I* lawsuit. Thus, the only question is whether Directors Marshall and Stebbins had an "indirect" interest in that transaction within the meaning of the Act.

Under the Act, a director is "indirectly" a party to a transaction "if the other party to the transaction is an entity in which the director has a *material financial interest* or of which the director is an officer, director, or general partner." 805 ILCS 105/108.60 (emphasis added).[8] Plaintiffs do not – and cannot – allege that Directors Marshall and Stebbins had a "material financial interest" in the June 29, 2001 vote so as to disqualify their participation. Nor does the Complaint allege that Marshall and Stebbins were officers or directors of any other entity that was a party to or had a financial interest in the transaction. Absent such allegations, Count I fails to allege sufficient facts to state a viable "conflict of interest" claim. Accordingly, to the extent Counts I and II seek relief based on Marshall's and Stebbins' alleged "conflict of interest," those counts should be dismissed.

B. Count I fails to allege any unlawful conduct or coercion by the Attorney General.

In addition to the conflict of interest allegations, Count I also seeks to set aside the Consent Judgment and Order entered by Judge Kinnaird on the ground that the Attorney General unlawfully interfered in *Buntrock I* by coercing Marshall and Stebbins into supporting the proposed settlement. To set aside a settlement agreement on the basis of coercion, plaintiffs must show: (1) a wrongful or illegal act or threat against a person which (2) deprives him of the exercise of his free will. *See Regengold v. Baby Fold, Inc.*, 68 Ill. 2d 419, 433 (1977). Plaintiffs have not – and indeed cannot – allege sufficient facts to satisfy either element.

[8] *See also* Foundation's Conflicts of Interest Policy, adopted 11/06/98 ("Interested person" defined as a director "who has a *direct or indirect financial interest*" to a transaction) (emphasis added, attached as Exh. W hereto.)

16di-004554

First, plaintiffs have failed to allege any unlawful acts by the Attorney General necessary to establish the first element of the coercion test. The Plaintiffs essentially claim Assistant Attorney General Perkins coerced Directors Marshall and Stebbins into voting for the proposed settlement agreement by threatening the institution of judicial and administrative proceedings in unrelated matters. In the case of Marshall, Perkins began a fact-finding inquiry into the Illinois Academy of Mathematics and Science, where Marshall serves as president. (Am. Cmplt. ¶¶ 62-66.) In the case of Stebbins, Perkins named him in a "draft" state court complaint charging conflict of interest due to Stebbins' alleged representation of multiple parties at art auctions. (Am. Cmplt. ¶¶ 54-61.) As Judge Bucklo held in the second (federal) lawsuit, both the Attorney General's fact-finding inquiry concerning Dr. Marshall's school and the threatened lawsuit against Stebbins constituted perfectly lawful acts and thus fail to support a claim of coercion. *See Terra Foundation for the Arts v. Perkins*, 151 F. Supp. 2d 931, 937 (N.D. Ill. 2001) (citing cases). Thus, plaintiffs' "coercion/unlawful interference" claim fails on this ground alone.

Second, even if plaintiffs could allege unlawful conduct by the Attorney General, and they cannot, they do not allege that either Marshall or Stebbins were "deprived of their free will." In fact, plaintiffs' own allegations demonstrate that Directors Marshall and Stebbins' freely arrived at their decision to support the settlement. Indeed, with respect to Dr. Marshall, plaintiffs allege that Dr. Marshall "insisted that the [Attorney General's] investigation 'had not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of the Foundation.'" (Am Cmplt. ¶ 71.) Similarly, plaintiffs allege that Dr. Stebbins insisted that – while he

"abhorred the threatening tactics of the Attorney General" – he "was voting his 'own conscience'" in supporting the settlement. (*Id.* ¶ 72.) Thus, far from alleging facts sufficient to support their assertion that Directors Marshall and Stebbins were coerced, plaintiffs own allegations demonstrate that those directors arrived at their decision to support the settlement of their own free will. On this ground as well, plaintiffs' "coercion/unlawful interference" claim fails. Accordingly, to the extent that Count I seeks to set aside the settlement agreement based on coercion or unlawful interference by the Attorney General, it should be dismissed.

C. Counts I and IV should be dismissed because the Foundation's approval of the settlement was not expressly prohibited by its Articles of Incorporation or By-Laws.

Finally, in both Counts I and IV, plaintiffs assert that the settlement should be set aside because it was "incompatible with the Foundation's purpose to propagate American art in the United States and abroad," or, put another way, *ultra vires*. (Am. Cmplt. ¶¶ 99(a), 108-110.) To succeed on this claim, plaintiffs must demonstrate that the settlement agreement embodied in the Consent Judgment and Order is ***expressly*** prohibited by the Foundation's Articles of Incorporation. *See Sherrard State Bank v. Vernon*, 243 Ill. App. 122 (2d Dist. 1926); *Stroh v. Blackhawk Holding Co.*, 48 Ill. 2d 471, 475 (1971) (powers and limitations of a corporation are found in its articles of incorporation and by-laws). Because plaintiffs do not – and indeed cannot – point to a provision of the Foundation's Articles of Incorporation and By-Laws that expressly

prohibits the Foundation from agreeing to the terms of the Consent Judgment and Order, Counts I and IV fail to state a viable *ultra vires* claim.[9]

Indeed, the only provision of the Articles of Incorporation and by-laws referenced in the plaintiffs' Amended Complaint allows the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

(Am. Cmplt. ¶ 30.) It cannot be reasonably disputed that this provision does not prohibit – but in fact expressly allows – the continued operation of a museum in Chicago as provided for in the Consent Judgment and Order. In fact, no other provision of the Articles of Incorporation or by-laws – cited by plaintiffs or not – expressly prohibits the continued operation of a museum in Chicago. On this basis alone, plaintiffs' *ultra vires* claim fails.

In fact, the Foundation's decision to agree to the settlement embodied in the Consent Judgment and Order is not only allowable under the Articles of Incorporation and By-laws, but is perfectly consistent with their mandate to promote American art "both in the United States and abroad." Indeed, the Consent Judgment and Order expressly provides that the Foundation "shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad)" and that the "Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants." (Exh. U ¶ 4.) Further:

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[9] Because they are incorporated by reference in plaintiffs' Amended Complaint and for the Court's convenience, the Foundation includes the complete Articles of Incorporation and By-Laws as Exhibits X and Y to its Motion to Dismiss.

> The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France. . . . Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

(*Id.* ¶ 5.) As Judge Kinnaird observed in *Buntrock I*, the Consent Judgment and Order is not the draconian document plaintiffs make it out to be, but rather permits the Foundation wide latitude to manage its own affairs.

Moreover, the Illinois Not For Profit Corporation Act specifically empowers the Board of Directors to amend the Articles of Incorporation and by-laws of the Foundation as they did here. *See* 805 ILCS 105/102.55, 110.05. Thus, the Foundation's approval of the settlement was permissible under its Article of Incorporation, By-Laws, and Illinois law. The dissenting directors were entitled to vote against the proposed settlement; however, now that they have done so and lost, they are not entitled to judicial relief merely because they disagree with the Board's vote. Accordingly, to the extent Counts I and IV seek to set aside the Consent Judgment and Order on the ground that it is "inconsistent with the Foundation's purposes" or "*ultra vires*," those counts should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss Counts I, II and IV of plaintiffs' Amended Complaint with prejudice, thereby dismissing the Foundation as a party to this litigation and allowing it to return to the business of art, as opposed to the business of litigation.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

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EXHIBITS TO

THE TERRA FOUNDATION'S
MEMORANDUM IN SUPPORT
OF ITS MOTION TO DISMISS,
OR IN THE ALTERNATIVE,
TO STAY, COUNTS I, II, AND IV
OF PLAINTIFFS' AMENDED COMPLAINT
(01/04/01)

IN SEPARATE REDWELD

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	JAN 05 2002
Plaintiffs,	)	No. 01 L 009112
v.	)	(Transferred to Chancery Division)
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

NOTICE OF FILING

TO: See attached Service List

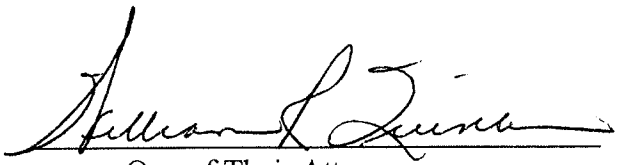
PLEASE TAKE NOTICE that on January 4, 2002, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **Section 2-619.1 Motion to Strike and Dismiss Counts I, IV, and V of the Amended Complaint** and **Memorandum of Law in Support of Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint**, a copy of which is

16di-004562

attached and hereby served upon you.

Respectfully submitted,

DEAN BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

By: 
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Doc:185898

CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and correct copies of the attached **Notice of Filing** and **Section 2-619.1 Motion to Strike and Dismiss Counts I, IV, and V of the Amended Complaint** and **Memorandum of Law in Support of Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint**, to be served on the attorneys listed on the attached service list on January 4, 2002, by messenger delivery before 5:00 p.m. or by Federal Express, as indicated.

[X] Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth herein are true and correct.

Doc:185898

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16di-004565

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

JAN 0 5 2002

No. 01 L 009112

(Transferred to Chancery Division)

SECTION 2-619.1 MOTION TO STRIKE AND
DISMISS COUNTS I, IV AND V OF AMENDED COMPLAINT

Defendants, Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Carroll, Ltd., hereby move this Court to strike and dismiss counts I, IV and V of the amended complaint pursuant to sections 2-606, 2-615, 2-619,

16di-004567

and 2-619.1 of the Illinois Code of Civil Procedure. In further support of their motion, defendants state as follows:

1. Plaintiffs' amended complaint is an improper attempt to undermine and vacate the consent judgment and order entered in the matter *Buntrock and Gidwitz v. Terra, et al.*, 00 CH 13859 ("*Terra I*"). The issues and claims raised in counts I, IV and V of the amended complaint have previously been considered and rejected by the court in *Terra I*. In fact, plaintiffs are currently appealing *Terra I* and that appeal is pending. Thus, as set forth further and incorporated herein by reference in defendants' memorandum of law in support of its motion to strike and dismiss counts I, IV and V of the amended complaint, defendants move for dismissal pursuant to section 2-619(a)(3) and (a)(4) on the grounds that the matter is currently pending before the appellate court and is barred by res judicata and collateral estoppel.

2. Defendants also move to dismiss counts I, IV and V of the amended complaint pursuant to section 2-606 as a result of plaintiffs' failure to attach a copy of the consent judgment on which plaintiffs' claims for relief are based.

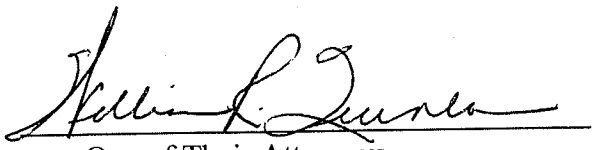
3. In addition, defendants move for dismissal of counts I, IV and V pursuant to section 2-615 because plaintiffs have failed to state a claim for declaratory relief, breach of fiduciary duty, or *ultra vires* acts. Plaintiffs are seeking to vacate the consent judgment and argue that it is *ultra vires* and that Board members who voted in favor of the consent judgment breached fiduciary duties by doing so. Plaintiffs have failed to allege any facts to support such claims and, as set forth further in the memorandum of law, these claims should be denied.

WHEREFORE, for all these reasons, as well as those set forth in the memorandum of law filed concurrently herewith and incorporated herein by reference, defendants Buntrock, Daley,

Gidwitz, and Hartman respectfully request that this Court strike and dismiss counts I, IV and V of the amended complaint pursuant to sections 2-606, 2-615, 2-619, and 2-619.1 of the Illinois Code of Civil Procedure, and enter any other relief that this Court deems fair and just.

Respectfully submitted,

DEAN L. BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

By: 
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAN 0 5 2002

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

(Transferred to Chancery Division)

MEMORANDUM OF LAW IN SUPPORT OF SECTION 2-619.1 MOTION TO STRIKE AND DISMISS COUNTS I, IV AND V OF AMENDED COMPLAINT

Defendants, Dean L. Buntrock, Margaret Daley, Ronald Gidwitz, and Arthur Hartman, by and through their attorneys, Quinlan & Carroll, Ltd., state as follows as their memorandum of law in support of their section 2-619.1 motion to strike and dismiss counts I, IV and V of the

16di-004571

amended complaint:

INTRODUCTION

By this motion, defendants move this Court to strike and dismiss counts I, IV and V of the amended complaint on numerous grounds.[1] The crux of plaintiffs' complaint is to undermine and challenge the consent judgment and order entered in the matter *Buntrock and Gidwitz v. Terra, et al.*, 00 CH 13859 (hereinafter "*Terra I*"). A copy of that consent judgment and order is attached hereto as Exhibit A. Plaintiffs' attempt to seek review of *Terra I* in this Court while, at the same time, appealing *Terra I* to the Appellate Court amounts to improper litigation of the same cause in two forums. Moreover, counts I, IV and V are simply plaintiffs' attempt to relitigate issues that were presented, litigated, and ruled on in *Terra I*. Thus, not only is review of these issues reserved to the Appellate Court, but plaintiffs' effort to relitigate these issues here is barred by the well-established doctrines of res judicata and collateral estoppel. Indeed, the only proper forum for plaintiffs' claims is the Appellate Court. Accordingly, as set forth below, this Court should strike and dismiss counts I, IV and V of the amended complaint.

RELEVANT FACTUAL BACKGROUND

Terra Foundation

The Terra Foundation for the Arts (the "Foundation") was established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit an extensive collection of American

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[1] Count II seeks a declaratory judgment regarding the addition of new members to the Foundation's Board. Count II does not seek direct relief against the individual defendants and is therefore not specifically addressed in this motion; however, the individual defendants expressly incorporate and adopt the Foundation's motion and memorandum to dismiss to the extent it addresses Count II. Defendants also incorporate and adopt the motion and memorandum filed by defendants Stebbins and Marshall.

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Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate a museum in the Chicago area. The Foundation's assets now total approximately $450 million, including investments, real estate, and a valuable collection of American art.

Terra I

In September, 2000, Dean Buntrock and Ronald Gidwitz, directors of the Foundation, filed *Terra I*. A copy of the complaint in *Terra I* is attached hereto as Exhibit B. That case was assigned to the Honorable Dorothy Kirie Kinnaird. In *Terra I*, Buntrock and Gidwitz sought a declaratory judgment, injunctive and other relief to protect the Foundation from *inter alia*, breaches of fiduciary duties by certain directors of the Foundation, namely, Judith Terra, Paul Tucker and Alan Simpson.[2] At issue in *Terra I* was an attempt by Simpson, Tucker and Terra to close the museum in Chicago and move the Foundation, an Illinois charitable trust, out of Illinois. Within days of the filing of *Terra I*, the Illinois Attorney General intervened as a party plaintiff to protect the interests of the people of the State of Illinois as the beneficiary of the Foundation.

Settlement of *Terra I*

Throughout the pendency of *Terra I* before Judge Kinnaird, from September 2000 to July 2001, an extraordinary number of substantive motions were filed and decided in this matter. Judge Kinnaird heard no less than 30 motions, including 10 motions for injunctive relief. After months of litigation, the complexity and volatility of the case motivated all the parties, particularly the current *Terra II* plaintiffs, to agree to participate in mediation. Accordingly, on

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[2] Specifically, the individual defendants in *Terra I* are now the plaintiffs in the current matter, *Terra, et al. v. Buntrock, et al.* ("*Terra II*").

February 5, 2001, Judge Kinnaird entered an agreed order submitting this case for mediation. The mediation process continued for over 4 months and resulted in a mediated settlement on June 29, 2001. The settlement was encompassed in a proposed consent judgment and order ("consent judgment") that required approval by both the Board and Judge Kinnaird.

The Consent Judgment and Order

The consent judgment was approved by Board members Buntrock, Gidwitz, Daley, Hartman, Marshall, and Stebbins — a clear majority of the Board. Specifically, the consent judgment provides as follows:

- For at least 50 years from the court's entry of the consent judgment, the Foundation will remain an Illinois corporation and maintain its principal office and corporate headquarters in Illinois. Throughout that 50 years, the Foundation's books and records will remain in Illinois and be available to the Attorney General of Illinois for inspection upon reasonable advance notice to the Foundation.

- For at least 50 years from the entry of the consent judgment, the Foundation will maintain and exhibit the Terra Collection of American Art, either by itself or through partnerships and arrangements with other institutions, in the Chicago metropolitan area.

- After 50 years, if the Foundation desires to maintain and exhibit the collection elsewhere, the Foundation must give one year's advance written notice to the Attorney General of Illinois of its intent to cease maintaining its principal office, corporate headquarters and books and records in Illinois. The Attorney General may take whatever action he deems appropriate in response to the receipt of any such notice.

- The Foundation is free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and

for scholarly use, to make loans and acquire works for, and de-acceession works from, the Collection.

- The consent judgment and order shall not in any way interfere with the Foundation's ability to continue and conduct its activities, operations and programs in Giverny, France.

- The Foundation bylaws would be amended to expand the Board to 15 members and establish an 8 year term limit for all directors by August 1, 2001.

- For at least 25 years from the entry of the consent judgment, the majority of the Board must be residents of Illinois (except that until the December 31, 2002 meeting or the 2002 annual meeting, whichever occurs first, 50% of such Board positions shall be held by Illinois residents).

- All current members of the Board will only serve until the 2002 annual meeting and will not be eligible to stand for future election to the Board.

- *Terra I* was dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its directors.

Efforts to Prevent Settlement

Significantly, the defendants in *Terra I* — now the plaintiffs in *Terra II* — disagreed with the settlement reached by the majority of the Board and engaged in various measures to prevent the Board's approval of the settlement and the entry of the consent judgment by Judge Kinnaird.[3]

On June 28, 2001, Terra, Tucker and Simpson attempted to prevent the Board's vote on the settlement by filing an action in the United States District Court for the Northern District of Illinois, *Terra, et al. v. Floyd Perkins*, 01 CV 4976, alleging undue influence of the Attorney

[3] Terra, Tucker, and Simpson's specific objections to the consent judgment are set forth further in section IIIa.

General. The federal action was filed on the eve of the Board meeting in which the consent judgment was scheduled to be voted on by the Board. The federal court, Judge Elaine E. Bucklo presiding, dismissed that action the same day. In a 12-page opinion, Judge Bucklo held that, *inter alia*, the federal court lacked jurisdiction to hear Terra, Tucker and Simpson's claims and that they lacked standing to bring the claims.

On June 29, 2001, after the first attempt to block the Board's approval of the consent judgment, Terra, Tucker and Simpson sought an emergency injunction in the Circuit Court of Cook County before Judge Kinnaird to stop the June 29 meeting. Judge Kinnaird denied their motion for a temporary restraining order and allowed the June 29, 2001 meeting to proceed.

Approval of the Settlement by the Board and the Court

On June 29, 2001, the Board voted by a vote of 6 to 2 to adopt the consent judgment. The lone dissenters were Terra and Tucker. Indeed, at the meeting, in direct response to the objections by Terra, Tucker and Simpson, Stebbins and Marshall expressly stated that their vote was not the result of any coercion or indue influence by the Attorney General. *See* Transcript from June 29, 2001 Board meeting, attached as Exhibit C, pp. 26-28.

Shortly thereafter, the Foundation requested the court approve and enter the consent judgment. Judge Kinnaird allowed the filing of objections by Terra, Tucker and Simpson to the consent judgment.[4] The matter was extensively briefed and, on July 24, 2001, Judge Kinnaird heard over 5 hours of arguments from the parties. After thoroughly considering all arguments, on July 26, 2001, Judge Kinnaird signed and entered the consent judgment that settled this matter

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[4] The objections raised by Terra, Tucker, and Simpson are discussed in detail in section IIIa.

and dismissed *Terra I*.

August 1, 2001 Board Meeting

The consent judgment provided that five directors would be added to the Board by August 1, 2001 and each would be elected to a four year term. The consent judgment reflecting the consensus of the original Board, specifically named the five directors: James R. Donnelly, Marshall Field, V, Dr. Kathleen A. Foster, Professor Robert S. Hamada, and Frederick A. Krehbiel. On August 1, 2001, the Foundation held a Board meeting and welcomed the new directors. Since August 1, 2001, the Board has conducted its business on behalf of the Foundation.

Terra II

On July 31, 2001, Terra, Tucker and Simpson initiated this action, *Terra II*. Initially, *Terra II* was filed in the Law Division but was transferred to the Chancery Division and reassigned to Judge Kinnaird based on its relatedness to *Terra I*. Shortly thereafter, Judge Kinnaird granted plaintiffs' motion for substitution of judge as a matter of right. On November 20, 2001, this Court granted plaintiffs' leave to file an amended complaint, naming Sidley, Austin, Brown & Wood and Winston & Strawn — counsel for the Foundation — as defendants. A copy of the amended complaint is attached as Exhibit D.

Appeal from *Terra I*

On August 22, 2001, Terra, Tucker and Simpson filed their notice of appeal from Judge Kinnaird's order entering the consent judgment. A copy of the notice of appeal is attached hereto as Exhibit E.

Parties in *Terra I* and *Terra II*

The plaintiffs in *Terra I* were Dean Buntrock and Ronald Gidwitz, directors of the Foundation. The defendants in *Terra I* were Judith Terra, Paul Tucker, Alan Simpson, Naftali Michaeli,[5] and the Foundation. The Illinois Attorney General intervened as a plaintiff on behalf of the people of the State of Illinois.

The plaintiffs in *Terra II* are Judith Terra, Paul Tucker, and Alan Simpson — the individual director defendants in *Terra I*. The defendants in *Terra II* are all members of the Board that voted in favor of the consent judgment, the five new directors of the Board, the Foundation, Attorney General James E. Ryan, Assistant Attorney General, Floyd Perkins, and the two law firms that represented the Foundation.

ARGUMENT

I. THIS COURT SHOULD DISMISS COUNTS I, IV AND V OF THE AMENDED COMPLAINT PURSUANT TO SECTION 2-619(a)(3).

This Court should dismiss counts I, IV and V of the amended complaint pursuant to section 2-619(a)(3) because "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3).[6] Dismissal under section 2-619(a)(3) is appropriate to avoid duplicative litigation. *Southwest Financial Bank of Orland Park v. McGrath*, 200 Ill. App. 3d 736, 558 N.E.2d 441 (1st Dist. 1990). Here, there is an appeal pending in *Terra I* that seeks the same relief sought in counts I, IV and V and thus dismissal under section 2-619(a)(3) is proper.

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[5] Mr. Michaeli has never been a member of the Board and is not involved in *Terra II*.

Specifically, the *Terra II* plaintiffs have appealed Judge Kinnaird's entry of the consent judgment in *Terra I*. The appeal in *Terra I* is currently pending before the First District, Appellate Court.[7] Counts I, IV and V of the amended complaint are an improper effort by plaintiff to appeal *Terra I* to a court of coordinate jurisdiction while, at the same time, pursuing an appeal before the appellate court. Section 2-619(a)(3) provides for dismissal when, as here, the same cause is pending in another forum. Accordingly, plaintiffs may not pursue the same claims in two forums and counts I, IV and V should be dismissed.

Counts I, IV and V of the amended complaint purport to challenge the consent judgment by a variety of legal theories which have already been litigated in *Terra I* and are now subject of a pending appeal in that matter: count I of the amended complaint seeks a declaration that the settlement is unlawful; count IV alleges that the approval of the consent judgment by the Board constituted an *ultra vires* act; and count V alleges that the board members who voted in favor of the consent judgment breached their fiduciary duties.

The purpose of section 2-619(a)(3) is to further the interest of judicial economy and to avoid a multiplicity of actions. *Schnitzer v. O'Connor*, 274 Ill. App. 3d 314, 318, 653 N.E.2d 825, 828 (1st Dist. 1995). Illinois courts have recognized that this section should be applied liberally in furtherance of these goals. *Id.* Under Illinois law, dismissal pursuant to section 2-619(a)(3) is proper when, as here, the same claim is pending on appeal. *See Wheatley v. International Harvester Co.*, 166 Ill. App. 3d 775, 520 N.E.2d 975 (5th Dist. 1998); *In re Ordinance Requesting the Annexation of Certain Territory to the Village of Willowbrook*, 62 Ill.

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[7] Although plaintiffs' opening brief was due in January 2002, plaintiffs have moved for a second extension of time to file the record of proceedings and record on appeal.

App. 2d 45, 210 N.E.2d 25 (2nd Dist. 1965) (pendency of appeal from order of disconnection is proper grounds to dismiss of annexation action).

Illinois courts have held that the definition of "same parties" for purposes of section 2-619 does not require that the parties be identical. *Id.* at 318, 653 N.E.2d at 828. The requirement of "same parties" is satisfied if the litigants' interests are sufficiently similar, even though the litigants differ in name or number. *Id.* Here, the litigants' interests are sufficiently similar: the *Terra I* appellants and *Terra II* plaintiffs are seeking to invalidate the consent judgment in *Terra I*. Moreover, the *Terra I* appellants and *Terra II* plaintiffs are the same. The appellees in the *Terra I* appeal are the Terra Foundation, Ronald Gidwitz and Dean Buntrock. As to counts I, IV and V, defendants Daley, Hartman, Stebbins and Marshall are the only "new" parties — they were not individually named in *Terra I*. However, the interests of these "new" parties is sufficiently similar to that of the appellees' in the *Terra I* appeal because these individuals, like Buntrock and Gidwitz, are all directors on the Board and they all voted in favor of the consent judgment and thus have the same interest in preserving the settlement allowing the Foundation's business to proceed after lengthy litigation.

In addition, the appeal in *Terra I* and the relief sought in *Terra II* is for the "same cause" as required by section 2-619(a)(3). Two actions are for the "same cause" under section 2-619 if the relief sought is requested on substantially the same set of facts. *Schnitzer*, 274 Ill. App. 3d at 319, 653 N.E.2d at 829. The central inquiry is whether the two actions arise out of the same transaction or occurrence, and not whether the legal theories or the relief sought materially differs between the actions. *Id.* Here, regardless of the legal theory advanced by plaintiff, counts I, IV and V seek to invalidate the consent judgment. The appeal in *Terra I* also seeks to invalidate the

consent judgment. The appeal and counts I, IV and V all arise out of the same set of facts: the mediation, the consent judgment, the alleged coercion by the Attorney General, the Board's vote on the consent judgment, and the alleged conflict of interest of Stebbins and Marshall. Thus, pursuant to section 2-619(a)(3), counts I, IV and V of the amended complaint should be dismissed due to the pendency of the appeal in *Terra I*.

II. THIS COURT SHOULD DISMISS COUNTS I, IV AND V OF THE AMENDED COMPLAINT PURSUANT TO SECTION 2-606.

Plaintiffs failed to attach a copy of the consent judgment to the amended complaint and, for this reason, this Court should dismiss counts I, IV, and V pursuant to section 2-606. Section 2-606 provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or so much of the same as is relevant, must be attached to the pleading as an exhibit or cited therein . . ." *See* 735 ILCS 5/2-606. Counts I, IV, and V of the amended complaint are expressly founded upon the consent judgment approved by the Foundation.[8] Moreover, plaintiffs fail to attach the Foundation's articles and bylaws. Counts I, IV, and V are also predicated on purported violations of the bylaws and articles. Failure to comply with the requirements of section 2-606 is grounds for dismissal of a complaint. *Plocar v. Dukin' Donuts of America*, 103 Ill. App. 3d 740, 431 N.E.2d 1175 (1st Dist. 1981). Accordingly, counts I, IV, and V should be dismissed.

III. COUNTS I, IV AND V SHOULD BE DISMISSED PURSUANT TO SECTION 2-619(a)(4).

Dismissal is appropriate where, as here, the cause of actions are barred by a prior

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[8] Count I seeks a declaratory judgment invalidating the consent judgment; count IV alleges that the Board's approval of the consent judgment is an *ultra vires* act; and count V alleges a breach of fiduciary duty by the Board members that voted in favor of the consent judgment.

judgment. 735 ILCS 5/2-619(a)(4). The court in *Terra I* entered and approved the consent judgment and as a result, considered and rejected the claims alleged in count I (declaratory judgment), count IV (ultra vires), and count V (breach of fiduciary duty). As discussed further below, the doctrines of res judicata and collateral estoppel bar plaintiffs' attempt to relitigate certain claims

A. Relitigation Of Prior Objections To The Consent Judgment.

After the Board approved the consent judgment in *Terra I*, the Foundation filed a motion seeking the court's approval of the consent judgment. In response, Terra, Tucker and Simpson submitted numerous objections.

In particular, plaintiffs argued that the consent judgment was not approved by the Board because directors Stebbins and Marshall had a conflict of interest that prevented them from voting. The purported conflict of interest was based on the alleged undue influence of the Attorney General. Specifically, as to Stebbins, it was argued that Stebbins voted in favor of the settlement because the Assistant Attorney General circulated a proposed amended complaint at the start of mediation that named Stebbins as a defendant. As to Marshall, it was argued that her vote was conflicted because the Assistant Attorney General investigated the Illinois Mathematics and Science Academy (where Marshall serves as President) and that she allegedly voted in favor of the settlement as a result of the investigation. According to plaintiffs, if the votes of Marshall and Stebbins were not counted, then the consent judgment did not receive the number of votes necessary to change the Foundation's bylaws. Here, count IV of the complaint alleges that the approval of the consent judgment was *ultra vires* because it contravened the Foundation's Articles of Incorporation and bylaws.

Plaintiffs also argued in *Terra I* that the consent judgment required the abandonment of the fiduciary obligations owed by the directors of the Foundation to the beneficiaries because the consent judgment violated the corporate purpose and resulted in waste of the Foundation's assets. Plaintiffs argued that the Foundation's purpose was violated and its assets wasted because the consent judgment limited its directors to Illinois residents, required it to remain in Illinois for 50 years, and limited the Foundation to "partnering" with an Illinois institution. Here, count IV alleges that by voting for the consent judgment, the directors violated their fiduciary duty to the Foundation.

In addition, plaintiffs objected to the consent judgment because of the alleged coercion of the Attorney General and his assistant. Here, in count I, plaintiffs seek a "declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad."

B. The Court's Prior Rulings On the Issues Raised In Counts I, IV, and V.

The court in *Terra I* considered and rejected the claims alleged in counts I, IV, and V. For example, with regard to the issue that the consent judgment was not approved by the Board in accordance with Illinois law and was based on conflicts of interests (counts I and IV), the court ruled:

> I am not finding that under the Illinois-Not-For-Profit Act that they (Stebbins and Marshall) are an interested – that they were interested Board members that should not have participated . . . They could properly participate in this decision and they did properly participate in this decision.

Ex. F, Transcript of Proceedings July 24, 2001, Vol. II, pp. 133-34.

The court ruled with regard to the issue of the alleged improper interference by the Attorney General: "I do not see it as a case in which there has been abuse of power and I definitely don't see it as a case in which the State has tried and succeeded to take control of a charitable Foundation. The Attorney General is not controlling this Foundation, as being alleged in the papers." *Id.*, p. 130.

In addition, the court also rejected the objection that the consent judgment was inconsistent with the Foundation's purpose and the director's fiduciary duties:

> And I do not see this settlement, as the objectors have said as being antithetical — I am reading from the document – antithetical to the Foundation's purposes. And that it precludes the Foundation from recruiting the best and brightest worldwide to serve on the Board.
>
> This is not a very limiting document as far as this Foundation is concerned. This Foundation is going to be able to pretty much operate the way that it has. It will be able to conduct its mission of providing education and art throughout the world . . .
>
> But I don't read this Consent Decree as the restrictive document that counsel for the defendant has said that it is.
>
> I think this collection can be moved around and loaned and shown throughout the world and everybody, including the people of the State of Illinois, are going to benefit from that.

Id., p. 127-28.

C. Counts I, IV, and V Should Be Dismissed Pursuant To The Doctrine Of Collateral Estoppel.

Collateral estoppel applies when a party participates in two separate and consecutive cases arising out of different causes of action and some controlling fact or question material to the determination of both cases has been adjudicated against the party in the former suit by a

court of competent jurisdiction. *See St. Paul Fire & Marine Insurance Company v. Lefton Iron & Metal Co.*, 296 Ill. App. 3d 475, 694 N.E.2d 1049 (5th Dist. 1998). When some specific fact or question has been directly in issue and decided upon and the same fact or question is again put in issue by the same parties or their privies, the former adjudication is conclusive on the parties whether or not the cause of action is the same. *Preferred America Ins. v. Dulceak*, 302 Ill. App. 3d 990, 706 N.E.2d 706 (2d Dist. 1999) (tort judgment against insured collaterally estopped insurer from relitigating liability of insured). Collateral estoppel is properly invoked when the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication. *DuPage Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 744 N.E.2d 845 (2001); *Illinois State Chamber of Commerce v. Pollution Control Board*, 78 Ill. 2d 1, 398 N.E.2d 9 (1979). As set forth below, each of these three elements is satisfied in this case.

Here, the issues alleged in counts I, IV, and V are identical to the issues decided in *Terra I*; namely, the alleged conflict of interest of Stebbins and Marshall, whether Stebbins and Marshall's vote violated the Foundation's bylaws, the alleged interference by the Attorney General, the alleged violations of the Articles and bylaws caused by the consent judgment, and the alleged breach of fiduciary duties. The circuit court in *Terra I* considered and rejected these issues by approving the consent judgment.

The court's rulings on the objections to the consent judgment constitute adjudications on the merits for purposes of collateral estoppel. The Illinois Supreme Court has recognized that:

'[w]hen an issue is properly raised, by the pleadings or otherwise,

> and is submitted for determination, and is determined the issue is actually litigated within the meaning of this Section.'

DuPage, 195 Ill. 2d at 85, 744 N.E.2d at 852, citing Restatement (Second) of Judgments, § 27, Comment, D at 255 (1982). The consent judgment was the result of a mediated settlement between the parties in *Terra I*.[9] The court expressly approved the consent judgment and rejected plaintiffs' objections to the consent judgment. Collateral estoppel may apply to determinations made prior to the entry of a settlement agreement disposing of the underlying litigation. *Knodle v. Jeffrey*, 189 Ill. App. 3d 877, 545 N.E.2d 1017 (2d Dist. 1989) (interlocutory orders became final judgments when parties settled and agreed to dismiss claims with prejudice). Here, the consent judgment dismissed *Terra I* with prejudice and was thus, a final judgment on the merits.

A dismissal with prejudice pursuant to settlement is deemed to be as conclusive of rights of parties as if the matter had proceeded to trial and been resolved by final judgment. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896, 713 N.E.2d 239, 241 (4th Dist. 1999 (successor owner was barred by res judicata from relitigating issue subject of settlement agreement between defendant and original owner). In fact, defendants have essentially conceded

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[9] Defendants recognize that, in general, courts are reluctant to give preclusive effect to consent judgments because at times the extent to which issues are actually litigated in suits ending in consent judgments is often in doubt. *See Ekkert v. City of Lake Forest*, 225 Ill. App. 3d 702, 588 N.E.2d 482 (2d Dist. 1992) (federal consent order would not have preclusive effect due to lack of identity of issues or parties and it was unclear whether relevant issue was actually litigated in federal action). This case is distinguishable in that plaintiffs are challenging the ultimate validity of the consent judgment itself. Moreover, there is no doubt that the issues plaintiffs are raising were expressly considered and rejected by the circuit court in *Terra I*. The consent judgment, as a court approved settlement that resulted from court ordered mediation, should, similar to arbitration awards, be given the same res judicata or collateral estoppel effect as court judgments. *See Peregrine Financial Group, Inc. v. Martinez*, 305 Ill. App. 3d 571, 712 N.E.2d 861 (1st Dist. 1999); *Rosee v. Board of Trade of City of Chicago*, 43 Ill. App. 3d 203, 239 356 N.E.2d 1012, 1036-7 (1st Dist. 1976) (arbitration award entitled to preclusive effect and barred litigation alleging identical issues).

the finality of *Terra I* by filing a notice of appeal of the consent judgment in that case.

Finally, plaintiffs here were defendants in *Terra I*. Thus, the requirement of identity of parties is satisfied. Accordingly, the doctrine of collateral estoppel is applicable and precludes plaintiffs from relitigating counts I, IV, and V.

D. Counts I, IV, and V Should Be Dismissed Based On Res Judicata.

The doctrine of res judicata also prevents plaintiffs from relitigating the claims alleged in counts I, IV, and V. The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 703 N.E.2d 883 (1998) (affirming dismissal of complaint on grounds that dismissal of federal complaint was a final adjudication for purposes of res judicata). Res judicata bars relitigation of matters decided in the first action, as well as those matters that could have been decided. *River Park*, 184 Ill. 2d at 303, 703 N.E.2d at 889; *LaSalle National Bank v. County Board of School Trustees*, 61 Ill. 2d 524, 529, 337 N.E.2d 19 (1975). Here, the matters raised in counts I, IV, and V were decided in *Terra I* when the court rejected plaintiffs' objections and entered the consent judgment.

There are three requirements for res judicata: (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of parties or their privies, and (3) an identity of cause of action. *River Park*, 184 Ill. 2d at 303, 703 N.E.2d at 889. Each of these requirements is satisfied here.

First, there was a final judgment on the merits rendered in *Terra I*. Indeed, plaintiffs are appealing that final judgment — the consent judgment. A judgment entered by consent of the

parties operates in the same manner as any other judgment for res judicata purposes, and is conclusive with respect to matters settled by the judgment. *City of Mattoon v. Mentzer*, 282 Ill. App. 3d 628, 635, 668 N.E.2d 601, 606 (4th Dist. 1996) (consent decree was res judicata); *Barth v. Reagan*, 146 Ill. App. 3d 1058, 497 N.E.2d 519 (2d Dist. 1986); *Elliot v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 728, 589 N.E.2d 1074, 1077 (2d Dist. 1992); *Wascher v. Lundeen*, 111 Ill. App. 2d 452, 250 N.E.2d 318 (4th Dist. 1969); *Village of Maywood Bd. of Fire and Police Com'rs v. Dep't of Human Rights of State of Ill.*, 296 Ill. App. 3d 570, 580, 695 N.E.2d 873, 881 (1st Dist. 1998) (no res judicata because court in prior action lacked subject matter jurisdiction). Any other interpretation would effectually nullify all settlements because the same claim would be subject to the possibility of future litigation and double recovery. *Elliot*, 226 Ill. App. 3d at 728, 589 N.E.2d at 1077; *see also Arnett v. Environmental Science & Engineering, Inc.*, 275 Ill. App. 3d 938, 944, 657 N.E.2d 668, 673 (3d Dist. 1995).

In addition, if a court approves a settlement, it merges all included claims and causes of action and is a bar to further proceedings. *Keim v. Kalbfleisch*, 57 Ill. App. 3d 621, 624, 373 N.E.2d 565, 568 (5th Dist. 1978) (dismissal with prejudice pursuant to settlement agreement in first action was res judicata bar to second action). Here, the court approved the consent judgment. In addition, the consent judgment provided for the dismissal with prejudice of *Terra I*. A dismissal with prejudice is as conclusive of the rights of the parties as if the suit was prosecuted to a final adjudication adverse to the plaintiff. *Keim*, 57 Ill. App. 3d at 624, 373 N.E.2d at 568. Thus, the entry of the consent judgment by the Court constituted a final judgment on the merits for purposes of res judicata.

The element of identity of the parties is also satisfied. For purposes of res judicata,

privity is defined as a mutual or successive relationship to some property rights which were the subject matter of the prior litigation. *Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc.*, 318 Ill. App. 3d 856, 865,744 N.E.2d 312, 320 (2d Dist. 2001). Here, for purposes of counts I, IV, and V, the only "new" parties are defendants Stebbins, Marshall, Daley, and Hartman. These "new" defendants stand in privity to defendants Gidwitz and Buntrock who were also parties in *Terra I*. Buntrock and Gidwitz and the "new" defendants are all members of the Board and all voted in favor of the consent judgment. Thus, the "new" defendants share a mutual relationship to the Foundation that is the subject of this litigation.

Plaintiffs' claims in counts I, IV, and V were resolved in *Terra I*. The Illinois Supreme Court has stated that Illinois courts are to apply the transactional test to determine whether there is an identity of causes of action. *River Park*, 184 Ill. 2d at 311, 703 N.E.2d 883; *Saxon*, 318 Ill. App. 3d at 863-64, 744 N.E.2d at 319. The transaction test is satisfied if the claims arise from a single group of operative facts even if the evidence needed to support the claims does not substantially overlap. *River Park*, 184 Ill. 2d at 311. Here, the claims of counts I, IV, and V arise from the same operative facts that the court considered in its ruling on the consent judgment and plaintiffs' objection to the consent judgment: the terms of the consent judgment, the intent of the Foundation as set forth in its articles, the Foundation's bylaws, the mediation, the Attorney General's involvement in the mediation, the Board's vote to approve the consent judgment, and the alleged conflict of interest.

In fact, Judge Kinnaird expressly noted that much of *Terra II* is simply a collateral attack on *Terra I*. Specifically, when ruling on plaintiffs' motion for substitution of judge as a matter of right, Judge Kinnaird stated as follows:

> Now, I'm not saying that there's any merit to their Count I. I'm not saying that that can be interpreted as anything other than a collateral attack on my decision.
>
> * * * *
>
> And I can understand why you may want to make [a substitution for motion of judge] because I personally believe that this second lawsuit, at least what I have seen of it, except for perhaps the last count, is a collateral attack on my decision.
>
> I think these arguments should be in front of the Appellate Court. Not before another judge in the circuit court.

Ex. G, Transcript of Proceedings of September 21, 2001, pp. 45, 71-72. Judge Kinnaird, who was extremely familiar with the issues and record litigated before the court in *Terra I,* expressly noted that res judicata or collateral estoppel would be applicable based on her review of the complaint in this action.[10] For this additional reason, plaintiffs' claims are barred pursuant to res judicata and should be dismissed accordingly.

IV. COUNT I FAILS TO STATE A CLAIM FOR DECLARATORY RELIEF AND SHOULD BE DISMISSED PURSUANT TO SECTION 2-615.

Count I fails to state a claim for declaratory relief and should be dismissed pursuant to section 2-615. Count I seeks a declaration that would declare the consent judgment unlawful. Declaratory judgments are governed by section 2-701 of the Illinois Code of Civil Procedure that provides that "[t]he court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." 735 ILCS 5/2-701. Under Illinois law, a declaratory judgment will be deemed to terminate "some part" of a controversy if it terminates "an entire claim which is part of more

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[10] Although Judge Kinnaird did not review the amended complaint, that complaint did not substantively amend counts I, IV, and V.

than one claim." *Marlow v. American Suzuki Motor Corp.*, 222 Ill. App. 3d 722, 584 N.E.2d (1st Dist. 1994). The purpose of a declaratory judgment is to avoid litigation by allowing a court to address a controversy "one step sooner than normally, after the dispute has arisen but before steps are taken which give rise to a claim for damage or other relief." *Tait v. Sangamon County*, 138 Ill. App. 3d 169, 485 N.E.2d 558, 560 (4th Dist. 1985). Thus, Illinois courts require that declaratory judgments terminate at least "some part" of litigation.

Here, count I seeks declaratory relief that would not terminate the controversy or "some part" of the controversy that led to this action. Indeed, the declaratory relief sought would result in piecemeal litigation. For example, a declaration as to the invalidity of the consent judgment would result in additional litigation in *Terra I*, as well as have an impact on the appeal of that matter.

In *Marlow*, the Illinois Appellate Court, First District, upheld the dismissal of a complaint for declaratory judgment on the grounds that the relief sought would lead to "impermissible piecemeal litigation." *Marlow*, 222 Ill. App. 3d 722, 584 N.E.2d 345; *see also Schlossberg v. E.L. Trendel & Associates, Inc.*, 63 Ill. App. 3d 939, 942, 380 N.E.2d 950 (1st Dist. 1978) (affirming dismissal of complaint that does not seek to declare rights under a contract or a continuing legal relationship, but was an improper attempt to adjudicate whether plaintiff has a legitimate cause of action). In addition, in *Krebs v. Mini*, 53 Ill. App. 3d 787, 368 N.E.2d 159, 163 (2d Dist. 1977), the court affirmed the dismissal of a prayer for declaratory relief on the grounds that the relief would not terminate the litigation, but "would have led to the use of a declaratory judgment for the kind of piecemeal resolution of matters in controversy which the [Code of Civil Procedure] prohibits."

To avoid piecemeal litigation, dismissal of a declaratory judgment claim is appropriate when that claim — as here — is essentially a collateral attack on another action. *Tait*, 138 Ill. App. 3d 169, 485 N.E.2d 558 (declaratory judgment action barred as impermissible collateral attack on judgment in criminal proceedings); *see also Coles-Moultrie Electric Co-op v. City of Charleston*, 8 Ill. App. 3d 441, 289 N.E.2d 491 (4th Dist. 1972) (affirming dismissal of claim for declaratory relief because issues subject of claim were pending before Commerce Commission). Here, plaintiffs fail to state a claim for declaratory judgment because the relief sought in count I will clearly lead to "impermissible piecemeal litigation" and a clear collateral attack on *Terra I.*[11]

V. COUNT IV SHOULD BE DISMISSED PURSUANT TO SECTION 2-615.

Count IV of the complaint alleges that the Board's adoption of the consent judgment on June 29, 2001 was an *ultra vires* act and seeks injunctive relief and monetary damages, including punitive damages. Plaintiffs allege that the resolutions adopted by the Board on June 29, 2001 were *ultra vires* and that this Court should "enjoin the doing of such acts" and enter an order "enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation." Count IV, as discussed below, must also be dismissed for several reasons.

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[11] Plaintiffs are essentially seeking to vacate the consent judgment by count I. Indeed, the plaintiffs are essentially seeking to rescind the consent judgment but have failed to allege the requisite elements of recision, namely, a statement of material fact, made to induce another party to act, statement is false, and known by party making it to be false, and party to whom statement is made reasonably believes it to be true and relies on it. *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 692 N.E.2d 1221 (1st Dist. 1998). Moreover, although seeking to rescind the consent judgment, plaintiffs have failed to seek such relief pursuant to section 2-1401 of the Illinois Code of Civil Procedure and, for this additional reason, count I must be dismissed.

A. The Amended Complaint Does Not Establish That The Board's Actions On June 26, 2001 Were *Ultra Vires*.

Plaintiffs fail to allege any facts to support the conclusory allegation that the six members of the Board took actions that contravened the Articles of Incorporation and By-Laws. Plaintiffs allege that the amended Articles of Incorporation state that the Foundation may "operate museums and schools, both in the United States and abroad" but do not provide any facts to support the allegation that the consent judgment is *ultra vires*. Plaintiffs' conclusory allegation that the consent judgment is *ultra vires*, without more, fails to state a claim and should be dismissed.

B. Plaintiffs Fail To Allege The Elements Necessary For Injunctive Relief.

Plaintiffs fail to allege any facts necessary to support a claim for the injunctive relief sought. An injunction, whether preliminary or permanent, is an extraordinary remedy, the use of which is limited to those instances where the remedy at law is inadequate and serious irreparable harm would result without immediate relief. *Brown v. Murphy*, 278 Ill. App. 3d 981, 664 N.E.2d 186 (1st Dist. 1996). A party must establish, through well-pled facts that: (1) he possesses a clearly ascertainable right or protectable interest which will suffer irreparable damage in the absence of relief, and (2) he has an inadequate remedy at law. *Id.* Here, plaintiffs fail to allege any facts to establish an ascertainable right or protectable interest. Nor do plaintiffs allege any irreparable harm or inadequate remedy at law. Indeed, plaintiffs' claim for damages undermines any claim of inadequate legal remedy.

C. The Requested Injunctive Relief Sought Is Vague.

Plaintiffs request that this court enjoin defendants "from taking further action in violation

of law and contrary to the best interests of the Foundation." Plaintiffs fail to allege any illegal acts that must be enjoined. Illinois law requires that injunctions be specific:

> The terms of an injunction should be as definite, clear and precise as possible in order that there may be no excuse or reason for misunderstanding or disobeying it . . . A proper injunction must couch its directions or prohibitions 'in terms so definite, clear and precise as to demand obedience or to be capable of enforcement or execution.'

Hartlett v. Dahm, 94 Ill. App. 3d 1, 5, 418 N.E.2d 44, 47 (2d Dist. 1981) (reversing judgment entered that enjoined landowner from using property other than for authorized purposes) citing *People ex rel. Traiteur v. Abbot*, 27 Ill. App. 3d 277, 282-83, 327 N.E.2d 130 (5th Dist. 1975). Here, the injunction that plaintiffs seek is impermissibly vague and, count IV should be dismissed.

D. There Are No Allegations To Support Punitive Damages.

Plaintiffs improperly seek punitive damages in count IV. Under Illinois law, punitive damages are available only where the plaintiff alleges that the conduct at issue was malicious or outrageous: "Illinois courts have consistently held that punitive damages are disfavored at law and are generally inappropriate absent evidence of outrageous conduct or acts committed with malice or a reckless indifference towards the rights of others." *McCann v. Presswood*, 308 Ill. App. 3d 1068, 1071, 721 N.E.2d 811, 814 (4th Dist. 1999). To be entitled to punitive damages, one must allege outrageous conduct, acts perpetrated by evil motive or with reckless indifference to the rights of others." *Guice v. Sentinel Tech., Inc.*, 294 Ill. App. 3d 97, 689 N.E.2d 355, 365 (1st Dist. 1997). Here, plaintiffs fail to allege any such facts and the claim for punitive damages must be stricken.

E. The Board's Approval Of The Consent Judgment Was Consistent With The Foundation's By-Laws And Illinois Law.

Plaintiffs are unable to state an *ultra vires* claim based on allegations that the Board's approval of the consent judgment (and amendment of the by-laws) did not have the requisite number of votes. Plaintiffs allege in a conclusory fashion that defendants Stebbins and Marshall had a conflict of interest, their votes should not have been counted, and that, as a result, there was not enough votes to approve the consent judgment. Plaintiffs fail to allege a conflict of interest under Illinois law. Specifically, section 108.60 of the Not For Profit Act provides that a conflict of interest exists if a director of the corporation is directly or indirectly a party to the transaction. 805 ILCS 105/108.60. Section 108.60(d) further provides that a conflict of interest occurs where a director of a corporation is an officer, director or general partner, or has a material financial interest in an entity which is the other party to the transaction at issue. Thus, under Illinois law, a conflict of interest exists only if a director has a pecuniary interest in the transaction. 805 ILCS 105/108.60. Here, plaintiffs do not allege that Stebbins or Marshall had a financial interest in any other party to the consent judgment — nor were they officers or directors of any other entity that was a party to this transaction. Plaintiffs have not alleged a conflict of interest existed under Illinois law and have failed to state a claim that the Board's approval of the settlement was *ultra vires*.

VI. COUNT IV SHOULD BE DISMISSED PURSUANT TO SECTION 2-619(a)(9).

The terms of the consent judgment itself bar plaintiffs' claim that the consent judgment is an *ultra vires* act. Plaintiffs allege in conclusory fashion that the consent judgment violates the Articles of Incorporation that provide that the Foundation's purpose is to "expand the artistic

horizons of a growing art public" and to "operate museums and schools, both in the United States and abroad." Plaintiffs suggest that the consent judgment violates the Foundation's purpose by "[r]estricting the Foundation's art collection to Chicago in isolation and installing a majority of Illinois residents on its Board."

The consent judgment provides that:

> For at last fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. . . The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection.

Ex. A, pp. 2-3. The consent judgment does *not* limit the Foundation's ability to exhibit its Collection in Giverny and for other special programs and scholarly use outside of Chicago. Indeed, Judge Kinnaird in *Terra I*, expressly noted that the consent judgment did not require that the entire Collection remain in Chicago for fifty-years and that the Foundation was entitled to exhibit the Collection elsewhere. *See* Exhibit F, p. 128. Thus, the terms of the consent judgment bar plaintiffs' claim that it was an *ultra vires* act.

VII. COUNT V SHOULD BE DISMISSED PURSUANT TO SECTION 2-615.

Count V purports to state a claim of breach of fiduciary duty against the Foundation's directors that voted in favor of the consent judgment, alleging that the directors "willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation." Plaintiffs fail to allege any facts to support the

allegations that the directors breached their fiduciary duty to the Foundation by voting in favor of the consent judgment.

The officers and directors of a not-for-profit corporation are charged with the same degree of fidelity to the interests of the corporation as are the officers and directors of a business corporation. *Mile-O-Mo Fishing Club, Inc. v. Noble*, 62 Ill. App. 2d 50, 210 N.E.2d 12 (5th Dist. 1965). Pursuant to the business judgment rule, corporate directors are not liable for mere mistakes or errors of judgment. 3A Fletcher, Cyclopedia of Corporations, § 1039, at 45 (perm rev. ed 1986 and § 1039, at 4 (supp. 1994). The rationale behind the business judgment rule is "that those to whom the management of the corporation has been entrusted are primarily responsible for judging whether a particular act or transaction is one which is helpful to the conduct of corporate affairs." *Id.*

Here, the amended complaint contains only conclusory allegations that the directors' votes in favor of the consent judgment amounts to a breach of fiduciary duty. Under Illinois law, absent allegations of fraud, illegality or conflict of interest on the part of the directors, decisions made by corporate directors are protected by the business judgment rule, and may only be attacked by alleging facts showing lack of due care in the making of those decisions. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 636 N.E.2d 616 (1st Dist. 1993). Plaintiffs have not alleged any fraud, illegality or conflict of interest on the part of defendants Buntrock, Daley, Gidwitz, and Hartman. In addition, plaintiffs have not alleged any facts establishing that the business judgment rule should not apply, *i.e.*, that the vote for the consent judgment was the result of a lack of due care, such as inattentiveness or the failure to make informed decisions. *Id.* Instead, plaintiffs' claim for breach of fiduciary duty is based on the plaintiffs' conclusory

allegations that the consent judgment was not in the Foundation's best interest and inconsistent with the Foundation's by-laws and charter. Plaintiff's self-serving statements are not sufficient to allege a claim for breach of fiduciary duty or to overcome the business judgment rule.

Plaintiffs have not alleged any facts to establish that defendants Buntrock, Daley, Gidwitz, and Hartman did not exercise due care when voting in favor of the consent judgment. The consent judgment was the product of months of highly contested litigation and extensive mediation efforts. The circuit court approved the consent judgment.[12] Stripped of all rhetoric, it is clear that plaintiffs simply are unhappy with the consent judgment. In the absence of additional factual allegations, plaintiffs' dissatisfaction with the consent judgment is insufficient to state a claim for breach of fiduciary duty against defendants Buntrock, Daley, Gidwitz, and Hartman.

VIII. PLAINTIFFS' CLAIM FOR DAMAGES IN COUNTS IV AND V MUST BE STRICKEN.

Plaintiffs seek damages in count IV (*ultra vires*) and count V (breach of fiduciary duty). Plaintiffs have failed to allege any facts to support their claim for damages. Assuming plaintiffs properly stated a claim for breach of fiduciary duty, which they have not, the defendants owe a duty to the Foundation, not plaintiffs, and thus, any purported harm would be to the Foundation. Plaintiffs have not alleged any facts whatsoever to establish any damages suffered by either the Foundation or themselves and thus, the prayer for damages must be stricken.

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[12] Courts across the nation have recognized the value of referring litigated matters to alternative methods of resolution. Here, Judge Kinnaird's suggestion of mediation, and the consent of all the parties, was the appropriate methodology to resolve the dispute. Mediation by a skilled facilitator forced a dysfunctional and divided Board to rediscover its functionality, communication and ability to achieve consensus. The process had the requisite integrity and the consent decree reflects that consensus.

CONCLUSION

WHEREFORE, for all the foregoing reasons, defendants Dean Buntrock, Margaret Daley, Ronald Gidwitz, and Arthur Hartman, respectfully request that this Court strike and dismiss counts I, IV and V of the Amended Complaint and enter any relief that this Court deems fair and just.

Respectfully submitted,

DEAN L. BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

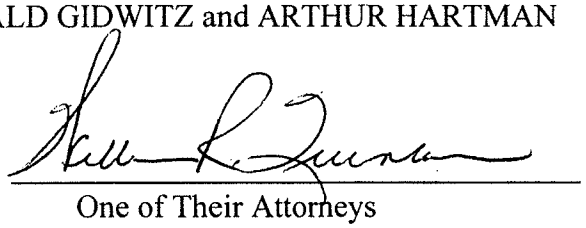
By: 
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Exhibit A

16di-004600

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

16di-004601

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

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programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

16di-004603

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:35 A.M.

16di-004604

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/02/01

Ronald L. Gidwitz

Date: 7/03/01

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____
Assistant Attorney General (Title)
State of Illinois

Print Name: _____

Date: Floyd Perkins
7/6/01

16di-004606

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Pace Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

16di-004607

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

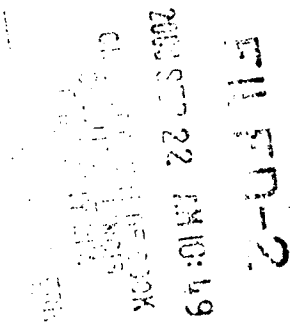
The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

EXHIBIT B

16di-004609

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	00 13859
v.	)	No. 00 CH
JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an an Illinois Not-For-Profit Corporation	)	
Defendants.	)	



VERIFIED COMPLAINT
FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs, Dean L. Buntrock ("Buntrock") and Ronald Gidwitz ("Gidwitz"), Directors of Terra Foundation for the Arts, an Illinois not-for-profit corporation, for their Complaint against the Defendants, state as follows:

Nature of this Action

1 This is an action for declaratory, injunctive and other relief seeking to enjoin defendants' illegal and wasteful conduct in connection with the management and operations of Terra Foundation for the Arts, an Illinois not-for-profit corporation ("Terra Foundation").

2 In this action Plaintiffs seek to enjoin defendants from (1) holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws; (2) taking any action

to elect or remove any member of the Board of Directors or changing any committee assignment; (3) taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and (4) taking any other action contrary to the by-laws of the Terra Foundation or defendants' fiduciary duties as directors of an Illinois Not For Profit Corporation.

The Parties

3 Plaintiff Buntrock is a resident of DuPage County, Illinois, a prominent businessperson, and a benefactor of the arts. Since 1998, Buntrock has served as a director and officer of Terra Foundation. He presently serves as Terra Foundation's treasurer, is chairman of its finance and investment committee, and is a member of its Executive Committee.

4 Plaintiff Gidwitz is a resident of Chicago, Cook County, Illinois, a former CEO of Helene Curtis Corporation, and a benefactor of the arts. Since 1982, Gidwitz has served as a director and officer of Terra Foundation. He presently serves as chairman of Terra Foundation's strategic planning committee and is a member of its Executive Committee.

5 Defendant Paul Hayes Tucker ("Mr. Tucker") is a resident of Massachusetts. Mr. Tucker is a director, chairman and president of Terra Foundation and is a member of its Executive Committee.

6 Defendant Judith Terra is a resident of Washington, D.C. Judith Terra is a director and vice chairman of Terra Foundation, and is a member of its Executive Committee.

7 Defendant Senator Alan K. Simpson is a resident of Wyoming and a former United States senator from that state. Sen. Simpson is a director of Terra Foundation and a member of its finance and investment committee.

8 Defendant Naftali Michaeli ("Mr. Michaeli") is an Israeli citizen and a resident of Washington, D.C. Mr. Michaeli is a close personal friend of Judith Terra, and has no official position with Terra Foundation.

9 Defendant Terra Foundation is an Illinois not-for-profit charitable corporation established in 1978 by Daniel J. Terra (deceased) ("Dan Terra") to preserve and exhibit collections of American Art, to expand the artistic horizons of the Illinois art public through educational programs, and to operate museums in Chicago and France.

10 Because of Dan Terra's extraordinarily generous gifts to Terra Foundation in his lifetime, and his bequest to Terra Foundation of most of his estate, Terra Foundation's assets now total approximately $450 million, including investments, real estate, and a priceless collection of American art.

11 Terra Foundation owns and operates the Terra Museum of American Art (the "Terra Museum") located at 664 N. Michigan Ave., Chicago, Illinois.

12 Terra Foundation currently has eleven directors, the maximum number allowed under the by-laws of Terra Foundation. The Board includes Margaret Daley, a well-known benefactor of education and the arts and the wife of Mayor Richard M. Daley, and Arthur A. Hartman, the former United States Ambassador to France. The Board also includes Helene Ahrweiler, Jacques Andreani, Stephanie Marshall and Theodore Stebbins. Catherine A. Stevens, the wife of United States Senator Ted Stevens, was the Executive Director of Terra Foundation from August of 1996 through April, 2000 until terminated by Tucker.

Creation of Terra Foundation

13 Dan Terra established Terra Foundation in December 1978 under the Illinois General Not For Profit Corporation Act. It was Dan Terra's intent and purpose to provide a Museum in the Chicago area that would exhibit collections of American art and educate the public generally on issues of American art. As set forth in the original Articles of Incorporation, the purpose of Terra Foundation was:

> to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions.

(See Articles of Incorporation, attached hereto as Exhibit 1).

14 To ensure that the primary mission and purpose of Terra Foundation was carried out, the Terra Museum was opened in 1982 in Evanston, Illinois. In 1987, the Museum relocated to 664 N. Michigan Avenue, Chicago, Illinois, and remains at that location until today.

15 Throughout the 1980s and early to mid-1990s, Dan Terra contributed cash, stock and art for the continued growth and viability of the Terra Foundation and the Terra Museum in Chicago. To ensure that his contributions would further the goals and mission of Terra Foundation for the benefit of the public, Dan Terra created two restricted endowments, the "B2 Endowment," restricted to the acquisition of art for Terra Foundation, and the D4 Endowment restricted to education endeavors relating to American art.

16 In the early 1990s, Terra Foundation constructed and developed the Musee d'Art Americain Giverny ("Giverny Museum"), an art museum in Giverny, France dedicated to the exhibition of American art and American art education.

17 Primarily because of Dan Terra's gifts and bequests, the value of Terra Foundation has grown substantially since its creation. Currently, Terra Foundation holds net assets worth approximately $450 million. The value of the art alone located at the Terra Museum in Chicago exceeds $100 million, with the overall value of Terra's Foundation's art collection exceeding $173 million.

18 Pursuant to its by-laws, the Board of Directors of Terra Foundation is required to hold an annual meeting during the month of September of each year for the purpose of electing directors and officers and for the transacting of other business. If the election of the directors and officers is not held at such meeting, the Board of Directors may cause the election to be held at a meeting of the Board of Directors as soon thereafter as may be convenient. The Board of Directors may only elect officers and directors by a majority vote.

19 In periods of time between the quarterly Board of Director Meetings, the by-laws provide that as Terra Foundation's Executive Committee has the authority to take action on behalf of Terra Foundation, except on specific issues delegated to the Board of Directors pursuant to the Illinois General Not For Profit Corporation Act. Since October, 1999, Terra Foundation's Executive Committee has consisted of plaintiffs Buntrock and Gidwitz, defendants Edith Terra and Mr. Tucker, and director Stephanie Marshall.

Dan Terra's Dedication To Chicago

20 Dan Terra was a successful entrepreneur and businessman who resided predominately in the Chicago area. A large portion of his wealth enured through investments in companies located in and around Chicago. As result, Dan Terra made the decision to start the Terra Foundation with the intent to benefit of the citizens of Illinois and the Chicago area. Terra Foundation became Terra's principal charitable endeavor.

21 Dan Terra described his decision to establish Terra Foundation in Illinois and to open Terra Museum in the Chicago area for the people of Illinois as follows:

> [W]hat's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do.

(See Grace Glueck, *American-Art Museum Opening in Chicago*, N.Y. Times, April 19, 1987 at B14, attached hereto as Exhibit 2). On many occasions, Dan Terra articulated his intent to benefit the people of Illinois through the creation of Terra Foundation in Illinois and the opening of Terra Museum as "major institution in Chicago." (See, e.g., Dodie Kazanjian, *Daniel J. Terra, America's First Ambassador-at-large for Cultural Affairs Pursues the Best in American Painting for His New Museum in Chicago*, House & Garden, May 1987, at 52, attached hereto as Exhibit 3).

22 Shortly after the creation of Terra Foundation, Dan Terra's first wife, Adeline died. In 1986, Dan Terra married Judith Terra. Judith Terra acknowledged in a prenuptial agreement that she fully understood that the bulk of Dan Terra's estate would go to the Terra Foundation, and she unequivocally promised that after his death she would not seek any assets of his Estate other than those given to her under the prenuptial agreement. Under the prenuptial agreement, Judith Terra agreed she would receive only a fixed amount of money and assets upon Dan Terra's death. Judith Terra became a member of the Board of Directors of Terra Foundation.

23 On information and belief, after Judith Terra became a member of the Board of Directors of Terra Foundation, she suggested to Dan Terra that the Terra Museum be closed and Terra Foundation be moved out of Chicago. This was never done during Dan Terra's lifetime.

Terra's Death And The Will Contest

24 On June 28, 1996, Dan Terra died after suffering a stroke. As the sole residuary beneficiary under his will, Terra Foundation was to receive $125 million.

25 As the first step in a plan to seize control of Terra Foundation, Judith Terra immediately attempted to transfer Dan Terra's probate proceedings from the Circuit Court of Cook County to Washington, D.C. After a five-day trial, the Chief Judge of the Probate Division denied the motion to transfer, finding that the motion was without merit in law or fact.

26 Judith Terra next embarked on a scheme to seize tens of millions of dollars that Dan Terra intended for Terra Foundation.

27 Under the prenuptial agreement between Dan Terra and Judith Terra, Judith Terra was to receive $4.5 million in cash plus approximately $2.6 million in other assets, for a total of $7.1 million.

28 Contrary to her promise in the prenuptial agreement, after Dan's death, Judith Terra immediately filed an action challenging the prenuptial agreement and contesting Dan Terra's will. Judith Terra sought for herself $43 million of the $125 million bequest to Terra Foundation.

29 Judith Terra's attempt to seize $43 million of Dan Terra's bequest to Terra Foundation put her in irreconcilable conflict with the interests of Terra Foundation and, therefore, with the people of the State of Illinois as the beneficiaries of the charitable trust created by Dan

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Terra. As a result, Judith Terra was forced to take a leave of absence as a director of Terra Foundation.

30 The Terra Foundation hired Tyrone Fahner, former Attorney General of Illinois, and Howard McCue III of Mayer, Brown & Platt as special counsel with respect to Judith Terra's attempt to seize the $43 million bequest. Both Terra Foundation's special counsel and the counsel for Dan Terra's estate found that Judith Terra's claims lacked substantial merit. However, to avoid protracted litigation, the estate and Terra Foundation entered into a settlement with Judith Terra whereby she received approximately $1 million more than she was entitled to under the prenuptial agreement. This allowed Terra Foundation to receive virtually all of Dan Terra's $125 million bequest as intended under Dan Terra's will.

Mismanagement of Terra Museum After Dan Terra's Death

31 Following the settlement of her claims against the Dan Terra's Estate, Judith Terra sought reinstatement to her position as director of Terra Foundation. Thereafter, changes were made within Terra Foundation and the Museum that were contrary to the best interests of Terra Foundation and therefore contrary to the public interest that was intended to benefit from Terra Foundation.

32 Beginning in mid-1998, Judith Terra launched a scheme to gain control of Terra Foundation to carry out her own agenda of closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C. Judith Terra owns a home in Washington, D.C. and desires to move the Foundation there to obtain a prominent place in the social circles of Washington, D.C. Judith Terra believes that if she is able to move a foundation as large as Terra Foundation to

Washington, D.C., she would be able to establish herself in Washington, D.C. as a large benefactor of the arts, thereby placing herself in the elite social circles of Washington, D.C.

33 To accomplish her scheme of seizing control of Terra Foundation, Judith Terra began stacking Terra Foundation's Board with persons loyal to her alone. For example, Judith Terra recommended and sought the election of her friend Sen. Simpson to the Board. Sen. Simpson became a director in mid-1999. At his first Board of Directors meeting in October 1999, Sen. Simpson announced to the Board that his purpose for being on Terra Foundation's Board of Directors was "to protect Mrs. Terra's interests."

34 Prior to October 1999, Judith Terra orchestrated a plan to replace Arthur Hartman as Terra Foundation's president and chairman with her loyalist, Mr. Tucker. Although Terra Foundation had been searching for a new president for more than two years from outside the Board of Directors, Judith Terra and her new allies on the Board replaced Arthur Hartman as president and chairman with Mr. Tucker. As was later discovered, the decision to place Mr. Tucker in the position of president and chairman was made to further Judith Terra's attempt to gain control of Terra Foundation and to further her own agenda contrary to the mission and intent of Dan Terra in creating Terra Foundation.

35 Mr. Tucker and Judith Terra further entrenched their power through the hiring of Donald Ratner and the unauthorized expansion of his authority within Terra Foundation. Mr. Ratner was originally retained as a consultant to the Foundation on an interim basis. During the January 25, 2000 meeting of the Board of Directors a motion was made to give Mr. Ratner the title of vice president of finance and administration. The Board members present at the meeting voted in favor of the motion. However, because not all Board Members were present, the motion was made subject

to the ratification by each of the absent Board members. In a subsequent poll of Board members, the motion failed to receive unanimous approval as required by the vote at the January 25, 2000 meeting. Nonetheless, pursuant to Mr. Tucker's dictate, Mr. Ratner has continued to serve as a purported officer of Terra Foundation, and has taken direction from Board members loyal to Judith Terra.

36 Judith Terra also furthered her scheme to gain control of Terra Foundation by causing the removal of the attorneys that had counseled and represented Terra Foundation since its inception. In 1982, Dan Terra asked James Collins, an attorney at the law firm of Bell, Boyd & Lloyd, to act as both general counsel and an officer of Terra Foundation. Collins served in the capacity of general counsel and secretary of Terra Foundation from 1978 until his removal in October 1999. He also served as treasurer from August 1996 through October 1999. During this time, Collins had represented the interests of Terra Foundation through many difficult issues, including Judith Terra's attempt to confiscate $43 million of Dan Terra's bequest to Terra Foundation.

37 Defendants next forced the resignation of Terra Foundation's special counsel, Ty Fahner and Howard McCue III of Mayer, Brown & Platt. Terra Foundation hired Mayer, Brown & Platt as special counsel when Judith Terra sued Dan Terra's estate for the $43 million residual bequest to Terra Foundation. Mayer, Brown & Platt also represented Terra Foundation in connection with its interests in the now defunct Mercury Finance Company.

38 Specifically, on or about August 11, 2000, Mr. Ratner, acting in his *ultra vires* capacity at the direction of defendants, told Mayer, Brown & Platt that Terra Foundation would not pay its fees for any time incurred in dealing with or responding to any issues not specifically requested by either Mr. Tucker or Mr. Ratner. Mayer, Brown & Platt rejected this arrangement

recognizing that it would be contrary to its duties and obligations as special counsel to Terra Foundation and its directors. In resigning its position as special counsel to Terra Foundation, Mayer, Brown & Platt stated in a letter to Mr. Tucker:

> In our original engagement letter of December 11, 1996, sent by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all of its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

(Emphasis added) (See August 18, 2000 Letter, attached hereto as Exhibit 4).

39 In furtherance of her plan to seize control of Terra Foundation, Judith Terra, Mr. Tucker and Sen. Simpson have ignored the requirements of Terra Foundation's by-laws regarding management of Terra Foundation. Article III, Section 11 of the by-laws provides that the executive committee is to operate Terra Foundation between the quarterly Board of Director meetings. (See By-laws of Terra Foundation, attached hereto as Exhibit 5, at Article IV, Section 9). With few exceptions relating to bringing in new counsel for Terra Foundation, issues were not brought before the executive committee. By not having meetings of the executive committee, Judith Terra, Mr. Tucker, Sen. Simpson were able to control the operations of Terra Foundation for their own benefit, contrary to the provisions of the by-laws.

40 Judith Terra, Mr. Tucker, Sen. Simpson have also consulted with and taken advice from Mr. Michaeli. Mr. Michaeli has been making decisions for Terra Foundation even though he is not an officer or director of Terra Foundation, or even an employee. Mr. Michaeli's only connection to Terra Museum is his relationship with Judith Terra.

41 Judith Terra also began treating the art collection of Terra Foundation as if it were her own personal property. Judith Terra ordered that art from the collection held by Terra Foundation be transported from the Giverny Museum to her personal residence. The curator of the Giverny Museum objected to any piece of the collection leaving the Giverny Museum. However, at Judith Terra's direction, Mr. Tucker ordered the curator of the Giverny Museum to transport the art to Judith Terra's residence for her personal use.

42 Under the control of Judith Terra, Mr. Tucker, Sen. Simpson and Mr. Michaeli, substantial waste and mismanagement has occurred which jeopardizes the continued viability of Terra Museum. This waste and mismanagement includes, but is not limited to, the following:

a. Grossly mismanaging Terra Museum in a manner that has resulted in the loss or turnover of almost half the employees, including key persons responsible for Terra Museum's day-to-day operations and continued success;

b. Causing the primary individuals in charge of security at Terra Museum to quit resulting in an inexperienced and understaffed security staff, and jeopardizing the security of the $100 million of art displayed and collected at Terra Museum;

c. Permitting a director of Terra Foundation to engage in a conflict of interest in representing Terra Foundation at art auctions while, on information and belief, representing the interests of private clients at the same auction;

d. Expending significant monies on the purchases of art without obtaining the input or approval of the Board of Directors or the Collections Committee charged with the responsibility of advising the Board of Directors on issues involving art acquisition;

e. Attempting to invade the D4 Endowment restricted to educational purposes for the unauthorized purpose of acquiring art;

f. Bypassing the lawfully elected Executive Committee operating Terra Foundation and Terra Museum;

g. Wastefully incurring excessive legal fees by retaining inexperienced counsel in replacement of Terra Foundation's long-standing counsel;

h. Misusing the art collection of Terra Foundation for Judith Terra's own personal use and in a manner that placed the collection in danger and jeopardy; and

i. Allowing Mr. Michaeli to participate the management, control and operation of Terra Foundation and Terra Museum.

43 Members of the Board of Directors have repeatedly questioned the manner in which Mr. Tucker, Judith Terra and Sen. Simpson have been operating Terra Foundation in the past year. For example, on March 2, 2000, Margaret Daley wrote to John Neff, Director of Terra Museum, regarding the significant problem occurring at Terra Museum as a result of the high turnover of key employees. Specifically, Mrs. Daley stated:

> Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler. John, Ginny worked tirelessly on the School Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their herculean efforts, it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation. Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner. In my working with her on education issues, I believe she has always gone "above and beyond" her duties .... I couldn't leave without letting you and the Board know my feelings and deep concerns.

(See March 2, 2000 Letter, attached hereto as Exhibit 6).

44 Other members of the Board of Directors, including Buntrock, as well employees of both Terra Foundation and Terra Museum have repeatedly and vigorously challenged the manner and lack of direction in which Terra Foundation has been operated and managed under the direction of Mr. Tucker. (See Arthur A. Hartman letter dated November 7, 1999, attached hereto as Exhibit 7).

45 On information and belief, the pattern of mismanagement and waste occurring at Terra Museum is a conscious effort on the part of Judith Terra, Mr. Tucker and Sen. Simpson to cause the failure of Terra Museum in Chicago to justify closing Terra Museum in Chicago and

moving Terra Foundation from Chicago to Washington, D.C. for their own purposes and in utter disregard for the people of Illinois intended to benefit from Dan Terra's museum and foundation.

Judith Terra's Plan To Move Terra Museum From Chicago To Washington

46 Despite the fact that Terra during his life had rejected any suggestion of moving Terra Museum from Chicago and therefore depriving the people of the State of Illinois of the charitable trust that he had created, Judith Terra has never abandoned her personal scheme to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. In the last year, after Mr. Tucker obtained the position of president and chairman, Judith Terra, Mr. Tucker and Mr. Michaeli have been actively seeking to close Terra Museum in Chicago.

47 To this end, and in breach of their fiduciary duties to Terra Foundation and the people of Illinois, Judith Terra and Mr. Tucker have engaged in negotiations relating to a merger or affiliation between Terra Foundation and The Corcoran Gallery of Art in Washington, D.C. ("the Corcoran"). As part of the proposed merger of affiliation, certain positions on the Board of The Corcoran would be filled by individuals on the Board of Directors of Terra Foundation. Also, the proposal provides that the president and chairman of Terra Foundation, Mr. Tucker, would assume the position of vice-chairman of The Corcoran.

48 The overall plan and method whereby Judith Terra and Mr. Tucker would secure their mission of obtaining prominent positions in Washington, D.C., in breach of their fiduciary duties to the people of Illinois, was clearly evidenced at the recent Board of Directors meeting held on August 24, 2000. There, Mr. Tucker made clear that it was his intention to close Terra Museum in Chicago. Mr. Tucker stated that under his thinking, there were potential problems with the

continued operation of the museum in Chicago. Mr. Tucker went to state clearly and unambiguously,

> the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

(Emphasis added) (See Minutes of August 24, 2000 Board of Directors Meeting, attached hereto as Exhibit 8, p. 2). In fact, many of the "problems" with the Chicago museum were of the defendants' own making.

49 Buntrock objected to Mr. Tucker's improper interpretation of the mission of Terra Foundation and stated that the closing of Terra Museum in Chicago had never been discussed or considered by the full Board of Directors. Mr. Tucker agreed that this critical issue had never been discussed by the full Board of Directors, but stated that a decision had already been reached to close Terra Museum in Chicago. According to Mr. Tucker, the Strategic Planning Committee was prepared to make a recommendation on this issue to the Board of Directors. Mr. Tucker stated that the Board of directors "definitely" must make a decision on the closing of the Chicago museum during the annual Board of Directors meeting in September 2000.

50 In conjunction with their overall plan, Judith Terra and Mr. Tucker have attempted to create the impression that Terra Museum in Chicago needs to be abandoned as a mission of Terra Foundation.

Defendants' Plan To Remove Buntrock
From Board Of Directors To Further Their Goals

51 Notice was mailed to the directors informing them that the annual Board of Directors meeting of Terra Foundation was scheduled for Tuesday, September 26, 2000 in France. Although various events and committee meetings were scheduled to occur between September 23, 2000 and

September 26, 2000, the annual meeting of the Board of Directors was scheduled for September 26, 2000.

52 As set forth in the agenda for the annual Board meeting that was distributed to each Board member, the election of officers and directors for the upcoming year was to be held during the September 26, 2000 meeting. (See Agenda for September 26, 2000 Board of Directors Meeting, attached hereto as Exhibit 9). As set forth in the agenda, the elections were to occur and then the chairman of each committee would make a presentation to the Board. (Id.) As indicated in the agenda, Mr. Buntrock was scheduled to give a presentation to the Board as the chairman of the finance and investment committee immediately subsequent to the election of the directors and officers.

53 The defendants have now contrived a plan to ensure that the directors are elected with the exception of Buntrock. Defendants intend to see that Buntrock is not retained as a director in order to allow them to more easily accomplish their unlawful personal objective of closing the museum in Chicago and moving Terra Foundation to Washington, D.C. Buntrock has recognized defendants' efforts and has continued to question the Board's authority to move the charitable assets of the people of the State of Illinois to Washington, D.C. in contravention of the Board's fiduciary duties to the people of Illinois.

54 Plaintiffs have just recently learned of the defendants' improper plan to remove Mr. Buntrock from the Board of Directors. Subsequent to the dissemination of the agenda for the September 26, 2000 meeting of the Board of Directors, and only days prior to the directors leaving for France, Mr. Ratner was directed to send a letter to all directors, without any consultation, informing them that a 30-minute Board of Directors meeting was scheduled for September 24, 2000,

two days prior to the properly noticed and scheduled meeting of the Board of Directors. (*See* September 15, 2000 Letter, attached hereto as Exhibit 10). This improperly noticed meeting has been scheduled because defendants will not have a sufficient number of directors available on September 26, 2000 to remove Mr. Buntrock from the Board of Terra Foundation.

55 Defendants' attempt to hold the elections for directors and/or officers at a Special Meeting of the Board of Directors on September 24, 2000, is violative of the by-laws of Terra Foundation for at least two reasons. First, Ratner does not have the authority to provide notice of a meeting of the Board of Directors as he is not the secretary of Terra Foundation, nor is he even a duly elected officer or director. Pursuant to the by-laws of Terra Foundation, only the secretary of Terra Foundation is empowered to provide notices required under the by-laws. (Exhibit 5, Article IV, Section 9). Any attempt by Ratner to send notice of a meeting of the Board of Directors constitutes an *ultra vires* act.

56 Second, under the by-laws an election of the officers and directors may occur only at one of two occasions. First, the election may take place at the annual meeting of the Board of Directors. Second, if the election is not held at the scheduled annual meeting, a special meeting may be held subsequent to the annual meeting. (Id. at Article III, Section 3). The by-laws provide no authority for the holding of elections of officers or directors prior to the scheduled annual meeting. For this additional reason, defendants' attempt to hold the elections of directors and officers at the improperly noticed meeting on September 24, 2000 constitutes and *ultra vires* act, as well as a clear breach of their fiduciary duty to Terra Foundation and the people of Illinois.

57 Without relief from this Court, defendants will carry out their improper plan to ensure that Buntrock does not remain as a director and officer, to close the Terra Museum in Chicago and

to undermine the effort of the other directors to ensure that fiduciary duties to the Terra Foundation, and its beneficiaries -- the people of the State of Illinois -- are followed. The Defendants' plan is motivated by their own self-interests and desires, and inconsistent with their fiduciary obligations as directors of a charitable trust intended to benefit the people of Illinois.

58 Moreover, if defendants are permitted to carry out their plan to remove Buntrock there is a real and serious danger that other members of the Board of Directors will resign their positions thereby leaving the Terra Foundation in great jeopardy, and leaving the people of Illinois without protection on the Board. Once Buntrock and other similar "obstructionist" directors are removed or resign, defendants will have no opposition to carrying out their plan of depriving the people of Illinois of the public trust created over twenty years ago by Dan Terra for their benefit.

COUNT I
(Declaratory Relief)

59 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 58 of this Complaint as though fully set forth in this Paragraph 59.

60 By and through the creation Terra Foundation as a not-for-profit Illinois corporation, Dan Terra intended that a museum of American art be operated in the Chicago area to be held in trust for the benefit of the people of the State of Illinois.

61 At various times after the creation of Terra Foundation, Terra reaffirmed his mission of operating a museum in the Chicago area for the benefit of the people of Illinois through the collection of American art and the education generally of the public on the issue of American art.

62 The Board of Directors of Terra Foundation are the trustees of the charitable trust created by Dan Terra responsible to the people of Illinois as the beneficiaries of the public trust.

63 As directors of Terra Foundation, plaintiffs Buntrock and Gidwitz, as well as many others, have donated their time, efforts and resources to accomplish the goals and mission started over twenty years ago by Terra.

64 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to protect Terra Foundation from waste and mismanagement caused by defendants.

65 Plaintiffs as directors of Terra Foundation have a fiduciary duty and an obligation to see that Terra Foundation continues to carry out the mission for which it was started for the benefit of the people of Illinois.

66 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the Terra Foundation and the people of Illinois to protect the charitable assets of Terra Foundation and to act in their interests by furthering the charitable purpose and mission started by Terra more than twenty years ago.

67 Notwithstanding their fiduciary duties to the people of Illinois to further the charitable purpose and mission started by Dan Terra more than twenty years ago, Judith Terra, Sen. Simpson and Mr. Tucker used their positions as directors and/or officers of Terra Foundation to intentionally mismanage Terra Museum in Chicago to further their own self interests in closing Terra Museum in Chicago and moving Terra Foundation to Washington, D.C.

68 The foregoing improper conduct of Judith Terra, Sen. Simpson and Mr. Tucker has caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois as the beneficiaries of the public trust established for Terra Museum in Chicago as a unique center for American art.

69 Plaintiffs have no adequate remedy at law.

70 An actual controversy exists between the parties hereto concerning Terra Foundation's obligation and purpose to maintain a museum in the Chicago area for the benefit of the people of Illinois as originally intended by Dan Terra at the time of the creation of Terra Foundation.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation as a public trust for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Dan Terra in creating Terra Foundation was to operate the museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants are precluded from closing Terra Museum in Chicago and moving the Foundation to a location outside of the Chicago area;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of the Chicago area would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

B. A temporary, preliminary and permanent injunction enjoining defendants from closing Terra Museum in Chicago or transferring the museum or its art to Washington, D.C. or any other location outside of Illinois.

C. For such additional relief as the Court deems fair and just.

COUNT II
(Statutory *Ultra Vires Acts*)

71 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 70 of this Complaint as though fully set forth in this Paragraph 71.

72 The above acts and conduct of defendants have been taken without lawful authority, capacity, or power and will continue unless enjoined.

73 Section 103.15 of the General Not for Profit Corporation Act of 1986 allows this Court to enjoin defendants' unlawful acts.

WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

B. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

C. An accounting of all assets of the Terra Museum and Terra Foundation.

D. For such additional relief as the Court deems fair and just.

COUNT III
(Breach of Fiduciary Duty)

74 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 73 of this Complaint as though fully set forth in this Paragraph 74.

75 By virtue of their positions as directors and/or officers of Terra Foundation, Judith Terra, Sen. Simpson and Mr. Tucker owed fiduciary duties to the people of Illinois to act in their interests by furthering the charitable purpose and mission started by Dan Terra more than twenty years ago.

76 Defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust. Defendants improper conduct included, but is not limited to, the following acts:

a. Mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

b. Seeking to close Terra Museum in Chicago and transfer the art to some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois contrary to Illinois law;

d. Contrary to the by-laws of Terra Foundation, attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation.

77 The foregoing breaches of fiduciary duty of Judith Terra, Sen. Simpson and Mr. Tucker have caused, and will continue to cause, irreparable harm to Terra Foundation, and irreparable harm to the people of Illinois, as the beneficiaries of the public trust by endangering the

future of Terra Foundation and the continued viability of Terra Museum in Chicago as a unique center for American art.

78 Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for the following relief:

A. A declaration that:

(1) Daniel Terra created Terra Foundation for the benefit of the people of Illinois on or before December 13, 1978;

(2) The intent of Terra in creating Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois;

(3) Defendants have no authority to close Terra Museum in Chicago or transfer the museum or its art to Washington, D.C. or any other location outside of Illinois;

(4) The closure of Terra Museum in Chicago or the transfer of the museum or its art to Washington, D.C. or any other location outside of Illinois would violate the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq.* (West 1995)) and the Illinois Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

(5) Defendants Judith Terra, Sen. Simpson and Mr. Tucker have breached their fiduciary duty to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation;

(6) Irreparable injury will result to Terra Foundation and the people of Illinois as the beneficiaries of Terra Foundation if defendants are permitted to continue breaching their fiduciary duties;

(7) Defendants have acted improperly and breached their fiduciary duties by seeking to defeat Mr. Buntrock's re-election as director in order to further their own agenda;

(8) The letter sent by Ratner to the members of the Board of Directors dated September 15, 2000 is a nullity and does not comply with the by-laws of Terra Foundation for scheduling a meeting of the Board of Directors for the election of directors and/or officers.

B. A temporary, preliminary and permanent injunction enjoining defendants from the following:

(1) Holding a meeting of the Foundation's Board of Directors in violation of Terra Foundation's by-laws;

(2) Taking any action to elect or remove any member of the Board of Directors or changing any committee assignment;

(3) Taking any action to close the Terra Museum in Chicago or move Terra Foundation or any of its assets outside the State of Illinois; and

(4) Taking any other action contrary to the by-laws of the Terra Foundation.

C. The appointment of a receiver to operate and maintain Terra Foundation pursuant to the Court's equitable powers and the Illinois General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 1995)).

D. An accounting of all assets of the Terra Museum and Terra Foundation.

E. For such additional relief as the Court deems fair and just.

COUNT IV
(Inducing A Breach of Fiduciary Duty)

79 Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 78 of this Complaint as though fully set forth in this Paragraph 79.

80 As set forth more fully above, defendants Judith Terra, Sen. Simpson and Mr. Tucker breached their fiduciary duties by acting in a manner that was intended to further their own personal interests to the detriment of the people of Illinois as the beneficiaries of the charitable trust established by Dan Terra. Defendants improper conduct included, but is not limited to, the following acts:

a. Intentionally mismanaging Terra Museum in Chicago to create the impression that the museum needs to be closed;

16di-004633

b. Seeking to close Terra Museum in Chicago and transfer or re-establish the museum to Washington, D.C. or some other location outside of Illinois to further their own personal goals;

c. Attempting to defeat Buntrock's re-election as director to enable defendants to carry out their plan of moving or transferring Terra Museum from Chicago to a location outside of Illinois;

d. Attempting to improperly reschedule the vote for the election of directors to ensure that defendants have enough votes to defeat Buntrock's nomination and therefore further their personal agenda to the detriment of the intended beneficiaries of Terra Foundation

81 Defendant Mr. Michaeli colluded with Judith Terra, Sen. Simpson and Mr. Tucker in committing breaches of fiduciary duty, or otherwise induced or participated in their breaches of duty to Terra Foundation and the people of Illinois as the various ways, including, but not limited to the following:

a. Knowingly providing advice to Judith Terra, Mr. Tucker and Sen. Simpson that was contrary to the fiduciary duties owed by them as directors of Terra Foundation;

b. Acting with Judith Terra, Mr. Tucker and Sen. Simpson to make decisions for Terra Foundation in contravention of the by-laws of Terra Foundation;

c. Advising Judith Terra, Mr. Tucker and Sen. Simpson to take action relating to Terra Foundation that constituted waste and mismanagement in an attempt to justify the closure of Terra Museum in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

d. Colluding with or advising Judith Terra, Mr. Tucker and Sen. Simpson in the decision to replace Jim Collins and the law firm of Bell, Boyd & Lloyd in order to gain control over the operations of Terra Foundation for their own improper purpose in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

e. Colluding with, advising or participating in the plan to remove Mr. Buntrock from the Board of Directors in order to remove opposition to their plan to close Terra Museum in Chicago and move Terra Foundation to Washington, D.C. in contravention of their fiduciary duties to Terra Foundation and the people of Illinois;

82 The conduct of Mr. Michaeli has caused, and will continue to cause, damage to Terra Foundation and the people of Illinois. If the conduct of Mr. Michaeli is not stopped, the public trust created by Dan Terra may be destroyed to the detriment of the people of Illinois.

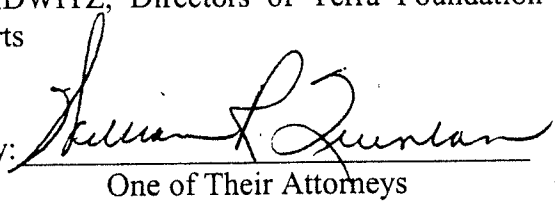
WHEREFORE, Plaintiffs pray for the following relief:

A. A temporary, preliminary and permanent injunction enjoining Mr. Michaeli, his agents or assigns from colluding with, inducing or participating in any further breaches of fiduciary duty with Judith Terra, Sen. Simpson and Mr. Tucker.

B. An award of exemplary damages for Mr. Michaeli's intentional, deliberate, and ongoing inducement of Judith Terra's, Sen. Simpson's and Mr. Tucker's breaches of its fiduciary duties to Terra Foundation.

Respectfully submitted,

DEAN L. BUNTROCK and RONALD GIDWITZ, Directors of Terra Foundation of the Arts

By: 
One of Their Attorneys

Dated: September 22, 2000

William R. Quinlan
James R. Carroll
Michael I Rothstein
Martin J. O'Hara
QUINLAN & CRISHAM, LTD.
30 North LaSalle Street, Suite 2900
Chicago, Illinois 60602
(312) 263-0900
Firm ID No. 33745

VERIFICATION

DEAN L. BUNTROCK, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

BY: Dean L Buntrock
DEAN L. BUNTROCK

VERIFICATION

RONALD GIDWITZ, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that he has read the Verified Complaint for Declaratory, Injunctive, and Other Relief, and that the statements set forth in the Verified Complaint for Declaratory, Injunctive, and Other Relief, are true and correct, except as to matters therein stated to be on information and belief, and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

By: _____
RONALD GIDWITZ

Exhibit 1

Certificate 38125

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

Whereas, Articles of Incorporation duly signed and verified of

FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

have been filed in the Office of the Secretary of State on the 13th day of December A. D. 1978, as provided by the "GENERAL NOT FOR PROFIT CORPORATION ACT" of Illinois, approved July 17, 1943, in force January 1, A. D. 1944;

Now Therefore, I, ALAN J. DIXON, Secretary of State of the State of Illinois, by virtue of the powers vested in me by law do hereby issue this Certificate of Incorporation, and attach thereto a copy of the Articles of Incorporation of the aforesaid corporation.

In Testimony Whereof, I hereto set my hand, and cause to be affixed the Great Seal of the State of Illinois.

Done at the City of Springfield, this 13th day of December AD 19 78 and of the Independence of the United States the two hundred and 3rd

(SEAL)

Alan J. Dixon

16di-004639

$25.00

FORM NP-29

ARTICLES OF INCORPORATION
UNDER THE
GENERAL NOT FOR PROFIT CORPORATION ACT

(These Articles Must Be Filed in Duplicate)

(Do Not Write in This Space)
Date Paid 12/13/78
Filing Fee $ 25.00
Clerk

Secretary of State, Springfield, Illinois.

We, the undersigned,
(Not less than three)

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

being natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of forming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

1. The name of the corporation is: FOUNDATION FOR THE DANIEL J. TERRA MUSEUM

2. The period of duration of the corporation is: perpetual
(Please state "perpetual" or a definite number of years)

3. The address of its initial **Registered Office** in the State of Illinois is: 2600 Central Park
Street in the City of Evanston (60201) (Zip Code) County of Cook and
the name of its initial **Registered Agent** *at said Address* is: Daniel J. Terra

4. The first Board of Directors shall be three (Not less than three) in number, their names and addresses being as follows:

Name	Number	Street	Address City	State
Daniel J. Terra	2600 Central Park,	Evanston,	Illinois	60201
James D. Terra	2600 Central Park,	Evanston,	Illinois	60201
Robert J. Sugrue	One IBM Plaza, Suite 2650,	Chicago,	Ill.	60611

5. The purpose or purposes for which the corporation is organized are: This corporation is organized exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, or the corresponding provisions of any subsequent Federal tax laws ("Code"). Within the foregoing, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, soulpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses and other subjects relating thereto; build, erect, maintain, equip, manage, lease, and operate a museum and all component parts deemed advisable or necessary to provide space for these activities and exhibitions engage in any and all oter activities and exhibitions; engage in any and ll other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

16di-004640

No part of the net earnings of the corporation shall inure to the benefit of or be distributable to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article 5 hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributions of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

7. Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

NOTE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)

Daniel J. Terra
James D. Terra
Robert J. Sugrue

Incorporators

ACKNOWLEDGMENT

STATE OF ILLINOIS,
County of Cook } ss.

I, Margaret Solyomi a Notary Public do hereby certify that on the 11th day of December 19 78 Daniel J. Terra, James D. Terra, and Robert J. Sugrue (Names of incorporators)

personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE NOTARIAL SEAL) HERE

Margaret Solyomi
Notary Public

PAID
DEC 19 1978
ALAN J. DIXON
Secretary of State

FILED
DEC 18 [illegible]
Secretary of State

SECRETARY OF STATE
CORPORATION DEPARTMENT
TELEPHONE: (217) 782-7880

(These Articles Must Be Executed and Filed in Duplicate)

Filing Fee $25.00

FO P-29

ARTICLES OF INCORPORATION
under the
GENERAL NOT FOR PROFIT
CORPORATION ACT
of

16d-004641

Exhibit 2

American-Art Museum Opening in Chicago

By GRACE GLUECK
Special to The New York Times

CHICAGO, April 19 — For a cultural institution, the Terra Museum of American Art has had a meteoric career. The latest entry in what seems to be an increasing trend toward private museums, it started out seven years ago with a highly personal selection of paintings — dating mainly from 1850 to 1900 — installed in a former florist's shop in nearby Evanston. Tuesday, at four times its original size and with holdings more oriented to the needs of a public institution, it opens in a pair of elegantly refurbished buildings on North Michigan Avenue, part of a $25 million real-estate package in the heart of Chicago's "Magnificent Mile."

"Someone said that Dan Terra has made up his mind he'll be a force in American art, and I don't deny it," Mr. Terra said. The museum's ebullient founder is a 75-year-old industrialist who since 1981 has been a cultural ambassador-at-large for President Reagan.

"Sure, I suppose you could characterize the museum as a personal monument," he said. "But what's exciting is that it's a deep commitment. There's not another museum of American art within 400 miles of Chicago, and we have a real educational job to do."

Although Mr. Terra and his wife, Adeline, who died in 1982, had been acquiring 18th- and 19th-century American paintings for many years, he came to national attention as a collector in 1982 by paying $3.25 million for Samuel F. B. Morse's 1832 canvas "The Gallery of the Louvre." It was then the highest auction price ever paid for an American work of art. The painting stars in the museum's opening show, which combines works from the Terra collection with a distinguished group borrowed from the Pennsylvania Academy of the Fine Arts. "God knows what we'd pay for the Morse today," said Mr. Terra, whose holdings of some 800 works are valued, for insurance purposes, at more than $100 million. "It's not at all unusual to spend $2.5 to $3 million for top American paintings now."

Stores Help Pay Expenses

The new museum at present occupies two of the four buildings on North Michigan Avenue owned by Mr. Terra. The elegant five-story entrance building at No. 664, a former Helena Rubinstein salon of rather shallow interior space, was gutted and handsomely redone by the architect Larry Booth. Entrance is through a ground-floor museum bookshop, and a ramp-and-stair system with a dramatic arrangement of railings guides the viewer up the four gallery levels. A four-story glass window on the facade gives a full view of the bustling street and the Saks Fifth Avenue store across from the museum.

The entrance building is connected to an older, 11-story structure next door, which also houses four floors of galleries, along with museum offices and education, library and workshop facilities. A shoe store that occupies the ground floor will remain for the present, since its lease helps pay for the museum's operation.

"I got the idea from Paul Mellon's Yale Center for British Art in New Haven, which has retail stores on its ground level," Mr. Terra said.

The two other Terra-owned buildings, one across the street to the south, the other immediately north of the two now used for the museum, will figure in later plans. At present, they are leased to retail tenants who sell shoes, haberdashery, popcorn and books and produce a substantial income for the new museum. So far, real estate and renovation expenses have cost Mr. Terra and his son, James, an electronics entrepreneur, more than $30 million, with an additional $3 million contributed by individuals and corporations.

Before making firm plans for the new facility, Mr. Terra — the founder, president and chief executive officer of Lawler Chemicals Inc. — had thought of merging his collection with the Art Institute of Chicago, which has impressive holdings in American art and is building a new wing to house them. But after some months of negotiations, discussions broke off.

"The hang-up was that I insisted that we have our own board, raise our own money and make our own decisions," Mr. Terra said, then laughed. "Many times since, I've wondered if I didn't make a mistake."

The director of the Art Institute, James Wood, said: "He really wanted to have his own identity. After all, there's only so much you can do in an existing institution. But as a separate museum, there's a wonderful role he can play. In Chicago, we don't have many of the smaller, more specially focused institutions that are a vital part of urban culture."

'Flabbergasted by the Interest'

It was the success of the small museum in low-profile Evanston that brought about the move to Chicago, Mr. Terra said. "After we started the Evanston museum, I was flabbergasted by the interest it excited and the number of people who showed up for symposia we held. We said to ourselves, if this excitement exists, now would be the time to open a museum with the highest visibility and accessibility, in Chicago. So we began to broaden the collection from a public viewpoint, and we bought the first property on Michigan Avenue in 1981."

He rejected the idea of seeking city-owned park land for the museum because — partly inspired by the Whitney Museum branches in New York — he wanted it in a "high density" area, Mr. Terra said. "I hope it draws lots of people who have never seen a museum or looked at American art before," he said. "But we're going to have to prove that locating a museum of this character on a very valuable commercial piece of land is viable. If we do it well, the public will support it."

If the present facilities meet Mr. Terra's hopes in terms of such support, there will be a Phase 2 and then a Phase 3 to the project.

Actually, Phase 2 is already in the planning stage. It would involve razing the low structure immediately to the north of the entrance building, and putting up a nine-story one instead. Cantilevering over the top of the entrance building, it would not only add to the present exhibition space, but would provide room for a 900-seat concert hall, which Mr. Terra said was sorely needed in Chicago. Altogether the museum's space would be increased to around 100,000 square feet from its present 60,000. To carry out these plans, some $25 million will be sought from individuals, corporations and foundations.

Phase 3: Unification

Phase 3, perhaps to be the subject of an architectural competition, would presumably involve unification of the various buildings into a large museum complex. "When all the elements are in place, we project an income of $3 million a year from retail tenants," the museum's director, Michael H. Sanden, said. "It will help considerably toward operational expenses."

The New York Times/Mark Peterson
Dan Terra at the new Terra Museum of American Art in Chicago.

So far Mr. Terra, whose collection will not actually be given to the museum until after his death, has borne the brunt of those expenses. The Evanston museum, which will be retained as a branch, costs $900,000 a year, and it is hoped that corporate sponsorship can be found for it. Estimated costs for both Evanston and Chicago are between $3 million and $4 million a year. "I sell properties and securities and I borrow," Mr. Terra said. "I don't beg, I don't steal, but I do everything else."

The museum's staff now comprises some 30 professionals, headed by Mr. Sanden and including three curators and a director of education. "We need to build strong education and exhibition programs so that people don't think of the Terra as just one man's collection," Mr. Sanden said.

There is general agreement, too, that the six-member board, closely associated with Mr. Terra, needs broadening. Already, on the educational side, the museum runs symposiums for the general public as well as programs for schoolteachers and children. On the exhibition side, apart from the collection itself, several shows are being organized, among them one on the Ashcan school and another on the work of William Merritt Chase. In December, a show of art by three generations of the Wyeth family, now in the Soviet Union, is to open at the Terra.

16di-004643

Exhibit 3

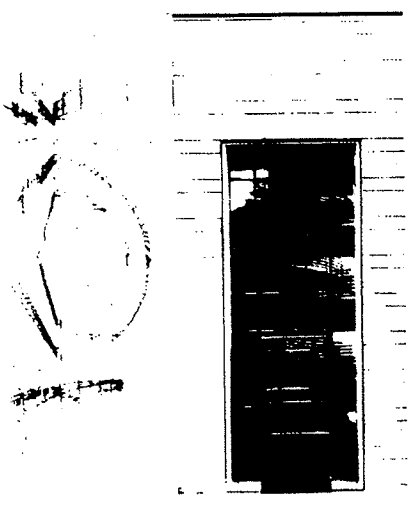
DANIEL J. TERRA

America's first ambassador-at-large for cultural affairs pursues the best in American painting for his new museum in Chicago

By Dodie Kazanjian

We have more frontage on North Michigan Avenue than Neiman-Marcus, Saks Fifth Avenue, Marshall Field's, Lord & Taylor, or—what's the name of that other one?—Bloomingdale's," says Daniel J. Terra looking down from the rooftop of his new Terra Museum of American Art. Even the wind that Chicago is famous for and subzero winter weather can't stifle his enthusiasm. "We have more frontage than the Whitney. Yes, we do. But we don't have as much frontage as the Metropolitan . . . yet," he laughs uproariously. His explosive laugh has an infectious quality that makes any listener want to join in.

Ambassador Terra, *above*, on the dramatic central staircase of his Chicago museum. *Below:* Details of interior ramp and elevation by architect Laurence Booth.



For more than three years Ambassador Terra and I have been talking about the opening of his North Michigan Avenue museum. Beneath us on this cold January day, the museum that bears his name is far from finished. The skeleton of a ramp system is in place, but welding, hammering, plastering, and painting continue at an accelerated pace so that the museum can be ready for its scheduled opening on April 21. (See the opening feature of this issue for a selection of American Impressionist paintings from the museum.) We, along with his wife, Judith, are on top of the tallest of four buildings (eleven stories) that will make up the Terra Museum. These buildings take up 245 feet along Chicago's Magnificent Mile where Terra plans to attract as many as he can of the estimated 14.5 million pedestrians who pass by here every year. He says the museum "will ultimately be the tallest known art museum. This land is so valuable, we had to go vertical." His idea is to bring American art to the people. That's why he picked a site on the avenue that has one of the highest pedestrian traffic counts in the nation, second only to Fifth Avenue between 48th and 57th streets.

Don't be fooled by Dan Terra's age, 75, or his full white head of hair or his diminutive stature. He has more energy than a Fourth of July firecracker. He is, first of all, chairman of his own company, Lawter International, the printing-ink manufacturing company in Northbrook, Illinois, which he started in the 1930s. The son of an immigrant Italian lithographer, Terra at age 25 pioneered a printing process with fast-drying ink that "revolutionized magazine printing" and made it possible to substantially shorten deadlines "so that news items in national magazines wouldn't be stale by the time the magazines came out." In 1936, using his new process, *Life* magazine began publication. "I had a cot for a six-week period in the plant where it was being printed so I could be there all night if they had problems."

In 1981, President Reagan appointed him America's first ambassador-at-large for cultural affairs. His office is at the State Department, and last year he gave 109 speeches around the world promoting the importance of America's cultural achievements and urging private-sector support for the arts in

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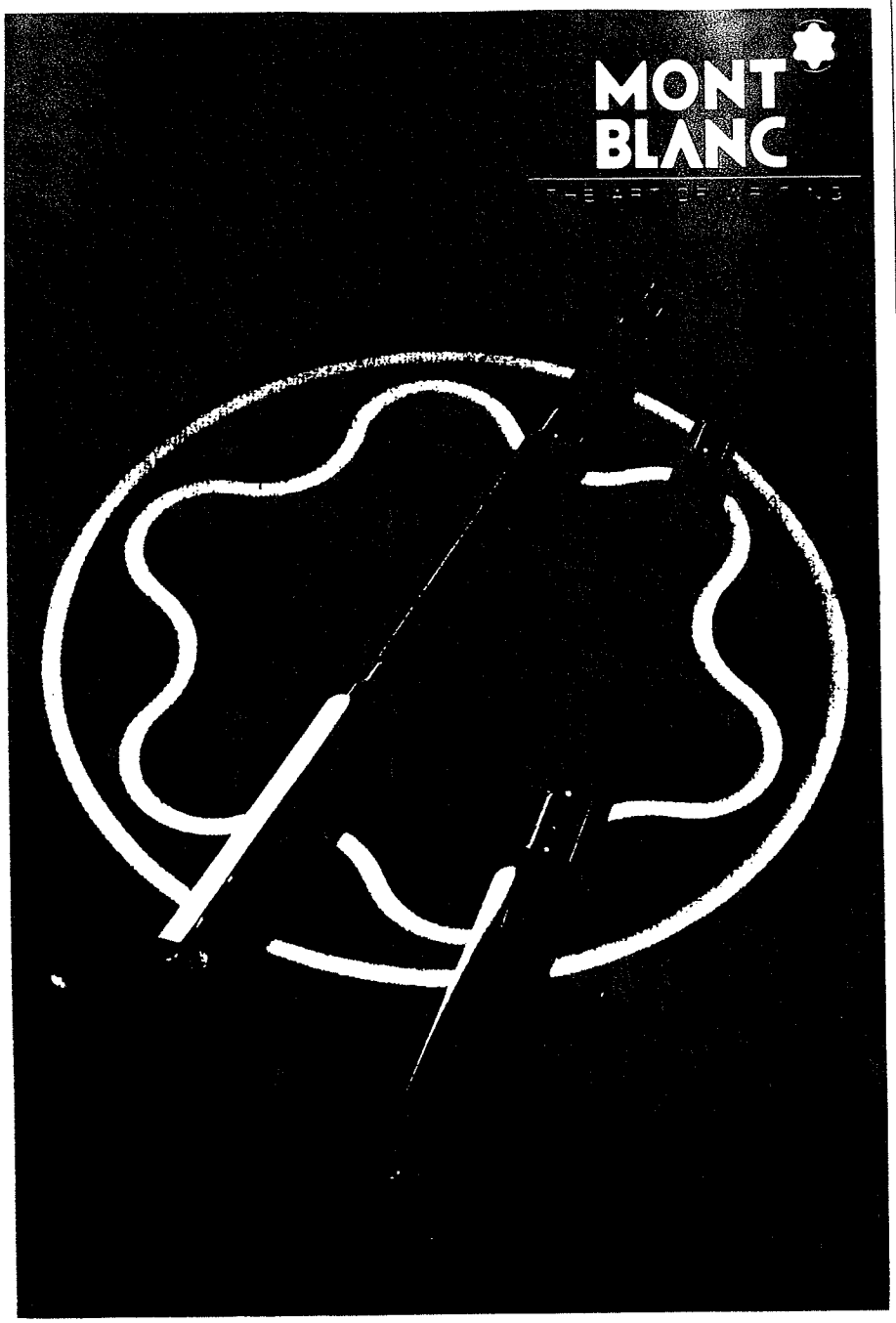

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this country. And to make sure his museum opens on time, he's been commuting for the past year at least twice a week between his two homes in Washington and Kenilworth, near Chicago.

A longtime collector of American paintings, Terra has had a museum in Evanston, Illinois, since 1980 (it will remain open as a branch of the new one on North Michigan Avenue). His first wife, the late Adeline Evans Richards, was an art historian and inspired Terra to begin collecting more than fifty years ago. But it wasn't until a New York dealer mentioned to him that there wasn't a museum of American art within 400 miles of Chicago that he got the idea to open his own museum. "One of the problems with the little museum in Evanston is its location," he says. "We don't even have bus service there on Sundays, and weekends are the biggest part of museum attendance. We were in a quiet hard-to-find spot, and we were getting excellent crowds. So we decided that we had to go to the other extreme. Imagine what American art would draw if you had the best location. And when you start thinking in terms of Chicago, the best location has to be North Michigan Avenue."

Many of Dan Terra's paintings—his collection now numbers more than eight hundred important American works—are on loan elsewhere and are being reassembled for the museum opening. The most famous, *The Gallery of the Louvre* by Samuel F. B. Morse ("It's the icon of America," he says), which he purchased in 1982 for $3.25 million—a then-record price for an American painting—is returning from Cincinnati. *Brace's Rock, Brace's Cove* by Fitz Hugh Lane, which National Gallery Deputy Director John Wilmerding says is one of the finest examples of Luminism, and *The Jolly Flatboatmen* by George Caleb Bingham are being hand-carried from Sweden. And *Lilies* by Frederick Carl Frieseke, Terra's most recent acquisition, is being framed at the Berry Hill Gallery in New York, but will be ready on time. The opening exhibition, "A Proud Heritage: Two Centuries of American Art," will feature about a hundred paintings from the Terra collection along with more than sixty major paintings from the Pennsylvania Academy of the Fine Arts in Philadel-

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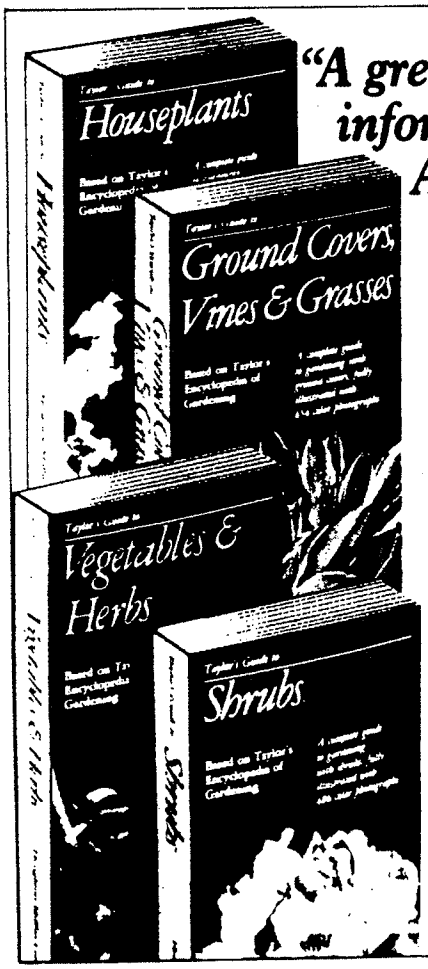

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phia. ("It's the longest-standing museum of American art in the country, and we're the newest," explains Terra.) "It's very unusual for the Pennsylvania Academy to lend a substantial group of paintings like this," says Michael Sandin, director of the Terra Museum and former director of the Oklahoma Art Center.

The museum opening in April is the first phase of a three-phase plan and will involve two of the existing four buildings—a 1927 limestone building by architect Philip B. Maher and the five-story building that Helena Rubenstein built in 1957. The third building sits next to the Helena Rubenstein building to the north, and the fourth is across Erie Street to the south. Architect Laurence Booth of the noted Chicago firm Booth/Hansen & Associates has gutted the interior of the eleven-story corner building and connected it with a new five-story building constructed on the foundations of the Helena Rubenstein building. "We wanted something that would catch people's attention," says Booth, "so we chose white Vermont marble to brighten that stuffy part of the avenue. We wanted it to be appropriately visible, exciting and intriguing, and at the same time not jarring and aggressive—creating the appropriate presence that establishes the Terra as a major institution in Chicago."

Booth's white marble building houses the main entrance and a winding ramp that runs from top to bottom. Descending through the interior, the ramp—unlike the Guggenheim's spiral, it's more like a sculpture combining stairs and ramps—makes a dramatic statement. "Larry Booth deserves the credit for coming up with the ramp system," says Dan Terra. "It is really quite brilliant because it allows plenty of wall space for large paintings and for receptions, too."

The museum's second phase is expected to begin in 1988. This will involve tearing down the third building to the north and replacing it with a new structure that will connect with and add four stories to the white marble center building. "The second phase has to unify the three buildings," says Ambassador Terra. The third and final phase will involve the fourth building across Erie Street and will not begin until the second phase is finished.

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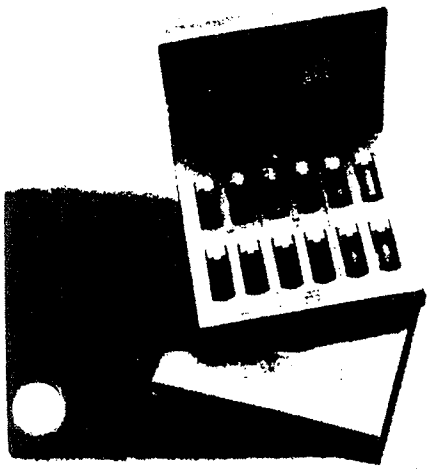

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Terra chose Laurence Booth because of his experience with conversion and restoration. "Larry Booth has done most of the conversion work of the loft buildings on Printers Row in Chicago," says Terra. "I think he's come up with some very intriguing plans. He took that Helena Rubenstein building and really did something."

"The museum is not inward looking. It's outward looking," explains Laurence Booth, referring to the four-story-high window that exposes the ramp system and defines the entrance into the museum. "It breaks the museum open and makes it much more American. It's not like an exclusive club. It's open to all the people. That's the spirit of the place. And it's certainly the spirit of the ambassador and his generosity."

James Wood, director of the nearby Art Institute of Chicago, which has an extensive collection of Amercian art, feels that "this is an opportunity for the city. There is no question that there is room for a new vital institution." Art historian Barbara Novak goes even further: "It's tremendously important for a new museum devoted to American art to exist and tremendously important for it to happen in the Midwest. We don't have enough of them yet in this country because many people don't share Ambassador Terra's sense of the value and richness of American art. He has a genuine enthusiasm and I respect what he's doing."

Terra did not begin as a collector of American art. "The first painting I bought was in 1936," he says, as he and Judith and I drive to the museum in Evanston. "It was a nineteenth-century English landscape, which is still hanging over the fireplace at home. And it cost $40."

But it took him more than twenty years before he bought his first American works—two of the four studies of John Singer Sargent's *The Oyster Gatherers of Cancale*. Twenty years later he bought the third study at a cost that "was 51 times as much as either one of the others. That gives you a pretty good idea of what has happened to the value of important American paintings." Another indication: George Caleb Bingham's first version of *The Jolly Flatboatmen* painted in 1846 (Terra owns the second version of 1848) was sold in January by Senator Claiborne Pell for $6 million, the new record price for an American painting.

And Terra predicts the trend will continue. "We're on the cutting edge of the most dynamic surge of interest in American art that this nation has ever seen."

When we arrive in Evanston at the first Terra Museum, which he refers to these days as the "little museum," I'm immediately drawn to one painting in particular. In 1985, Dan Terra called to ask me to go to the Coe Kerr Gallery in New York to take a look at his latest acquisitions. One was *In the Garden, Corfu* by John Singer Sargent, which I recently saw again on loan to the Whitney's Sargent show. And the other, *Summertime: Woman and Child in a Rowboat* by Mary Cassatt, I now find myself in front of once again.

American Impressionist paintings play an important part in the Terra collection, and standing in this room surrounded by Cassatt's *Summertime* and *The Cup of Chocolate*, Charles Courtney Curran's *Lotus Lilies*, Winslow Homer's *The Croquet Match*, James McNeill Whistler's *Note in Red: The Siesta*, John Leslie Breck's *Rock Garden at Giverny*, Frieseke's *Lady in a Garden*, and so many others, it is apparent that women and gardens are a common theme in the collection. And his most recent purchase, Frieseke's *Lilies*, continues this theme.

"This garden is right next door to the Monet compound at Giverny," Terra says. "The painting is just called *Lilies* because the main flower that's in the picture is the white lily, as you can see. But what makes that very exciting to us is we know that garden so well," he says turning to his bride of less than a year, the former Judith Banks. (About two years ago while the three of us were having dinner in Washington, he told me that Judith reminds him of all the beautiful women in his paintings.)

"The name of the house is the Perry House because Lilla Cabot Perry was the earliest of five American artists who lived there," the ambassador continues. The others are, in addition to Perry and Frieseke, Theodore Robinson, John Leslie Breck, and Frederick MacMonnies; all five are represented in the Terra collection. "We have about fifty pictures in the collection which were painted either in this garden or in gardens that are close to it, including the Monet gardens themselves."

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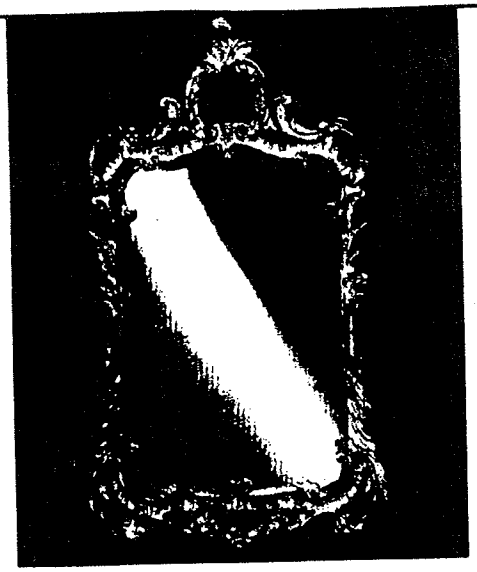

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Dan Terra's passion for *Lilies* is apparent. "This is a drop-dead picture. It really is. Frieseke didn't always make it but this time he was absolutely superb. And there isn't anybody in American art who I think paints these magnificent flowers like Frieseke did. And beautiful, beautiful female figures."

Later during lunch Terra says, "I know the story behind all the paintings before I buy them," he says. For instance, if there is a house in the painting, the ambassador often visits the site before buying the painting.

"That's part of learning what these artists were all about because of all the information you can get out of these visits. We went to Shinnecock Hall [the Long Island home of William Merritt Chase] and spent two days at that house just exploring it before we bought that great Chase pastel. It's so fabulous." He lowers his voice to a near whisper and says, "Let me tell you, as great he was, Degas never did any better."

You can't talk about the Terra collection without mentioning Maurice Prendergast. "The last non-American paintings we collected were the French Impressionists, and there was something about Prendergast that resembled the Impressionists and Post-Impressionists," says Terra. He has acquired about eighty works (considered to be the most comprehensive collection) by Prendergast, 58 of which are monotypes. These are now traveling in a show that first opened at the National Gallery of Art in Washington in January 1985.

In the past year Daniel Terra has bought more than twenty important works to fill gaps in his collection. Through one collector in Zürich he found several paintings by early modern artists Marsden Hartley, Joseph Stella, Stuart Davis, and Patrick Henry Bruce. "I don't think it's compulsive buying," he says. "I think it's very careful, deliberately planned buying to fill out the collection. There are always gaps in all of these periods, and that acquisition was a fine step forward in the early modern collection.

"I'm aware of where probably ninety percent of the last remaining American historical works, perhaps a hundred, are in private hands. I never stop trying to negotiate a purchase." Right now he's trying to obtain several

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Exhibit 4

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August 18, 2000

Dr. Paul Tucker
Chairman and President
Terra Foundation for the Arts
664 N. Michigan Avenue
Chicago, IL 60611

Dear Dr. Tucker:

We are in receipt of Donald H. Ratner's letter of August 11, 2000. In that letter, Mr. Ratner, purporting to speak for you, has indicated that the Foundation will not pay Mayer, Brown & Platt "for any time incurred in dealing with or responding to any issues not specifically requested by either Paul Tucker or Donald Ratner as his agent." We have spoken to Mr. Ratner about this letter. He has indicated to us that the Foundation wishes to reduce the substantial level of its professional fees; he has suggested that you intend to make our task easier and less time consuming by encouraging us to decline to communicate with other officers and directors.

With all due respect to you and Mr. Ratner, we conclude that we cannot continue to act as special counsel to the Foundation under these circumstances and therefore withdraw from our representation. In our original engagement letter of December 11, 1996, sent to us by Catherine A. Stevens on behalf of Helene Ahrweiler, Chairman of the Board, and signed by Ms. Ahrweiler and ourselves, the Foundation requested that we act as special counsel to the Foundation. It was clear that the client was the Foundation, not merely its President and Chairman. That letter also made clear that we were to provide legal advice and representation to the Board of the Foundation. As special counsel, we have worked with three different Chairmen, a number of board members, staff and counsel. We owe professional obligations to the institution and all its directors. It would not be consistent with our professional obligations to decline to respond to the concerns of directors.

Most recently, we have been engaged in three tasks. We have been providing information to your new general counsel at Winston & Strawn. We have represented the Foundation in connection with the administration of the Estate of Ambassador Terra (which is ready to close, awaiting only final action by the Foundation). We have given advice to the

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Foundation with regard to its claim as a member of the "holder class" in the Mercury Finance bankruptcy matter.

As to the transition to new general counsel, we have made all of our files available to your new counsel. They and Mr. Ratner have examined them extensively and requested voluminous copies. We have complied with all of their requests, and they have acknowledged our complete cooperation. These files remain available to you and your counsel.

As to the Estate of Daniel Terra, you have asked your new general counsel to review the matters as to which we were previously asked to give counsel. We should arrange for a prompt substitution of counsel in the Estate so that the Foundation can be represented by Winston & Strawn in these matters. You do not require both firms.

We understand that Winston & Strawn has a potential conflict of interest in the Mercury bankruptcy. Note, however, that we have never filed an appearance in any of these matters, but have gathered information from Bell, Boyd & Lloyd and other sources. Under these circumstances, we recommend that you retain another firm to act as special counsel to advise you with respect to these matters.

We have enjoyed the opportunity to work with the Terra Foundation for the Arts.

Very truly yours,

Tyrone C. Fahner

Howard M. McCue III

mgp

cc: Board of Directors
Mr. Mark Heatwole

Exhibit 5

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RESTATED BYLAWS OF
TERRA FOUNDATION FOR THE ARTS

ARTICLE I

Purposes

The purposes for which the corporation is organized are exclusively for charitable, educational, literary, and scientific purposes including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Section 501(c) (3) of the Internal Revenue Code of 1986, or the corresponding provisions of any subsequent Federal tax laws ("Code"). For illustrative purposes only, the purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and any and all artistic and technical educational courses in the visual and performing arts and other general educational subjects; build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad, and all component parts deemed advisable or necessary to provide space for these activities and exhibitions; engage in any and all other activities and exhibitions; engage in any and all other activities and promote any and all other purposes permitted by law to such a not-for-profit corporation.

No part of the net earnings of the corporation shall inure to the benefit of or be distributed to, its members, directors, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting, to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of these bylaws the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from Federal income tax under Section 501(c)(3) of the Code.

If this corporation is in any one year a private foundation, as defined in Section 509(a), it shall be required to distribute its income for such taxable year at such time and in such manner as not to subject the foundation to tax under Section 4942, and shall be prohibited from engaging in any act of self-dealing, as defined in Section 4941(d), from retaining any excess business holdings, as defined in Section 4943(c), from making any investments in such manner as to

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The bylaws of the corporation were restated on July 18, 1994, amended on August 17, 1996 and amended on January 27, 1998.

subject the foundation to tax under Section 4944, and from making any taxable expenditures, as defined in Section 4945(d), all Sections being of the Code.

Upon dissolution of the corporation, the Board of Directors shall, after paying or making provision for the payment of all the liabilities of the corporation, dispose of all of the assets of the corporation exclusively for the purposes of the corporation in such manner, or to such organization or organizations organized and operated exclusively for charitable, educational, literary, religious or scientific purposes as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Code, as the Board of Directors shall determine.

The corporation shall have such powers as are authorized by law and in general, subject to such limitations and conditions as are or may be prescribed by law, to exercise such other powers which now are or hereafter may be conferred by law upon a corporation organized for the purposes hereinabove set forth, or necessary or incidental to the powers so conferred, or conducive to the attainment of the purposes of the corporation, subject to the further limitation and condition that only such powers shall be exercised as are in furtherance of the exempt purposes of the organization set forth in Section 501(c)(3) of the Code and its Regulations as they now exist or as they may hereafter be amended.

The corporation also has such powers as are now or may hereafter be granted by the General Not For Profit Corporation Act of the State of Illinois.

ARTICLE II

Offices

The corporation shall have and continuously maintain in this state a registered office and a registered agent whose office is identical with such registered office, and may have such other offices within or without the State of Illinois as the Board of Directors may from time to time determine.

ARTICLE III

Board of Directors

Section 1. General Powers. The affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications.

(a) The number of directors elected by the Board of Directors shall be no less than seven and no more than eleven. The number of directors may be fixed or changed from time to time, within this minimum and maximum, without further amendment to these bylaws. Each elected director shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been elected and qualified.

(b) Directors need not be residents of Illinois.

Section 3. Regular Meetings. A regular annual meeting shall be held during the month of September of each year, for the purposes of electing directors and officers and for the transaction of such other business as may properly come before the meeting. If the election of directors and officers shall not be held at such meeting, the board of directors shall cause the election to be held at a meeting of the board of directors as soon thereafter as conveniently may be. The Board of Directors shall provide by resolution the time and place, either within or without the State of Illinois, for the holding of the regular annual meeting and additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings. Special meetings of the Board of Directors may be called by or at the request of the president or any two directors. The person or persons authorized to call special meetings of the board may fix any reasonable place, either within or without the State of Illinois, as the place for holding any special meeting of the Board called by them.

Section 5. Notice. Notice of any meeting of the Board of Directors shall be given at least five days previously thereto by written notice delivered personally or sent by mail or telegram to each director at his address as shown by the records of the corporation. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail in a sealed envelope so addressed, with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice of waiver of notice of such meeting, unless specifically required by law or by these Bylaws.

Section 6. Quorum. A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the board, except that if less than a majority of the directors are present at such meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting. The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided by law or by these Bylaws.

Section 8. Vacancies. Any vacancy occurring in the Board of Directors, or any directorship to be filled by reason of an increase in the number of directors, shall be filled by the Board of Directors. A director elected to fill a vacancy shall be elected for the unexpired term of his predecessor in office, and a director elected by reason of an increase in the number of directors shall be elected for a term expiring on the date of the next annual meeting of the Board of Directors.

Section 9. Informal Action by Directors. Unless specifically prohibited by the articles of incorporation or bylaws, any action required to be taken at a meeting of the board of directors, or any other action which may be taken at a meeting of the board of directors or any committee thereof, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the directors entitled to vote with respect to the subject matter thereof, or by all the members of such committee, as the case may be. Any such consent signed by all the directors or all the members of the committee shall have the same effect as a unanimous vote, and may be stated as such in any document filed with the Secretary of State.

Section 10. Participation by Telecommunications Equipment. Directors or nondirector committee members may participate in and act at any meeting of the board or committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can communicate with each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

Section 11. Executive Committee. The board of directors may, by resolution passed by a majority of the whole board, designate an executive committee consisting of two or more of the directors of the corporation. The executive committee shall have and may exercise all the authority of the board of directors in the management of the corporation between meetings of the board of directors, provided the committee shall not have the authority of the board of directors in reference to (a) amending the articles of incorporation, (b) adopting a plan of merger or adopting a plan of consolidation with another corporation or corporations, (c) authorizing the sale, lease, exchange or mortgage of all or substantially all of the property and assets of the corporation, (d) authorizing the voluntary dissolution of the corporation or revoking proceedings therefor, (e) adopting a plan for the distribution of the assets of the corporation, (f) amending, altering or repealing the bylaws of the corporation, (g) electing, appointing or removing any director or officer of the corporation or any member of the executive committee or (h) amending, altering or repealing any resolution of the board of directors which by its terms provides that it shall not be amended, altered or repealed by the executive committee. The executive committee shall keep minutes of each of its meetings and report the same at the next meeting of the board of directors.

Section 12. Other Committees. The board of directors may from time to time establish other committees and specify the scope of their authority.

Section 13. Compensation. Directors as such shall not receive any stated salaries for their services, but by resolution of the Board of Directors, a fixed sum may, and expenses of attendance, if any, shall be allowed for attendance at each regular or special meeting of the Board or committee thereof; except that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor.

ARTICLE IV

Officers

Section 1. Officers. The officers of the corporation shall be a chairman, one or more vice chairmen, a president, one or more vice presidents, a secretary and a treasurer. The Board of Directors may appoint such other officers, including one or more assistant secretaries and one or more assistant treasurers as it shall deem desirable, such appointed officers to have the authority to perform the duties prescribed from time to time by the Board of Directors. Any two or more offices may be held by the same person, except the offices of president and secretary.

Section 2. Election and Term of Office. The officers of the corporation shall be elected by the Board of Directors at its regular annual meeting. If the election of officers shall not be held at such meeting, such election shall be held as soon thereafter as conveniently may be.

Vacancies may be filled and new offices created and filled at any meeting of the Board of Directors. Each elected officer shall hold office until the next annual meeting of the Board of Directors or until his successor shall have been duly elected and shall have qualified. Election or appointment of an officer or agent shall not of itself create contract rights.

Section 3. Removal. Any officer or agent elected or appointed by the Board of Directors may be removed by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person removed.

Section 4. Chairman. The chairman shall be the chief executive officer of the corporation and shall in general supervise and control all of the affairs of the corporation. He shall preside at all meetings of the Board of Directors. He shall have the power to execute all documents that the board of directors has authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the board of directors or by these bylaws to some other officer or agent of the corporation, or shall be required by law to be otherwise signed or executed, and in general shall perform all duties incident to the office of chairman and such other duties as the board of directors may from time to time prescribe.

Section 5. Vice Chairman. In the absence of the chairman or in the event of his inability or refusal to act, the vice chairman, or in the event there is more than one in the order designated by the Board of Directors (or if none, in the order of election), shall perform the duties of the chairman and when so acting shall have all the powers of the chairman. These duties shall not include the duty to preside at meetings of the Board of Directors in the event of the absence, inability or refusal to act of the chairman, which is expressly granted to the president. Each vice chairman shall perform such other duties as from time to time may be assigned to him by the chairman or the Board of Directors.

Section 6. President. The president shall be the principal operating officer of the corporation and shall in general supervise and control all the day-to-day business and affairs of the corporation. In the absence of the chairman or in the event of his inability or refusal to

preside at any meeting of the Board of Directors, the president shall preside at such meeting or meetings of the Board of Directors. He may sign, with the secretary or any other proper officer of the corporation authorized by the Board of Directors, any deed, mortgages, bonds, contracts, or other instruments which the Board of Directors have authorized to be executed, except in cases where the signing and execution thereof shall be expressly delegated by the Board of Directors or by these Bylaws or by statute to some other officer or agent of the corporation; and in general shall perform all duties incident to the office of president and such other duties as may be prescribed by the Board of Directors from time to time.

Section 7. Vice Presidents. In the absence of the president or in the event of the inability or refusal to act of the president, the vice presidents in the order designated by the Board of Directors (or if none, in the order of election) shall perform the duties of the president, and when so acting shall have all the powers of the president. Each vice president shall perform such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 8. Treasurer. If required by the Board of Directors, the treasurer shall give a bond for the faithful discharge of his duties in such sum and with such surety or sureties as the Board of Directors shall determine. He shall have charge and custody of and be responsible for all funds and securities of the corporation; receive and give receipts for moneys due and payable to the corporation from any source whatsoever, and deposit all such moneys in the name of the corporation and in such banks, trust companies or other depositories as shall be selected in accordance with the provisions of ARTICLE V of these Bylaws; and in general perform all the duties incident to the office of treasurer and such other duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 9. Secretary. The secretary shall keep minutes of the meetings of the Board of Directors in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law; be custodian of the corporate records and of the seal of the corporation and see that the seal of the corporation is affixed to all documents, the execution of which on behalf of the corporation under its seal is duly authorized in accordance with the provisions of these Bylaws; and in general perform all duties as from time to time may be assigned to him by the president or by the Board of Directors.

Section 10. Assistant Treasurers and Assistant Secretaries. If required by the Board of Directors, the assistant treasurers shall give bonds for the faithful discharge of their duties in such sums and with such sureties as the Board of Directors shall determine. The assistant treasurers and assistant secretaries, in general, shall perform such duties as shall be assigned to them by the treasurer or the secretary, as the case may be, or by the president or the Board of Directors.

ARTICLE V

Contracts, Checks, Deposits and Funds

Section 1. Contracts. The Board of Directors may authorize any officer or officers, agent or agents of the corporation, in addition to the officers so authorized by these Bylaws, to

enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc. All checks, drafts or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation, shall be signed by such officer or officers, agent or agents of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors. In the absence of such determination by the Board of Directors, such instruments shall be signed by any two elected officers of the corporation.

Section 3. Deposits. All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies or other depositaries as the Board of Directors may select.

Section 4. Gifts. The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest or devise for the general purposes or for any special purpose of the corporation.

Section 5. Loans. No loan of money shall be contracted on behalf of the corporation and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. Such authority may be general or confined to specific instances.

ARTICLE VI

Books and Records

The corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of its Board of Directors and its committees.

ARTICLE VII

Fiscal Year

The fiscal year of the corporation shall begin on July 1 of each year and end on June 30 of the succeeding year.

ARTICLE VIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the form of a circle and shall have inscribed thereon the name of the corporation and the words "Corporate Seal, Illinois".

ARTICLE IX

Waiver of Notice

Whenever any notice whatever is required to be given under the provisions of the General Not For Profit Corporation Act of Illinois or under the provisions of the Articles of Incorporation or the Bylaws of the corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE X

Indemnification

(a) The corporation shall indemnify any and all of its directors or officers or the directors or members of the boards or committees of the constituent museums or schools of the corporation or any person who may have served at its request or by its election as a director or officer of another corporation (an "indemnified person") against expenses actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties, or a party, by reason of being or having been an indemnified person except in relation to matters as to which any such indemnified person shall be adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicted on the existence of such liability.

(b) Except as provided in paragraph (a) above, the termination of any litigation by judgment, settlement, conviction or upon a plea of *nolo contendre*, or its equivalent, shall not create a presumption that the person seeking indemnification did not meet the applicable indemnification standard as set forth in paragraph (a) above.

(c) Advances may be made by the corporation against costs, expenses and fees arising out of, or in connection with, such litigation at the discretion of, and upon such terms (but always subject to the final determination of a person's right to indemnification) as may be determined by the Board of Directors.

(d) The right of indemnification provided hereunder shall not be deemed exclusive of any other right to which any person may be entitled, or of any other indemnification which may lawfully be granted to any person in addition to the indemnification provided hereunder. Indemnification provided hereunder shall, in the case of the death of the person entitled to indemnification, inure to the benefit of his heirs, executors or other lawful representative.

(e) The corporation may purchase and maintain insurance on behalf of any and all of its indemnified persons against any liability, incurred by them by reason of being or having been an indemnified person, whether or not the corporation would have the power to indemnify them against such liability or settlement under the provisions of this ARTICLE X.

ARTICLE XI

Interchangeability

Whenever the context requires or permits, the gender and number of words shall be interchangeable.

ARTICLE XII

Amendments to Bylaws

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by a majority of the directors then in office and present at any regular meeting or at any special meeting, if at least two days' written notice is given of intention to alter, amend or repeal or to adopt new Bylaws at such meeting.

Exhibit 6

Margaret Corbett Daley

2 March 2000

Dear John

Having just returned from out of town, I am disheartened about the news concerning Ginny Spindler.

John, Ginny worked tirelessly on the Stark Resource Guide. I was very impressed with her work and Rachel's as well. In fact, without their tireless efforts it would not have been a worthwhile publication. In fact, it would have been an embarrassment to the Foundation.

Your letter to Ginny was, from my point of view, unkind and uncalled for. It distressed me to see people treated in such a manner.

16di-004664

In my dealings with her on Education issues, I believe she has always gone "above and beyond" her duties.

I am leaving today for my Aunt's funeral in Pittsburgh.
But I couldn't leave without letting you and the Board know my feelings and deep concerns.

Maggie

cc: Founders Board

Exhibit 7

ARTHUR A. HARTMAN
2738 MCKINLEY STREET, NW
WASHINGTON, D.C. 20015
(202) 362-6660 FAX & VOICE

November 7, 1999 CONFIDENTIAL

MEMORANDUM to the Board of the Terra Foundation

On my return from Moscow, I find the concerns that I expressed to all of you both prior to our meeting and at the meeting itself have now come true. We are once again embarked on an argument that is seriously dividing the Board and keeping us from carrying on the fulfillment of our mandate. This is due in my opinion to the hasty action of transferring authorities without each of the members taking the time to get properly briefed on the functions and the activities of the previous Board leadership. I am not counting in this the charges made by Alan Simpson, which I can only describe as off the wall. Thus, after what I had seen as progress at our recent retreat, we are now engaged in a review of past history and not focused on the search for a President. So be it.

I would like to state for the record that I agree with the description of events and actions in Jim Collins' memorandum. I have always said to you that, despite my occasional differences with Jim, this Foundation owes him a debt of gratitude for the effective and scrupulously honest way that he has brought our finances together. If anything, his memo understates the efficient and creative effort that he and his colleagues made to assure that the intentions of Dan Terra (as he directly related it to me) to leave the bulk of his estate to this Foundation, was carried out. Lest we forget, that was and is the duty of all those on this Board. (Here I must say that I found Alan's statements totally out of line and contrary to the law under which this Foundation is chartered in the State of Illinois.) Some of our new members might not have been present when we briefed the Board (and sought appropriate approval) on the various stages of the settlement of the estate and the sale of assets. The reason for the participation of special counsel—Scott McCue and Ty Fahner—a former Attorney General of Illinois—was to assure ourselves that our duties were being properly carried out. Since Dan had put me on the Lawter Board, I was particularly concerned that there might even be the appearance of a conflict of interest with my position as President/Chairman of the Foundation. On the advice of special counsel, I was always careful to tell my colleagues what actions were proper for me to take and those on which I had to recuse myself. Jim did the same. But we were both able to work with the Lawter Board to get them first to buy back the estate shares and then, finally, to help in the mutually advantageous sale of Lawter itself to Eastman

Chemical. Jim's efforts in all these endeavors, to say nothing of his handling of Dan's outstanding bank loans, saved this Foundation millions of dollars in assets which might have been lost or reduced in value. These efforts were at all times in the interest of this Foundation. And I reject any notion that his efforts on our behalf met anything other than the highest ethical standards.

Several of you have commented on the question of continuity. As I informed you, I was in the process of attempting to effect a seamless transition on the financial side by hiring A.T. Kearney to search for a Vice President for Finance and Administration in order to provide the necessary continuity in the functions that Jim had performed. I did this with complete accord of the Finance Committee even though we all recognized that such a hire should logically follow that of the President. The intention was to assure that our Finance Committee and Chairman would have the most competent professional advice at all times. This was naturally to be followed by the election of a Board member as Treasurer. I hope this process will continue but I fear our current controversy may make that search more difficult. In any case, it is urgent to build into the Foundation staff an ability to backstop our Finance Committee and to look after our resources properly.

With respect to the Secretary, Stephanie should obviously have access to all records. This too was in process as I read Dean's memo after his conversations with a senior partner in Bell/Boyd. Incidentally, these records are not only at Bell/Boyd, as Cathy could have told anyone willing to be briefed. They are also indexed and in the possession of the Foundation. On the subject of counsel, I should point out that Jim Collins was not our sole resource at Bell/Boyd. Rick Sevcik has been of invaluable assistance to us on matters as varied as getting employment manuals and human relations policies in place in the Chicago Museum to settling employment issues in France and the U.S. Others in the firm have helped us with many problems that have arisen because the Foundation and its properties were not in the best shape from a documentary and regulatory point of view when Dan died. He had many great qualities but as with other founders he was more focused on long-term objectives and was very impatient with what he considered bureaucratic detail. We can thank Jim and his staff for getting much of this straightened out, with help from Cathy. On personnel issues, several of these are still outstanding and require continuity of treatment.

As you all know, I spent a great amount of time over the last six months, particularly on the problems of Chicago. It is essential that these matters be dealt with and followed through along the lines that on behalf of the Foundation I have set out contractually with John Neff. We should not let our current discussions deflect us from the progress that has been made. I clearly have much less concern about MAAG than I do about Chicago which is not well led. Again, someone must pick up with Cathy to prevent this situation from
deteriorating.

You may ask if I have any positive suggestions. My feeling at this point is that the Chairman/President should call another Board meeting prior to January 18th to review our proposed candidates for President, the status of the search for a Vice President for Finance and Administration and thrash out the other matters before us. This would get us back to the point I thought we had reached at the end of our retreat.

Arthur Hartman AH

cc: Catherine Stevens
Tyrone Fahner
Howard McCue
James Collins

Exhibit 8

16di-004670

Terra Foundation
Board Meeting
Minutes
August 24, 2000

In attendance by Conference Call:

Dr. Paul Tucker, Chair
Hon. Jacques Andreani
Mr. Dean Buntrock
Mrs. Margaret Daley
Senator Alan Simpson
Dr. Theodore Stebbins, Jr.
Dr. Stephanie Pace Marshall
Mrs. Judith Terra

By Invitation:
Mr. Mark Heatwole
Mr. Ralph Lerner

Staff:

Mr. Donald Ratner

By Invitation:

Dr. Derrick Cartwright
Dr. John Hallmark Neff

The meeting was called to order at 1:08 PM. Dr. Tucker indicated that the purpose was to review the four proposals and detailed data we had received from our four potential partners allow us to be better prepared for the September meeting. The minutes from the August 7, 2000 Strategic Plan meeting were reviewed and unanimously approved by the Strategic Planning Committee.

There were significant discussions around whether Giverny was "central" to the focus of the Foundation's mission. A decision was made to examine this question at the Board meeting in September.

Dr. Stebbins suggested that we had already decided on the central importance of Giverny.

Dr. Tucker reviewed the background that resulted in the decision of making Giverny central. Mr. Buntrock indicated that he saw that there is a difference between the importance of Giverny and making it central. Dr. Marshall discussed alternatives at this point:

1. Agree that there are unresolved issues and put them aside and then look at the proposals in front of us; or
2. Focus on the issues and then refer them back to a small group to make a presentation at the next meeting and end the call now.

Dr. Marshall agreed that we had not discussed the centrality of Giverny as a Board but had discussed it in Strategic Plan Committee meetings and that Committee has come to the conclusion of Giverny as being central.

Dr. Marshall also suggested we ask Helene to write "her perception of Dan's vision of Giverny". In other words, what is the purpose of Giverny?

Dr. Cartwright indicated that he has Helene's paper and will send it out as soon as Helene reviews it.

The Board asked Dr. Cartwright to write his view of Giverny's future relating to education.

Mrs. Daly said that she did not recall that we had discussed "abandoning" Chicago.

Dr. Tucker indicated that the thinking had gone along these lines:

- The Chicago facility needs a great deal of money to be brought up to par with other museums;
- There are problems with the Chicago museum's configuration;
- We have a problem attracting attendance in Chicago;
- There is considerable cost involved in supporting the Chicago museum;
- The collection is not adequate to be split between two institutions;
- Therefore, the best way to maximize our resources and fulfill our mission is to align with another institution, close the Chicago museum and focus on Giverny and educational initiatives of the Foundation.

Mr. Buntrock said that we had never discussed this at the Board level.

Dr. Tucker agreed but noted that it was a conclusion of the Strategic Planning Committee and that they were going to make a recommendation to the Board.

Dr. Marshall said that we could make a decision on this call if we so chose. She further indicated that we should make sure that there are two issues on the agenda at the September meeting:

- Giverny as being central;
- Closing Chicago

Dr. Tucker suggested that we definitely make a decision in September.

Dr. Marshall suggested we change the order of the agenda to go through Ralph's contract. Mr. Andreani indicated that two of the proposals need more detail. Mr. Lerner then discussed the strategic alliance contract. One premise of his draft was that there would be no museum in the U.S. and that would relieve us of the administrative burden of running that museum. He also indicated that the education portion had not yet been sufficiently developed. And the final premise was that we would ultimately turn the works of art over to the new/aligned institution.

Mr. Lerner walked the Board through each part of the draft contract. From that review there emerged the following items:

1. Ownership of the collection. Would it be donated and who holds title.
2. Where the collection would be housed, how much would be exhibited and for how long.
3. The question of a study center.
4. The question of office space.
5. Whether we should contribute money for construction or a naming opportunity.
6. Who would curate the collection and who that person would work for.
7. On what subjects the aligned institution would have to consult with the Terra Board.
8. What works should never be sold.
9. Issues regarding exhibitions, publications, etc. resulting from the possible alliance.
10. How the acquisition fund should be handled and who should maintain control of it.
11. Educational issues.
12. The status of the art at Giverny and what needs to stay there permanently versus what might rotate.

The Board concluded that it will have to address the above 12 issues as well as the issue of determining a strategic partner.

Mr. Ratner was asked to finalize the above list and send it out with the minutes by the end of next week.

At the September meeting, we need to be prepared to discuss what qualities of the educational programs we want to have included in this plan.

Dr. Marshall asked if we should send out an RFP to all four suitors on education. Senator Simpson suggested that we need to decide what we want as opposed to what they're going to give us.

Dr. Tucker suggested that the next step should be the following:

1. Get proposals on education from the four institutions as to how they would see working with the Foundation.
2. Equalize the general portion of the proposals on affiliation from all four institutions.

3. Get more information on the existing educational programs of the four institutions.

4. Reduce the four institutions to two or three and then focus on those and discuss.

In September we will need:

1. White papers on education from any Board member who would like to prepare one.

2. Educational information.

The meeting was adjourned at 4:00 PM.

Respectively submitted,

_____

Donald H. Ratner

TERRA FOUNDATION for the ARTS

BOARD MEETING AGENDA

September 26, 2000
9:30 AM – 4:00 PM
Giverny

			TAB
I.	Report of Chairman	Paul Tucker	
II.	Review and Approval/Acceptance of Minutes	Paul Tucker	1
	• Board Meeting – October 22, 1999 • Strategic Planning – March 13, 2000 • Strategic Planning – April 5, 2000 • Strategic Planning – May 10, 2000 • Finance – May 16, 2000 • Executive – June 7, 2000 • Board – June 19, 2000 • Collections – June 19, 2000 • Executive – June 19, 2000 • Finance – June 19, 2000 • Board – June 20, 2000 • Finance – August 8, 2000 • Board – August 24, 2000 • Collections – August 24, 2000		
III.	Election of Directors/Officers	Paul Tucker	
IV.	Committee Reports		2
	• Finance • Education • Strategic Planning • Collections	Dean Buntrock Margaret Daley Ron Gidwitz Ted Stebbins	
V.	Review of Estate	Mark Heatwole	
VI.	Directors' Reports	John Neff Derrick Cartwright	3
VII.	Report of VP Finance & Administration	Donald Ratner	4

VIII. Setting Meeting Dates — Paul Tucker

IX. Executive Session

X. Other Business

16di-004678

TERRA FOUNDATION FOR THE ARTS

Donald H. Ratner
VP Finance and Administration
Terra Foundation for the Arts
664 N. Michigan
Chicago, IL 60611

Phone 312-654-2265
Fax 312-664-2052
E-mail ratner@terramuseum.org

Memo

To. Board of Directors

From: Donald H. Ratner
VP Finance and Administration

Date: 09/15/00

Re: Giverny Meeting Arrangements

There have been a couple of questions regarding the arrangements for the meeting in Giverny on September 23 –26. I wanted to get out a preliminary memo to give you the current status. There have been a few changes from the information sent you previously.

Any changes to the following information will be sent out with the Board Books which are scheduled to be Federal Expressed to you next Monday. Also, detail information for breakfast and lunch locations, as well as information on daily transportation to and from the hotel and information for spouses will be included in a packet of information for you when you arrive.

Lastly, I am sending out detail accommodation information seperately.

The current schedule is as follows:

Friday, September 22	On your own
Saturday, September 23	Educational Session – 9:30 AM-5.00 PM - Perry House. Dinner at Marguerite de Bourgogne 7:30 PM – Pickup at Hotel at 7:00 PM
Sunday, September 24	Strategic Planning Session – 9:30 AM – 4.00 PM - Perry House. BOARD MEETING – 4:00 PM – 4:30 PM – Perry House

	Cocktails and Dinner at Ambassador Andreani's. Pickup at Hotel at 6:00 PM
Monday, September 25	Finance Committee 9:00 AM Perry House Education Committee 12:00 PM Bertin House Collections Committee 3:00 PM Perry House Dinner at Judith's 7:30 PM Pickup at Hotel 7:15 PM
Tuesday, September 26	Board Meeting 9:00 AM – 4:30 PM - Perry House Taxis to Paris have been arranged for those returning to Paris

Please let me know if you need transportation from the airport or to the airport by filling out the attached form and faxing back to me by Monday, September 18, 2000.

Please let me know if you have any questions.

EXHIBIT C

16di-004681

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FILED-4
2001 AUG 13 PM 4:30
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
LAW DIV.
DOROTHY BROWN CLERK

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts,; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD. D. PERKINS, Assistant Illinois Attorney General; WINSTON &STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112

Judge Gardner

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT AT LAW

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson complain of the

16di-004682

Defendants Dean Buntrock and Ronald Gidwitz, Margaret Daley, Arthur Hartman, Stephanie Pace Marshall, Theodore Stebbins, James R. Donnelley, Marshalll Field V, Kathleen A. Foster, Robert S. Hamada, Frederick A. Krehbiel, James E. Ryan, Floyd D. Perkins, the Terra Foundation for the Arts ("Foundation"), Winston & Strawn and Sidley & Austin as follows:

Preliminary Statement

1. Through this action, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson seek to vindicate both the mission of the Foundation and the intent of its founder Daniel J. Terra. The plaintiffs complain that certain directors of the Foundation are irreconcilably conflicted and have willfully and wantonly breached their fiduciary obligations by pursuing a course of action antithetical to the best interests of the Foundation and inconsistent with both the purpose of the Foundation and the clearly expressed intentions of its founder. These breaches of fiduciary duty were aided by – and even induced by – the illegal conduct of the Illinois Attorney General and his assistant. Indeed, as we set out more fully below, the improvident conduct of the Attorney General not only induced breaches of fiduciary duty but constitutes an unlawful deprivation of the Foundation's property without due process of law and an unlawful deprivation of the Foundation's rights to freedom of speech. The Foundation's interests have been further compromised by the conflicted interests of several Directors and various counsel who purported to, but did not, represent and counsel the Foundation free of improper influence

2. The plaintiffs have been unlawfully denied the opportunity to bring these claims in other litigation. As a result, this case is filed to secure relief – a declaratory judgment, injunctive relief and damages – in order to halt the perversion of the Foundation's

16di-004683

mission which has been the direct result of the defendants' conduct.

Nature of the Case

3. On June 29, 2001, the Board of Directors of the Terra Foundation for the Arts, by a conflicted majority, voted to accept a settlement of this litigation that would chain the Foundation to Chicago for 50 years and install a majority of Illinois residents on its Board. As the dissenting board members stated before the vote, this acquiescence to the extraordinary intrusions by the State of Illinois into the Foundation's affairs was *ultra vires* and an utter abdication of the Board's fiduciary responsibilities. Yet six board members, some with personal conflicts, none acting in the best interests of the Foundation, chose to vote in favor of a proposal that—if allowed to stand—will do violence to the clear vision of an American philanthropist and set a chilling precedent for all not-for-profit corporations.

4. The Foundation's existing bylaws, written under the direction of the founder Daniel J. Terra, encourage the world-wide dissemination of its art and the artistic accomplishments of American artists. Yet six Board members voted to impose parochial new rules that would prevent the Foundation from moving across state boundaries, preclude it from displaying its collection permanently outside Chicago, force it to relinquish control of its assets to another Chicago-based museum, and pack its board with native sons instead of seeking out the finest art experts worldwide. None of these restrictions were ever envisioned by Mr. Terra; indeed, they are antithetical to the Foundation's charter and its founder's demonstrated intentions.

5. Earlier litigation and a mediation process compromised by conflicts of interest became a vehicle for a power grab by the Attorney General of the State of Illinois and

16di-004684

Assistant Attorney General Floyd D. Perkins, who is charged with enforcing the State's charitable institution laws. Through threats of investigation and legal action—including the threat of suing pivotal board members - Perkins has used his official powers to compromise and conflict certain members of the Foundation's Board of Directors such that the Foundation's right of self-governance, its right to control its own assets, and its right to freedom of speech have been effectively nullified. The Attorney General's conduct has unlawfully interfered with the conduct of the Foundation, a private not-for-profit corporation, through a pattern of harassment, threats and acts of intimidation under color of law, which has deprived and threatens further to deprive Plaintiffs of (1) their freedom of speech, in violation of the First Amendment; (2) their property without due process of law, in violation of the Fourteenth Amendment; and (3) rights under the commerce and contracts clauses of the Constitution. Through this unlawful conduct, Mr. Perkins has also induced certain Board members to violate their fiduciary duties to the Foundation.

6. In approving a tainted mediation process, a conflicted majority of the Board of Directors of the Foundation have violated their fiduciary duties to the Foundation and caused the Foundation to act *ultra vires*. Despite irreconcilable conflicts of interest and their consequent disqualification, directors Stephanie Pace Marshall and Theodore Stebbins have acted against the interest of the Foundations. By taking action incompatible with the Foundation's charter and wasting valuable assets and opportunities for the Foundation to carry out its mission, the Board members who approved the proposed settlement violated duties of obedience to the Foundation's purpose and best interests.

16di-004685

Parties

7. The Terra Foundation for the Arts is a not-for-profit corporation established in 1978 by Ambassador Daniel J. Terra. The Foundation, pursuant to its Articles of Incorporation and By-Laws, oversees the $175 million Terra Collection of American Art and roughly $250 million in other assets.

8. Paul Hayes Tucker is Chairman of the Board of Directors and President of the Foundation. He is a chaired professor of art history at the University of Massachusetts Boston and a resident of Massachusetts.

9. Alan K. Simpson is a Director of the Foundation, a former United States Senator and retired Director of the Institute of Politics at Harvard University's John F. Kennedy School of Government, and a resident of Wyoming. Senator Simpson also serves as Chairman of the Board of Trustees of the Buffalo Bill Historical Center in Cody, Wyoming, which maintains assets valued in excess of $350 million.

10. Judith Terra is Vice Chairman of the Board of Directors and Vice President of the Foundation, Mr. Terra's widow, and a resident of Washington, D.C.

11. Dr. Stephanie Pace Marshall is the Foundation's Secretary and Treasurer and chairman of its finance and strategic planning committees. She is president of the Illinois Mathematics and Science Academy, and a resident of Illinois.

12. Dr. Theodore O. Stebbins is a Director of the Foundation and Chairman of the collections committee. He currently serves as curator of American art at the Fogg Museum at Harvard University and resides in Massachusetts.

13. Margaret Daley is a Director of the Foundation and Chairman of its education committee. She is a resident of Illinois.

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14. Dean Buntrock is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

15. Ronald Gidwitz is a Director of the Foundation and an at-large member of its Executive Committee. He is a resident of Illinois.

16. Arthur Hartman is a director of the Foundation.

17. James R. Donnelley is an individual residing in Illinois. He purports to be a new director of the Foundation.

18. Marshall Field V is an individual who, on information and belief, resides in Illinois. He purports to be a new director and Chairman of the Foundation.

19. Dr. Kathleen A. Foster is an individual who, on information and belief, resides in Illinois. She purports to be a new director of the Foundation.

20. Robert S. Hamada is an individual residing in Illinois. He purports to be a new director of the Foundation.

21. Frederick A. Krehbiel is an individual residing in Illinois. He purports to be a new director of the Foundatoin.

22. James E. Ryan is the Attorney General of Illinois.

23. Floyd D. Perkins is Assistant Attorney General, Bureau of Charitable Trusts and Solicitations.

24. Winston & Strawn is, on information and belief, an Illinois partnership organized to engage in the practice of law. Winston & Strawn is counsel to the Foundation and at least some of its directors.

25. Sidley & Austin is, on information and belief, an Illinois partnership organized to engage in the practice of law. Sidley & Austin is counsel to Foundation and at least some

of its directors.

The History of the Terra Foundation

26. Daniel J. Terra (1911-1996) was a scientist, businessman, and an art lover. Born and educated in Philadelphia and a graduate of Pennsylvania State University, Mr. Terra maintained residences in Chicago and Washington, D.C. President Ronald Reagan, who appointed Mr. Terra Ambassador-at-large for Cultural Affairs, lauded his achievements in promoting education in American art nationally and internationally. Mr. Terra's collection includes hundreds of important American paintings and other works spanning the period from 1750 to 1950. Among the artists represented are John Singleton Copley, Thomas Cole, Frederic Edwin Church, George Caleb Bingham, Winslow Homer, James Whistler, John Singer Sargent, Edward Hopper, and Georgia O'Keefe.

27. In 1978, Mr. Terra formed the Foundation to hold his collection and enhance public appreciation of the arts in the broadest sense, without any geographic limitation. Its purposes, according to its original Articles of Incorporation, were

> to form, preserve, and exhibit collections of paintings . . . expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, and related educational programs designed to further these purposes; establish, conduct, operate, and maintain a school of instruction and any and all artistic and technical educational fine arts courses.

Articles of Incorporation (as filed Dec. 13, 1978).

28. The Foundation, with Mr. Terra as President and Chairman of the Board, established a museum in Evanston, Illinois, in 1980. In 1987, Mr. Terra decided to move the museum to Chicago where, he hoped, it would receive a wider audience and appreciation. He created a multimillion dollar museum facility on North Michigan Avenue now worth well over $30 million. Bolstered by a belief that American cultural

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development and art was underappreciated abroad, in 1992 Mr. Terra founded the Musée d'Art Américain in Giverny, France, the rural home of Claude Monet. He moved a substantial portion of his collection there every year from April to October. Mr. Terra insisted that the American painters, whom he honored in the museum, offered something new to the international art scene and provided a way to celebrate the cultural connection between U.S. and European art. Today, the Foundation owns substantial property in the Village of Giverny.

29. By the 1990s, Mr. Terra became concerned that his collection was underappreciated in Chicago. At an April 25, 1990, annual meeting of the Board of the Terra Museum of American Art, Mr. Terra expressed dismay over low attendance at the Chicago museum. Given his massive investment in the North Michigan Avenue property and only around 60,000 visitors per year, Mr. Terra calculated that he was spending more than $5,000 per visitor. Mr. Terra confided his concerns to friends and future Board members, such as Senator Alan Simpson, and actively investigated relocating his art collection.

30. By 1994, Mr. Terra began concrete steps to move his collection. On August 26, 1994, Mr. Terra caused the Foundation to adopt certain changes to its Articles of Incorporation, allowing the Foundation to:

> Build, erect, maintain, equip, manage, lease, and operate museums and schools, *both in the United States and abroad*, and all components deemed advisable or necessary to provide space for these activities and exhibitions.

Articles of Incorporation (Aug. 26, 1994) (emphasis added). Mr. Terra reiterated to others, including Senator Simpson and his long-time friend Peter Solmsson of the University of the Arts in Philadelphia, that he wanted his art to achieve the broadest

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possible impact on the public.

31. Between 1991 and 1993, Mr. Terra negotiated with the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City to form a strategic alliance that would pool the Foundation's collection with those of the other two institutions and move the emphasis of the Foundation's work from Chicago to Washington. Discussions broke down over issues relating to the Whitney Museum's control over the collection.

32. Between 1993 and 1995, Mr. Terra conducted negotiations with two Philadelphia institutions, the Pennsylvania Academy of Fine Arts and the University of the Arts, concerning relocation of the collection from Chicago to Philadelphia. A deal with the former institution broke down when Mr. Terra sought to retain ownership and control over his collection; a preliminary agreement with the latter institution was signed, but not finalized.

33. In 1996, the last year of his life, Mr. Terra focused intently on Washington, D.C., where he then resided. He expressed to many colleagues a desire to move the Foundation to Washington. In early 1996, Mr. Terra hired a real estate agent and bought a building on Thomas Jefferson Street in Georgetown to serve as the new interim corporate headquarters of the Foundation. At the same time, Mr. Terra commissioned an architect to draw plans and obtain zoning permits for a new museum facility and headquarters on his existing property on Connecticut Avenue, which were completed in May 1996. Phone lines, name plates, furniture and other items were purchased for the new property. Mr. Terra even distributed change of address forms to friends and colleagues announcing the move of the Foundation's headquarters to the Thomas Jefferson street location,

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sometimes with his own handwritten annotations. However, Mr. Terra was unable to complete his contemplated move of the Foundation's collection because of his death in June 1996.

34. By the time of his death, Mr. Terra had left more than $100 million in art, $210 million in cash and securities, and millions in real property to the Foundation, including the valuable North Michigan Avenue museum site. Between 1996 and 1998, the Foundation was consumed with issues relating to Mr. Terra's estate.

The Board Fight Over the Future of the Foundation

35. Upon settlement of Mr. Terra's estate, the Board returned to consideration of a strategic plan for the Foundation. At a November 1998 meeting, Mr. Buntrock recommended that the Board form a Strategic Planning Committee to consider options for the future of the Foundation. Mr. Gidwitz was elected chairman of this committee.

36. Paul Hayes Tucker was elected Chairman of the Board and President of the Foundation in 1999. Dr. Tucker holds a Ph.D. in the History of Art from Yale University and teaches Art History at the University of Massachusetts where he is a chaired professor and a leading expert on Claude Monet. Other current members of the 11-member Board of Directors include Mr. Terra's widow, Judith Terra; former U.S. Senator Alan Simpson, recently retired as Director of the Institute for Politics at Harvard University's John F. Kennedy School of Government; Dr. Stephanie Pace Marshall, president of the Illinois Mathematics and Science Academy; Margaret Daley, wife of Mayor Richard M. Daley; Jacques Andreani, former French Ambassador to the United States; Arthur A. Hartman, former U.S. Ambassador to France and Russia; Helene Ahrweiler, former president of the Sorbonne and the Georges Pompideu Center in Paris;

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Dr. Theodore Stebbins, curator of American art at the Fogg Museum at Harvard; Dean Buntrock, former chief executive of Waste Management, Inc.; and Ronald Gidwitz, former chief executive of Helene Curtis Corporation.

37. Under Dr. Tucker's leadership, the Foundation continued active strategic planning in the year 2000, considering cooperative arrangements presented by a number of nationally recognized art institutions, based both within and outside Chicago. The Strategic Planning Committee met several times to consider options, with Mr. Gidwitz himself raising suggestions of building a new museum facility on a different site, affiliation with other museums, and closing the museum to focus on education efforts and building the collection.

38. In preparation for the Board's September 2000 annual meeting in France, Dr. Tucker encouraged members to focus on long-term planning options and circulate ideas they might have in advance of the meeting for the group to study and consider.

39. Dr. Tucker circulated a "white paper" suggesting a potential collaboration with the National Gallery in Washington, D.C. -- which attracts 6 million visitors annually, more than double that of any alternative in Chicago. Dr. Tucker presented the idea as only one way to encourage increased exposure for the collection, and he sought full consideration of other ideas. He noted, for example, that museums and localities frequently "compete" for the honor of hosting such unique and irreplaceable collections as Mr. Terra's, offering incentives to foundations that agree to provide their collections on a semi-permanent basis. Mr. Tucker thought that such a competition could bring enhanced global awareness of the collection and financial wherewithal to enhance the Foundation's ability to pursue its educational mandate throughout the world; accordingly,

Dr. Tucker encouraged members to consider the potential value of a "beauty contest" as another option.

40. At the same time, Dr. Tucker pointed out that the sale of the Chicago facility could be beneficial given that it ties up over $30 million worth of assets and requires an additional $3.5 million in annual support from the Foundation, a fact that deeply concerned Mr. Terra before his death.

The Ploy to Keep the Foundation in Chicago

41. Messrs. Gidwitz and Buntrock opposed Dr. Tucker's brainstorming suggestions. Instead of taking up their concerns with their colleagues, however, Messrs. Gidwitz and Buntrock filed a lawsuit alleging that the named individual directors had breached their fiduciary duties to the Foundation merely by considering the possibility of moving the collection from Chicago.

42. In their lawsuit, Messrs. Gidwitz and Buntrock claimed, contrary to fact, that Mr. Terra intended that the Foundation would always remain in the Chicago area. The complaint quoted news reports from 1987, the time of the move from Evanston to North Michigan Avenue, in which Mr. Terra described his enthusiasm for the new location. The complaint did not refer to Mr. Terra's 1990 statement to the Board of Directors or to any of his subsequent discussions and plans relating to relocation of the Foundation to another city. It also did not mention the 1994 amendment to the charter which permitted the Foundation to operate museums and schools "both in the United States and abroad." Based on this misleading statement of Mr. Terra's intent, the defendants alleged that the Foundation's mission was to operate a "museum of American art . . . in the Chicago area to be held in trust for the benefit of the people of the State of Illinois."

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43. Attorney General James Ryan and Floyd Perkins, an Assistant Attorney General, seized upon the turmoil of the Terra Foundation Board as an opportunity to assert State control over its assets. At the inception of the lawsuit, the Attorney General filed an intervenor complaint that simply borrowed the allegations of Messrs. Gidwitz and Buntrock. The complaint also reiterated the faulty premise -- based upon a demonstrably incorrect statement of Mr. Terra's intent -- that the Board of Directors were without authority to relocate the Foundation. The complaint sought a declaration, among other things, that "[t]he intent of Daniel Terra in creating the Terra Foundation was to operate a museum of American art in the Chicago area for the benefit of the people of Illinois and he and others who have donated to the Foundation intended and expected the Museum to remain in Chicagoland."

44. The Attorney General intervened expressly to prevent any possibility that the Board might remove the Foundation's assets from Chicago, which he described as an *ultra vires* act. As Assistant Attorney General Perkins has stated in an interview, he believes it is his role as assistant attorney general to see that Illinois-based charitable institutions utilize their assets in Illinois. Mr. Perkins attempts to accomplish this by seeking installment of Illinois directors on the boards of such institutions and through other restrictions. He has employed this tactic successfully in other cases, for example, that of the Regenstein Foundation. Mr. Perkins acknowledges, however, that he does not have the authority to impose Illinois-related restrictions on institutions which were created to serve broader interests, such as national and international aid organizations, even though such institutions may be based in Illinois and subject to reporting and other statutory requirements of Illinois law.

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45. As authority for his intervention in that lawsuit, Mr. Perkins relied on the Charitable Trust Act (760 ILCS 55/1 *et seq.* (1997)) and his "common law power and duty to protect the interests of the PEOPLE OF ILLINOIS in matters pertaining to charitable assets and trusts." Whatever authority these sources of law may provide to the Attorney General, they do not permit any action to force a charitable trustee or Board member of a not-for-profit corporation to change the institution's fundamental purpose in a manner inconsistent with its charter or founder's intent. Nor do these authorities mandate that any charitable trust or not-for-profit corporation that is established in the State of Illinois must remain in Illinois, regardless of its purposes and founder's intent.

46. The propriety of the Attorney General's intervention and sole basis for authority in that case depended upon his claim that the Terra Foundation's purpose was to serve the people of Illinois, rather than a broader population. Like the other defendants, the Attorney General based this claim on selected statements of Mr. Terra to the press. A reasonable investigation of the facts would have revealed, however, that Mr. Terra did not intend that any of the assets of the Terra Foundation should be restricted geographically. Mr. Perkins did not conduct such an investigation before filing his initial complaint. For example, Mr. Perkins has admitted that when he filed that complaint he was unaware of Mr. Terra's 1994 amendment to the Articles of Incorporation of the Foundation expressly stating that the Foundation's efforts shall include museums "both in the United States and abroad."

47. In January 2001, the Terra Foundation filed a motion for judgment on the pleadings, noting that nothing in the Foundation's Articles of Incorporation or By-Laws prevented Board members from considering a move of the collection, but instead

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encouraged simply the best possible dissemination of art, knowledge and appreciation among the public in the United States and abroad.

48. Although the true facts of Mr. Terra's intent were revealed early in litigation, and at the latest by the Foundation's motion for judgment on the pleadings, defendants and the Attorney General persisted in their efforts to capture the Foundation in Illinois. They were able to do so through a barrage of motions designed to delay the proceedings and deflect attention from the core issue of Mr. Terra's intent. Mr. Perkins and the other defendants first challenged the Board's choice of counsel and early decisions about directing and funding the litigation. Then, once the Board had selected an independent litigation committee of Dr. Stebbins and Amb. Andreani, Mr. Perkins and the other derfendants challenged Dr. Stebbins' ability to serve on this committee. These tactics had the desired effect of paralyzing the Board and placing Mr. Perkins and the other defendants in a strong position to make demands upon the Foundation, without regard to the merits of their lawsuits.

49. As the case proceeded to mediation, the Attorney General and Assistant Attorney General Perkins insinuated themselves into the process in an attempt to railroad its result. Mr. Perkins pursued the goal of capturing the Foundation's assets in Illinois despite the fact that he had no basis to assert that he was seeking to preserve Mr. Terra's intent.

50. In mediation, the Attorney General and Assistant Attorney General Perkins took several extraordinary positions that evidenced their recognition that Mr. Terra's intent was not to constrain the Foundation to Chicago. The Attorney General disagreed that the Board of Directors was governed in the use of the Foundation's funds solely by the Articles of Incorporation. He argued that those Articles were too broad to provide any

meaningful purpose to the Foundation. Most strikingly, the Attorney General maintained that a not-for-profit corporation established for charitable purposes in a particular jurisdiction, simply by virtue of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population.

51. Without legal authority and in disregard of the facts regarding Mr. Terra's intent, Assistant Attorney General Perkins demanded throughout the mediation that any settlement include a massive re-write of the Foundation's bylaws requiring it to give up its rights to self-governance, keep its collection in Chicago, and fold into an existing Chicago-based institution. Mr. Perkins demanded, among other things, that the Foundation:

a. Negotiate a partnership with the Art Institute of Chicago in which the Foundation would sell the North Michigan Avenue property to fund a new wing at the Art Institute.

b. Remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois in perpetuity.

c. Maintain and exhibit its collection in the Chicago metropolitan area in perpetuity.

d. Amend its by-laws to expand the Board to include fifteen members, a majority of whom must at all times be residents of Illinois.

52. Mr. Perkins won approval for these limitations, unsurprisingly, from Messrs. Gidwitz and Buntrock. He also gained support from Mrs. Daley and Mr. Hartman. But Mr. Perkins was unable to win over a majority of the Board.

53. Frustrated by the Board's resistance to his demands, Mr. Perkins resorted to using the power of his office to harass, threaten and intimidate directors and the Foundation.

These tactics were directed in particular at two key swing directors, Drs. Stebbins and Marshall.

Attacks on Dr. Stebbins

54. Since his earliest involvement with the Terra Foundation, Dr. Stebbins had supported a comprehensive approach to strategic planning that included consideration of options outside of Illinois. In 1997, before Dr. Stebbins joined the Board, he headed an advisory committee that conducted a review and analysis of the collection and reported recommendations to the Board for the future. The committee consisted of Dr. Stebbins, then curator of American paintings at the Museum of Fine Arts in Boston, Professor John Wilmerding, former chairman of the art department at Princeton, and Charles Moffett, former deputy director of the National Gallery and director of the Phillips Collection in Washington. In its report to the Board in February 1997, the advisory committee concluded strongly that the present building in Chicago is inappropriate as a museum. The committee envisioned three alternative scenarios for the future, two of which involved discontinuing the Chicago presence by: (1) concentrating on French operations, with the establishment of a new Terra Center for American Art and American Studies in Paris, or (2) improving the collection and housing it another American city.

55. Dr. Stebbins joined the Board in April 1998. In Strategic Planning Committee meetings until the outbreak of litigation, he continued to advocate consideration of options within and without Illinois. He was an especially strong advocate for the idea of maintaining a stand-alone museum.

56. When litigation began, Dr. Stebbins became a key figure in its conduct. Upon defendants' demand for an independent litigation committee, Dr. Stebbins and Amb.

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Jacques Andreani were chosen from among the non-party directors to oversee the litigation on behalf of the Foundation. Because Amb. Andreani was in France at the time, Dr. Stebbins effectively controlled the litigation committee.

57. Within three weeks of Dr. Stebbins' election to the litigation committee on November 30, 2000, Mr. Perkins filed a motion to remove Dr. Stebbins from the committee on the grounds of conflict of interest. On January 22, 2001, Mr. Perkins obtained a Court order to conduct special discovery focusing on Dr. Stebbins' conduct as a director. Within two weeks of that order — and less than two weeks before a scheduled evidentiary hearing focusing upon Dr. Stebbins' conduct — the Foundation entered into mediation. With challenges to his reputation and integrity having become the central focus of the litigation, Dr. Stebbins strongly advocated directing the Foundation into mediation.

58. On March 21, 2001, Mr. Perkins circulated a draft complaint naming Dr. Stebbins as a defendant for the first time. In a cover letter, Mr. Perkins stated that the document was a draft and was not being filed, but rather supplied to set forth issues to be discussed at settlement. The draft complaint named Dr. Stebbins as a new defendant and included specific charges of impropriety against him. The allegations included alleged breaches of the duty of loyalty to the Foundation by representation of multiple parties at art auctions. The amended complaint also charged Stebbins with breaching the Code of Ethics for Professional Practices in Art Museums. The amended complaint was never filed.

59. Dr. Stebbins now knew that, if settlement was not reached, the litigation would resume, with his reputation and integrity once again the central focus, and he would become a defendant in the case.

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60. On the same day that the draft complaint was distributed to counsel, the mediator circulated to the Board a revised mediation proposal, which had been formulated after reviewing the amended complaint and discussing this matter with the Attorney General. The proposal contained a requirement that the Foundation would maintain and exhibit its collection in perpetuity at the Art Institute of Chicago. According to the mediator, this provision resulted from the position of the Attorney General. Mr. Perkins had not participated in mediation sessions on March 5 and 6, but worked behind the scenes with the mediator to influence the course of mediation.

61. Dr. Stebbins, facing the threat of becoming a defendant in the lawsuit, now expressed his support for settlement. On April 2, 2001, he and Amb. Andreani prepared a letter to the mediator stating that "in order to end this destructive process, we are willing to pledge that the foundation and its collection remain in Chicago." They enclosed a settlement proposal "follow[ing] the outline" of the March 21, 2001, proposal reflecting the Attorney General's positions.

Attacks on Dr. Marshall

62. Dr. Marshall joined the Board in 1998. Like Dr. Stebbins, Dr. Marshall held the view that the Terra Foundation was established for the broadest possible dissemination of American art. For example, at a May 10, 2000, meeting of the Strategic Planning Committee that Drs. Stebbins and Marshall attended, consensus was reached that the beneficiaries of the Foundation included the national and international public.

63. Late into the mediation process, Dr. Marshall remained a strong critic of the Attorney General's methods and proposals. In a May 20, 2001, letter to counsel for the Foundation and her fellow Board members she reported:

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> [W]ith respect to the AG's version of the proposal, I find it unacceptable and antithetical to my understanding of the fiduciary obligations of a director with respect to the duty of diligence. My understanding of the mediation process is that a settlement agreement, if it can be achieved, is dictated by no one party and mutually constructed by all parties. The AG's version of the proposed agreement clearly lacked mutual construction.

64. In addition to serving on the Board, Dr. Marshall serves full-time as president of the Illinois Mathematics and Science Academy, a highly-regarded education institution that depends on public funding for the bulk of its operating budget and is currently in the midst of a significant capital campaign.

65. After a mediation session on May 11, 2001, Mr. Perkins began to feel that several of the directors were resisting settlement and that the mediation might be unsuccessful. Mr. Perkins believed that he had been tricked into going along with mediation and had lost valuable time preparing for litigation. He began to investigate Dr. Marshall to determine if there were allegations he could make against her in this action. After reviewing public documents, Mr. Perkins purportedly developed concerns about two issues relating to Dr. Marshall's position as president of the Illinois Mathematics and Science Academy. He considered these issues for "a couple of days" before sending an administrative subpoena to the Academy on May 25, 2001. Mr. Perkins knew that the subpoena would come to the attention of Dr. Marshall and would "aggravate" her.

66. Mr. Perkins never informed Dr. Marshall or her counsel that the investigation had been concluded.

The Proposed Settlement and Board Approval

67. On June 29, 2001, the Board held a special meeting to consider the terms of a proposed settlement of this litigation. The settlement called for entry of a consent

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judgment and order implementing the Attorney General's goal of locking the Foundation in to the State of Illinois. In this regard, the proposed judgment requires:

a. For at least 50 years, the Foundation shall remain an Illinois corporation, with its principal office and corporate headquarters in Illinois;

b. For at least 50 years, the Foundation shall maintain and exhibit the Terra Collection of American Art in the Chicago metropolitan area;

c. For at least 25 years, the Foundation will require that a majority of its Board positions be at all times held by residents of Illinois;

d. The Foundation shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

68. Dr. Marshall, the Foundation's Treasurer and Secretary, presided at the special meeting. Other directors present were: Mr. Gidwitz, Mr. Buntrock, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Mrs. Terra and Dr. Tucker.

69. Immediately prior to the vote, several Board members made personal statements. Mrs. Terra objected that "the mediation proposal before us cannot be approved consistent with our responsibilities as Terra Foundation trustees."

> Certainly, it will destroy Dan Terra's dream of allowing this private Terra Foundation to really chart its own course, free from any kind of state intervention, which is what he always intended. And I think, finally, we're going to be destroying his goal of allowing people across this entire country and the world to view this magnificent collection of art . . . . [W]e will be sending a chilling signal to the entire foundation world as a result of this mediation proposal, that as a Board, we have invited the State of Illinois to really come in and run our Foundation . . . telling us that only Illinois residents can serve, and really depriving the Foundation of access to the most . . . outstanding voices, certainly, in the national and international art community, which is what Dan wanted so badly to have as a part of the Foundation.

70. Dr. Tucker echoed Mrs. Terra's concerns. He stated that

> what I find most disturbing is the ways in which this Foundation, as a not-for-profit entity, is in fact going to become part of the state's purview.

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> The invasion of its independence, its privacy, by . . . the Attorney General, I find repugnant. I find it detrimental and offensive.

71. At the recommendation of the Foundation's attorney, Drs. Stebbins and Marshall each addressed the issue of conflict of interest due to the Attorney General's conduct in the case. Dr. Marshall confirmed that "the Attorney General has asked the Illinois Mathematics and Science Academy to respond to a fact-finding investigation," but insisted that the investigation "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board member of this Foundation."

72. Dr. Stebbins first defended his "reputation, both as a scholar and as someone of complete integrity," and maintained that he had served on the Board "without any iota of a conflict of interest." He then stated that he "abhor[ed] the threatening tactics of the Attorney General." Dr. Stebbins also insisted that he was voting his "own conscience."

73. Upon the motion of Dr. Stebbins, the Board voted on whether to approve the proposed resolutions to amend the By-Laws and accept the settlement. Mr. Buntrock, Mrs. Daley, Mr. Gidwitz, Mr. Hartman, Dr. Marshall and Dr. Stebbins voted in favor. Mrs. Terra and Dr. Tucker voted against.

74. Members of the Board of Directors of the Terra Foundation have statutory and common law fiduciary duties to the Foundation. These duties include, but are not limited to, the duty of loyalty, which encompasses the duty to avoid conflicts of interest and to act in the best interests of the Foundation; the duty of obedience to purpose, which prohibits action contrary to the purposes for which Foundation was established; and the duty to use the Foundation's assets productively and not to waste Foundation assets.

75. At least two members of the Board who voted in favor of the proposed settlement were faced with a conflict of interest. Dr. Marshall expressly acknowledged that the

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Attorney General, the primary beneficiary of the settlement transaction, was conducting an investigation of the publicly-funded institution of which Dr. Marshall is president. Dr. Marshall reasonably could expect her vote on the settlement to influence the outcome of that investigation, either positively or negatively.

76. Dr. Stebbins also had strong personal incentives to support the settlement to the detriment of the Foundation. During the course of the litigation and corresponding public scrutiny of the Foundation's operations, he had faced charges of serious lapses of professional responsibility. In acknowledging his abhorrence of the Attorney General's tactics and vociferously defending his reputation and integrity immediately prior to the vote, Dr. Stebbins plainly identified his conflict of interest. If the mediation was unsuccessful, Dr. Stebbins would become a defendant in the case and face personal liability. Only through settlement could Dr. Stebbins hope to avoid more scrutiny which carried the threat of a potentially devastating effect on his career.

77. The Foundation's bylaws can be amended only "by a majority of the directors then in office and present" at the meeting at which the vote is taken. Because eight members of the Board were present at the June 29, 2001 meeting, the affirmative vote of five directors was required to approve the Proposed Settlement's many bylaw changes. Without the votes of Dr. Stebbins and Dr. Marshall, the Proposed Settlement garnered only four votes.

78. Each Board member who voted in favor of the settlement did so in violation of their fiduciary duty of obedience to the Foundation's purpose. Restricting the Foundation's art collection to isolation in Chicago for 50 years and installing a majority of Illinois residents on its Board is directly contrary to the Foundation's stated purpose in

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its Articles of Incorporation to "expand the artistic horizons of a growing art public" and to "operate museums and schools, both in the *United States and abroad*." Articles of Incorporation (Aug. 26, 1994) (emphasis added).

79. The Foundation's mission is meant to be world-wide and its board members equally diverse, not given over specially to Illinois and its citizenry. Indeed, the problems of the 50-year lock-in and Illinois-majority provisions were identified by Dr. Marshall prior to her conflict of interest arising. In her letter of May 20, 2001, she stated that because of the Foundation's "intentional national and international outreach and presence," she did "not believe any specifically defined constituency should hold a reserved majority." Dr. Marshall acknowledged that a 50-year lock-in would be a relinquishment of the Board's power to govern the Foundation when she stated that "[a]fter the stipulated period, it is the ***Board of the Foundation*** that must make decisions regarding the Foundation's future."

80. Each Board member who voted in favor of the proposed settlement also violated a duty not to waste the Foundation's assets. By eliminating the possibility of merger or partnership with a non-Chicago institution, the Board accepted a undue limitation on its negotiating power. By limiting the field of competitors for the Terra relationship, the Board would waste all the benefits that would flow from that competition, and in particular the ability to secure the most attractive possible terms for the future and for the collection to have the greatest possible impact on the art world and public education.

81. The Foundation has benefited tremendously from the participation of art experts worldwide on its board of directors -- including, among others, the curator of American art at Harvard's Fogg Museum; a leading expert on Claude Monet; and the president of a

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major Parisian art museum. Yet the Board majority voted in favor of a settlement under which the Foundation would forfeit the benefit of such experts in favor of a board packed with individuals whose chief virtue is that they are residents of Illinois. By limiting the pool of talent from which the Board can recruit directors, the Board would waste its opportunity to secure the best and most experienced leadership.

82. Locking the Foundation into Chicago for 50 years or any other length of time and stacking the Board with Illinois residents dangerously compromises the Foundation's flexibility to fulfill its charter. There is absolutely no guarantee that the Chicago community will provide adequate support to the Foundation over such a long period of time. If the Foundation is to remain viable it must have the flexibility to consider other venues where its collection may attract the maximum possible interest.

The August 1, 2001 Board Meeting and the So-Called "New Board Members"

83. On August 1, 2001, the Foundation's Board of Directors convened a meeting purportedly to implement the directives of the so-called "Consent Judgment and Order" erroneously entered by the Court on July 26, 2001. Even though the notice for this August 1, 2001 was both procedurally and substantively defective and failed to comply with the requirements of the Foundation's bylaws, members of the Foundation's Board – namely, directors Buntrock, Gidwitz, Arhweiler, Daley, Stebbins and Hartman – attempted to conduct business. The plaintiffs, directors Tucker, Terra and Simpson, objected to the transaction of any business at the August 1, 2001 because of the procedural and substantive defects in the notice. The plaintiffs moved to adjourn the meeting. That motion was defeated. As hereinafter alleged, the law firms representing the Foundation allowed this improper meeting to be conducted despite serious and on-

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going conflicts of interest.

84. During this improper August 1, 2001 Board meeting, the so-called "new board members" – defendants James R. Donnelley, Marshall Field V, Dr. Kathleen A. Foster, Robert s. Hamada and Frederick A. Krehbiel – were summarily "welcomed" to the Board of the Foundation. Indeed, these purportedly "new directors" were never properly elected to the Board. The Agenda for the August 1, 2001 meeting states that these "new board members" were "elected June 29, 2001, effective as of July 26, 2001." No such election ever took place. Even the "Consent Judgment and Order," entered by the Court on July 26, 2001, states, "The Foundation will add to its Board the following five Directors, each of whom ***shall be elected*** to serve an initial term of four years and be eligible for election to one additional four-year term."

85. Because defendants James R. Donnelley, Marshall Field V, Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel were not properly elected to the Board in compliance with the Consent Judgment and Order and the Foundation's bylaws, these individuals are not, in fact, directors and should therefore exercise none of the duties and obligations of directors. At least two these "new" directors have even been elected officers of the Foundation. Such election is without effect when these purported officers were not even properly elected directors in the first place.[1] Indeed, the performance of duties reserved solely for directors by these five individuals constitutes illegal and *ultra vires* conduct on the part of both the Foundation and the defendant directors who improperly convened and continued the August 1, 2001 meeting.

86. The failure of the Board and its directors to properly elect the so-called "new

[1] As a result, any action taken by these "officers" – including the issuance of a notice for a Board meeting – is also void and without effect.

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directors" renders all action taken by the Board at its August 1, 2001 void. Declaratory relief setting forth the failure of the Board and the defendant directors to properly elect the so-called "new directors" is therefore appropriate. In addition, the Foundation and the plaintiff directors have been injured and continue to be injured by the improper exercise of authority by the so-called "new" directors. By these "new directors" exercising authority and casting votes on the Foundation's board without having been properly elected, the Foundation acts without any legitimate authority while the plaintiffs' lawful participation as directors and/or officers of the Foundation's board has been improperly restricted.

The Debilitating Conflicts of the Foundation's Law Firms

87. Throughout this fight over the future of Daniel Terra's vision, the Foundation has been represented by two law firms, Winston & Strawn and Sidley & Austin. Despite the obligations imposed by the Illinois Rules of Professional Conduct regarding conflicts, these two firms have engaged in the Foundation's representation – and have continued with that representation – despite obvious and foreseeable actual and potential conflicts of interest.

88. Specifically, Winston & Strawn continues to engage in the concurrent, adverse representation of the Foundation and at least one of the defendant directors. Winston & Strawn has continued this hopelessly conflicted representation under the misguided theory that it acts only as "corporate" counsel for the Foundation and has played no role in the litigation between the Foundation and its director client. Such a theory is belied by the facts which plainly demonstrate that Winston & Strawn has provided – and continues to provide – substantive legal counsel to the Foundation on matters directly related to

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litigation tactics and outcomes. As a result, Winston & Strawn has breached its fiduciary obligations to the Foundation and its directors and has violated the Illinois Rules of Professional Conduct.

89. Sidley & Austin has engaged in similar conduct. Specifically, Sidley & Austin has been accused – by two defendant directors in this litigation – of breaching its responsibilities to the Foundation throughout the underlying fight over the Foundation's future. Indeed, the defendant directors have even submitted an expert affidavit that concludes that Sidley & Austin is unable to provide the Foundation with independent professional advice given its conflicts of interest. Sidley & Austin has even undertook the representation of one of the directors – defendant Stebbins – just after Floyd Perkins and the Attorney General circulated allegations against that director making it perfectly clear that the Foundation and Stebbins were directly adverse. Despite such an obvious and foreseeable conflict, Sidley & Austin represented director Stebbins, provided him with counsel and, on his behalf, informed the other parties that director Stebbins would not submit for an interview regarding the allegations of Perkins and the Attorney General. At the time Sidley & Austin refused to submit Stebbins for an interview, Sidley & Austin knew that submitting for such an interview was in the best interests of the Foundation.

90. Both Winston & Strawn and Sidley & Austin have compounded their breaches of fiduciary duty and violations of applicable ethical rules by continuing to represent the Foundation despite unresolved conflicts of interest. Indeed, Winston & Strawn and Sidley & Austin have pursued their own interests at the expense of the Foundation by failing to challenge the other firm's representation of the Foundation in the face of such obvious and debilitating conflicts. On at least two occasions, counsel for the plaintiffs

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has written to Sidley & Austin and Winston & Strawn requesting information regarding the law firms' adverse, concurrent representation of the both the Foundation and one or more of its directors. Sidley & Austin and Winston & Strawn have refused to provide any information.

91. In seeking to represent the Foundation, Winston & Strawn and Sidley & Austin were obligated to competently pursue the Foundation's interests free of any conflicts as mandated by their fiduciary obligations and applicable provisions of the Illinois Rules of Professional Conduct. Winston & Strawn and Sidley & Austin have breached their fiduciary duties and obligations and violated the Illinois Rules of Professional Conduct in at least the following respects:

a. By Engaging in Conflicts of Interest in Violation of Rule 1.7

Winston & Strawn's and Sidley & Austin's concurrent representation of individual board members whose conduct was alleged to be in conflict with the interests of the Foundation place these firms in a position whereby their representation of the Foundation was materially limited by the obligations to such board members and by their own interests in seeking to maintain their relationship as counsel to both the Foundation and the individual board members; and

b. By Failing to Competently and Diligently Represent the Foundation's Interests in Violation of Rules 1.1, 1.3 and 1.4

Winston & Strawn and Sidley & Austin knew that serious allegations of breaches of fiduciary duty were asserted against one or more board members; Winston & Strawn and Sidley & Austin knew that allegations of their own conflicts had not been fully developed, investigated and resolved; Winston & Strawn and Sidley & Austin knew that at a critical stage in the mediation process potential conflicted interests of the designated

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mediator warranted evaluation, discussion and, as necessary, appropriate remedial action; and Winston & Strawn and Sidley & Austin knew that each of the above circumstances as well as the improvident intervention of the Attorney General warranted competent, diligent and thorough discussion and evaluation by independent counsel. Nonetheless, both Winston and Sidley failed to advise the Foundation to seek such independent advice.

92. The inaction and conduct of Winston & Strawn and Sidley & Austin have compromised the interests of the Foundation as well as the interests of the plaintiffs and have directly and proximately caused damage and injury including but not limited to the imposition of legal fees and expenses all of which could have been avoided had the Foundation had the benefit of unconflicted independent counsel.

93. The actions and conduct of Winston & Strawn and Sidley & Austin continue to cause damage and injury to the plaintiffs in that they are aiding and abetting further and continuing actions of the defendant directors as herein alleged.

CLAIMS FOR RELIEF

Count I - Declaratory Relief

94. All foregoing paragraphs are incorporated herein by reference.

95. An actual and justiciable controversy exits between the parties as defined by 735 ILCS 5/2-701.

96. As directors of the Terra Foundation, Plaintiffs have donated their time, efforts and resources to accomplish the mission of the Foundation.

97. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

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98. The conduct of the Defendants alleged herein has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

99. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the settlement is unlawful because it was not approved by the Board in accordance with Illinois law; it is the product of conflicts of interest, breaches of director fiduciary duties and unlawful interference by the Attorney General; and it is incompatible with the Foundation's purpose to propagate American art in the United States and abroad;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count II - Declaratory and Injunctive Relief

100. All foregoing paragraphs are incorporated herein by reference.

101. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, in compliance with its bylaws and to protect the Terra Foundation from waste and mismanagement and unlawful interference with its rights.

102. The conduct of Defendants alleged herein – specifically, the exercise of authority reserved solely for directors by defendants James R. Donnelley, Marshall Field V,

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Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel when these individual have not been properly elected members of the Foundation's board -- has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad.

103. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that defendants James R. Donnelley, Marshall Field V, Kathleen A. Foster, Robert S. Hamada and Frederick A. Krehbiel have not been properly elected as members of the Foundation's board in compliance with the Consent Judgment and Order and with the Foundation's bylaws; that any such exercise of authority by these defendants, having failed to become duly elected directors of the Foundation is void, without any effect and inconsistent with the governing rules of the Foundation;

(b) Injunctive relief to prevent these so-called new directors from taking any action purportedly on behalf of the Foundation when these individuals have not been properly elected to the Board and, as a result, should exercise no authority whatsoever over the Foundation;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Such other relief as may be just and proper.

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Count III - Declaratory Relief

104. All foregoing paragraphs are incorporated herein by reference.

105. Plaintiffs have a fiduciary duty to see that the Foundation acts lawfully and in obedience to its charter and purpose, in compliance with its bylaws and to ensure that the Terra Foundation secure competent legal counsel free from any conflicts of interest as mandated by Illinois Rules of Professional Conduct.

106. The conduct of Defendants alleged herein – specifically, the concurrent, adverse representation of the Foundation and at least some of its directors by Winston & Strawn and Sidley & Austin -- has caused and will continue to cause irreparable harm to the to the Terra Foundation and its beneficiaries in the United States and abroad. In addition, the conduct of Winston & Strawn and Sidley & Austin in furthering their own interests in derogation of their obligations to the Foundation should disqualify these firms from any further representation of the Foundation or its directors.

107. Plaintiffs have no adequate remedy at law and request that this Court enter a judgment declaring as stated in the prayer for relief below.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) A declaration that the representation of the Foundation by Winston & Strawn and Sidley & Austin is, and has been, tainted by conflicts of interest in violation of Winston & Strawn's and Sidley & Austin's fiduciary duties and is inconsistent with applicable provisions of the Illinois Rules of Professional Conduct; and that, as a result of such obvious and foreseeable conflicts of interest, Winston & Strawn and

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Sidley & Austin are disqualified from any further representation of the Foundation or its directors in this litigation

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred; and

(c) Such other relief as may be just and proper.

Count IV - *Ultra Vires* Acts (805 ILCS 105/103.15)

108. All foregoing paragraphs are incorporated herein by reference.

109. The resolutions approved by six members of the Board of the Foundation on June 29, 2001, constitute acts of the Foundation taken in contravention of its Articles of Incorporation and By-Laws, and thus taken without lawful authority, capacity or power.

110. The court should enjoin the doing of such acts in this proceeding pursuant to the General Not for Profit Corporation Act of 1986, 805 ILCS 105/103.15(a).

Prayer for Relief

Plaintiffs request that this Court to enter judgment as follows:

(a) An Order enjoining the defendants from taking further action in violation of law and contrary to the best interests of the Foundation;

(b) Damages in an amount to be determined at trial;

(c) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(d) Punitive damages;

(e) Such other relief as may be just and proper.

Count V - Breach of Fiduciary Duty

111. All foregoing paragraphs are incorporated herein by reference.

112. A fiduciary relationship exists between the Foundation and the members of its

Board of Directors. The Board's fiduciary duties include, without limitation, the duties of acting in good faith and with due regard for the Foundation's interest, of refraining from acting in a manner adverse to the Foundation's interest, of making full disclosure of all material information in their possession, of obedience to the Foundation's purposes as established by its Articles of Incorporation, of making productive use of the Foundation's assets and opportunities, and the duties of care, loyalty, fair dealing, and honesty.

113. The Defendant Board Members who voted in favor of the proposed settlement willfully and wantonly breached some or all of these fiduciary duties because the settlement is not in the best interests of the Foundation, is inconsistent with the Foundation's charter and by-laws, and wastes assets and opportunities of the Foundation.

114. In addition, board members Stephanie Pace Marshall and Theodore Stebbins breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation.

115. As a direct and proximate result of these breaches of fiduciary duty, the plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Count VI - Inducing Breach of Fiduciary Duty

116. All foregoing paragraphs are incorporated herein by reference.

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117. As set forth above, the Defendant members of the Board who voted in favor of the proposed settlement of this litigation did so in violation of their fiduciary duties to the Foundation.

118. Attorney General Ryan and Assistant Attorney General Perkins colluded with these Board members in committing breach of their fiduciary duties, or otherwise induced or participated in such breach.

119. As a direct and proximate result of this conduct, Plaintiffs and the Foundation have suffered injury.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Punitive damages;

(d) Such other relief as may be just and proper.

Count VII - Deprivation Under Color of Law of Constitutional Rights (42 U.S.C. § 1983)

120. All foregoing paragraphs are incorporated herein by reference.

121. At all relevant times, Attorney General Ryan and Assistant Attorney General Perkins acted under color of law as Assistant Attorney General of the State of Illinois.

122. Mr. Perkins' conduct constitutes an unlawful deprivation of the Foundation's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

123. The conduct of the Attorney General and Assistant Attorney General constitutes

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an unlawful deprivation of the Foundation's rights to freedom of speech under the First Amendment to the Constitution of the United States.

124. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful restraint by the State of Illinois on interstate commerce in violation of Art. I, § 8 of the Constitution of the United States.

125. The conduct of the Attorney General and Assistant Attorney General has resulted in an unlawful impairment of the Foundation's contractual obligations in violation of Art. I, § 9 of the Constitution of the United States.

126. The Attorney General and Assistant Attorney General engaged in such illegal conduct to the injury of Plaintiffs and the Foundation.

Prayer for Relief

Plaintiffs request that this Court to enter judgment on their behalf as follows:

(a) Damages in an amount to be determined at trial;

(b) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(c) Such other relief as may be just and proper.

Jury Trial Requested

127. Plaintiffs request trial by jury.

16di-004718

Dated: August 13, 2001

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

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Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of Filing and First Amended Complaint At Law to be served on the parties listed below via hand delivery on this 13th day of August, 2001.

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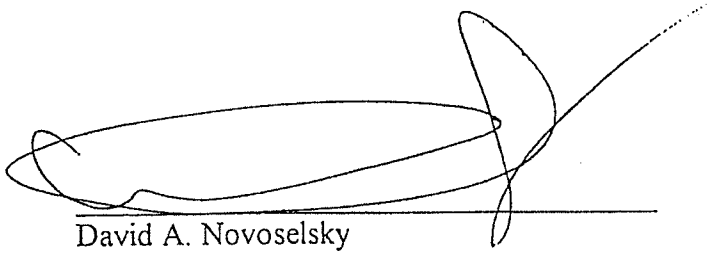

David A. Novoselsky

EXHIBIT D

16di-004721

Board of Directors Meeting for the
Terra Foundation for the Arts
June 29, 2001

Tape 1, Side 1

(Music)	
Announcer	Thank you for using conferencecall.com. Please stand by. Your meeting will begin when the chairperson joins the teleconference by entering their unique pass code.
(Music)	
Announcer	To ensure the best sound quality on your conference call, call from a quiet location with few distractions.
(Music)	
Announcer	To keep background noise at your location from disrupting the call, press star six to mute or un-mute your individual line. Depending on your location, some phone lines can be louder or softer than others. If your volume in the conference call is too loud or too soft, press star four to balance your line. For more information on available conference call options, please visit our web site at www.conferencecall.com.
(Music)	
(Beeps)	
Ron Gidwitz	Hello?
Ambassador Arthur Hartman	Hello.
Gidwitz	Hello.
Dr. Stephanie Pace Marshall	Yes, who's, is that Ron?
Gidwitz	Yes.
Marshall	Ron, good afternoon. Stephanie.
Gidwitz	Hi Stephanie.
Marshall	Is there anyone else on the line?
Hartman	Yes, Art Hartman is on.
Marshall	Uh, good afternoon, Arthur, where are you?

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was prepared to ratify it, at an authorized board meeting. Uh, I also said in that letter that I believe in my heart that it does preserve the most fundamental dimensions of the Foundation's independence in determining the course of its own destiny, which I believe to be stated in the mediated agreement, although, I do believe that unprecedented restrictions have been imposed on the Foundation, as well, but I believe that a settlement, and not continued litigation is perhaps in the best interest of the Foundation and I would hope, um that the sixteen board members for this year, and the fifteen board members in the future, would see uh, the astounding opportunities that this Foundation has to make a mark, uh, not only in this country, but around the world. And I would hope that we would in fact commit uh to uh to ensuring that the vision of Dan Terra remain not only alive, but burn very brightly. Are there any other, any other points of discussion?

Heatwole — Stephanie?

Marshall — Yes.

Heatwole — Mark Heatwole. Just one last item, before you vote. And I think this is important, and Judith touched on it, and Stephanie, you touched on it in your comments as well. In light of the allegations that have been uh brought forward in the federal court yesterday, to a certain extent, I was not there, but I understand that sort of the same substantive comments were made in the Cook County Courts this morning, about the coercion um that uh some members of this board may feel uh, or may not feel, uh from the action of the attorney general. I think it's important for each one of you to, I think, indicate before you take this vote, that you are voting freely, and you are voting with your fiduciary obligations to this board and this institution and without, and without that pressure. And if anyone feels they can't do that, I don't think you should vote. But if you are voting freely, and if you do not feel that compulsion, then, I think you are free to vote. And I, I think the board ought to be on record and everybody ought to be clear that this vote is being taken without that pressure, without that, um impediment.

Marshall — Well, Mark, are you asking then, for a statement, or a comment, because I certainly can, can comment on what you just said.

Heatwole — The comment was directed really to you and Ted.

Marshall — OK.

Heatwole — But in a general way to everyone. Because you do have fiduciary obligations to this institution. Um, which transcend your obligations to other, other facts. And, uh, each one of you should examine that, I think Judith brought that to the fore, Stephanie, you echoed it, but since the allegations have been made, I think it's

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important to be on the record, that if anyone feels that they can't vote that way, I think they should abstain. So, having said that, if you vote, I assume that means you are not doing so um feel freely

Marshall

Well, I, let me just make a personal comment, just in response to what you just said, Mark. I have felt in the past that uh, despite the desire of some board members, uh, over the last year or so, to try to peg me into an alleged camp or an alleged side, one side or the other, I have always walked uh, my own path, and I have always spoken with my own voice, uh, to represent the integrity of my own convictions. Uh, I have done it throughout this arduous process, and I do so now, with full knowledge of my fiduciary responsibilities. It is true, that the attorney general's office has asked the Illinois mathematics and science academy to respond to a fact finding investigation. This has not played a part in my decision making with respect to my fiduciary responsibilities, as a board member of this Foundation. I believe now, as I have said before, that this motion and settlement to be in the best long-term and sustainable interest of this remarkable Foundation. Ted, I don't know, if you want to make a comment as well.

Stebbins

I'd just, I'd like to say, that I came to the board, like Stephanie, and everyone else, as a volunteer. Um, I came to the board, at, I knew Dan Terra, I came to the board at the request of Jim Collins and Judith Terra, I've served as chair of the collections committee, and I think I've served effectively. And I've brought some wonderful new paintings, helped bring some wonderful new paintings to the Foundation collection. I've done this without any iota of a conflict of interest. I value my reputation, both as a scholar and as someone of complete integrity, very very highly, and I think I'm well known for both those uh things. Uh, I've last when I've always felt free to form my own judgments, and last either August or early September, um, when Paul Tucker told me first about his enthusiasm for the building in Washington, and wanting to move there, I disagreed. I long argued to explore a variety of stand-alone options in Chicago, I was willing to consider as part of the strategic planning going elsewhere, but I've always been a defender of Chicago. Uh, like Arthur, I at the board meeting in Giverny, on September 25, I guess it was, 2000, when we learned of the suit, I argued for a total board replacement. Um, at the same time, I abhor the personalized suit brought by the plaintiffs. Unnecessary. I feel very very sympathetic for Judith Terra. I lament the behavior of Senator Simpson. I'm very saddened by the behavior of Paul Tucker. I abhor the threatening tactics of the attorney general, but I am voting my own conscience, and for what I believe is the best interests of the Foundation for its future as an independent, viable force in Chicago, and in France. For the promulgation of American art.

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Marshall — Is there anyone who has a statement, uh, to make, otherwise I will, I think it's appropriate that we now call for, call the question.

Tucker — I'd like to make a statement, Stephanie.

Marshall — Paul is that you?

Tucker — That's me.

Marshall — OK.

Tucker — Um, I, it's painful to hear, the comments that have been made, and in many quarters, although I admire the honesty about it all. I think it's very difficult to be able to predict the future in any form or fashion. None of us could have thought we would be at this particular juncture when we all joined the board. Maybe some did, I don't know, but I certainly didn't. And I don't think Ted did, or Stephanie did. And I applaud their efforts to try to be able to find the right way to act in these difficult causes. But I find most disturbing is the ways in which uh, this Foundation is a not-for-profit entity, is in fact going to become part of uh, the state's purview. Uh, the invasion of its independence, its privacy, of a, a public domain, i.e., the hand of the attorney general, I find repugnant. I find it detrimental and offensive, I find it also counter to the very foundations on which foundations and America as a whole are supposed to be founded, which is why I protested this mediation will continue to do so. Uh, I also find it, uh, disturbing that the um, resolution, um calls for the continued presence of uh the Illinois factions, not that they're not wonderful people in Illinois, certainly more than enough to handle all of this, but I think that that should have been our choice, not somebody else's choice. Uh, and that compromise of our independence is something which uh I think again goes right to the heart of the matter. I think that everybody's consciences have been articulated with grace and conviction, and I think that that is appropriate. But I also believe, in the end, that there are serious principles, uh particularly that of the ways in which a foundation is supposed to operate, which are deeply compromised by this mediation and this process. And I think that it is in the end a sad day for uh the Foundation, and ultimately a sad day in the larger case for the ways in which the state interferes with uh private property.

Marshall — Uh,

Hartman — I I really would like to make one further, short comment. And that is that foundations are established under certain laws, and have to meet certain requirements. Their responsibilities are to the people, uh, of the jurisdiction, that has permitted them to set up these tax free organizations. Therefore, I do not see that an oversight by such authorities is out of order. Thank you.

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Marshall	I think it's time for us to call the question, so we will now proceed to a role call vote on the motion. Uh, and I guess the question is, uh, OK, Mr. Jacques, not here, Helene, not here, Dean,
Buntrock	I vote yes.
Marshall	Maggie.
Daley	Yes.
Marshall	Ron
Gidwitz	Yes
Marshall	Arthur
Hartman	Yes.
Marshall	Stephanie, yes. Alan, Ted
Stebbins	Yes.
Marshall	Judith
Terra	No
Marshall	Paul
Tucker	No.
Marshall	Paul?
Tucker	No, Steph.
Marshall	Oh, I'm sorry, I didn't hear you, Paul.
Tucker	That's OK.
Marshall	Um, the motion has been passed by six board members, uh, we now need a motion for adjourn.
Stebbins	I move to adjourn.
Marshall	Oh, I'm sorry, is there, the agenda did say, any new business. Is there any new business which needs to come before this board at this time? Hearing none, uh, we need a motion to adjourn.
Stebbins	So moved.
Marshall	Is that Ted?
Hartman	Second
Marshall	Second, I'm sorry, Dean?
Buntrock	No, that was Arthur.
Marshall	Oh, Arthur.
Hartman	Yes.
Marshall	Do we need a roll call? Uh, role call for the motion? Dean.

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Buntrock	Uh, I move to ad, we adjourn, or uh, I vote to adjourn.
Marshall	OK, yes. Maggie.
Daley	Yes.
Marshall	Ron.
Gidwitz	Yes.
Marshall	Arthur.
Hartman	Yes.
Marshall	Stephanie, yes. Uh, Ted.
Stebbins	Yes.
Marshall	Judith.
Terra	Yes.
Marshall	Paul.
Tucker	Indeed, yes.
Marshall	Uh, the uh, this meeting is adjourned. Thank you all, and bonne chance.
Hartman	Thank you.
Ratner	Thank you.

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Exhibit E

16di-004728

APPEAL TO THE APPELLATE COURT OF
ILLINOIS, FOR THE FIRST JUDICIAL DISTRICT,
FROM THE CIRCUIT COURT OF COOK COUNTY,
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, Plaintiffs, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	No. 00 CH 13859
THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, Attorney General of Illinois, Plaintiff-Intervenor, vs. JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, Defendants.	

NOTICE OF APPEAL

NOW COME the defendants, PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON, by their attorneys, CUMMINS & CRONIN, LLC. and

NOVOSELSKY LAW OFFICES, and appeal to the Appellate Court of Illinois, First District, from order of July 26, 2001 in its entirety (Exhibit "A").

By this appeal, defendants, PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON, will ask the Appellate Court to vacate the order of July 26, 2001. In the alternative they will ask the Court to vacate the order and remand this cause for a new hearing, or will seek such other relief that that Court shall deem just and proper.

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON

By: _____
One of Their Attorneys

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CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, and RONALD GIDWITZ, a Director of the Terra Foundation for the Arts,

Plaintiffs,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a director of the Terra Foundation for the Arts, NAFTALI MICHAELI and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation,

Defendants.

No. 00 CH 13859
Judge D. K. Kinnaird

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. JAMES E. RYAN, Attorney General of Illinois,

Plaintiff-Intervenor,

vs.

JUDITH TERRA, a Director of the Terra Foundation for the Arts, PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, and the TERRA FOUNDATION FOR THE ARTS, an Illinois Not-for-Profit Corporation,

Defendants.

ENTERED
CLERK OF CIRCUIT COURT
DOROTHY BROWN
JUL 26 2001
JUDGE DOROTHY KINNAIRD - 276
DEPUTY CLERK

EXHIBIT "A"

16di-004731

CONSENT JUDGMENT AND ORDER

This case having come before the Court upon the Complaints of, in the first instance, Dean L. Buntrock and Ronald Gidwitz and, in the second instance, The People of the State of Illinois, ex rel. James E. Ryan, Attorney General of Illinois, the Terra Foundation for the Arts (the "Foundation") having moved for judgment on the pleadings, defendants Sen. Alan Simpson, Dr. Paul Tucker and Mrs. Judith Terra having filed a verified answer to the complaints by leave of Court on July 24, 2001, and defendant Mr. Naftali Michaeli having filed a verified answer; the plaintiffs Mr. Dean Buntrock and Mr. Ronald Gidwitz, the Foundation and the Illinois Attorney General having reached an agreement to settle this dispute pursuant to Mediation ordered by this Court, it is hereby ORDERED as follows:

1. This Court has personal jurisdiction over the parties and the subject matter of these actions.

2. Plaintiffs Mr. Buntrock, Mr. Gidwitz, the Illinois Attorney General and the defendant Foundation now desire to resolve these disputes amicably and without the necessity of further proceedings in these actions. To that end, the Plaintiff Directors and the People of the State of Illinois hereby release and discharge the Terra Foundation for the Arts, its officers, directors, agents and employees, and the Foundation hereby releases and discharges the Plaintiff Directors and the People of the State of Illinois from any and all claims and obligations of any kind or nature raised in or related to the matters raised in this lawsuit, whether in pleadings, motions or argument, other than those obligations set forth herein.

3. For at least fifty years from the entry of this Order, the Foundation shall remain an Illinois corporation, maintain its principal office in, and have its corporate headquarters in Illinois. For at least fifty years from the entry of this Order, the Foundation shall also maintain its books and records in Illinois, which shall be available to the Attorney General of Illinois for inspection during normal business hours upon reasonable advance notice to the Foundation.

4. The Foundation shall conduct its affairs in accordance with its Articles of Incorporation and its By-Laws (including promoting American art and culture in the U.S. and abroad) and the laws of the State of Illinois and act consistently with these undertakings. The Foundation remains free to determine how best to achieve its goals, including (without limitation) where and to whom to make grants.

5. For at least fifty years from the entry of this Order, the Foundation shall maintain and exhibit the Terra Collection of American Art ("the Collection"), either by itself or through partnerships or arrangements with other institutions, in the Chicago metropolitan area. If at any time thereafter the Foundation desires to maintain and exhibit the Collection elsewhere, to cease being an Illinois corporation or to cease maintaining its principal office, corporate headquarters and books and records in Illinois, it shall first give one year's advance written notice to the Attorney General of Illinois of its intent, which notice may be given before or after the end of such fifty-year period. Nothing herein shall be deemed to interfere in any way with the Attorney General's ability to take whatever action he or she deems appropriate in response to receipt of any such notice. The Foundation shall remain free to manage the Collection as it deems appropriate including to provide art for display in Giverny, France, and for special exhibits and

16di-004732

programs and for scholarly use, to make loans and to acquire works for, and de-accession works from, the Collection. Nothing herein shall be deemed to interfere in any way with the Foundation's ability and freedom to continue to conduct its activities, operations and programs in Giverny, France, which ability and freedom the Illinois Attorney General specifically acknowledges and agrees to.

6. The Foundation shall amend its By-Laws to:

a. expand the Board by August 1, 2001, to include fifteen members (except that for the first year the Board may include up to sixteen members);

b. institute initial staggered terms of one, two, three and four years for all Directors with subsequent terms of four years each, and each of the fifteen Board members shall be elected to a term of one, two, three or four years as the Board determines appropriate for each Director elected, subject to the requirement that each of the five new Directors serve an initial term of four years; and

c. establish term limits for all Directors, with no member serving more than eight years after entry of this Order.

7. The Foundation shall reserve and require that, for at least twenty-five years from entry of this Order, a majority of the Board positions be at all times held by residents of Illinois, with the exception that until the 2002 Annual Meeting or December 31, 2002, whichever occurs first, fifty per cent of such Board positions shall be held by Illinois residents.

8. All current members of the Board of Directors will serve only until the 2002 Annual Meeting and will not be eligible to stand for election to the Board of Directors at any time thereafter.

9. The Foundation will add to its Board the following five Directors, each of whom shall be elected to serve an initial term of four years and be eligible for election to one additional four-year term:

a. James R. Donnelley

b. Marshall Field V

c. Dr. Kathleen A. Foster

d. Prof. Robert S. Hamada

e. Frederick A. Krehbiel

10. The new Chairman of the Board shall be chosen from among the five new Directors.

16di-004733

11. As soon as practicable after the new Directors have taken office, new officers and committee heads shall be elected. The new Executive Committee shall be composed of the newly elected officers and committee heads. The new Strategic Planning Committee shall include Messrs. Gidwitz and Stebbins and one or more of the new Directors and shall try to negotiate a partnership with another Chicago metropolitan area institution with the goal of ceasing to operate a stand-alone museum in Chicago.

12. Reasonable attorneys' fees incurred by the Foundation's Directors in connection with this lawsuit, as determined by the Court, shall be paid by the Foundation.

13. These actions are hereby dismissed with prejudice, without any admission of wrongdoing or liability on the part of the Foundation or any of its Directors, each of whom specifically denies any wrongdoing or liability. The Court retains jurisdiction over the actions and the parties solely for purposes of enforcing the terms of this Consent Judgment And Order and for such further orders and directions as may be necessary or appropriate for the construction and effectuation of this Consent Judgment And Order.

14. The Plaintiff Directors, the Attorney General, and the Foundation agree to the mutually-acceptable press release attached as Exhibit A, and agree that no other public statement shall be made by the Plaintiff Directors, the Attorney General or the Foundation or any of their attorneys, agents or employees on their behalf regarding the Litigation, the mediation or the settlement.

ENTERED:

DATE: 7/26/01

Judge Dorothy Kirie Kinnaird 9:35 A.M.

16di-004734

Plaintiff-Directors of the Terra Foundation

Dean L. Buntrock

Date: 7/12/01

Ronald L. Gidwitz

Date: 7/03/01

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on _____

By: _____

Its _____

Print Name: _____

Date: _____

Attorney General of Illinois

By: _____
Assistant Attorney General (Title)
State's Attorney

Print Name: _____

Date: _____
7/6/2

Plaintiff-Directors of the Terra Foundation

_____
Dean L. Buntrock

Date: _____

_____
Ronald L. Gidwitz

Date: _____

Attorney General of Illinois

By: _____

_____ (Title)

Print Name: _____

Date: _____

The Terra Foundation for the Arts, an Illinois Not-for-Profit Corporation, pursuant to resolution passed by its Board on June 29, 2001

By: Stephanie Pace Marshall

Its SECRETARY AND TREASURER

Print Name: STEPHANIE PACE MARSHALL

Date: July 24, 2001

EXHIBIT A

JOINT PRESS RELEASE re BUNTROCK et. al. v. TERRA FOUNDATION, et al.

The plaintiffs and the Foundation are pleased to announce that a settlement has been reached and adopted by the Court.

The settlement will preserve the public's access, here in Chicago, to The Terra Foundation's collection for no less than 50 years. The Foundation will continue to manage its affairs, to operate its museum and programs in Giverny, France, and to promote understanding of and appreciation for American art. The Attorney General is satisfied that the settlement upholds the interests of the people of the State of Illinois. The plaintiffs and the Foundation are pleased that a settlement could be reached.

The plaintiffs and the Foundation have agreed to let this statement stand alone. No further statements are to be made.

Exhibit F

16di-004739

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

DEAN L. BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,
Plaintiffs,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

No. 00 CH 13859

AND

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., JAMES E. RYAN, Attorney General of Illinois,
Plaintiff-Intervenor,
vs.
JUDITH TERRA, a Director of the Terra Foundation for the Arts, et al.,
Defendants.

REPORT OF PROCEEDINGS had in the above-entitled cause, before the HONORABLE DOROTHY KIRIE KINNAIRD, Judge of said Court, in Courtroom 2302, on the 24th day of July, A.D. 2001, at the approximate hour of 4:30 o'clock p.m.

16di-004740

intimidation of Dr. Stebbins in this case. And I just simply don't see it. I have carefully considered all of the objections. I have read every bit, even though they weren't supposed to file it, every bit of the history of the Foundation, the intent of Dan Terra, information that was given by these objectors.

And I do not see this settlement, as the objectors have said as being antithetical -- I am reading from the document -- antithetical to the Foundation's purposes. And that it precludes the Foundation from recruiting the best and brightest worldwide to serve on the Board.

This is not a very limiting document as far as this Foundation is concerned. This Foundation is going to be able to pretty much operate the way that it has. It will be able to conduct its mission of providing education and art throughout the world and, yes, the Board is going to change.

Yes, I wish some of these Board members weren't leaving, but that's not for me to say. Yes, I hope that many of them, including the defenants, may continue to be involved in this

Foundation.

But I don't read this Consent Decree as the restrictive document that counsel for the defendant has said that it is.

I think this collection can be moved around and loaned and shown throughout the world and everybody, including the people of the State of Illinois, are going to benefit from that.

I do have a very severe problem. And I won't sign a piece of paper that has that last sentence on it, that says no other public statement shall be made. So that has to be changed with combining the two sentences and putting in the words, "and these parties have agreed."

And I won't sign it unless -- I don't want to sign a red line or a sloppily-written document today. I want that first paragraph corrected so that it says who filed answers, including defendant Michaeli, who is not mentioned in here. Everybody who has filed a current responsive pleading.

And as far as I am concerned, I have no problem allowing these defendants leave to file their answer and that can be put in there,

this action. And that's without prejudice to them bringing any other separate lawsuit that they may see may be appropriate in any valid cause of action that they may have against any individual. But it's not part of this case.

This Foundation was lucky enough to have one of the most experienced and capable mediators. I did not really believe that this case could be mediated successfully to conclusion.

At the time that it went out, I had some very, very strong doubts. I believe this is a just and appropriate conclusion. I do not see it as a case in which there has been abuse of power and I definitely don't see it as a case in which the State has tried and succeeded to take control of a charitable foundation.

The Attorney General is not controlling this Foundation, as being alleged in the papers. And this Court is going to be able to continue to operate the way they have.

The big difference is that this Board is now going to be able to operate. There will be a functional Board, which there has not been for almost a year now. And the Board will be able to

THE COURT: I am not putting a Finding of Fact in this order. I am saying that I am not seeing anything in this order, I mean in these papers, that should defeat the entry of this Consent Decree.

MR. CUMMINS: But --

THE COURT: You are free to file whatever lawsuit you want against whoever and raise whatever allegations that you want about that.

However, there is not going to be that kind of a finding. You don't want that kind of a finding in this case.

MR. CUMMINS: But you didn't address the issue of disinterestedness, as we believe that's critical. It may have come in late in the game, but that's an issue that was not addressed at the Board meeting.

No one was given advice or counsel on that at the Board meeting and that issue remains, as far as I am concerned, an issue that I presume you are overruling.

THE COURT: I am not finding that under the Illinois Not-for-Profit Act that they are an interested -- that they were interested Board

members that should not have participated.

Is that what you are saying?

MR. CUMMINS: I am wanting you to make a ruling on that, yes, Judge.

THE COURT: They could properly participate in this decision and they did properly participate in the decision.

MR. CUMMINS: I just want to clarify that finding, because that's an issue.

MR. GARMENT: May I, your Honor, --

THE COURT: Yes, sir.

MR. GARMENT: -- express my disappointment at your Honor's ruling, understanding what you articulated.

It is a very long distance from the commencement of this proceeding and I would like on the record to simply have it appear once again that this case started with a suit that was brought by two dissident directors, Mr. Buntrock and Mr. Gidwitz, which were not privileged documents, it would have been a very clear, very flagrant slander, because it was filled with false allegations that have been known to be false.

On the basis of that pleading,

allegations that have been known to be false.

On the basis of that pleading, on the basis of that pleading, you have the Attorney General come in and bootstrap himself into a position of the intervenor, using false allegations to play a role.

What followed, your Honor, was the contentious and litigious course of conduct that led to the mediation proceeding and within the cover of the mediation proceeding and without your knowing about this, without your being consulted, without your having any knowledge, the Attorney General forced the proceedings to the point of depriving certain of the directors of this Foundation of their free and untrammeled choice.

But we must not forget where this started and where it came out. And we have a situation that reminds me briefly of a custody case where the clients said, "All I want is custody. I will be prepared to do all the cosmetic things with respect to visitation and holidays and gifts and they have custody now."

And they have made a great deal

out of all of the cosmetic changes and alterations that have nothing to do with the fundamental defect in this case that started right at its beginning, continued all the way through, and it's now finally solidified in the Judgment of the Court.

MR. QUINLAN: Your Honor, I have to object and ask the comments be stricken. Counsel has no basis to make those comments. Frankly, the only test of this has been where your Honor denied the motion to dismiss.

And they have filed an answer today, which admits there is a cause of action. So I don't know how counsel can stand in front of this Court and make his grand speech of the basis that there is something here that is totally unfounded.

The complaint was proper. It was found proper by this Court and it's now been found proper by filing an answer. And I object and ask it be stricken.

MR. CUMMINS: Well, Judge, --

THE COURT: I am not going to be striking any remarks of counsel. All of counsel's remarks may stay on the record.

And there were -- There was no

trial in this case. None of the allegations that were alleged in either of the complaints filed in this case have been proven and everyone knows that.

This case is a mediated settlement and in large part I was convinced not only about the skill of the mediator but also the fact that all parties in this mediation process had counsel available to them and including the conflicted -- alleged conflicted Board members.

And there is nothing in anything that I have received here that makes me believe that discovery is necessary or anything is further necessary to investigate in this case any alleged conduct. I just simply don't see it.

MS. STONE: Housekeeping matter, your Honor.

MR. CUMMINS: Judge, before --

THE COURT: Yes, housekeeping.

MR. CUMMINS: Just one matter, if I may, your Honor. But before Mr. Quinlan gets too righteously indignant about the comments of my colleague, I would ask him to go back and read his memorandum that I referred to earlier.

THE COURT: Which one, about the Special Litigation Committee?

MR. CUMMINS: Yes, about all the conflicts, Judge.

THE COURT: Okay.

MR. CUMMINS: All the conflicts, which quite frankly no one has addressed in resolution of this matter at any time, including the fact that lawyers who purport to represent the Foundation can currently represent folks individually who purport to be taking actions inconsistent with the Foundation.

But I just assume, when folks made those pleadings, they believed it to be true.

THE COURT: Mr. Cummins, there comes a time that all litigation has to be ended. And this litigation is going to be ended tomorrow in this Court with the signing of these orders.

And the only thing that is going to remain is the Petitions for Attorney's fees, which the Consent Decree requires me to adjudicate. And if I am wrong, I am sure the Appellate Court is going to tell me I am wrong and I will see you all back here.

MS. STONE: I believe it's necessary to respond to the last salvo by counsel for the objectors.

Sidley, Austin, Brown & Wood solely represented the Foundation. We do not represent any of the defendants in their -- any of the directors in their individual capacity. We do not represent Dr. Stebbins in his individual capacity. He has another lawyer for that purpose.

We do not represent Dr. Marshall in her individual capacity. We represent merely the Foundation. We give advice to the six non-named, nonparty directors. That includes Dr. Stebbins and Dr. Marshall.

There is no conflict by Sidley, Austin, Brown & Wood at any point in this case. There is no conflict anywhere.

Thank you.

MR. QUINLAN: Judge, I would like to reserve my comments for the lounge across the street after the proceedings here.

Thank you.

THE COURT: We are in recess. Thank you.

Thank you, Mr. Reporter.

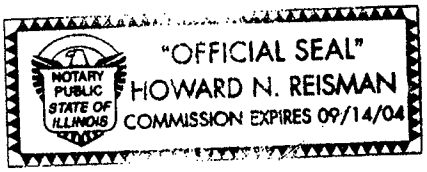
(WHEREUPON, the hearing of this matter was adjourned.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

I, HOWARD N. REISMAN, being first duly sworn on oath, says that he is a court reporter doing business in the City of Chicago, County of Cook, and State of Illinois, and that he reported in shorthand the proceedings had in the matter of the above-entitled cause, to the best of his knowledge, skill, and ability, and that the foregoing is a true and correct transcript of his shorthand notes so taken as aforesaid and contains all the proceedings had at the hearing of the said matter.

Howard N. Reisman

HOWARD N. REISMAN, CSR and Notary Public, Cook County, Illinois
License #084-000411 7-31-01
Expires 5/31/03



16di-004752

16di-004753

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; et al., Plaintiffs	)	
-vs-	)	No. 01 L 009112 Trans. to Chancery
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; et al., Defendants.	)	

Record of proceedings before the Honorable JUDGE DOROTHY KIRIE KINNAIRD, Judge of the Circuit Court of Cook County, Illinois, commencing at 8:00 o'clock a.m. on the 21st day of September, A.D. 2001.

A P P E A R A N C E S :

CUMMINS & CRONIN by
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DAVID A. NOVOSELSKY & ASSOCIATES by
MR. DAVID A. NOVOSELSKY
120 North LaSalle Street
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Chicago, Illinois 60602
(312) 346-8930

for a sub with the hope that one of my 13 colleagues might give them a different kind of an order. And as we see and we apply that statute, we grant those orders as a matter of right. Even if it is on the same identical issue. It can even almost be sometimes the same or related kinds of parties. And they have a right to try elsewhere.

Now, I'm not saying that there's any merit to their Count I. I'm not saying that that can be interpreted as anything other than a collateral attack on my decision. And I have been baffled in looking at the timing here. I look at a case that I made my decision on July 26 and there's no appeal and there's no Motion to Stay and I don't know -- I still don't know because I can't tell from these papers that I got for today if there was or there wasn't a Board meeting on August 1.

MS. STONE: There was, Your Honor.

MR. CARROLL: There was, Your Honor.

THE COURT: But then on July 31, instead of appealing, they filed the different lawsuit. And I'm not quite sure what happened between August 1 and August 14 or 13 because I was out of the country. But there's a meeting that was obviously scheduled

me but you have it in front of everybody else in the courthouse. And I'm troubled by that. The legislature has passed that statute. The courts seem to be saying -- seem to be going in your direction.

Looking at their cases, I realize that they are under the prior statute. And their cases are very persuasive when you look at them that way under the prior statute. I think your motion is timely. But I believe that this statute enacted after their cases doesn't talk about relatedness. The local rule says related, sends it back here.

But I anticipated when you were all here on August 29 or September 7 and you told me that you were going to Judge Evans and that Judge Gardner had sent this case over there and there was going to be a big argument, I said to myself right at that time, well, if they decide to consolidate the cases, I'll have 'em both. If they decide to send it as a related case, there's going to be a Motion for Substitution. And I anticipated there was going to be one. And I can understand why you may want to make one because I personally believe that this second lawsuit, at least what I have seen of it, except for perhaps the last count, is a collateral

attack on my decision.

I think these arguments should be in front of the Appellate Court. Not before another judge in the Circuit Court. I don't know what your Amended Complaint's going to say. But you have a right, if you get an order from a court granting you leave to file an Amended Complaint, you will have leave to file an Amended Complaint if someone says you can. And you have a right to take a substitution and you've used it up in this case and, well, this is only Mrs. Terra's motion. Is that correct?

MR. NOVOSELSKY: That's correct, Your Honor.

MR. CUMMINS: That's right.

MR. CARROLL: Defendants also have a right.

THE COURT: Well, I understand that. And this case is in the Chancery Division now.

MR. NOVOSELSKY: At this point.

THE COURT: And so it will be sent back to the Presiding Judge for reassigning.

MR. NOVOSELSKY: Thank you, Your Honor.

THE COURT: Thank you. And I don't know when it will get reassigned. That's not up to me.

I need to have you writ an order. I need a draft order that states that the Court has heard

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

DR. STEBBINS' AND DR.MARSHALL'S MOTION TO DISMISS PURSUANT TO SECTION 2-615 AND SECTION 2-619, OR IN THE ALTERNATIVE FOR A STAY

Defendants Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall"), by their attorneys, respectfully move for dismissal of the Amended Complaint filed by plaintiffs Paul Hayes Tucker, Judith Terra, and Alan K. Simpson ("plaintiffs"), pursuant to Section 2-615 and Section 2-619 of the Illinois Code of Civil Procedure, or in the alternative for a stay of this case. In support of their motion, Dr. Stebbins and Dr. Marshall state the following:

1. In plaintiffs' amended complaint, plaintiffs seek to undo a settlement agreement entered into by the Terra Foundation for the Arts ("the Foundation") in *Buntrock v. Tucker*, Case No. 00 CH 1359. The settlement agreement was approved and effectuated on July 26, 2001 in a Consent Judgment and Order entered in the *Buntrock* case by Judge Dorothy Kinnaird. Plaintiffs contend that the Foundation wrongfully agreed in *Buntrock* to the Consent Judgment and Order and that Judge Kinnaird wrongfully entered the Consent Judgment and Order.

2. Plaintiffs are three Foundation directors who objected to the settlement agreement in *Buntrock*, but were outvoted by their fellow board members. Plaintiffs have named as defendants in this case the Foundation, all of the six directors who voted for the settlement, all five new Foundation directors, the two law firms which represented the Foundation during the *Buntrock* litigation, and the Illinois Attorney General and Assistant Attorney General. Dr. Stebbins and Dr. Marshall are two of the six directors who voted for the settlement.

3. As we explain in our supporting memorandum which accompanies this motion, plaintiffs have failed pursuant to Section 2-615 to state any claim for relief against Dr. Stebbins and Dr. Marshall, for several reasons. First, plaintiffs have no standing to assert claims personally against Dr. Stebbins and Dr. Marshall. Second, plaintiffs fail to allege sufficient *facts*, as opposed to conclusions, to state any viable claim against Dr. Stebbins and Dr. Marshall. In particular, plaintiffs do not plead that they have personally suffered any injury or damage. Plaintiffs do not allege that Dr. Stebbins and Dr. Marshall owed them any fiduciary duties. Plaintiffs do not allege facts which show that Dr. Stebbins and Dr. Marshall breached any fiduciary duties to anyone. Indeed, plaintiffs' complaint is so unclear and imprecise that it cannot be discerned with certainty as to which counts of their complaint are even asserted against Dr. Stebbins and Dr. Marshall. For all of these reasons, all of plaintiffs' claims against Dr. Stebbins and Dr. Marshall should be dismissed, with prejudice, pursuant to Section 2-615.

4. All of plaintiffs' claims against Dr. Stebbins and Dr. Marshall should also be dismissed on the additional grounds that their claims are barred pursuant to Section 2-619(a)(4) by the doctrines of *res judicata* and collateral estoppel, and pursuant to Section 2-619(a)(3) because a prior case is pending in which the same issues are raised by these very same plaintiffs. The Foundation is briefing these Section 2-619 issues in detail. In order to avoid duplication, Dr.

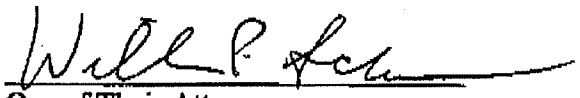
Stebbins and Dr. Marshall will not repeat the Foundation's arguments and authorities in their supporting memorandum. Instead, Dr. Stebbins and Dr. Marshall adopt and incorporate them, and hereby assert them on their own behalf, in support of their motion to dismiss.

5. Dr. Stebbins and Dr. Marshall also adopt and incorporate, and hereby assert on their own behalf, the arguments and authorities set forth in the motions to dismiss and supporting memoranda which are being filed by each of the other defendants in this case, as well.

6. If any of plaintiffs' claims against Dr. Stebbins and Dr. Marshall survive this motion to dismiss, then Dr. Stebbins and Dr. Marshall ask the Court, in the alternative, to stay this case pending resolution of the prior pending action involving these plaintiffs *i.e.*, the *Buntrock* litigation, which currently is on appeal in the Illinois Appellate Court. This would avoid enormous duplication of efforts and costs, eliminate the risk of inconsistent results in two different courts, and prevent plaintiffs from impermissibly seeking to have this Court act as a lateral court of appeals in connection with the decisions rendered by Judge Kinnaird in *Buntrock*.

WHEREFORE, for the reasons set forth herein and in Dr. Stebbins' and Dr. Marshall's memorandum in support of their motion to dismiss, and for the reasons set forth in the motions to dismiss and the supporting memoranda of the Foundation and the other defendants in this case, Dr. Stebbins and Dr. Marshall respectfully request that the Court grant this motion and issue an Order dismissing all of plaintiffs' claims against Dr. Stebbins and Dr. Marshall, with prejudice, or in the alternative staying this case, and awarding to Dr. Stebbins and Dr. Marshall all of their attorneys' fees and costs incurred in connection with this matter and all other relief which the Court deems appropriate under the circumstances.

DR. THEODORE E. STEBBINS JR. and
DR. STEPHANIE PACE MARSHALL

By: 
One of Their Attorneys

William P. Schuman
Lizabeth A. Boyer
MCDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606-5097
(312) 372-2000
Firm I.D. No. 90539

16di-004762

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

NOTICE OF MOTION

To: **See Attached Service List**

On **Wednesday, February 13, 2002 at 2:00 p.m.** or as soon thereafter as counsel may be heard, I shall appear before the Honorable Judge Julia M. Nowicki or any judge sitting in her stead, in the courtroom usually occupied by her in Room 2510 of the Richard J. Daley Center, Chicago, Illinois, and present Dr. Stebbins' and Dr. Marshall's Motion to Dismiss Pursuant to Section 2-615 and Section 2-619, or in the Alternative for a Stay, a copy of which is hereby served upon you.

Attorney for: **Defendants Dr. Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall**

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16di-004763

PROOF OF SERVICE BY FACSIMILE

I, Lizabeth A. Boyer, certify that on January 4th, 2002, I caused to be served this **Notice of Motion and Dr. Stebbins' and Dr. Marshall's Motion to Dismiss Pursuant to Section 2-615 and Section 2-619, or in the Alternative for a Stay** by causing a copy to be sent by facsimile to the named parties on the attached service list as set forth on the attached transmission sheet. The following named parties were also served by messenger:

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Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DR. STEBBINS' AND DR. MARSHALL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY

This memorandum is submitted by two of the director defendants in this case, Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall"), in support of their motion to dismiss the First Amended Complaint (hereafter "Complaint") filed by plaintiffs Paul Hayes Tucker, Judith Terra, and Alan K. Simpson ("plaintiffs"), based on Section 2-615 and Section 2-619 of the Illinois Code of Civil Procedure, or in the alternative to stay the proceedings.

I. INTRODUCTION.

In plaintiffs' Complaint, plaintiffs seek to undue a settlement agreement entered into by the Terra Foundation for the Arts ("the Foundation") in a case known as *Buntrock v. Tucker*, Case No. 00 CH 1359, which was approved on July 26, 2001 in a Consent Judgment and Order entered by Judge Dorothy Kinnaird. The essence of plaintiffs' Complaint is that the Foundation wrongfully agreed to settle the *Buntrock* case, and that Judge Kinnaird wrongfully entered the Consent Judgment and Order which made the *Buntrock* settlement effective.

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The plaintiffs in this case are three directors of the Foundation who opposed the *Buntrock* settlement, but were outvoted by the majority of the Foundation's Board. In what can fairly be described as litigation by blunderbuss, plaintiffs name as defendants in this case not only the Foundation, but also (1) all six of the directors who voted in favor of the settlement, (2) all five new Foundation directors who were not directors during the *Buntrock* case, (3) Sidley & Austin and Winston & Strawn, the law firms which represented the Foundation during the *Buntrock* litigation, and (4) the Illinois Attorney General and Assistant Attorney General.

In this Memorandum, Dr. Stebbins and Dr. Marshall primarily address the claims asserted by plaintiffs personally against Dr. Stebbins and Dr. Marshall, and the bases for dismissal of those claims pursuant to Section 2-615. First, plaintiffs have no standing to assert claims personally against Dr. Stebbins and Dr. Marshall. Second, plaintiffs fail to allege sufficient *facts*, as opposed to conclusions and rhetoric, to state any viable claim for relief against Dr. Stebbins and Dr. Marshall. Plaintiffs do not plead that they have personally suffered any injury or damage, nor do they allege that Dr. Stebbins and Dr. Marshall owed to them any fiduciary duties. Nor do they plead any facts showing that Dr. Stebbins and Dr. Marshall breached any fiduciary duties to anyone.

The Foundation addresses comprehensively the reasons why the Complaint is fatally defective as against the Foundation in its separately filed motion to dismiss and supporting memorandum. These reasons include the doctrines of *res judicata* and collateral estoppel, which require dismissal under Section 2-619(a)(4), and the presence of a prior pending action, which requires dismissal under Section 2-619(a)(3). Each of these arguments also requires dismissal of the claims asserted against Dr. Stebbins and Dr. Marshall. Moreover, if the Complaint fails to state a claim against the Foundation, the claims asserted against Dr. Stebbins and Dr. Marshall

must fail, *a fortiori*. To avoid unnecessary duplication, these arguments by the Foundation will not be repeated here. However, Dr. Stebbins and Dr. Marshall hereby join in and adopt, and assert on their own behalf, all of these arguments set forth in the Foundation's motion to dismiss and supporting memorandum.

Accordingly, for the reasons set forth herein, and in the Foundations' papers, plaintiffs' claims against Dr. Stebbins and Dr. Marshall should be dismissed, with prejudice.[1]

II. PERTINENT FACTS[2]

Dr. Stebbins is, and at all times pertinent hereto has been, a Director of the Foundation and Chairman of the Foundation's Collections Committee. (Am.Cmplt. ¶ 12). He is the current Consultative Curator of American Art at the Fogg Museum at Harvard University. (Am.Cmplt. ¶ 12). Dr. Stebbins has been involved with the Foundation since at least 1997. (Am.Cmplt. ¶ 54).

Dr. Marshall is, and at all times pertinent hereto has been, a Director of the Foundation. She has served as the Foundation's Secretary and Treasurer and Chairman of its Finance and Strategic Planning Committees. (Am.Cmplt. ¶ 11). Dr. Marshall is the current President of the Illinois Mathematics and Science Academy. (Am.Cmplt. ¶¶ 11, 64).

In the *Buntrock* litigation, filed in the Fall of 2000, two members of the Board of Directors of the Foundation sued the Foundation to prevent the Foundation from moving the Foundation's art collection out of Illinois. The Illinois Assistant Attorney General intervened and filed a companion case which was consolidated with the *Buntrock* case. (Am.Cmplt. ¶ 5). Dr. Stebbins and Dr. Marshall were not defendants in the *Buntrock* litigation. (Am.Cmplt. ¶ 83).

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[1] We understand that the other defendant directors, the defendant law firms and the Illinois Attorney General and Assistant Attorney General are separately filing motions to dismiss and supporting memoranda. We adopt and join in their motions and supporting memoranda, as well.

[2] We accept as true the following facts alleged in the Complaint only for purposes of this Motion to Dismiss.

After many months of litigation, all parties agreed to mediate the dispute. (Am.Cmplt. ¶ 49). Dr. Stebbins was from the beginning in favor of attempting to mediate the dispute. (Am.Cmplt. ¶ 57).

During the mediation, the Illinois Attorney General prepared a draft amended complaint in the *Buntrock* litigation, which was never filed. According to plaintiffs, the draft amended complaint purported to assert that Dr. Stebbins had breached a duty of loyalty to the Foundation by representing multiple parties at art auctions. (Am.Cmplt. ¶ 58). Also during the mediation, the Illinois Attorney General began to investigate Dr. Marshall "about two issues relating to Dr. Marshall's position as President of the Illinois Mathematics and Science Academy." (Am.Cmplt. ¶ 65). Dr. Stebbins and Dr. Marshall knew these facts. (Am.Cmplt. ¶¶ 75, 76).

In a May 20, 2001 letter addressing an early mediation proposal made by the Attorney General (which plaintiffs do not attach to the Complaint and which is not alleged to be the same agreement which was subsequently approved by the Foundation's board), Dr. Marshall stated that she found that particular proposal to be "unacceptable." (Am.Cmplt. ¶ 63).

The mediation continued. At the conclusion of the mediation, a majority of the members of the Board of Directors of the Foundation approved a settlement agreement which disposed of the *Buntrock* litigation. Accordingly, at the Foundation's June 29, 2001 board meeting, the mediator's final proposed settlement agreement was approved by the Foundation's board. Dr. Stebbins and Dr. Marshall voted in favor of the settlement. They were joined by co-directors Buntrock, Gidwitz, Daley, and Hartman, thereby constituting a majority of the eleven member board. (Am.Cmplt. ¶ 73). Only two directors, Judith Terra and Paul Tucker, voted against the settlement. *Id.*

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As plaintiffs concede in their Complaint, Dr. Stebbins specifically stated at the board meeting that he was "voting his 'own conscience'," and Dr. Marshall specifically stated that the Illinois Attorney General's conduct "has not played a part in my decision-making with respect to my fiduciary responsibilities as a Board Member of this Foundation." (Am.Cmplt. ¶¶ 71, 72).

The parties agreed that the Court had to approve the settlement in the form of a Consent Judgment and Order in order to make the settlement effective. On July 26, 2001, after a lengthy hearing, the Court entered the Consent Judgment and Order. (Am.Cmplt. ¶ 83-84). The plaintiffs in this case, who were defendants in the *Buntrock* litigation, objected to the terms of the settlement and the Consent Judgment and Order, but Judge Kinnaird overruled their objections. They thereafter promptly appealed to the Illinois Appellate Court all aspects of the Consent Judgment and Order entered by Judge Kinnaird. *See* Notice of Appeal, attached as an Exhibit to the Foundation's supporting memorandum. Plaintiffs also filed the instant lawsuit.

At an August 1, 2001 meeting of the Foundation's Board of Directors, the new members of the Foundation's Board of Directors, who had been designated and approved in the settlement agreement and Consent Judgment and Order, were welcomed to the Board. (Am.Cmplt.¶ 84).

III. STANDARD OF REVIEW FOR A SECTION 2-615 MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

A motion to dismiss brought pursuant to Section 2-615 for failure to state a cause of action admits all well-pleaded facts and attacks only the legal sufficiency of the complaint. *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 725, 688 N.E.2d 732, 736 (1st Dist. 1997). However, in considering a Section 2-615 motion, conclusions contained within the challenged pleading will not be taken as true unless supported by specific factual allegations. *Simon v. Wilson*, 291 Ill. App. 3d 495, 503, 684 N.E.2d 791, 796 (1st Dist. 1997). Legal conclusions couched as factual allegations are not taken as true. *Estate of Johnson v. Condell Mem'l Hosp.*,

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119 Ill.2d 496, 510, 520 N.E.2d 37, 43 (1988); *Eymon v. McDonough Dist. Hosp.*, 245 Ill. App. 3d 394, 397, 613 N.E.2d 819, 821 (3rd Dist. 1993). As a fact pleading jurisdiction, Illinois courts require plaintiffs to allege *facts*, and not merely conclusions, sufficient to bring a claim within the scope of the cause of action being asserted. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199, 721 N.E.2d 605, 612 (1st Dist. 1999).

IV. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT THEIR CLAIMS PERSONALLY AGAINST DR. STEBBINS AND DR. MARSHALL.

Plaintiffs' Complaint plainly demonstrates that they have no standing to bring claims personally against Dr. Stebbins and Dr. Marshall. Nothing in the Illinois General Not For Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.* (hereafter, "the Act"), provides standing to these plaintiffs to sue Dr. Stebbins and Dr. Marshall personally. Likewise, plaintiffs fail to allege sufficient facts to give them standing to assert claims personally against Dr. Stebbins and Dr. Marshall under traditional standing analysis.

A. Plaintiffs Have No Standing to Sue Dr. Stebbins and Dr. Marshall Under the Act.

The Act provides only very limited standing to directors of Not For Profit corporations to bring a lawsuit on the ground that the corporation has acted without the capacity or power to act. Section 103.15 specifically permits a director to bring such an action only "against the *corporation*." *Id.*, § 105/103.15(a) (emphasis added). Directors are plainly given no standing under the Act to bring such claims against their fellow directors. Moreover, were the limited breadth of the standing conferred by the Act subject to any doubt, that doubt has been conclusively resolved – and the absence of any such standing as against individual directors has been confirmed – in *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1047, 673 N.E.2d 430, 438 (1st Dist. 1996). In *Brown*, the plaintiff sued a bank and its directors to recover damages

which allegedly occurred because the bank refused to honor the guarantees it had promised. In support of the plaintiff's purported standing to sue the directors, the plaintiff relied on a section of the Illinois Business Corporation Act of 1983, namely 805 ILCS 5/3.20. That section provides that "all persons who assume to exercise corporate powers without authority to do so shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." *Id.* Section 5/3.20 of the Illinois Business Corporation Act is identical to Section 105/103.20 of the Not for Profit Act on which plaintiffs in this case purport to rely. The *Brown* court held that this language provides standing to sue a director only "where a defendant acted before incorporation or after a corporation was dissolved." *Brown Leasing, Inc.*, 284 Ill. App. 3d at 1047, 673 N.E.2d at 438 (citations omitted). The court observed that other jurisdictions with similar statutes are entirely in agreement, and impose personal liability only upon those who act on behalf of a nonexistent corporation. *Id.* Plaintiffs in the present case do not, and obviously cannot, contend that the acts of which they complain occurred prior to the incorporation of the Foundation or after dissolution. Accordingly, the Act provides no standing to plaintiffs to assert their claims personally against Dr. Stebbins and Dr. Marshall.[3]

B. Plaintiffs Have No Standing to Assert Their Claims Against Dr. Stebbins and Dr. Marshall Under Traditional Standing Analysis.

Without any special, statutorily-conferred standing, plaintiffs must satisfy traditional standing requirements in order to pursue claims personally against Dr. Stebbins and Dr. Marshall. Under well-settled common law, a plaintiff must allege facts showing that the plaintiff suffered a distinct and palpable injury *to himself or herself*, that the injury is fairly traceable to the defendant's alleged action, and that *the specific injury to the plaintiff* is substantially likely to

[3] The Act permits a *corporation*, acting directly or derivatively through a Receiver or other legal representative, to bring suit against directors in connection with a claim of lack of authority. 805 ILCS 105/103.15(b). However, the Foundation did not bring such an action, and plaintiffs did not, and cannot, bring this action derivatively.

be prevented or redressed by the grant of the requested relief. *See, e.g., Messenger v. Edgar*, 157 Ill. 2d 162, 170, 623 N.E.2d 310 (1993). Plaintiffs do not come close to satisfying this standard.

In the Complaint, plaintiffs allege that Daniel Terra's intentions have been violated by the Foundation's approval of the settlement and by the Court's issuance of the Consent Judgment and Order. (Am.Cmplt. ¶¶ 1, 4). However, nowhere in the Complaint do any of the plaintiffs allege how they have been personally injured. They certainly plead no physical harm to themselves. Neither do they plead, and they could not truthfully do so, that they have suffered any financial harm. To the contrary, the only purported "damage" they allege is to the Foundation. But plaintiffs did not, and could not, bring this case in the name of the Foundation. *See* Complaint generally. Indeed, the only reference to plaintiffs' purported "damages" in the Complaint appears in the Prayer for Relief in Counts IV (for *ultra vires* conduct) and Count V (for breach of fiduciary duty). There, plaintiffs purport to seek "damages in an amount to be determined at trial." However, not one word is alleged in the Complaint which even suggests, much less alleges, that plaintiffs have personally suffered "distinct and palpable" injury or damage.[4] Accordingly, plaintiffs have no standing to assert their claims personally against Dr. Stebbins and Dr. Marshall under the common law. *See, e.g., Glisson v. City of Marion*, 188 Ill.2d 211, 221, 740 N.E.2d 1034, 1040 (1999); *Kemp-Golden v. Dept. of Children and Family Services*, 281 Ill. App. 3d 869, 878, 667 N.E.2d 688, 694 (4th Dist. 1996).

V. PLAINTIFFS HAVE FAILED TO STATE ANY VIABLE CLAIMS AGAINST DR. STEBBINS AND DR. MARSHALL.

Should the Court reach the substance of plaintiffs' claims against Dr. Stebbins and Dr. Marshall, which we respectfully suggest the Court should not do because plaintiffs have no standing, plaintiffs' complaint nonetheless must be dismissed as against Dr. Stebbins and Dr.

[4] Count VI (for allegedly inducing a breach of fiduciary duty) and Count VII (for deprivation under color of law of Constitutional rights) also include a request for damages in the Prayer for Relief. However, those claims are plainly asserted only against the Illinois Attorney General and Assistant Attorney General. Moreover, those counts do not include any factual assertions that plaintiffs have personally suffered damages.

Marshall on the independent ground that they fail to state any viable claims against Dr. Stebbins and Dr. Marshall.

A. Counts I, II, III, VI, and VII Are Not Asserted Against Dr. Stebbins and Dr. Marshall.

As an initial matter, it is not sufficiently clear from the Complaint which claims plaintiffs are even attempting to assert personally against Dr. Stebbins and Dr. Marshall. For this reason alone, the claims should be dismissed.

Counts I and II seek solely declaratory and injunctive relief that would provide: (1) that the Consent Judgment and Order entered by Judge Kinnaird, and the settlement which that Consent Judgment and Order effectuated, are unlawful and unenforceable, (2) that the new members of the Foundation's board have not been properly elected and any exercise of the Foundation's authority by them is void, and (3) that the new board members may not act on behalf of the Foundation. Counts I and II allege nothing against Dr. Stebbins and Dr. Marshall, seek nothing from Dr. Stebbins and Dr. Marshall, and do not require Dr. Stebbins and Dr. Marshall to be part of those Claims in order for plaintiffs to obtain the relief they seek in those counts.

Indeed, any injunction entered by this Court against the Foundation would bind the Foundation's directors as well. *See, e.g., In re Marriage of Marshall*, 278 Ill. App. 3d 1071, 1079, 663 N.E.2d 1113, 1119 (3rd Dist. 1996) ("a decree of injunction binds not only the parties but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control."); *Floralife, Inc. v. Floraline Int'l, Inc.*, 807 F.2d 518, 519 (7th Cir. 1986) (injunction entered against defendant corporation and its non-defendant "officers, agents and all persons or entities in concert or privity with it.").[5] Accordingly, Dr. Stebbins and Dr. Marshall are in no way necessary parties to these claims.

[5] All non-Illinois cases cited herein are attached at the back of this memorandum and are organized alphabetically.

Count III is targeted only against Sidley & Austin and Winston & Strawn, the two law firms which have represented the Foundation during the *Buntrock* litigation. In Count III, plaintiffs seek a declaration that Sidley & Austin and Winston & Strawn should be disqualified from representing the Foundation and its directors in this litigation. This claim alleges no wrongdoing by Dr. Stebbins and Dr. Marshall, seeks nothing from Dr. Stebbins and Dr. Marshall, and does not require the inclusion of Dr. Stebbins and Dr. Marshall in order for plaintiffs to obtain the relief they seek.

Similarly, Counts VI and VII are asserted only against the Illinois Attorney General and the Assistant Attorney General. There, plaintiffs contend that the Attorney General and Assistant Attorney General induced a breach of fiduciary duty and deprived the Foundation of property under color of law without due process. No wrongdoing is asserted in those counts against Dr. Stebbins and Dr. Marshall, and no relief is sought from them.

In sum, Counts I, II, III, VI and VII must be dismissed as against Dr. Stebbins and Dr. Marshall for failure even to attempt to state a claim against them. And if, contrary to the plain language of these counts, it was plaintiffs' intent to assert those claims against Dr. Stebbins and Dr. Marshall, plaintiffs have in all events totally failed to plead sufficient facts to sustain those claims as against Dr. Stebbins and Dr. Marshall.

B. Plaintiffs Have Failed to State a Claim in Count IV for *Ultra Vires* Conduct as Against Dr. Stebbins and Dr. Marshall.

In Count IV, plaintiffs allege that approval of the settlement and the Consent Judgment and Order by the Foundation's board was an *ultra vires* act. An action is *ultra vires* if it is unauthorized or beyond the scope of power allowed or granted by corporate charter or by-law. BLACK'S LAW DICTIONARY, 1525 (7th ed. 1999). For their remedy, plaintiffs seek an order "enjoining defendants from taking further action in violation of law and contrary to the best

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interests of the Foundation." (Count IV, Prayer for Relief). Plaintiffs also seek in Count IV "damages in an amount to be determined at trial." Id. However, plaintiffs' *ultra vires* allegations fail to state a claim as against Dr. Stebbins and Dr. Marshall.[6]

First, as we showed above, the Act permits a director to file an action for alleged *ultra vires* conduct only against the Foundation. No such action against fellow directors is authorized by the Act. *See* Section IV.A. above. Indeed, the law is the same under statutory and common law in respect to For Profit corporations, as well. *See, e.g.*, ILLINOIS JUR., BUSINESS RELATIONSHIPS §8:8-8:9 (1994), citing Illinois Business Corporation Act of 1983, 805 ILCS 5/3.15.

Second, plaintiffs have failed to allege sufficient *facts* to support any *ultra vires* claim against Dr. Stebbins and Dr. Marshall. They have made no showing whatsoever that Dr. Stebbins and Dr. Marshall acted outside of their authority. Indeed, what Dr. Stebbins and Dr. Marshall are accused of doing, is voting. There is nothing *ultra vires* about voting. As described in more detail in the Foundation's supporting memorandum, Judge Bucklo was asked to address these very same allegations raised against Dr. Stebbins and Dr. Marshall by these very same plaintiffs. Judge Bucklo held, as a matter of law, that Dr. Stebbins and Dr. Marshall had a lawful right to vote as they did. As Judge Bucklo explained, "the conduct being induced (a changed vote) is not itself unlawful... [T]he plaintiffs do not explain, either with authority or with logic, how the directors can be charged with violating the plaintiffs' rights even under compulsion if they do what they had a lawful right to do in any event." *Terra v. Perkins*, 151 F. Supp. 2d 931, 937 (N.D. Ill. 2001). Moreover, plaintiffs concede that a majority of the duly

[6] The Foundation in its memorandum is setting forth in detail the reasons why plaintiffs have failed to state a claim for *ultra vires* acts as against the Foundation. We specifically adopt and incorporate those arguments on behalf of Dr. Stebbins and Dr. Marshall. Dismissal of the *ultra vires* claim against the Foundation would require, *a fortiori*, dismissal of the claim against all of the defendant directors, including Dr. Stebbins and Dr. Marshall.

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elected board voted to approve the settlement of the contentious *Buntrock* litigation, and that the Chancery Court specifically approved the settlement and entered a Consent Judgment and Order putting the settlement into effect. (Am.Cmplt. ¶¶ 73, 84.).

Still further, plaintiffs have failed to allege any facts which show that Dr. Stebbins and Dr. Marshall, along with their fellow board members who voted in favor of the Consent Judgment, took any action or caused any action to be taken by the Foundation which was *ultra vires*. As the Foundation explains in its supporting memorandum, plaintiffs do not, and cannot truthfully, cite to anything in the Consent Judgment and Order that is prohibited by the Foundation's articles of incorporation or by-laws. *See* Complaint generally. Accordingly, plaintiffs have failed to allege sufficient facts to state a claim for *ultra vires* conduct.

C. Plaintiffs Have Failed to State a Claim in Count V for Breach of Fiduciary Duty Against Dr. Stebbins and Dr. Marshall.

Count V alleges a purported breach of fiduciary duty. It is the only count in which the gravamen of the claim is purported wrongdoing by Dr. Stebbins and Dr. Marshall. In Count V, plaintiffs contend that Dr. Marshall and Dr. Stebbins "breached their duties of loyalty to the Foundation by voting in favor of a settlement which offered personal benefits having nothing to do with the interests of the Foundation." (Am.Cmplt. ¶ 114). As a result of this purported breach of fiduciary duty, claim plaintiffs, "the Plaintiffs and the Foundation have suffered injury." (Am.Cmplt. ¶ 115). However, plaintiffs do not even come close to alleging *facts* sufficient to state a claim for breach of fiduciary duty against Dr. Stebbins and Dr. Marshall.

1. Dr. Stebbins and Dr. Marshall Do Not Owe Fiduciary Duties to Plaintiffs.

To assert a claim for breach of fiduciary duty, plaintiffs must allege facts establishing that Dr. Stebbins and Dr. Marshall had a fiduciary relationship with *plaintiffs*, and that they breached

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that fiduciary duty. *See, e.g., Cessna v. City of Danville*, 296 Ill. App. 3d 156, 693 N.E.2d 1264 (4th Dist. 1998) (plaintiffs must allege facts establishing a breach of duty owed to them); *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 636 N.E.2d 616 (1st Dist. 1993) (complaint which fails to allege facts supporting the elements of a claim for breach of fiduciary duty cannot survive a Rule 2-615 motion to dismiss). Plaintiffs do not even attempt to allege, for they could not truthfully do so, that they had a fiduciary relationship with Dr. Stebbins or Dr. Marshall. *See* Count V, generally. To the contrary, each of the directors owed a fiduciary duty only to the Foundation. Plaintiffs have not brought this action as a derivative action, so they cannot assert the fiduciary duty claim on behalf of the Foundation. Because Dr. Stebbins and Dr. Marshall owed no fiduciary duty to plaintiffs, Count V is defective as a matter of law.

2. Plaintiffs Have Failed to Allege Facts Sufficient to Show that Dr. Stebbins and Dr. Marshall Breached Any Fiduciary Duty.

Plaintiffs' Complaint is also devoid of any well-pleaded factual allegations that Dr. Stebbins and Dr. Marshall acted in breach of any fiduciary duty. Under Illinois law, a fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty and good faith and to treat the principal as well as the agent would treat himself. *Peterson v. H&R Block Tax Serv., Inc.*, 971 F. Supp. 1204 (N.D. Ill. 1997). Plaintiffs have failed to allege any *facts*, as distinct from bald conclusions, which show that either Dr. Stebbins or Dr. Marshall voted to approve the settlement because of the purported "threats" against them by the Attorney General. Instead, plaintiffs' own allegations show the contrary. *See* Complaint, ¶¶ 71-73.

Dr. Marshall's comments in her May 20, 2001 letter on a soon-to-be superceded settlement proposal cannot be relied upon to support a claim for breach of fiduciary duty. In fact, plaintiffs do not even allege, for they cannot truthfully do so, that Dr. Marshall's comments

were made on the *same* proposal that was ultimately approved by her and a majority of the Board. Plaintiffs pleaded no *facts* which show that Dr. Stebbins or Dr. Marshall changed their minds as to an appropriate resolution of the *Buntrock* litigation after receiving the alleged "threats." Nor did plaintiffs allege *facts* showing that Dr. Stebbins and Dr. Marshall ultimately based their vote on anything other than their belief as to what was in the best interests of the foundation. *See, e.g., Borgsmiller v. Burrought*, 187 Ill. App. 3d 1, 542 N.E.2d 1281 (5th Dist. 1989) (Plaintiff shareholders, who sued derivatively on behalf of a corporation for alleged breach of fiduciary duty by directors who had purchased a controlling interest in the corporation, did not allege facts showing that the directors abused inside information, usurped a corporate opportunity, or otherwise acted wrongfully. Accordingly, they failed to state a claim for breach of fiduciary duty). Indeed, the significance of the Attorney General's purported "threats" against Dr. Stebbins and Dr. Marshall is entirely undermined by plaintiffs' own allegations acknowledging that four other directors voted to approve the settlement and the Consent Judgment without the "pressure" of any "threats" by anyone.

Plaintiffs allege, without any factual support, that the mere act of voting to approve the settlement was a breach of fiduciary duty on the part of all of the directors who approved it. (Am.Cmplt. ¶ 78). However, such an unsupported conclusion is insufficient to state a cause of action for breach of fiduciary duty. *See Dangeles v Muhlenfeld*, 191 Ill. App. 3d 791, 795, 548 N.E.2d 45, 48 (2nd Dist. 1989). Conclusory allegations of fact or law are not admitted in a Section 2-615 motion. *Shaker & Assoc., Inc. v. Med. Tech. Group, Ltd.*, 315 Ill. App. 3d 126, 134, 733 N.E.2d 865, 872 (1st Dist. 2000), citing *Knox Coll. v. Celotex Corp.*, 88 Ill. 2d 407, 417, 430 N.E.2d 976, 981 (1981).

Still further, as discussed above, plaintiffs have failed to plead that they have been personally injured or damaged in any way by the purported breach of fiduciary duty. They have alleged no physical injury. They have alleged no financial damage. They state the bald conclusion that the Foundation has been damaged, but they allege no *facts* to support such alleged damages. Moreover, plaintiffs cannot assert the *Foundation's* alleged damages as a basis for *their* fiduciary duty claim. Without a proper factual pleading showing that the plaintiffs suffered compensable damages, an essential element of the claim is missing and the cause of action must be dismissed. *See, e.g., Reuben H. Donnelley Corp. v. Brauer*, 275 Ill. App. 3d 300, 313-14, 655 N.E.2d 1162, 1172-73 (1st Dist. 1995) (no specific allegation that actual, pecuniary or consequential losses to plaintiff directly resulted from the alleged wrongdoing); *Latex Glove Co., Inc. v. Gruen*, 146 Ill. App. 3d 868, 874, 497 N.E.2d 466, 469 (1st Dist. 1986) (plaintiff did not allege facts showing that plaintiff suffered damages which could be proved with reasonable certainty, were proximately caused by defendant, and were reasonably within the contemplation of the parties when the contract was formed.) Accordingly, the fiduciary duty claim is fatally defective as against Dr. Stebbins and Dr. Marshall for these reasons, too.

3. Plaintiffs Have Failed to Allege Facts Which Would Overcome the Business Judgment Rule.

It is well-settled that courts will not re-examine the actions of a director in authorizing or permitting a corporate action, if the director's action was undertaken in good faith, in a manner reasonably believed to be in the best interests of the corporation, and with an independent and informed judgment. *In re S.N.A. Nut Co.*, 186 B.R. 98 (Bankr. N.D.Ill. 1995); *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 662 N.E.2d 1358 (1st Dist. 1996). Decisions by directors of a board are entitled to deference. *Cottle v. Hilton Hotels Corp.*, 635 F. Supp. 1094 (N.D.Ill. 1986). This is known as the business judgment rule. *Id.* The business judgment rule applies to the

decisions of boards of directors of charitable organizations, such as the Foundation. *Beard v. Achenbach Mem'l Hosp. Ass'n*, 170 F.2d 859 (10th Cir. 1948). Accordingly, a plaintiff operates under an even greater pleading burden when accusing a director of a breach of fiduciary duty arising out of the performance of the director's duties for the corporation, because the plaintiff must plead *facts* which are strong enough to overcome the business judgment rule. *See Spillyards v. Abboud*, 278 Ill. App. 3d at 675. The burden is on the party challenging a director's decision to establish facts rebutting the presumption that the director's decisions were made on an informed basis, in good faith and in an honest belief that the actions were taken in the best interest of the Foundation. *Id.*, 278 Ill. App. 3d 663, 681, 662 N.E.2d 1358, 1370 (1st Dist. 1996). Count V fails this test entirely.

4. Plaintiffs Failed to Meet the Further Heightened Pleading Burden Resulting from the Approval by the Non-Interested Directors of the Settlement and Consent Judgment.

Under the Act, a transaction in which a director of a corporation has a direct or indirect interest can be ratified if "the material facts of the transaction and the director's interest or relationship were disclosed or known to the board of directors...and the board...authorized, approved or ratified that transaction by the affirmative votes of a majority of disinterested directors, even though the disinterested directors be less than a quorum...." 805 ILCS 105/108.60(b)(1) (2001). Plaintiffs' own complaint reveals that a majority of the disinterested directors present at the June 29 Board meeting voted to approve the settlement and Consent Judgment and Order. Eight directors voted: Mr. Buntrock, Mr. Gidwitz, Mrs. Daley, Mr. Hartman, Dr. Stebbins, Dr. Marshall, Mrs. Terra and Dr. Tucker. (Am.Cmplt. ¶ 68). Exclusion of Mr. Buntrock, Mr. Gidwitz, Mrs. Terra and Dr. Tucker, because they were named parties in the *Buntrock* litigation, and exclusion of Dr. Stebbins and Dr. Marshall, pursuant to

plaintiffs' "theory" that they, too, were "interested," leaves only Mrs. Daley and Mr. Hartman as disinterested Board members who voted on the settlement. Both Mrs. Daley and Mr. Hartman voted to approve the settlement and the Consent Judgment and Order. (Am.Cmplt. ¶ 73). This ratification by the disinterested directors, which plaintiffs admit in their complaint (*id.*), further increases plaintiffs' pleading burden and further increases the distance between plaintiffs' actual conclusory allegations and the necessary level of fact pleading which would suffice to state a claim for breach of fiduciary duty against Dr. Stebbins and Dr. Marshall.

In sum, plaintiffs have failed to state, and cannot state, any claim for relief against Dr. Stebbins and Dr. Marshall. All claims asserted against them personally must be dismissed, with prejudice.

VI. PLAINTIFFS HAVE FAILED TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM FOR PUNITIVE DAMAGES.

For all of the reasons discussed herein, plaintiffs have failed to state any viable claims against Dr. Stebbins and Dr. Marshall. *A fortiori*, plaintiffs' request for punitive damages in Counts IV and VI must also be dismissed.

Furthermore, plaintiffs failed to allege any facts whatsoever which would support the kind of fraudulent or malicious conduct on the part of Dr. Stebbins and Dr. Marshall necessary to state a claim for punitive damages. *See, e.g., Monotronics Corp. v. Baylor*, 107 Ill. App. 3d 14, 21, 436 N.E.2d 1062, 1068 (2d Dist. 1982), citing *City of Chicago v. Martin*, 49 Ill. 241 (1868). In light of the fact that Judge Kinnaird approved the settlement and herself entered the Consent Judgment and Order, thereby effectuating the settlement, plaintiffs' request for punitive damages is nothing but a cynical effort to coerce the individual defendants through *in terrorem* tactics that have long been vigorously disapproved by the Courts. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975). Indeed, to accuse these defendants of such wrongful

motives is to accuse Judge Kinnaird herself of the wrongful conduct. Dr. Stebbins and Dr. Marshall respectfully suggest that, especially in this regard, plaintiffs have stretched zealous advocacy far past the snapping point.

VII. ALL OF PLAINTIFFS' CLAIMS AGAINST DR. STEBBINS AND DR. MARSHALL SHOULD BE DISMISSED PURSUANT TO SECTION 2-619(a)(3) AND 2-619(a)(4).

Section 2-619(a)(3) and Section 2-619(a)(4) provide additional, independent bases for dismissal of all of plaintiffs' claims as against Dr. Stebbins and Dr. Marshall. Under Section 2-619(a)(3), the claims against Dr. Stebbins and Dr. Marshall must be dismissed because the prior action before Judge Kinnaird, dealing with all of the same issues raised in this case, is pending in the Illinois Appellate Court. Under Section 2-619(a)(4), the claims against Dr. Stebbins and Dr. Marshall must be dismissed for the independent reasons that plaintiffs' claims were, or could have been, raised by them in the action before Judge Kinnaird, and Judge Kinnaird has already ruled on them. As a result, the doctrines of *res judicata* and collateral estoppel bar the litigation of these same issues in this case.

For example, as the Foundation explains in detail in its memorandum, Judge Kinnaird made the following findings and rulings, among others:

- [Dr. Stebbins and Dr. Marshall] "could properly participate in this decision and they did properly participate in this decision."
- [Dr. Marshall] "was not a lady who was being intimidated by anybody."
- "I also did not feel that there was intimidation of Dr. Stebbins in this case."
- "The Attorney General is not controlling this Foundation as [is] being alleged in the papers."
- "And I don't see this settlement, as the objectors have said as being antithetical...to the Foundation's purposes."

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See Transcript of July 24, 2001 hearing before Judge Kinnaird, at pp. 126-34, attached as an Exhibit to the Foundation's supporting memorandum. The Foundation has fully briefed these issues in its supporting memorandum. To avoid duplication, Dr. Stebbins and Dr. Marshall join in, adopt, and incorporate all of these arguments and the accompanying authorities provided by the Foundation, and assert these arguments and authorities on their own behalf as independent bases for dismissal of the claims against them.

VIII. IN THE ALTERNATIVE, DR. STEBBINS AND DR. MARSHALL ASK THAT THE COURT STAY THIS CASE.

As we have shown above, all of plaintiffs' claims as against Dr. Stebbins and Dr. Marshall should be dismissed with prejudice. However, if the Court were to determine that any portion of the claims asserted against Dr. Stebbins and Dr. Marshall should survive their motion to dismiss, then Dr. Stebbins and Dr. Marshall ask the Court to stay all proceedings in this case pending a resolution by the Illinois Appellate Court of the appeal filed by these same plaintiffs in the *Buntrock* litigation. As we explained above, and as described in more detail in the Foundation's motion to dismiss and supporting memorandum, all of the issues central to the present complaint are being challenged in the Illinois Appellate Court by these very plaintiffs. Indeed, plaintiffs are effectively asking this Court to act as a collateral, lateral court of appeals, and to rule on the propriety of, and indeed reverse, Judge Kinnaird's entry of the Consent Judgment and Order. This the court cannot do. Furthermore, if this case is permitted to proceed while the *Buntrock* litigation is pending in the Appellate Court, the result will be an enormous waste of assets and unnecessary duplication of effort. In addition, a substantial risk will be created that the two courts will issue conflicting rulings.

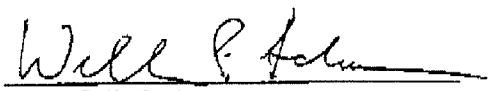
Accordingly, it makes most sense, if any portion of this case survives the motions to dismiss, to wait for the Appellate Court to rule in the *Buntrock* litigation. If the Appellate Court

affirms Judge Kinnaird's Consent Judgment and Order, this case is moot. If the Appellate Court should reverse Judge Kinnaird's decision, then the issues raised in this case must be addressed, and are more appropriately addressed, in that proceeding.

IX. CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the Motions to Dismiss and the supporting memoranda filed by the Foundation and the other defendants, the Court should grant Dr. Stebbins' and Dr. Marshall's motion to dismiss all of plaintiffs' claims asserted against them, with prejudice. In the alternative, any portion of this case which survives Dr. Stebbins' and Dr. Marshall's Motion to Dismiss should be stayed pending resolution of the *Buntrock* case on appeal.

DR. THEODORE E. STEBBINS, JR. and
DR. STEPHANIE PACE MARSHALL

By: 
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16di-004786

In The Circuit Court of Cook County, Illinois
County Department, Chancery Division
Tucker v. Buntrock, Case No. 01 L 9112
List of Federal Cases

1. Beard v. Achenbach Mem'l Hosp. Assn., 170 F.2d 859.
2. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723.
3. Cottle v. Hilton Hotels Corp., 635 F.Supp. 1094.
4. Floralife, Inc. v. Floraline, Int'l, Inc., 807 F.2d 518.
5. Peterson v. H&R Block Tax Service, 971 F. Supp. 1204.
6. In Re SNA Nut Co., 186 B.R. 98.
7. Terra v. Perkins, 151 F. Supp. 2d 931.

DE LA LAMA v. UNITED STATES.

No. 12551.

United States Court of Appeals
Fifth Circuit.

Nov. 30, 1948.

Criminal law ⇐998

On defendant's motion for a vacation of judgment and sentence and a discharge therefrom on the ground that sentence was for an escape and illegal because made to run concurrently with sentence which defendant was serving when he escaped, granting of motion to vacate and the resentencing of defendant to a term to run consecutively was not error.

Appeal from the United States District Court for the Northern District of Texas; T. Whitfield Davidson, Judge.

Manuel F. De La Lama was convicted of an escape. From a judgment of resentence, defendant appeals.

Affirmed.

Manuel F. De La Lama, pro se.

Cavett S. Binion, Asst. U. S. Atty., of Ft. Worth, Tex., for appellee.

Before HUTCHESON, SIBLEY, and McCORD, Circuit Judges.

PER CURIAM.

Appellant, claiming that the sentence of three years theretofore imposed upon him on Dec. 10, 1947, for an escape was illegal and void because made to run concurrently with the sentence he was serving when he escaped, moved in the sentencing court for a vacation of the judgment and sentence and a discharge therefrom.

The district judge agreed with petitioner's contention that the judgment and sentence was illegal and void, but disagreed with his contention that he could not be resentenced. He, therefore, on August 21, 1948, ordered vacated, the sentence imposed on Dec. 10, 1947, and resentenced the defendant to serve two years, the sentence to run consecutively with the sentence under which appellant was serving at the time of the escape.

Appellant is here complaining of the judgment and seeking its reversal.

A careful examination of the record shows that appellant was afforded a full and fair hearing in the court below, that no new or unsettled question requiring discussion is presented for our review, and that no error requiring reversal attended the proceedings which resulted in the judgment appealed from. The said judgment is accordingly affirmed.

HAWLEY v. UNITED STATES.

No. 12492.

United States Court of Appeals
Fifth Circuit.

Nov. 30, 1948.

Criminal law ⇐1162

An order denying defendant's motion to correct recital in judgment that defendant had appeared in proper person and by counsel and pleaded guilty would be affirmed where examination of record left no doubt that appeal was without merit.

Appeal from the United States District Court for the Northern District of Texas; T. Whitfield Davidson, Judge.

Philip John Hawley was convicted for an offense, and he filed a motion to correct a recital in the judgment. From an order denying the motion, he appeals.

Order affirmed.

Philip John Hawley, pro se.

William Cantrell, Jr., and Clyde G. Hood, Asst. U. S. Attys., both of Dallas, Tex., for appellee.

Before HUTCHESON, SIBLEY, and McCORD, Circuit Judges.

PER CURIAM.

His motion to correct the recital in the judgment, that he had appeared in proper person and by counsel and pleaded guilty,

having, after hearing, been denied, appellant is here appealing from the order.

An examination of the record leaves us in no doubt that the appeal is without merit,[1] and that the order appealed from should be affirmed.

BEARD v. ACHENBACH MEMORIAL HOSPITAL ASS'N et al.

No. 3524.

United States Court of Appeals
Tenth Circuit.

Nov. 12, 1948.

1. Courts ⇐406(1¼)

In trial of non-jury case, it is province of trial court to appraise credibility of witnesses, to determine weight to be given to their testimony, to draw reasonable inferences from the facts established, and to resolve conflicts in the evidence and inferences fairly to be drawn from it.

2. Courts ⇐406(1¼)

Where evidence and reasonable inferences fairly to be drawn from it were sufficient to support findings of trial court in non-jury case, and such findings were not plainly erroneous, they would not be overturned on appeal.

3. Contracts ⇐236, 252

Generally, parties to a simple contract may modify its provisions, and draft new terms upon it, or rescind it altogether, and in absence of a constitutional or statutory provision otherwise, it is not necessary that the agreement to modify, alter, change, add to or rescind be express.

4. Corporations ⇐310(1, 2)

Under Kansas law, directors of a corporation are charged with duty of managing its affairs honestly and in good faith, and they must exercise ordinary and reasonable care in performance of their duties and they must act with fidelity to interests of the corporation.

5. Corporations ⇐343

Under Kansas law, directors of a corporation are jointly and severally liable for losses of the corporation proximately resulting from bad faith, or fraudulent breaches of trust, or gross or wilful negligence in discharge of their duties.

6. Corporations ⇐297

Under Kansas law, directors of a corporation, acting in good faith and within limitations of law, have power to determine policies and manage affairs of the corporations.

7. Corporations ⇐331, 553(8)

Under Kansas law, ill-success or bad judgment, not so reckless or extravagant, as to amount to bad faith or gross or wilful negligence of directors in discharge of their duties do not warrant appointment of a receiver for the corporation or rendition of a personal judgment against the directors.

8. Hospitals ⇐1

Where members of medical staff of hospital operated by non-profit corporation organized under Kansas Laws refused to proceed under their original contract, payment of compensation to members of medical staff in excess of that provided in original contract, without an express rescission or modification of original contract or entry into a new agreement did not constitute such reckless, extravagant, or wrongful conduct on part of directors of the corporation as to warrant appointment of a receiver for the corporation or rendition of personal judgment against the directors.

9. Corporations ⇐320(1)

Although incentive compensation in form of a bonus to employees of a corporation must bear some reasonable relation to value of services rendered, ordinarily a bonus which bears a reasonable relation to value of services rendered, which is deemed to further the best interests of the

[1] Hawley v. U. S., 5 Cir., 169 F.2d 270; Biddle v. Dyche, 262 U.S. 333, 43 S.Ct. 565, 67 L.Ed. 1009; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357.

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corporation, and which is paid in good faith is not a mere gift gratuity or reckless expenditure of which stockholders may complain in a class action.

10. Hospitals ⇐1

Where directors of non-profit corporation operating a hospital and members of medical staff agreed that if remuneration of staff members for their services proved inadequate during early operation of hospital and that hospital later became a financial success a bonus would be paid staff members, subsequent payment of bonus to staff members upon finding of such conditions did not constitute reckless or extravagant expenditure of funds by directors so as to warrant appointment of a receiver for the corporation or rendition of a personal judgment against directors.

Appeal from the United States District Court for the District of Kansas, Second Division; Bower Broaddus, District Judge.

Class action by Charles C. Beard, a member of Achenbach Memorial Hospital Association, on behalf of himself and other members, against Achenbach Memorial Hospital Association and others, for appointment of a receiver, for an appropriate order restraining defendant corporation from execution of a renewal contract with defendant H. L. Galloway for conducting the hospital, and for accounting of funds alleged to have been wrongfully paid to members of medical staff of the hospital. From judgment for defendants, the plaintiff appeals.

Affirmed.

Harry O. Glasser, of Enid, Okl. (Harry O. Juricke, of Winfield, Kan., on the brief), for appellant.

Riley W. MacGregor, of Medicine Lodge, Kan., and J. B. Patterson, of Wichita, Kan. (Paul R. Wunsch, of Kingman, Kan., A. W. Hershberger, Richard Jones, and Wm. P. Thompson, all of Wichita, Kan., on the brief), for appellees.

Before PHILLIPS, Chief Judge, and BRATTON and MURRAH, Circuit Judges.

BRATTON, Circuit Judge.

Jacob Achenbach died leaving a will which contained a provision directing the trustees of his estate to erect and equip a public hospital in the town of Hardtner, Kansas, or on a specified tract of land adjacent to the town, at a cost to the estate of not more than $125,000. The provisions permitted the trustees to secure such persons or organizations as they might deem best to manage, control, and operate the hospital. The will was admitted to probate; and the hospital was constructed, equipped, and conveyed to Achenbach Memorial Hospital Association, a non-profit corporation organized under the laws of Kansas for the purpose of accepting and operating it. The deed of conveyance recited that it was executed under the terms and provisions of the will and certain orders of court; and it provided that should the grantee become unable or unwilling to maintain and operate the property as a hospital, or should it commit or permit waste upon the premises, or should it not protect and preserve the property according to the true intent and purpose of the conveyance, the conveyance should terminate and the property revert to the estate of the testator. Several months prior to the opening of the hospital, the corporation entered into a contract with Doctor H. L. Galloway, then engaged in conducting a hospital at Anthony, Kansas, a town located approximately forty miles from Hardtner, which provided that Doctor Galloway should move to Hardtner and be the chief of the hospital; that he should receive as remuneration for himself and other doctors and specialists sixty-five per cent of all moneys received from members of the hospital association, except that received from membership pledges, and sixty-five per cent of all moneys charged for the treatment of non-members who were treated by Doctor Galloway and his associates; that the remaining thirty-five per cent of such moneys should be used for the upkeep and maintenance of the hospital; and that all moneys received from the use of rooms, drugs, medicines, bandages, X-ray machines, laboratory equipment, and any other equipment owned by the association should go into the permanent or maintenance fund to be used for the maintenance of the hospital. The contract further provided that it should be in force and effect for a period of five years. The hospital was opened for the reception of patients in September, 1941. Doctor Galloway became its chief and he had two medical assistants.

In 1946, Charles C. Beard, a member of the association, on behalf of himself and other dissatisfied members, brought this class action against the corporation, certain directors, certain former directors, the three members of the medical staff of the hospital, the superintendent of the hospital, the executor of the last will of the testator, and the trustees of the estate of the testator. The cause of action pleaded in the second amended complaint was that the deed conveying the property to the corporation did not fulfill in certain particulars the intent and purposes of the provision contained in the will and subjected the corporation to certain handicaps and burdens not contemplated by the bequest; that funds of the corporation had been and were being paid to the members of the medical staff of the hospital as compensation for medical services, in violation of the contract with Doctor Galloway; that funds of the corporation had been wrongfully paid to Doctor Galloway and his associates in the form of a bonus; that the original contract with Doctor Galloway would terminate soon; and that unless prevented from doing so, the corporation and the doctor would enter into a new contract beneficial to the doctor and harmful to the corporation. The prayer was for the appointment of a receiver, for an appropriate order restraining the execution of a renewal contract, and for an accounting of the funds wrongfully paid to the members of the medical staff of the hospital. By answer, the defendants admitted certain allegations contained in the complaint, denied fraud, and pleaded that all of the dealings between the directors of the corporation and Doctor Galloway, including the payment of the bonus, had been from time to time approved by the members of the association. Judgment was entered for the defendants, and plaintiff appealed.

[1, 2] It is urged that more funds were paid to the doctors for their professional services at the hospital than was authorized by the contract, and that such excessive payments constituted wrongful mismanagement of the affairs of the corporation for which appropriate relief should have been granted. The written contract provided the basis on which the members of the medical staff were to be compensated for their professional services, and from the beginning of the operation of the hospital the provisions of the written agreement were not followed in certain respects. The doctors received all of the doctors fees, not including fees of the clinic, for operation upon and services to hospitalized non-members of the association; and, in addition, they received a portion of the fees for their services in connection with the laboratory and X-ray equipment. But the court found that at the time the terms of the written contract were agreed upon, the division of the fees and the need later for a change was discussed; that from the opening of the hospital, Doctor Galloway and his associates refused to proceed under the original contract and on various occasions informed the directors that they would not continue to staff the hospital without the change in distribution of such fees; that the division and distribution of the fees throughout the entire period was known to the directors; that the directors discussed such division and distribution at their monthly meetings; and that the directors accepted and acquiesced in the change or departure from the original contract. In the trial of a non-jury case, it is the province of the trial court to appraise the credibility of the witnesses, to determine the weight to be given to their testimony, to draw reasonable inferences from the facts established, and to resolve conflicts in the evidence and the inferences fairly to be drawn from it. The evidence and the reasonable inference fairly to be drawn from it were sufficient to support these findings of the trial court, and they are not plainly erroneous. Therefore they are not to be overturned on appeal. Yates v. American Republics Corporation, 10 Cir., 163 F.2d 178; Wyoming Railway Co. v. Herrington, 10 Cir., 161 F.

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2d 1004; Boston Insurance Co. v. Read, 10 Cir., 166 F.2d 551.

[3] The parties did not enter into a new agreement expressly rescinding or modifying the original contract between the corporation and Doctor Galloway. But with certain exceptions having no material bearing here, the parties to a simple contract may modify its provisions, engraft new terms upon it, or rescind it altogether. The parties are ordinarily as free to modify or change a contract after making it as they were to execute it in the first instance. And in the absence of a constitutional or statutory provision otherwise, it is not necessary that the agreement to modify, alter, change, add to, or rescind be express. Mutual assent to modification, change, or rescission may be implied from the acts of the parties and the circumstances. 6 Williston on Contracts § 1826. Here, under the facts as found by the trial court, the parties discussed from time to time the question of compensating the members of the medical staff on a basis substantially different from that specified in the original contract; throughout the entire period intermediate the opening of the hospital and the institution of the suit, the doctors were paid monthly on such basis different from that fixed in the written contract; and the directors acquiesced in such payment. Manifestly, the court was warranted in concluding that the parties impliedly modified the original contract in respect to the compensation of the doctors.

[4–8] The directors of a corporation are charged with the duty of managing its affairs honestly and in good faith, and they must exercise ordinary and reasonable care in the performance of their duties. They must act with fidelity to the interests of the corporation, and they are jointly and severally liable for losses of the corporation proximately resulting from bad faith, fraudulent breaches of trust, or gross or wilful negligence in the discharge of their duties. But under the law of Kansas the directors of a corporation, acting in good faith and within the limitations of the law, have the power to determine its policies and manage its affairs. Fees v. Mechanics' State Bank, 84 Kan. 828, 115 P. 563, L.R.A.1915A, 606; Inscho v. Mid-Continent Development Co., 94 Kan. 370, 146 P. 1014, Ann.Cas.1917B, 546; National Reserve Life Ins. Co. v. Moore, 114 Kan. 456, 219 P. 261. And ill-success or bad judgment not so reckless or extravagant as to amount to bad faith or gross or wilful negligence on the part of directors in the discharge of their duties do not warrant the appointment of a receiver for the corporation or the rendition of a personal judgment against the directors. Inscho v. Mid-Continent Development Co., supra. The modification by course of conduct of certain provisions in the contract relating to the compensation to be paid the members of the medical staff for their professional services and the making of monthly payments according to the modification did not constitute such reckless, extravagant, or wrongful conduct on the part of the directors as to warrant the appointment of a receiver for the corporation or the rendition of personal judgment against the directors.

[9, 10] Turning to the payment of the bonus, the directors of the corporation, at their meeting held in October, 1945, adopted a resolution authorizing payment of a bonus of $1500 each to the three doctors. The resolution recited that such payment was for the efficient services which the doctors had rendered during the previous four years. The court found that the directors and the doctors agreed that should the remuneration of the doctors for their services prove inadequate during the early operation of the hospital, a bonus would be paid later if the hospital became a financial success; that the doctors were inadequately compensated during the early operation of the hospital; that the hospital proved a financial success later; that the directors authorized payment of the bonus as such additional compensation; and that it was reasonable in amount for the services rendered. Again, these findings are adequately supported by the evidence and the inferences fairly to be drawn from it, and they are not plainly erroneous. Therefore they must stand on appeal. Yates v. American Republics Corporation, supra; Wyoming Railway Co. v. Herrington, supra; Boston Insurance Co. v. Read, supra.

The payment of incentive compensation in the form of a bonus to employees who render continuous and efficient services is a common practice of long standing among large employers. While incentive compensation of that kind must bear some reasonable relation to the value of the services rendered, ordinarily a bonus which bears a reasonable relation to the value of the services rendered, which is deemed to further the best interests of the corporation, and which is paid in good faith is not a mere gift, gratuity, or reckless expenditure of which stockholders or shareholders may complain in an action of this kind. Putnam v. Juvenile Shoe Corporation, 307 Mo. 74, 269 S.W. 593, 40 A.L.R. 1412. It cannot be said that under the facts and circumstances as found by the court, the payment of the bonus to the doctors constituted such reckless or extravagant expenditure of funds as to warrant the appointment of a receiver for the corporation or the rendition of a personal judgment against the directors authorizing the payment.

The judgment is affirmed.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., et al. v. SPERRY, for and on Behalf of NATIONAL LABOR RELATIONS BOARD.

No. 3654.

United States Court of Appeals
Tenth Circuit.

Nov. 2, 1948.

Rehearing Denied Dec. 6, 1948.

1. Courts ⇐406(1¼)

In nonjury case it is province of trial court to observe witnesses while testifying to judge their qualifications, appraise their credibility, determine inferences from facts established and resolve conflict in the evidence.

2. Courts ⇐406(1¼)

Where evidence and inferences fairly to be drawn therefrom in injunction suit under Labor Management Relations Act of 1947 were sufficient to support trial court's findings of fact, findings were not plainly erroneous and were conclusive on appeal.

3. Commerce ⇐5

Power of Congress to regulate interstate commerce is without restriction except where prescribed in Constitution, and within that paramount authority lies power to safeguard commerce against substantial burdens or obstructions regardless of source.

4. Commerce ⇐5

Congress may regulate not only commerce itself but matters which affect, interrupt or stifle interstate commerce, including activities which in isolation might be deemed to be local and yet in course of interlacings of business across state lines affect adversely interstate commerce.

5. Commerce ⇐5

Practices adversely affecting interstate commerce are not immune from congressional regulation merely because they grow out of labor disputes.

6. Commerce ⇐5

Whether or not practices of a given pattern may be deemed by Congress to affect interstate commerce in a harmful manner is not to be determined solely by quantitative effect of the activities immediately involved.

7. Commerce ⇐5

Power to protect interstate commerce against harmful encroachment may be exercised in individual cases involving activities which when multiplied into a general practice could reasonably exert adverse effect calling for preventive regulation.

8. Commerce ⇐5

Secondary boycott against contractor engaged solely in intrastate activities to compel contractor to cease doing business with manufacturer engaged largely in interstate business constituted an "unfair la-

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tory issues raised by appellees' claim against Philbrook were indistinguishable from those raised by their claim against the Secretary. Thus the only practical difference that resulted from the District Court's assumption of jurisdiction over the Secretary was that its injunction was directed against him as well as against appellant Philbrook. But the Secretary has announced, in his brief to this Court, that in the event the decision of the District Court on the statutory issue is affirmed, he intends to comply with it. The exercise of the District Court's jurisdiction over the Secretary in this case, therefore, has resulted in no adjudication on the merits that could not have been just as properly made without the Secretary, and has resulted in no issuance of process against the Secretary which he has properly contended to be wrongful before this Court.

The Secretary's appeal from the judgment in No. 74–132 is, therefore, dismissed.

It is so ordered.

BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–124. Argued March 24, 1975—Decided June 9, 1975

Under an antitrust consent decree petitioner New Blue Chip was required to offer a substantial number of common stock shares in its new trading stamp business to retailers like respondent which had previously used the stamp service but which were not shareholders in petitioner's corporate predecessor. Charging that New Blue Chip and other petitioners devised a scheme to dissuade the offerees by means of materially misleading statements containing an overly pessimistic appraisal of the new business from purchasing the securities so that the rejected shares might later be offered to the public at a higher price, respondent brought this class action for damages for violation of the provisions of § 10 (b) of the Securities Exchange Act of 1934 (Act) and Rule 10b–5 promulgated thereunder by the Securities and Exchange Commission (SEC), which make it unlawful to use deceptive devices or make misleading statements "in connection with the purchase or sale of any security." Acting on the basis of the rule enunciated in 1952 in *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461, which states that a person who is neither a purchaser nor a seller of securities may not bring an action under § 10 (b) of the Act or the SEC's Rule 10b–5, the District Court dismissed respondent's complaint. The Court of Appeals reversed, concluding that the facts warranted an exception to the *Birnbaum* rule. The court noted that prior cases had held that the rule did not exclude persons owning contractual rights to buy or sell securities and that the offering of securities in this case in compliance with the antitrust decree served the same function as a securities purchase or sales contract. *Held:* A private damages action under Rule 10b–5 is confined to actual purchasers or sellers of securities and the *Birnbaum* rule bars respondent from maintaining this suit. Pp. 731–755.

(a) The longstanding judicial acceptance of the rule together with Congress' failure to reject its interpretation of § 10 (b)

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argues significantly in favor of this Court's acceptance of the rule. P. 733.

(b) Evidence from the texts of the Act and the Securities Act of 1933 supports the *Birnbaum* rule. When Congress wished to provide statutory remedies to others than purchasers or sellers of securities, it did so expressly. Pp. 733–736.

(c) Policy considerations predominantly favor adherence to the rule. Failure to follow it could well result in vexatious litigation caused by a widely expanded class of plaintiffs bringing "strike" suits under Rule 10b–5 and opening litigation to hazy factual issues the proof of which would largely depend on uncorroborated oral testimony to the effect that a person situated like respondent consulted the security issuer's prospectus, and paid attention to it, and that its representations injured him. Pp. 737–749.

(d) Respondent, who derives no entitlement from the antitrust decree and does not otherwise possess any contractual rights relating to the offered stock, occupies the same position as any other disappointed offeree of stock registered under the 1933 Act who claims that an overly pessimistic prospectus has caused him to pass up the chance to purchase, and there is ample evidence that Congress did not intend to extend a private cause of action for money damages to the nonpurchasing offeree of stock registered under the 1933 Act for loss of the opportunity to purchase due to an overly pessimistic prospectus. Pp. 749–754.

(e) The exception to the *Birnbaum* rule that the Court of Appeals relied upon would expose the rule to case-by-case erosion depending upon whether a particular group of plaintiffs was deemed more discrete than potential purchasers in general so as to warrant departing from the rule, and would result in an unsatisfactory basis for establishing liability for the conduct of business transactions. Pp. 754–755.

492 F. 2d 136, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 756. BLACKMUN, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 761.

Allyn O. Kreps argued the cause for petitioners. With

him on the briefs were *Michael D. Zimmerman, G. Richard Doty*, and *Thomas J. Ready*.

James E. Ryan argued the cause for respondent. With him on the brief was *J. J. Brandlin*.

David Ferber argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Lawrence E. Nerheim*, and *Richard E. Nathan*.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to consider whether the offerees of a stock offering, made pursuant to an antitrust consent decree and registered under the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1933 Act), may maintain a private cause of action for money damages where they allege that the offeror has violated the provisions of Rule 10b–5 of the Securities and Exchange Commission, but where they have neither purchased nor sold any of the offered shares. See *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952).

I

In 1963 the United States filed a civil antitrust action against Blue Chip Stamp Co. (Old Blue Chip), a company in the business of providing trading stamps to retailers, and nine retailers who owned 90% of its shares. In 1967 the action was terminated by the entry of a consent decree. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (CD Cal.), aff'd *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U. S. 580 (1968).[1] The decree contemplated a plan of reorganiza-

[1] Neither respondent nor any of the members of its alleged class were parties to the antitrust action. The antitrust decree itself

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tion whereby Old Blue Chip was to be merged into a newly formed corporation, Blue Chip Stamps (New Blue Chip). The holdings of the majority shareholders of Old Blue Chip were to be reduced, and New Blue Chip, one of the petitioners here, was required under the plan to offer a substantial number of its shares of common stock to retailers who had used the stamp service in the past but who were not shareholders in the old company. Under the terms of the plan, the offering to nonshareholder users was to be proportional to past stamp usage and the shares were to be offered in units consisting of common stock and debentures.

The reorganization plan was carried out, the offering was registered with the SEC as required by the 1933 Act, and a prospectus was distributed to all offerees as required by § 5 of that Act, 15 U. S. C. § 77e. Somewhat more than 50% of the offered units were actually purchased. In 1970, two years after the offering, respondent, a former user of the stamp service and therefore an offeree of the 1968 offering, filed this suit in the United States District Court for the Central District of California. Defendants below and petitioners here are Old and New Blue Chip, eight of the nine majority shareholders of Old Blue Chip, and the directors of New Blue Chip (collectively called Blue Chip).

Respondent's complaint alleged, *inter alia*, that the prospectus prepared and distributed by Blue Chip in connection with the offering was materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects. It alleged that Blue Chip intentionally made the prospectus overly pessimistic in order to discourage respondent and other members of the allegedly large class whom it represents from accepting what was

provided no plan for the reorganization of Old Blue Chip but instead merely directed the parties to the consent decree to present to the court such a plan. App. 27, 31.

intended to be a bargain offer, so that the rejected shares might later be offered to the public at a higher price. The complaint alleged that class members because of and in reliance on the false and misleading prospectus failed to purchase the offered units. Respondent therefore sought on behalf of the alleged class some $21,400,000 in damages representing the lost opportunity to purchase the units; the right to purchase the previously rejected units at the 1968 price; and in addition, it sought some $25,000,000 in exemplary damages.

The only portion of the litigation thus initiated which is before us is whether respondent may base its action on Rule 10b–5 of the Securities and Exchange Commission without having either bought or sold the securities described in the allegedly misleading prospectus. The District Court dismissed respondent's complaint for failure to state a claim upon which relief might be granted.[2] On appeal to the United States Court of Appeals for the Ninth Circuit, respondent pressed only its asserted claim under Rule 10b 5, and a divided panel of the Court of Appeals sustained its position and reversed the District Court.[3] After the Ninth Circuit denied rehearing en banc, we granted Blue Chip's petition for certiorari. 419 U. S. 992 (1974). Our consideration of the correctness of the determination of the Court of Appeals requires us to consider what limitations there are on the class of plaintiffs who may maintain a private cause of action for money damages for violation of Rule 10b–5, and whether respondent was within that class.

II

During the early days of the New Deal, Congress enacted two landmark statutes regulating securities.

[2] The District Court opinion is reported at 339 F. Supp. 35 (1971).

[3] The Court of Appeals opinion is reported at 492 F. 2d 136 (1973).

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The 1933 Act was described as an Act to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1934 Act), was described as an Act "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."

The various sections of the 1933 Act dealt at some length with the required contents of registration statements and prospectuses, and expressly provided for private civil causes of action. Section 11 (a) gave a right of action by reason of a false registration statement to "any person acquiring" the security, and § 12 of that Act gave a right to sue the seller of a security who had engaged in proscribed practices with respect to prospectuses and communication to "the person purchasing such security from him."

The 1934 Act was divided into two titles. Title I was denominated "Regulation of Securities Exchanges," and Title II was denominated "Amendments to Securities Act of 1933." Section 10 of that Act makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The "Commission" referred to in the section was the Securities and Exchange Commis-

sion created by § 4 (a) of the 1934 Act. Section 29 of that Act provided that "[e]very contract made in violation of any provision of this chapter or of any rule or regulation thereunder" should be void.

In 1942, acting under the authority granted to it by § 10 (b) of the 1934 Act, the Commission promulgated Rule 10b–5, 17 CFR § 240.10b–5, now providing as follows:

> "§ 240.10b–5 Employment of manipulative and deceptive devices.
>
> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security."

Section 10 (b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any indication that Congress considered the problem of private suits under it at the time of its passage. See, *e. g.*, Note, Implied Liability Under the Securities Exchange Act, 61 Harv. L. Rev. 858, 861 (1948); A. Bromberg, Securities Law: Fraud—SEC Rule 10b–5 § 2.2 (300)–(340) (1968) (hereinafter Bromberg); S. Rep. No. 792, 73d Cong., 2d

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Sess., 5–6 (1934). Similarly there is no indication that the Commission in adopting Rule 10b–5 considered the question of private civil remedies under this provision. SEC Securities Exchange Act Release No. 3230 (1942); Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967); *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d, at 463; 3 L. Loss, Securities Regulation 1469 n. 87 (2d ed. 1961).

Despite the contrast between the provisions of Rule 10b–5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934,[4] it was held in 1946 by the United States District Court for the Eastern District of Pennsylvania that there was an implied private right of action under the Rule. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512. This Court had no occasion to deal with the subject until 25 years later, and at that time we confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154 (1972). Such a conclusion was, of course, entirely consistent with the Court's recognition in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), that private enforcement of Commission rules may "[provide] a necessary supplement to Commission action."

Within a few years after the seminal *Kardon* decision, the Court of Appeals for the Second Circuit concluded that the plaintiff class for purposes of a private damage action under § 10 (b) and Rule 10b–5 was limited to actual purchasers and sellers of securities. *Birnbaum* v. *Newport Steel Corp.*, *supra*.

[4] See, *e. g.*, §§ 11, 12, 15 of the 1933 Act, 15 U. S. C. §§ 77k, 77l, 77o; §§ 9, 16, 18, 20 of the 1934 Act, 15 U. S. C. §§ 78i, 78p, 78r, 78t.

The Court of Appeals in this case did not repudiate *Birnbaum;* indeed, another panel of that court (in an opinion by Judge Ely) had but a short time earlier affirmed the rule of that case. *Mount Clemens Industries, Inc.* v. *Bell*, 464 F. 2d 339 (1972). But in this case a majority of the Court of Appeals found that the facts warranted an exception to the *Birnbaum* rule. For the reasons hereinafter stated, we are of the opinion that *Birnbaum* was rightly decided, and that it bars respondent from maintaining this suit under Rule 10b–5.

III

The panel which decided *Birnbaum* consisted of Chief Judge Swan and Judges Learned Hand and Augustus Hand: the opinion was written by the last named. Since both § 10 (b) and Rule 10b–5 proscribed only fraud "in connection with the purchase or sale" of securities, and since the history of § 10 (b) revealed no congressional intention to extend a private civil remedy for money damages to other than defrauded purchasers or sellers of securities, in contrast to the express civil remedy provided by § 16 (b) of the 1934 Act, the court concluded that the plaintiff class in a Rule 10b–5 action was limited to actual purchasers and sellers. 193 F. 2d, at 463–464.

Just as this Court had no occasion to consider the validity of the *Kardon* holding that there was a private cause of action under Rule 10b–5 until 20-odd years later, nearly the same period of time has gone by between the *Birnbaum* decision and our consideration of the case now before us. As with *Kardon*, virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century have reaffirmed *Birnbaum*'s conclusion that the plaintiff class for purposes of § 10 (b) and Rule 10b–5 private damage actions is limited to purchasers and sell-

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Robert COTTLE, individually, and in a derivative capacity on behalf of Hilton Hotels Corporation, Plaintiff,

v.

HILTON HOTELS CORPORATION, a Delaware corporation, and Barron Hilton, as Chairman, President and Chief Executive Officer and as a Director of Hilton Hotels Corporation, William H. Edwards, as President and as a Director, Henri Lewin, as Executive Vice President, E.T. Applegate, as Senior Vice President and Secretary, Maurice J. Scanlon, as Senior Vice President and Treasurer, James E. Garrett, as Vice President, Paul D. Buckley, as Vice President and as General Manager, Willard C. Howard, as Vice President and James E. Bates, Benjamin V. Lambert, Thomas R. Wilcox, Frank G. Wangeman, Sam D. Young, Jr., Gregory R. Dillon, John V. Giovenco, respectively as Directors of Hilton Hotels Corporation, Defendants.

No. 85 C 4610.

United States District Court, N.D. Illinois, E.D.

April 17, 1986.

Shareholder derivative action was brought against officers and directors of hotel corporation to recover for alleged waste of corporate assets and breach of duty in connection with construction and sale of casino and hotel. Defendants moved to dismiss for failure to comply with demand requirements of civil rule. The District Court, Aspen, J., held that demand was not excused by allegations of entrenchment or that because directors allegedly were responsible for matters complained of it would be futile to demand that they cause the corporation to sue themselves.

Motion granted.

1. Corporations ⇐206(2)

Civil rule requirement of demand on directors as prerequisite to maintaining derivative action is intended to encourage intracorporate resolution of disputes and protect the managerial freedom of those delegated with responsibility of running the business; that policy is merely an extension of the business judgment rule. 28 U.S.C.A. § 2072; Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

2. Corporations ⇐310(1)

The "business judgment rule" dictates that judicial interference with corporate decision-making be limited to circumstances where the directors are not in a proper position to make sound corporate judgments.

See publication Words and Phrases for other judicial constructions and definitions.

3. Corporations ⇐206(4)

Prerequisite to derivative action that shareholders made demand on directors and officers to bring action on behalf of the corporation is excused in certain circumstances where it would not be logical to require such demand. 28 U.S.C.A. § 2072; Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

4. Corporations ⇐320(5, 7)

Demand on corporate directors prior to instituting derivative suit was not excused by allegations that because directors were responsible for matters complained of, i.e., disassociating themselves from certain individual in order to obtain casino license for new hotel and selling the business for a loss when gambling license was denied, it would have been futile to demand that they cause the corporation to sue themselves; there were no allegations, as required by Delaware law, creating a reasonable doubt that underlying transactions were made by disinterested and independent directors or that challenged transaction was not product of a valid business judgment notwithstanding directors' disinterestedness and independence. Fed.Rules Civ.Proc.Rule 23.1, 28 U.S.C.A.

Marshall Patner, Robert A. Holstein, Frederic F. Brace, Jr., Chicago, Ill., for plaintiffs.

Sheldon Karon, Lawrence A. Wojcik, Karon, Morrison & Savikas, Ltd., Chicago, Ill. and E. Norman Veasey, R. Franklin Balotti, Allen M. Terrell, Jr., Gregory V. Varallo, Richards Layton & Finger, Wilmington, Del., for defendant Hilton Hotels Corp.

Phil C. Neal, Ralph T. Russell, Jr., George M. Hoffman, Friedman & Koven, Chicago, Ill., for individual defendants.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Plaintiff Robert Cottle filed this shareholder's derivative suit on behalf of Hilton Hotels Corporation ("Hilton") against nominal defendant Hilton and several officers and directors of Hilton ("the individual defendants") based on allegations that the individual defendants engaged in transactions surrounding the construction and eventual sale of a New Jersey casino and hotel which constituted a breach of fiduciary duty to Hilton and a waste of Hilton's corporate assets. Hilton, joined by the individual defendants, has moved to dismiss Cottle's complaint for failure to comply with the demand requirements of Fed.R. Civ.P. 23.1.[1] The defendants also filed a motion for a protective order barring further discovery on both the merits of Cottle's claims and certain jurisdictional issues. After a careful review of the pleadings and memoranda filed on this motion, the Court grants the defendants' motion to dismiss for the reasons elaborated below. The motion for protective order is moot.

I. *FACTUAL ALLEGATIONS*

Hilton is a major hotel management corporation incorporated in Delaware with its principal place of business in Beverly Hills, California. It operates hotel facilities in many locations across the country. Cottle owns shares of common stock in Hilton and owned them at the time that all transactions relevant to this case took place. The allegations in Cottle's complaint involve the decision of Hilton's board of directors to build a casino and hotel facility in Atlantic City, New Jersey. The attraction to the Atlantic City location was apparently the lucrative legalized gambling business, and the financial success of the hotel-casino project turned largely on approval and licensing by the New Jersey Casino Control Commission ("the Commission"). The individual defendants made public pronouncements projecting financial success while representing that the proposed casino would be licensed without a problem. Cottle alleges that these defendants knew or should have known that the Commission had "stringent licensing requirements."

While the individual defendants predicted that their casino proposal was an offer the Commission could not refuse, they instead encountered serious obstacles in their pursuit of a license. Allegations were made before the Commission that the individual defendants fostered a relationship between Hilton and Sidney Korshak, a Chicago attorney who, according to the complaint, "had been identified by state and federal law enforcement officials and a United

1. The individual defendants initially moved to dismiss the complaint on the additional ground that this Court lacked personal jurisdiction over any of them. In conjunction with that claim, Hilton moved to dismiss for Cottle's failure to join indispensable parties claiming that at least one individual defendant must be joined for a derivative action to proceed. The individual defendants have since withdrawn their personal jurisdiction motion thus eliminating the necessity that the Court address any of these claims.

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States Senate Sub-Committee as a prominent link between organized crime and legitimate business." Complaint ¶ 11. The individual defendants failed to sever this relationship with Korshak even though they were aware that it would jeopardize their chances of successfully obtaining the casino license.

On February 28, 1985, the Commission denied a casino license for Hilton as a result of the Korshak connection. At first, the defendants announced that they would appeal the Commission's ruling, but instead sold the entire project to New York real estate entrepreneur Donald Trump for $320 million. This sale did not result from a competitive bidding process and yielded a purchase price approximately $20 million above Hilton's investment in the project.

Cottle alleges that were it not for the Korshak affiliation and the individual defendants' failure to distance the Hilton Corporation and themselves from Korshak, the Commission would have granted the license. Hilton has been harmed, Cottle further claims, by the loss of expected casino and hotel earnings in the millions of dollars and by the sale of the casino and hotel project at a loss.[1] Cottle also alleged that the individual defendants sold the project to Trump "without bidding or otherwise fully exploiting the market" as part of an improperly motivated scheme to stave off an attempted takeover of Hilton and entrench themselves in their current corporate positions.

Except for the cursory assertion that the individual defendants were in part motivated by the desire to retain their positions, the complaint does not contain any allegations regarding any personal benefits which might have accrued to the individual defendants as a result of these transactions. Cottle does not allege that the individual defendants had any sort of financial stake in their association with Korshak or their refusal to sever that association.

2. Although the sale of the project yielded $20 million in excess of Hilton's investment, Cottle claims that there was a net loss when that gain is compared to the interest sacrificed during the relevant period in which the corporate capital was tied up in the casino project.

II MOTION TO DISMISS UNDER RULE 23.1

[1, 2] Shareholder derivative suits are in a distinct class of federal litigation and are governed by a special procedural rule which states:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Fed.R.Civ.P. 23.1. The only aspect of Rule 23.1 relevant to the present motion is the shareholder demand requirement which establishes as a prerequisite to maintaining a shareholder derivative action the plaintiff's demand on the directors of the corporation to take action to correct the asserted

wrong. This requirement was intended to encourage the intracorporate resolution of disputes and protect the managerial freedom of those delegated with the responsibility of running the business. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del.1984). That policy is merely an extension of the business judgment rule, which dictates that judicial interference with corporate decision-making shall be limited to circumstances where the directors are not in a proper position to make sound corporate judgments. *Id.* Furthermore, there are numerous practical advantages to encouraging the corporation to pursue recourse on its own behalf. *See Lewis v. Graves*, 701 F.2d 245, 247–48 (2d Cir.1983).

[3] Nevertheless, procedural rules have been developed to provide shareholders with a remedial option to sue derivatively in behalf of the injured corporation even without first complying with the demand requirement. Thus, the requirement will be excused in certain circumstances where it would not be logical to require such a demand. 7A C.A. Wright & A.R. Miller, *Federal Practice and Procedure* § 1831 (1972). However, where federal subject matter jurisdiction in a derivative suit rests on the parties' diversity of citizenship, courts must refer to the substantive law of the relevant state, which in almost all circumstances will be the state of incorporation of the aggrieved corporation. *See Kreindler v. Marx*, 85 F.R.D. 612, 615 (N.D.Ill.1979). Moreover, the demand requirement has been described as a substantive right of the corporation and not simply a procedural prerequisite to the derivative action. *Haber v. Bell*, 465 A.2d 353, 357 (Del.Ch.1983). Thus, the substantive right to a demand on the corporation must be kept conceptually apart from the procedural requirement of Rule 23.1 that the plaintiff shareholder plead with particularity his or her efforts to obtain relief from the corporation or the reasons for not making such an effort. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 544 & n. 2, 104 S.Ct. 831, 843 & n. 2 (1984) (Stevens, J. concurring).[3] Thus, in the present case this Court is faced with the task of evaluating whether Cottle has pleaded with particularity (federal procedural requirement) facts which would constitute grounds for excusing the pre-suit demand requirement under Delaware law (state substantive requirement). It is with this analytical framework in mind that we evaluate Cottle's complaint.

In a relatively recent case, the Delaware Supreme Court established the standards for excusing the demand requirement in derivative suits against Delaware corporations. *Aronson v. Lewis*, 473 A.2d 805 (Del.1984).[4] The court noted that the "derivative" nature of shareholder suits extends from the primary right of a corporation to pursue its own legal interests. *Id.* at 811. Hence, under ordinary circumstances, a corporation through its board of directors, should be able to make the decision whether to pursue legal remedies for injuries to the corporate entity. As with other corporate decision-making processes, the decision of whether to sue is accorded great deference by the courts under the so-called "business judgment" rule. *Aronson*, 473 A.2d at 812 ("It is a presumption that in making a business decision the directors of a corporation acted on an informal basis, in good faith and in the honest belief that the action taken was in the best interests of the company").

Under this analysis, the plaintiff shareholder must plead particular facts suggest-

3. In his customarily perceptive manner, Justice Stevens observed in his concurring opinion that Fed.R.Civ.P. 23.1 merely creates a pleading requirement and not a substantive right to pre-suit demand. He further noted that the Rules Enabling Act, 28 U.S.C. § 2072 (1982), prohibits enlargement or alteration of a substantive right by a procedural rule.

4. In *Aronson*, the court was evaluating the plaintiffs' pleadings under Delaware Chancery Court Rule 23.1, Del.Ch.Ct.R. 23.1, which substantially mirrors Fed.R.Civ.P. 23.1 and includes a requirement that plaintiff plead with particularity the reasons for not making a pre-suit demand on the directors. However, in its fundamental analysis of the demand requirement, the court applied Delaware substantive standards.

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ing that the corporate directors are not entitled to hide within the impenetrable fortress of the business judgment rule with respect to their participation in the transactions for which legal remedies are sought by the shareholder. The same circumstances which remove the business judgment rule's protections in other contexts will negate its applicability to the shareholder demand requirement. Thus, directors cannot raise the business judgment rule where they are personally interested in the questioned transactions such as where they sit on both sides of a corporate transaction or engage in self-dealing. *Aronson*, 473 A.2d at 812. Furthermore, their judgment must follow the consideration of all material information reasonably available of which they have a duty to inform themselves. *Id.*

In paring these considerations down to a "test" for determining the futility of the shareholder demand requirement, the Delaware Supreme Court requires that a trial court

> must decide whether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. Hence, the Court ... must make two inquiries, one into the independence and disinterestedness of the directors and the other into the substantive nature of the challenged transaction and the board's approval thereof.

Id. at 814. If a reasonable doubt has been raised with respect to *either* the directors' disinterestedness and independence or whether the decision was otherwise a valid business judgment, the demand requirement will be excused and the shareholder permitted to pursue the derivative action. *Pogostin v. Rice*, 480 A.2d 619, 624–25 (Del.1984).

[4] In the present case, the only overt reason Cottle alleges to excuse his failure to execute a pre-suit demand is that "[b]ecause the defendant directors were responsible for the matters complained of, it would be futile to demand that they cause the Corporation to sue themselves." Complaint ¶ 22. No other allegations in the complaint purport to establish grounds for not making a demand on the corporation prior to the filing of the suit. Furthermore, the parties do not dispute the fact that Cottle never made any such demand.[5] Cottle's assertion in Paragraph 22 boils down to a contention that because the Hilton directors directly participated in and approved of the transactions regarding the casino project and casino licensing procedure, a demand for them to pursue legal remedies on Hilton's behalf would be futile. However, several courts have held that the mere fact that directors participated in and authorized the disputed transactions underlying the derivative suit is not enough by itself to excuse demand. *Aronson*, 473 A.2d at 817; *accord Lewis v. Graves*, 701 F.2d 245, 248 (2d Cir.1983); *Lewis v. Curtis*, 671 F.2d 779, 785 (3d Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982). If this were the only prerequisite to excusing demand, the demand requirement would be effectively repealed since, by definition, the directors have a hand in all corporate transactions of any consequence. *See Graves*, 701 F.2d at 248.

The contention that prior board approval of the disputed transaction negates the demand requirement is often coupled with the quite similar but also universally rejected argument that demand is excused where the directors are called upon to sue *themselves* in behalf of the corporation. The rationale for this argument is that the plaintiff shareholder cannot expect to successfully place the litigation in the hands of the very parties whose actions are being challenged. Again, this circumstance alone is not sufficient without more particularized allegations regarding director disinterestedness in the underlying business transactions to excuse the shareholder demand requirement. *Aronson*, 473 A.2d at 818; *Allison on behalf of General Motors Corp. v. General Motors Corp.*, 604 F.Supp. 1106, 1114–15 (D.Del.), *aff'd*, 782 F.2d 1026 (3d Cir.1985).

These are not the type of excuses which permit shareholders to circumvent the demand requirement under the *Aronson* test. Rather, as the first part of the test suggests, the allegations must create a reasonable doubt that the underlying corporate transactions were made by disinterested and independent directors. *Aronson*, 473 A.2d at 814. As elaborated in further detail by the court in *Pogostin v. Rice*, 480 A.2d 619, 624 (Del.1984), "[d]irectorial interest exists whenever divided loyalties are present, or a director has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders." However, in Cottle's case, nothing has been alleged which even remotely suggests that the Hilton directors' decision to pursue the casino project, to associate with the purportedly nefarious Korshak or to abandon the casino project following the licensee denial was motivated by any personal interest. Nor, for example, has any external allegiance been alleged such that the directors could be presumed to lack "independence." Because none of the complaint's allegations raises a reasonable doubt that the Hilton directors were disinterested and independent, Cottle has not met the first part of the *Aronson* test for excusing demand.

A plaintiff-shareholder can also be excused from demand under *Aronson* if he or she can allege particularized facts which create a reasonable doubt that the challenged transaction was the product of a valid business judgment notwithstanding the directors' disinterestedness and independence. *Aronson*, 473 A.2d at 814. This aspect of the test has not been examined as thoroughly by the courts, though the *Aronson* court alluded to the narrowness of this exception when it noted that "in *rare* cases a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists." *Id.* at 815 (emphasis added). Again, Cottle failed to allege any particularized facts which would suggest that any of the casino transactions were the product of anything besides a valid business judgment. The protections of the business judgment rule are waived only in the case of improperly-motivated corporate decisions, not in the case of poor ones. Thus, Cottle's only recourse may be at the annual shareholders' meeting.

Next, the Court addresses two additional potential bases for excuse of demand raised by Cottle in response to the defendants' motion to dismiss. The defendants anticipated that Cottle would argue that his allegations of waste of corporate assets and entrenchment in corporate office, Complaint ¶¶ 19, 20, sufficiently demonstrated the futility of pre-suit demand, although it is apparent from the complaint that Cottle included these claims as part of his allegation of liability and not as an excuse for his failure to make a demand. However, since Cottle cursorily argued these points in his memorandum in opposition to the motion to dismiss, we will deal with them briefly. In *Pogostin v. Rice*, 480 A.2d 619 (Del.1984), the Delaware Supreme Court applied the principles laid out in *Aronson* to a shareholder suit alleging wrongful rejection of a tender offer by the corporate directors. The plaintiffs failed to make a pre-suit demand on the directors, claiming unsuccessfully that demand should be excused. Among other things, the plaintiffs in *Pogostin* claimed that the directors' rejection of the tender offer permitted them to receive bonuses under a shareholder-approved executive compensation plan (waste of corporate assets) and to maintain their

5. On August 20, 1985, this Court granted a motion to transfer to this Court as a related case Lewis v. Hilton, No. 85-6968 (N.D.Ill. filed Aug. 7, 1985), a derivative suit by another Hilton shareholder based on the same transactions questioned here. *See* Local Rule 2.31. We stayed all proceedings in *Lewis* until resolution of this motion to dismiss. Lewis, however, alleged that he made a demand on Hilton's directors and his case would not be affected by today's ruling. The Court will hold a status hearing in the *Lewis* case on May 2, 1986, at 10:30 a.m.

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positions of control in corporate management (entrenchment).

In rejecting these claims as a basis for excusing demand, the *Pogostin* court noted that plaintiff shareholders "have the burden of demonstrating by particularized allegations that the ... [director action] is so devoid of a legitimate corporate purpose as to be a waste of assets." 480 A.2d at 626. If Cottle had met this pleading obligation, demand would have been excused under the second part of the *Aronson* test discussed above. Hence, his corporate waste claim adds nothing to his demand excuse argument. The *Pogostin* court further noted that while a claim that directors have acted with the sole or primary motive of perpetuating themselves in office would be sufficient to excuse demand, the plaintiff must allege particularized facts to sustain such a claim. *Id.* at 627. In the present case, Cottle has merely pled in a conclusional fashion his charge that the Hilton directors sold the casino project without bidding "as an improper entrenchment device to ward off a takeover attempt of Hilton." Complaint ¶ 19. This Court does not view this allegation as the type of particularized pleading of entrenchment sufficient to excuse demand.[6]

Cottle's complaint must be dismissed under Fed.R.Civ.P. 23.1 in light of the above discussion.[7] While the *Aronson* test appears to present substantial barriers to the maintenance of a shareholder derivative suit, this Court believes that the Delaware Supreme Court contemplated precisely that result. In its own words, that court felt that "[t]he reasonable doubt standard in conjunction with the particularity requirement of [Chancery] Rule 23.1 strikes the essential balance between avoiding abuse of the derivative action and forcing a plaintiff to plead evidence without the benefit of discovery." *Pogostin*, 480 A.2d at 625. In the context of Fed.R.Civ.P. 23.1, federal courts called upon to apply the Delaware demand excuse standard must avoid an overly restrictive reading of the *Aronson* rule in order to maintain that balance and remain mindful that the plaintiff shareholder need only plead facts which raise a reasonable doubt of director disinterestedness, and not a certainty.

III. CONCLUSION

The defendants' motion to dismiss Cottle's complaint for failure to comply with Fed.R.Civ.P. 23.1 is allowed. Accordingly, the defendants' motion for a protective order is dismissed as moot. It is so ordered.

6. Cottle claimed, in any event, that he need not rely on the entrenchment argument to establish an excuse for the pre-suit demand requirement. Plaintiff's Answering Memorandum in Opposition to Defendants' Motion to Dismiss Based on F.R.C.P. 23.1 at 8. We note that even with this argument, his pleadings are inadequate to excuse demand.

7. Motions to dismiss under Fed.R.Civ.P. 23.1 are ordinarily decided solely on the basis of the complaint. Lewis v. Graves, 701 F.2d 245, 248 (2d Cir.1983). While Hilton's motion to dismiss was pending, all defendants filed a motion for a protective order, Fed.R.Civ.P. 26(c), regarding outstanding discovery requests by Cottle. At a status hearing on November 1, 1985, this Court indicated that it would decide in what order to rule on these two motions. Granting the motion to dismiss renders moot the motion for protective order.

Marvin BEMIS, Plaintiff,

v.

John HOGUE, as Plan Administrator and Trustee of the Franklin Electric Profit Sharing Plan and Franklin Electric, Inc., a Michigan corporation, Defendant.

No. 83-CV-8122-FL.

United States District Court, E.D. Michigan, S.D., at Flint.

April 22, 1986.

Former employee brought action against employer and administrator of employer's profit-sharing plan for benefits and penalties in connection with distribution of plan, after having been denied benefits after being terminated. On cross motions for summary judgment, the District Court, Newblatt, J., held that: (1) amount of benefits to which employee was entitled presented genuine issue of material fact precluding summary judgment; (2) employee was entitled to penalties for failure of administrator to notify him of decision to deny request for benefits; and (3) employee was entitled to damages for administrator's delay in providing employee with requested plan documents.

Ordered accordingly.

1. Action ⇐6
Pensions ⇐139

Former employee's action against employer and administrator of profit-sharing plan for lump-sum distribution of vested benefits was rendered moot by employee's refusing to accept benefits after having been offered them; however, "appropriate equitable relief" to which former employee would be entitled for alleged violation of Employee Retirement Income Security Act could include benefits improperly denied. Employee Retirement Income Security Act of 1974, §§ 502(a)(3), 510, 29 U.S.C.A. §§ 1132(a)(3), 1140.

2. Federal Civil Procedure ⇐2497

Amount of benefits to which former employee was entitled under profit-sharing plan presented genuine issue of material fact precluding summary judgment on claim under Employee Retirement Security Act arising from denial of vested interest in plan at employee's termination. Employee Retirement Income Security Act of 1974, §§ 502(a)(3), 510, 29 U.S.C.A. §§ 1132(a)(3), 1140.

3. Pensions ⇐140

Generally, claimants under retirement plans must exhaust administrative remedies before seeking federal court review unless exhaustion would be futile as claimant has been or will be wrongfully denied meaningful access to internal remedies. Employee Retirement Income Security Act of 1974, § 502(c), 29 U.S.C.A. § 1132(c).

4. Pensions ⇐87

Former employee who was participant in profit-sharing plan was entitled to penalties under Employee Retirement Income Security Act for failure of plan administrator to notify employee of decision to deny request for benefits upon receiving written request for vested benefits or reason for denying them. Employee Retirement Income Security Act of 1974, §§ 502(c), 503, 29 U.S.C.A. §§ 1132(c), 1133.

5. Pensions ⇐49

Former employee who was participant in profit-sharing plan was entitled to statutory damages from plan administrator, for administrator's delay in complying with employee's request for plan documents, irrespective of whether employee was prejudiced or administrator acted in good faith. Employee Retirement Income Security Act of 1974, § 502(c), 29 U.S.C.A. § 1132(c).

Marilyn A. Modoraky, Southfield, Mich., for plaintiff.

Steven F. Spender, Flint, Mich., for defendant.

MEMORANDUM OPINION AND ORDER

NEWBLATT, District Judge.

Before the Court are the parties' cross Motions for Summary Judgment pursuant to Rule 56, Fed.R.Civ.P., on the issue of liability. This case is an action against defendants Franklin Electric and John Hogue for benefits and penalties in relationship to the distribution of the Franklin Electric Profit Sharing Plan (hereinafter referred to as the Plan).

Plaintiff, Marvin Bemis, a participant in the Plan, was terminated from Franklin on March 26, 1982. On April 19, 1982, Bemis sent a request by certified mail for the "non-forfeitable vested portion" of his account. Hogue did not respond but claims

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Accordingly, the district court's *forum non conveniens* dismissal cannot be considered an abuse of discretion, and its dismissal of this action is hereby AFFIRMED.

FLORALIFE, INC., Plaintiff-Appellee,

v.

FLORALINE INTERNATIONAL, INC., Defendant-Appellant.

No. 86-1442.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 31, 1986.

Decided Oct. 31, 1986.*

Opinion Dec. 1, 1986.

Rehearing Denied Jan. 14, 1987.

Defendant appealed from injunctive order entered by the United States District Court for the Northern District of Illinois, Eastern Division, Hubert L. Will, J., in trademark infringement suit. The Court of Appeals, Posner, Circuit Judge, held that: (1) stipulation authorized judge to enter injunction that deviated from language of stipulation, and (2) plaintiff was entitled to award of reasonable attorney fees as sanction for defendant's frivolous appeal.

Affirmed, with sanctions.

1. Stipulations ⇐14(12)

Stipulation authorized judge to enter injunction that deviated from language of stipulation, where stipulation provided that defendant would consent to entry of a final order, and then stated gist of order, thus leaving it to district judge to formulate exact language.

2. Injunction ⇐70

Principles of equity jurisprudence codified in Federal Rules of Civil Procedure would automatically extend reach of injunction against corporation to officers, successors, etc., when acting in these capacities. Fed.Rules Civ.Proc.Rule 65(d), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2747

Plaintiff was entitled to award of a reasonable attorney fees as sanction for defendant's frivolous appeal, where appeal was effort by defendant to renege on stipulation that it signed with its eyes open and waiver of attorney fees in parties' stipulation had reference only to proceedings in district court. F.R.A.P.Rule 38, 28 U.S.C.A.

Edward D. Gilhooly, Edward D. Gilhooly, Ltd., Chicago, Ill., for defendant-appellant.

James Van Santen, Hill, Van Santen, Steadman & Simpson, Chicago, Ill., for plaintiff-appellee.

Before BAUER, Chief Judge, POSNER, Circuit Judge, and PELL, Senior Circuit Judge.

POSNER, Circuit Judge.

This appeal presents a novel although not difficult question as to the meaning of a stipulation resolving a trademark dispute. Floralife, Inc. sells products to florists, including a preservative for cut flowers which it sells under the trademark "Floralife." Floraline International, Inc. offers the public a flower-ordering and delivery service through telephone terminals installed in public areas. Floraline sought to register "Floraline" with the Patent and Trademark Office as a service mark. Floralife filed both an opposition with the Patent and Trademark office and a complaint, in the federal district court in Chicago, charging Floraline with trademark infringement. Floralife requested and was granted a preliminary injunction in that action, and Floraline filed a notice of appeal to this court; the Patent and Trademark Office had by this time sustained Floralife's opposition to the registration of "Floraline," and Floraline had appealed to the U.S. Court of Appeals for the Federal Circuit. At this juncture Floraline dismissed its appeal in this court and the parties signed and filed with the district court a stipulation the key paragraph of which states:

> In the event the decision of the Trademark Trial and Appeal Board [of the Patent and Trademark Office] is affirmed ..., by the Federal Circuit ..., defendant [Floraline] will thereupon waive its objection to [personal] jurisdiction and venue in this action, and will consent to entry of a final order against defendant, without the assessment of damages, or attorney fees and costs, permanently enjoining defendant from using any trademark "Floraline" as a word feature or in stylized form for telemarketing units and floral industry credit cards, or on the services as specified in the defendant's various trademark application(s) or any other manner in the floral industry.

The Federal Circuit did affirm, whereupon Floralife submitted to the district judge, and the district judge, after a brief discussion with counsel for both parties but without an evidentiary hearing, signed, the following injunctive order:

> Defendant Floraline International, Inc., its officers, agents and all persons or entities in concert or privity with it are permanently enjoined from all further use of the trademark, trade style or designation "FLORALINE" or any colorable imitation thereof whether as trademark, trade name, servicemark or any other colorable imitation of the trademark and trade name "FLORALIFE" of the Plaintiff Floralife, Inc. Such injunction is against any use by the Defendant of any trademark "FLORALINE" as a word feature or in stylized form for telemarketing units and floral industry credit cards, or on the services as specified in the Defendant's various trademark application(s) or in any other manner in the floral industry.

Floraline appeals, arguing that the stipulation did not authorize the judge to enter an injunction that deviated from the language of the stipulation.

[1] The stipulation is a contract. It must be enforced according to its terms. If it had said that, in the event of the Federal Circuit's affirming the ruling by the Patent and Trademark Office, Floraline would consent to the entry of the following order, or the attached order, or an order stating as follows, or had otherwise indicated that the parties had agreed on the language of the consent order, then the judge could not (at least on the authority of the stipulation) enter a different order, as he did here. But that is not what the stipulation said. It said that Floraline would consent to the entry of a final order, and then it stated the gist of the order, thus leaving it to the district judge, upon considering proposed drafts of an actual order when and if the condition precedent in the stipulation was fulfilled, to formulate the exact language. If Floraline mistrusted the judge, all it had to do was negotiate the exact language of the order with Floralife.

[2] Any other interpretation would be ridiculous, because the language in the stipulation is so plainly not the language of a final order. A minor point is that by omitting all reference to Floraline's officers, and possible successors and assigns, the stipulation, if treated as a draft order rather than the sketch of an order, might invite an argument that no human being could be held in contempt for violating it and that Floraline could not be prevented from reincorporating and continuing to use "Floraline" as a trademark. In fact the principles of equity jurisprudence codified in Fed.R.Civ.P. 65(d) would automatically extend the reach of the injunction to officers, successors, etc., when acting in these capacities (see 11 Wright & Miller, Federal Practice and Procedure § 2956 (1973))—but then Floraline cannot argue that the judge added to the stipulation when he made the injunction expressly applicable to such persons. In any event a careful draftsman of an actual injunction would not be likely to leave the matter to implication.

More important, if the "order" is deemed limited to the word "Floraline," thus excluding such colorable imitations as "Flora-Line," it is not worth the paper it is typed

* The case was decided from the bench at the close of the appellant's argument, with a statement that an opinion would follow.

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on, since it would enable Floraline to continue its trademark infringement, even while complying with the "order" by abandoning the trademark "Floraline." Finally, if the "order" is deemed limited to the trademark "Floraline" and excludes the use of the name as a trade name, then since Floraline must use its name in its advertising to identify itself to its customers, and on its telephone terminals and trademarks, there will be the same likelihood of confusion as with use of the name as a trademark. The only significant differences between the stipulation and the injunction actually entered by the judge are those necessary to give the stipulation the body and breath of an effective injunction. It is hardly likely that Floralife, in negotiating the stipulation, meant to give up its case against Floraline (which it had already won both in the Patent and Trademark Office and in the district court) in exchange for a porous, empty, worthless injunction—which is the interpretation that Floraline places on the stipulation. The words of the stipulation do not compel or even support such an interpretation, and contract interpretations that give one party everything and the other party nothing are implausible anyway and certainly should not be adopted without any support in the language of the contract.

[3] Floralife has asked us to award it the attorney's fees that it has incurred in defending this appeal, which it describes as a disingenuous attempt by Floraline to wriggle out of the obligations that it freely assumed by signing the stipulation. The parties by their stipulation consented to be bound by the outcome of the appeal to the Federal Circuit, which Floralife won hands down; and the injunction entered by the district judge was no broader than Floraline should have anticipated as the consequence of losing in the Federal Circuit, which upheld the finding of a likelihood of confusion between "Floraline" and "Floralife." We agree that the appeal is frivolous—an effort by Floraline to renege on a stipulation that it signed with its eyes open—and that the waiver of attorney's fees in the stipulation has reference only to the proceedings in the district court; and we reiterate this court's unwillingness to allow its processes to be abused by litigants unwilling or unable to evaluate the merits of an appeal. See, e.g., *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 255–56 (7th Cir.1986). Rule 38 of the Federal Rules of Appellate Procedure authorizes an award of reasonable attorney's fees as a sanction for a frivolous appeal. See Note of Advisory Comm. to Rule 38; *Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, Dist. No. 8, supra*, 802 F.2d at 255. Floralife shall submit to the clerk of this court, within 15 days, a statement of its attorney's fees reasonably incurred in defending this appeal.

AFFIRMED, WITH SANCTIONS.

Marvin L. FISHMAN and Illinois Basketball, Inc., Plaintiffs-Appellees,

v.

ESTATE OF Arthur M. WIRTZ, et al., Defendants-Appellants.

and

ILLINOIS BASKETBALL, INC., Plaintiff-Appellant,

v.

ESTATE OF Arthur M. WIRTZ, et al., Defendants-Appellees.

Nos. 85-1453, 85-1545.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 24, 1986.

Decided Nov. 21, 1986.*

As Amended March 3, 1987.

Unsuccessful bidder for professional basketball franchise and its president brought antitrust action against successful bidder and its stockholders, sports arena owner and others. The United States District Court for the Northern District of Illinois, Eastern Division, Stanley J. Roszkowski, J., bifurcated the trial, found that the successful bidder and its stockholders and the arena owner had violated the antitrust laws. The District Court awarded damages, 594 F.Supp. 853. Defendants' motion to amend was denied but plaintiffs' motion to amend was granted in part and denied in part, 609 F.Supp. 982, and appeal was taken. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) the denial of lease of sports arena to the unsuccessful bidder violated the Sherman Act; (2) the defendants' lobbying of board of governors of basketball league to reject transfer of franchise to unsuccessful bidder was not antitrust violation; (3) the defendants did not commit tortious interference with contract under Illinois law; (4) the defendants did commit the tort of unlawful interference with prospective advantage; (5) death of one defendant did not abate award of treble damages; (6) error in the calculation of "opportunity cost" required remand for recalculation of damages; (7) punitive damages were not recoverable on state tort claim; and (8) prejudgment interest could not be recovered.

Affirmed in part, reversed in part, vacated in part and remanded.

Easterbrook, Circuit Judge, dissented in part and filed opinion.

1. Monopolies ⇐12(1.3)

"Relevant market," for purposes of antitrust laws, is comprised of those commodities reasonably interchangeable by consumers for the same purposes, and in making the determination of the "relevant market" the trier must decide whether the product is unique or has close substitutes, as to which there are substantial cross-elasticities of demand. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

2. Federal Courts ⇐856

Finding in antitrust case as to area of effective competition and relevant market is subject to the "clearly erroneous" standard of review. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

3. Monopolies ⇐12(1.3)

When competitors for acquisition of franchise are also bidding to acquire access to a market, it is not clearly erroneous to define the "relevant market" as the market to which access is sought. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

4. Monopolies ⇐28(7.4)

In antitrust suit between successful and unsuccessful bidders for professional basketball team, findings that the relevant product market was the presentation of live professional basketball and that the relevant geographic market was the Chicago metropolitan area were not clearly erroneous. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

5. Monopolies ⇐12(6)

Successful bidders' refusal to lease sports arena that they controlled effectively cut off all competition for acquisition of professional basketball franchise and thereby inflicted antitrust injury on unsuccessful bidder. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6. Monopolies ⇐12(1)

The Sherman Act does protect competition to acquire a natural monopoly. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

7. Monopolies ⇐12(1.7)

Fact that the precise impact of alleged anticompetitive conduct on the broad consuming public remains unfocused does not prevent finding that antitrust laws have been violated. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

8. Monopolies ⇐17(2.2)

The "essential facilities doctrine" imposes upon a firm controlling an essential facility, i.e., a facility that cannot reasonably be duplicated and to which access is necessary if one wishes to compete, the obligation to make that facility available to competitors on nondiscriminatory terms.

*A Petition for Rehearing with Suggestion for Rehearing *In Banc* was filed by appellants but was dismissed after the parties advised this court that they had reached a settlement.

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improper disclosures. 18 U.S.C. §§ 401(3), 2(b)(2)(C), 1503. We sentenced Girardi as an accessory after the fact to the marijuana distribution crime which the grand jury was investigating. For a full description of the case's background, see the opinion affirming the defendant's sentence, *United States v. Girardi*, 62 F.3d 943 (7th Cir.1995). Girardi now brings a motion under 28 U.S.C. § 2255, requesting that we reduce his sentence. For the reasons that follow, we deny the motion.

[1] Girardi first appears to re-argue an earlier motion he filed under 18 U.S.C. § 3582(c)(2). Under that provision, if the Sentencing Commission lowers a sentencing range and generally expresses that the reduced range may be applied retroactively, then a court may reduce the sentence when warranted in light of the sentencing factors set forth in 18 U.S.C. § 3553(a). On January 4, 1996, we denied Girardi's § 3582(c)(2) motion, emphasizing the seriousness and uniqueness of the crime. Girardi failed to file a timely notice of appeal. Insofar as the defendant seeks reconsideration of the earlier denial, we adhere to our original decision.

[2,3] Next, the defendant also argues, in a "Supplement Motion," that we should depart downward and reduce his sentence due to extraordinary family circumstances. Supp. Mot. at 3-12. If Girardi means to argue that we should correct a sentencing guidelines error, § 2255 does not empower us to do so, see *Scott v. United States*, 997 F.2d 340, 342 (7th Cir.1993), nor would we have done so at the time of sentencing. If Girardi is contending that we should now, based on the unfortunate circumstances that have arisen after sentencing, reduce his sentence based on familial concerns, we possess no authority to modify the sentence on those grounds absent a motion from the Director of the Bureau of Prisons. *See* 18 U.S.C. § 3582(c)(1)(A); *Orajo v. United States*, No. 95-CV-1184, 1997 WL 139908, at *1 (E.D.N.Y March 12, 1997); *United States v. Hankins*, No.Crim. 93-221-01, 1996 WL 502199, at *2 n. 2 (E.D.Pa. Aug.27, 1996); *United States v. Gore*, 933 F.Supp. 1018, 1019 (D.Kan.1996), *aff'd*, No. 96-3106, 1997 WL 353025 (10th Cir. June 26, 1997) (unpublished affirmance); *United States v. Hewson*, 917 F.Supp. 543, 545 (W.D.Tenn.1995); *cf. Tavarez v. United States Parole Comm'n*, 816 F.2d 612 (7th Cir.1987) (discussing statutory predecessor to § 3582(c)(1)(A)).

For the reasons stated, the defendant's motion is denied. It is so ordered.

Belinda PETERSON, on behalf of herself and all others similarly situated, Plaintiff,

v.

H & R BLOCK TAX SERVICES, INC., a Missouri corporation, and John Does 1-10,

No. 96 C 6647.

United States District Court, N.D. Illinois, Eastern Division.

July 10, 1997.

Client of tax preparation service company sued company for breach of contract and breach of fiduciary duty. Company moved to dismiss. The District Court, Castillo, J., held that: (1) client's petition alleging that company solicited and charged client for "rapid refund" tax services despite knowing that services were unavailable stated cause of action for breach of contract, but (2) company's relationship with taxpayer-customer did not constitute agency or fiduciary relationship.

Granted in part and denied in part.

1. Contracts ⇐322(2)

Under Illinois law, client's petition alleging that tax preparation service company solicited and charged client and other customers for "rapid refund" tax services despite knowing that these services were unavailable stated cause of action for breach of contract to provide client with accurate tax advice and breached obligations of good faith and fair dealing implied in contract.

2. Contracts ⇐322(2)

To state cause of action for breach of contract under Illinois law, plaintiff must allege existence of contract, including allegations indicating offer, acceptance and consideration, plaintiff's performance of all contractual conditions required of him, fact of defendant's alleged breach and existence of damages as consequence.

3. Contracts ⇐168

Although covenant of good faith and fair dealing is never independent source of duties for parties to contract under Illinois law, it is frequently invoked when one of contracting parties is vested with broad discretion in contract performance forcing dependent party to rely on party in control to exercise that discretion fairly.

4. Contracts ⇐168, 326

Under Illinois law, obligation of good faith requires party vested with contractual discretion to exercise it reasonably, not arbitrarily, capriciously, or in manner inconsistent with reasonable expectations of parties and when such discretion is abused by party in bad faith, cause of action may arise derivatively from duty of good faith and fair dealing.

5. Contracts ⇐322(2)

To plead breach of implied covenant of good faith and fair dealing, party must allege that other party to contract had wide discretion in contract performance and that it exercised this discretion in bad faith.

6. Contracts ⇐312(1)

Under Illinois law when party acts with improper motive, party is exercising contractual discretion in manner inconsistent with reasonable expectations of parties and, thus, is acting in bad faith.

7. Principal and Agent ⇐18

Under Illinois law, "fiduciary duty" is duty of agent to treat his principal with utmost candor, rectitude, care, loyalty and good faith and to treat principal as well as agent would treat himself.

See publication Words and Phrases for other judicial constructions and definitions

8. Fraud ⇐7

Although courts may find fiduciary relationship when one person solicits another to repose trust in his expertise, fact that one party trusts other is insufficient to create fiduciary relationship under Illinois law.

9. Fraud ⇐7

Under Illinois law, essence of fiduciary relationship is one party's dominance over other and without dominance and influence there is no fiduciary relationships regardless of level of trust between parties.

10. Fraud ⇐7

Under Illinois law, slightly dominant business position does not operate to turn formal, contractual relationship into confidential or fiduciary relationship, and thus, courts will not impose fiduciary duties absent significant degree of dominance and superiority of one party over another.

11. Principal and Agent ⇐1

Under Illinois law, "agency" relationship has the following components: 1) principal has right to control manner and method in which agent performs work for her, and 2) agent has power to subject principal to personal liability.

See publication Words and Phrases for other judicial constructions and definitions

12. Principal and Agent ⇐1(2)

To form agency under Illinois law, parties need not use word agent nor characterize their relationship as principal-agent, but rather, their actions need only demonstrate desire to create agency relationship, for example, through previous course of dealing that is sanctioned or ratified by principal.

13. Principal and Agent ⇐1

Tax preparation service company's relationship with client did not constitute "agency relationship," even though client provided company with information it needed to complete her tax return, where company ran

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trolled manner and method in which it performed tax preparation services, such as whether client was eligible for earned income tax credit (EITC) and for refund anticipation loans.

See publication Words and Phrases for other judicial constructions and definitions

14. Principal and Agent ⇐1

Key consideration in determining whether agency relationship exists is whether principal had right to control manner and method in which agent performs work.

15. Principal and Agent ⇐189(1)

Although trier of fact most often answers whether particular facts giving rise to agency relationship exist, under Illinois law plaintiff must still plead facts, which, if proved, could establish existence of agency relationship.

16. Fraud ⇐7

Under Illinois law, tax advisor-client relationship does not constitute "fiduciary relationship" as matter of law.

See publication Words and Phrases for other judicial constructions and definitions

17. Fraud ⇐7

Relationship between client and tax preparation services company did not constitute "fiduciary relationship," even though client trusted in company's superior knowledge in filing her tax return, where company merely performed basic accounting functions in preparing tax returns and advising client on process, had no close, long-term relationship with client, had no influence over management and investment of client's assets and expressly offered client opportunity to ask questions.

18. Accountants ⇐9

When accountant merely performs basic accounting functions, no fiduciary relationship is created, but rather, to render accountant liable as fiduciary, plaintiff must allege that he either provided investment advice, recommended complex financial transactions, structured deals, or performed audits.

1. This Court granted Peterson's motion for class certification in a companion order issued today

Cathleen M. Combs, Daniel A. Edelman, James O. Latturner, Richard Joseph Doherty, Edelman & Combs, Chicago, IL, for Plaintiff.

Theodore John Low, Altheimer & Gray, Chicago, IL, David H. Latham, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Plaintiff Belinda Peterson and the putative tax class[1] ("Peterson") allege that defendants H & R Block Tax Services, Inc. and ten of its corporate officers (collectively, "Block") solicited and charged customers for Block's "Rapid Refund" tax services despite knowing that these services were unavailable. Peterson claims that this scheme was intended to defraud Block's customers, and has made it the subject of a six-count complaint. Count I alleges that Block breached the terms of a contract to provide Peterson with accurate tax advice and breached obligations of good faith and fair dealing implied in the contract. Counts II and III add RICO claims; Count IV asserts a violation of the Illinois Consumer Fraud and Deceptive Practices Act; Count V claims breach of fiduciary duty; and Count VI seeks restitution. Block's motion to dismiss Counts I and V for failure to state a claim upon which relief may be granted is presently before the Court.

LEGAL STANDARDS

A motion to dismiss tests the sufficiency of the complaint, not the merits of the suit. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 586 (7th Cir.1989). When considering a motion to dismiss, the Court views all facts alleged in the complaint, as well as any inferences reasonably drawn from them, in the light most favorable to the plaintiff. *Mosley v. Kliment*, 947 F.2d 1338, 1339 (7th Cir.1991). A motion to dismiss will be denied unless it appears beyond doubt that the plaintiff can prove no facts which would entitle him or her to relief. *Conley v. Gibson*,

355 U.S. 41, 45, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957).

RELEVANT FACTS

The following facts are drawn from Peterson's amended complaint. Block provides tax return preparation services to the public and, as part of that business, offers electronic tax return filing and refund anticipation loans ("RALs"). Amd. Cmplt. ¶ 10. These services are advertised and represented to the public as "Rapid Refund." *Id.* Electronic filing means transmitting tax returns to the IRS via computer rather than through the mail. RALs are loans issued by banks in the amount of the taxpayer's anticipated federal tax refund. Participating national banks contract with Block to make RALs to Block's electronic filing customers, and repayment is secured by the actual refund from the IRS. *Id.* For payment of a specified fee, Block's electronic filing customers can apply for RALs while at a Block office obtaining tax preparation services. *Id.* ¶ 18. Block allegedly endeavors to provide each customer with professional advice on their eligibility for RALs. *Id.* ¶ 17.

In January 1995, Peterson entered a Block office located in Forest Park, Illinois. *Id.* ¶ 11. With her, she brought the information that Block would need to complete her 1994 state and federal income tax returns. During her visit, a Block employee presented Peterson with a pamphlet entitled "Service-Plus," which informed Peterson, among other things, that Block would "[d]escribe how Rapid Refund works for you."[2] *Id.* ¶ 16, Ex. B.[3] Block then gave Peterson a schedule of RAL fees corresponding to the amount and timing of anticipated refunds. *Id.* ¶ 13, Ex. C. The schedule explained how Peterson could obtain the greater portion of her refund in the fastest time by paying $155.50—the highest RAL fee. By paying $100.50—the second highest fee—Peterson could obtain a modest portion of her refund in the fastest time, and the balance within three weeks. Finally, Peterson could obtain the entire balance of her refund within three weeks by paying $51.50—the lowest fee. *Id.* ¶ 20. Although the Fact Sheet warns that the bank issuing the RAL may limit loans in some cases or reduce the loan if the taxpayer claims an earned income tax credit (EITC),[4] the Fact Sheet does not anticipate refunds taking longer than three weeks. *Id.*

Based upon the representations that Block made in these materials, Peterson authorized Block to start preparing her tax returns. *Id.* ¶ 23. In the process, Block determined that Peterson was eligible for an EITC. *Id.* ¶ 21. In addition to purchasing tax preparation services, Peterson applied for Block's RAL program.[5] *Id.* ¶ 23. She paid a $100.50 fee, so that she could receive an immediate refund of $399.50 and a second refund check of $2,436.00.[6] *Id.* Block informed Peterson that

2. The pamphlet also assured Peterson that Block had completed her return and reported all income; that all appropriate adjustments, deductions, and credits had been claimed; and that all payments had been identified. It then explained that "[o]ur service doesn't end here", in addition to pledging to describe "how Rapid Refund works for you," the pamphlet said Block would explain what happens next with the refund and answer any questions; plan for next year's refund; provide record keeping materials, and explain its service and guarantees. Amd. Cmplt. Ex. B.

3. Peterson has attached four exhibits, lettered A through D, to her amended complaint. This Court may consider documents attached to the complaint if they are referred to in the complaint and central to the plaintiff's claims. *Siegel v. Village of Arlington Heights*, 65 F.3d 664, 665 (7th Cir.1995). Exhibits B and C comprise the alleged contract at issue and Exhibit D is evidence of its alleged breach, while Exhibit A is central to Peterson's breach of fiduciary duty claim. Therefore, Peterson's four exhibits are properly before the Court.

4. The Earned Income Tax Credit is an advance refundable credit based on the taxpayer's earned income. The amount of the credit is a specified percentage of the taxpayer's earned income, up to a certain amount. The applicable percentage and amounts vary according to IRS tables, which account for variables such as inflation and the number of the taxpayer's qualifying children. Amd. Cmplt. ¶ 30. For persons qualifying, the EITC makes up a substantial portion of their eventual refund. *Id.* ¶ 31.

5. Her application for RAL was approved by the contracting bank. Def. Br. Ex. 1.

6. The latter four figures are individualized, tailored to Peterson's personal tax status. Amd. Cmplt. ¶ 19.

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she would get the second refund check in two or three weeks. *Id.* ¶¶ 22, 23. She did not.[7] *Id.* ¶ 28. Instead, Peterson's refund was delayed as a result of the IRS's decision to review all 1994 tax year returns claiming an EITC in an effort to combat fraudulent EITC claims. *Id.* ¶ 28, Ex. D. The IRS sent Peterson a letter on February 20, 1995, a few weeks after she had filed her return. *Id.* The letter explained that the remainder of her refund—her second refund check—would be delayed for at least eight weeks because she had claimed an EITC. *Id.*

At the time that it prepared Peterson's tax return and charged her for its Rapid Refund service, Block allegedly knew that Peterson could not obtain a Rapid Refund because refunds for customers claiming an EITC were being delayed by the IRS for at least eight weeks. *Id.* ¶¶ 24, 33. In short, Peterson claims that Block knew persons claiming EITCs were ineligible for RAL but charged them for it anyway. Although Block allegedly failed to disclose this information to its customers, Block later informed its shareholders. *Id.* ¶ 35. In its Form 10-K dated July 28, 1995, Block stated, "During the 1995 tax season, the IRS made further changes to its electronic return processing systems and procedures to crack down on taxpayer fraud believed to be associated with the earned income tax credit claimed on returns. These changes resulted in delays in the IRS's issuance of refunds associated with the EITC . . . RAL's were not made available on the portion of the refund amount attributable to the EITC." *Id.* ¶ 35, Ex. A.

In Count I of her complaint, Peterson contends that Block breached a contract to provide accurate tax advice, as well as the obligations of good faith and fair dealing implied in the contract, by selling the Rapid Refund service to customers who were not eligible for it. Peterson further claims, in Count V of her complaint, that Block breached its fiduciary duty as a professional tax adviser to the class members by misrepresenting RAL services for the purpose of advancing Block's own interests. Block moves to dismiss both Counts under Rule 12(b)(6) for failure to state a claim.

ANALYSIS

I. Count I—Breach of Contract

Peterson's breach of contract claim alleges that Block contracted with her to provide accurate tax advice, particularly with regard to RAL availability, through its Service*Plus* pamphlet and RAL Fact Sheet. In exchange, Peterson paid the $100.50 RAL fee, expecting to receive this service as promised. By soliciting and charging Peterson for RAL when it knew she did not qualify for the service, Block allegedly breached its express contractual obligations, as well as covenants of good faith and fair dealing implied in the contract.

Block responds initially that the Court should dismiss Count I because Block has no contract with Peterson: rather, the only contract formed was the loan contract between Peterson and the lending bank. After all, Block points out the Bank is clearly identified in both the loan contract and RAL application as the lender—in other words, as the entity responsible for issuing the RALs. Moreover, the RAL Fact Sheet warns that the Bank has the authority to limit loans or reduce the amount of the RAL for applicants claiming an EITC. Consequently, Block claims, any promises that Peterson would obtain her refund by a specific date fall exclusively on the Bank's shoulders.

[1] A careful examination of the pleadings reveals that Block misperceives Peterson's breach of contract claim. The amended complaint does not allege that the lending bank or Block breached the *loan* contract. Nor does Peterson complain that the Bank limited her loan or reduced her RAL based on the fact that she claimed an EITC—indeed, the bank accepted her RAL application without such conditions. Most importantly, Peterson does not allege that her claim is based upon either the Bank or Block's failure to deliver her full tax refund within a certain amount of time. What Peterson claims is that, based on the language of Service*Plus* pamphlet and RAL Fact Sheet, Block had a written contractual obligation to advise her accurately on tax matters. She alleges that Block, not the lending bank, prepared her tax forms, determined she was eligible for an EITC, and promised to render her accurate tax advice when it pledged in the Service*Plus* pamphlet, among other things, to 1) describe how Rapid Refund would work for her and 2) explain what would happen next with her tax return. Since Peterson was claiming an EITC, describing how Rapid Refund would work for Peterson amounts to explaining that it wouldn't. Instead, Block solicited Peterson's interest in RAL by showing her the Fact Sheet and sold her the service for a hefty fee, all the while aware that Peterson could not take advantage of RAL. The Bank had no part in making these representations; it does not purport to dole out tax advice, sell the RAL service, or opine on how RAL works for a particular customer. Because a plaintiff need only plead a claim for relief "under any set of facts" consistent with the complaint, we will not force Peterson to accept Block's characterization of her contract claim. *See Rice v. Panchal*, 65 F.3d 637, 639 (7th Cir. 1995) (paramount policy of the well-pleaded complaint rule is that the plaintiff is master of her complaint). We therefore find that Peterson's claim is based on the alleged written service contract (i.e., the Service*Plus* pamphlet) with Block for tax advice.

Block's sole legal authority on this issue is a case also involving Block's RAL service, which granted summary judgment on a claim that Block had breached a contract promising RAL check deposits by a specific date. *See Washington v. H & R Block, Inc.*, No. 90 CH 2312 (Cook County, Ill. Jan. 6, 1995). This case is unavailing. The *Washington* plaintiffs' breach of contract theory differs markedly from Peterson's—it was based entirely on the premise that Block had guaranteed the plaintiffs that they would receive their Rapid Refunds by a specific date. The *Washington* court found that Block never guaranteed a specific date for refunds; Block merely told the plaintiffs when they could "expect" their checks to come in. Tr. at 7, 11. The court further determined that the relevant agreement addressing refund timing was the loan contract between the plaintiffs and the lending bank. *Id.* at 11. Here, by contrast, the alleged contract concerns certain customers' eligibility for RAL in the first place, not refund timing. And unlike the equivocal timing estimates in *Washington*, Block's obligation to tell customers how RAL would work for them is unqualified. Because Peterson's claim is based on Block's alleged obligation to provide accurate tax advice, not on the loan contract with the Bank, the *Washington* court's opinion has no application here.[8]

[2] Block next argues that, assuming the loan contract fails to dispose of Peterson's contract claim, we should still dismiss Count I because Peterson has not set forth sufficient facts giving rise to a service contract between her and Block for tax advice. To state a cause of action for breach of contract under Illinois law,[9] a plaintiff "must allege the existence of the contract, including allegations indicating an offer, acceptance and consideration, the plaintiff's performance of all contractual conditions required of him, the fact of the defendant's alleged breach, and the existence of damages as a consequence." *Nurvio v. Chicago Commodities, Inc.*, 257 Ill.App.3d 437, 443, 195 Ill.Dec. 670, 676, 628 N.E.2d 1134, 1139 (1993); *see Weil v. First Midwest Bank of Danville*, 142 Ill.App.3d 703, 706–09, 96 Ill.Dec. 516, 520–22, 491 N.E.2d 795, 799–801 (1986); *see also Steve-*

7. Peterson had previously used the services of Block, including Rapid Refund, on two or three occasions. Each time she claimed an EITC and received her RAL within three days of filing her return. Amd. Compl. ¶ 15.

8. We also note that the requirements for surviving a motion to dismiss are much less stringent than on summary judgment, which was the procedural posture facing the *Washington* court (although state procedural rules governed that case). Here, Peterson's facts are assumed true and examined only for purposes of stating a claim for relief. On summary judgment, however, the plaintiff must point to specific evidence that precludes judgment as a matter of law. *See Liberty v. Gas Research Inst.*, 31 F.3d 451, 454 (7th Cir.1994), and the court views all facts through the "prism of the substantive evidentiary burden," *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986), which lies on the plaintiff in a breach of contract action.

9. The parties do not dispute that Illinois law applies to Peterson's state law claims.

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Jecki v. Schwartz Paper Co., 824 F.Supp. 821, 829 (N.D.Ill.1993) (plaintiff satisfies pleading requirements of Fed.R.Civ.P. 8 by alleging that a contract was formed, plaintiff performed it, defendant breached it, and plaintiff suffered damages; detail need only be sufficient to enable defendants to identify the contract at issue). According to Block, the only contract that could possibly have been formed between Peterson and Block was for tax preparation and electronic filing services, and Peterson does not contend that those services were deficient in any way.

We find that, under the broad pleading standards of Fed.R.Civ.P. 8, Peterson's complaint alleges the requisite elements for a contract to render tax advice. First, Peterson pleads the existence of a contract that offers services beyond simply preparing tax forms. Block's Service*Plus* pamphlet begins with the basics, informing Peterson that it has prepared her 1995 tax returns and ensuring that: (1) the return is complete and all income has been reported; (2) all appropriate adjustments and deductions have been claimed; and (3) all relevant credits and payments have been identified and claimed, including the EITC. But Service*Plus* does not end there; it goes on to promise that Block will: (1) explain what happens next with your tax return; (2) answer any questions you may have; (3) plan for the refund you want next year; (4) describe how Rapid Refund works for you; and (5) provide record keeping material. It is this latter set of services that indicates Block is knowledgeable in tax matters and can ably answer its customers' tax questions, explain what the IRS will do with their tax returns, offer advice on obtaining tax refunds in the future, and explain the inner workings of Rapid Refund.

Peterson likewise sufficiently alleges acceptance of Block's offer to provide tax advice, as well as consideration and performance. Peterson authorized Block to proceed with preparing her tax return, and, after Block presented her with the Service*Plus* pamphlet and RAL Fact Sheet, paid the $100.50 fee in order to receive an immediate refund of $399.50 and a second refund check of $2,436.00 on an expedited basis. This payment, Peterson alleges, was based upon Block's explanation of how Rapid Refund could work for her. It also served as consideration, having worked as a monetary benefit to Block and a financial detriment to Peterson, *see Wait*, 142 Ill.App.3d at 708, 96 Ill.Dec. at 522–23, 491 N.E.2d at 801–02, and, besides filling out the loan application, was the only act required for Peterson's performance.

Third, Peterson adequately alleges that Block breached the contract by knowingly providing false tax advice. By the time Block prepared Peterson's tax return and sold her Rapid Refund services, it had already determined that she was eligible for an EITC. The key allegation, whose truth we must assume in this opinion, is that Block also knew, at the same time, that the IRS was delaying—for a minimum of eight weeks—refunds on returns claiming the tax credit. Armed with this knowledge, Block had the obligation, as part of its duty to explain how Rapid Refund would work for Peterson, to tell her that she was ineligible to receive the principal benefit of RAL—obtaining her second refund check on an expedited basis. But it never did so. As a consequence, Peterson paid for a service she had no hope of receiving, expending $100.50 for an expedited check worth only $399.50. She suffered damages by forfeiting the portion of the fee attributable to securing an expedited second refund check worth $2436.00 and losing the time value of her money while it languished in the government's coffer.[9]

9. Block proffers one more argument, which merits only footnote discussion, in support of its claim that the only contract it had with Peterson was one for tax preparation and filing services, not tax advice. According to Block, the past tense language in the Service*Plus* pamphlet reveals that Block does not give it to customers until after preparing and electronically filing their tax returns. At this point, Block has already performed its contractual obligations, the subsequently tendered pamphlet cannot thrust upon Block any additional duties. But this argument is premised on an erroneous assumption—that preparing and filing Peterson's tax return was tantamount to full contractual performance. We rejected this assumption in finding that Service*Plus* promised something more. In light of Service*Plus*'s offer to counsel Peterson as to how Rapid Refund "works" for her, Block did not discharge its contractual obligations simply by preparing and filing Peterson's return. Moreover, this key language is written in the future tense, contemplating that responsibilities remain after Block has prepared and filed tax forms.

We acknowledge that Peterson's express contract claim is somewhat tenuous. The Service*Plus* pamphlet does not explicitly promise that Block will render accurate tax advice. Nor does it state that Block will accept responsibility for circumstances outside its control that later undermine its advice on how RAL "works" for a particular customer. What is contemplated by Service*Plus*'s pledge to explain how RAL "works" for someone is honesty and forthrightness in that explanation. In this respect, Peterson's breach of contract claim is saved only by her allegation that Block knew before telling Peterson about its RAL service that the IRS was taking action that would render her ineligible for RAL—in essence, a deliberate breach of its promise to advise Peterson honestly about how RAL would work for her. The liberal federal pleading rules governing breach of contract claims require us to accept this allegation's truth. And Peterson is required only to allege facts sufficient to notify Block that the service contract was breached. *See Murphy v. White Hen Pantry*, 691 F.2d 350, 352 (7th Cir.1982) (under lenient federal pleading rules, breach of contract claim need only plead facts sufficient to notify the defendant that an agreement has been violated); *see also Conley v. Gibson*, 355 U.S. 41, 47–48, 78 S.Ct. 99, 102–03, 2 L.Ed.2d 80 (1957) (complaints are to be construed liberally under the notice pleading theory of the Federal Rules of Civil Procedure). We cannot say beyond doubt that she has failed to do this.

[3, 4] Moreover, Peterson's breach of contract claim is redeemed by the fact that Peterson does not rely solely on the terms of the Service*Plus* pamphlet. Peterson also asserts a breach of the implied contractual obligation of good faith and fair dealing, which Illinois law incorporates into every contract. *Oil Express Nat'l, Inc. v. Burgstone*, 958 F.Supp. 366, 369 (N.D.Ill.1997); *Northern Trust Co. v. VIII South Michigan Assocs.*, 276 Ill.App.3d 355, 367, 212 Ill.Dec. 760, 769, 657 N.E.2d 1095, 1104 (1995); *Dugan v. McDonald's Corp.*, 125 Ill.App.3d 972, 989–90, 81 Ill.Dec. 166, 169, 466 N.E.2d 958, 971 (1984). Although this covenant "has never been an independent source of duties for the parties to a contract," it is frequently invoked when one of the contracting parties is vested with broad discretion in contract performance, *Oil Express Nat'l*, 958 F.Supp. at 369, forcing the "dependent party (to) rely on the party in control to exercise that discretion fairly." *Dugan*, 125 Ill.App.3d at 990, 81 Ill.Dec. at 169, 466 N.E.2d at 971. In short, the obligation of good faith "requires the party vested with contractual discretion to exercise it reasonably, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *First Nat'l Bank v. Sylvester*, 196 Ill.App.3d 902, 910–11, 144 Ill.Dec. 24, 30, 554 N.E.2d 1063, 1069 (1990); *see Oil Express Nat'l*, 958 F.Supp. at 369. "When such discretion is abused by a party in bad faith, then, a cause of action may arise derivatively from the duty of good faith and fair dealing." *Oil Express Nat'l*, 958 F.Supp. at 369

[5] To plead a breach of the implied covenant of good faith and fair dealing, Peterson must allege 1) that Block had wide discretion in contract performance and 2) that it exercised this discretion in bad faith. *Id.* at 369–70. She meets these requirements with the contentions that Block deliberately dispensed erroneous tax advice by soliciting and charging unsuspecting customers for a service Block knew they could never obtain.

First, Block was plainly vested with broad discretion in providing Peterson accurate tax advice. Its tax return preparation and RAL business primarily serves customers who, like Peterson, are not wealthy (with an income sufficiently low to claim an EITC) and are relatively unsophisticated in tax matters (needing assistance to fill out tax forms). Consequently, these customers depend on Block's expertise, reposing in Block wide discretion to render appropriate tax advice. For example, Block determines for its customers what adjustments to income and deductions to make, and what credits and payments to identify and claim. And only Block knows what additional services, listed on this

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information, are appropriate for each customer. In this case, Block allegedly knew that Rapid Refund services would not work for Peterson because she was claiming an earned income credit. But instead of being truthful, Block used its discretion and superior knowledge to keep this information from her.

[6] Likewise, Block's alleged actions show bad faith. Its concealment was allegedly deliberate, done with the improper motive of defrauding Peterson by charging her for a service she could not obtain. "Where a party acts with improper motive ... that party is exercising contractual discretion in a manner inconsistent with the reasonable expectations of the parties and therefore is acting in bad faith." *Dayan*, 125 Ill.App.3d at 991, 81 Ill.Dec. at 170, 466 N.E.2d at 972; *see also Saunders v. Michigan Ave. Nat'l Bank*, 278 Ill.App.3d 307, 316, 214 Ill.Dec. 1036, 1044, 662 N.E.2d 602, 610 (1996) (improper motive is a "predominant theme" in bad faith cases). Rather than exercising its discretion reasonably, Block transgressed Peterson's reasonable expectation of receiving accurate tax advice by duping her into paying money for a service wholly unavailable to her. If proven, such conduct would unquestionably violate Block's duty of good faith and Fair dealing.

In sum, when we consider the obligation of good faith and fair dealing inherent in every contract, we conclude that Peterson has satisfied the generous federal pleading standards for breach of contract. Block's motion to dismiss is therefore denied as to Count I.

II. Count V—Breach of Fiduciary Duty

In Count V, Peterson alleges that Block owed her a fiduciary duty by virtue of its position as her tax adviser and accountant. Block allegedly abandoned this duty because it fraudulently misrepresented that Rapid Refund services were available to taxpayers who claimed an EITC. Instead of putting its customers' interests first, Block allegedly worked only to advance its own interests—contrary to its fiduciary duty. Block responds that the Court should dismiss Count V because 1) Block's affiliation with Peterson does not fit any of the traditional fiduciary models, including an agency relationship; 2) its relation to her as a tax preparer (and assuming the truth of Peterson's allegations) advisor or accountant does not give rise to fiduciary duties; 3) Peterson does not plead facts sufficient to establish any other fiduciary relationship; and 4) even assuming that Block owed Peterson a fiduciary duty, the alleged wrongs fall outside the scope of that duty.

[7–10] "A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself" *Lagen v. Balcor Co.*, 274 Ill.App.3d 11, 21, 210 Ill.Dec. 773, 780, 653 N.E.2d 968, 975 (1995). Although courts may find a fiduciary relationship when one person solicits another to repose trust in his expertise, "[t]he fact that one party trusts the other is insufficient [to create a fiduciary relationship]. We trust most people with whom we choose to do business." *Id.* The "essence" of a fiduciary relationship is one party's dominance over the other. *Id.* "Indeed, in the absence of dominance and influence there is no fiduciary relationships regardless of the level of trust between the parties." *Id.* (citations omitted). Significantly, a "slightly dominant business position ... [does] not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship." *Id.* (citations and internal quotations omitted). Courts therefore will not impose fiduciary duties absent a "significant degree of dominance and superiority of one party over another." *Id.*

Illinois courts recognize that these elements are manifested by nature in certain relationships, which they deem fiduciary as a matter of law. *See, e.g., Winston & Strawn v. Nosal*, 279 Ill.App.3d 231, 239, 215 Ill.Dec. 842, 847–48, 664 N.E.2d 239, 244–45 (1996) (partners); *Neaton v. Aitken*, 260 Ill.App.3d 717, 722, 198 Ill.Dec. 751, 756, 633 N.E.2d 213, 218 (1994) (joint venturers); *Lossman v. Lossman*, 274 Ill.App.3d 1, 7, 210 Ill.Dec. 818, 824, 653 N.E.2d 1280, 1286 (1995) (attorney and client); *Matter of Estate of Dynniewicz*, 271 Ill.App.3d 616, 622, 208 Ill.Dec. 154, 159, 648 N.E.2d 1075, 1081 (1995) (guardian and ward); *Smith v. First Nat. Bank of Danville*, 254 Ill.App.3d 251, 261, 191 Ill.Dec. 711, 719, 624 N.E.2d 899, 907 (1993) (trustee and beneficiary); *Kurtz v. Solomon*, 276 Ill.App.3d 643, 651, 212 Ill.Dec. 31, 37, 656 N.E.2d 184, 190 (1st Dist.1995) (agent and principal). Peterson's first argument in support of her fiduciary claim is that Block owed her fiduciary duties as a matter of law by agreeing to act as her agent.

A. Block Was Not Peterson's Agent

[11, 12] An agency relationship has two components: 1) the principal has the right to control the manner and method in which the agent performs work for her, and 2) the agent has the power to subject the principal to personal liability. *Knapp v. Hill*, 276 Ill.App.3d 378, 380, 212 Ill.Dec. 723, 726, 657 N.E.2d 1068, 1071 (1995). To form an agency, the parties need not use the word "agent" nor characterize their relationship as principal-agent. *RTC v. Hardisty*, 269 Ill.App.3d 613, 619, 207 Ill.Dec. 62, 66–67, 646 N.E.2d 628, 632–33 (1995). Their actions need only demonstrate a desire to create an agency relationship, for example, through a previous course of dealing that is sanctioned or ratified by the principal. *Id.* at 67, 646 N.E.2d at 633. "Once an agency relationship is found, a fiduciary relationship arises as a matter of law." *Letsos v. Century 21—New West Realty*, 285 Ill.App.3d 1050, 1060, 221 Ill.Dec. 310, 317, 676 N.E.2d 217, 224 (1996).

[13–15] Peterson and Block's relationship fails the first and most critical element. The "key consideration" in determining whether an agency relationship exists is whether the principal had the right to control the "manner and method" in which the agent performs work. *Knapp*, 276 Ill.App.3d at 380, 212 Ill.Dec. at 726, 657 N.E.2d at 1071. Although Peterson argues in her brief that Block's clients "direct[ed]" Block "regarding what returns to file and what information to put in the return," Pl. Br. at 9–10, the allegations in her complaint do not support this. The most Peterson alleges is that she provided Block the information it needed to complete her tax return. From there, Block took over. It was Block who made the determination that Peterson was eligible for an EITC and, according to ServicePlus, ensured that all of Peterson's income was reported, her adjustments and deductions claimed, and her credits and payments identified. Furthermore, Peterson's complaint indicates that it was Block who wielded complete control in determining, RAL eligibility. There is no allegation that Peterson instructed Block as to how it should go about preparing her return or assessing what services were available to her. Consequently, the complaint is devoid of facts demonstrating that Peterson controlled the "manner or method" in which Block performed its services.[11] Although the trier of fact most often answers whether particular facts giving rise to an agency relationship exist, "a plaintiff must still plead facts, which, if proved, could establish the existence of an agency relationship." *Knapp*, 276 Ill.App.3d at 382, 212 Ill.Dec. at 727, 657 N.E.2d at 1072. Peterson has not done so.

B. No Other Fiduciary Relationship Exists

[16, 17] Unable to establish a fiduciary relationship as a matter of law, Peterson attempts to impose fiduciary duties on Block on an "ad hoc" basis, alleging that the particular tax advisor/accountant-client relationship between her and Block rendered Block her fiduciary.[12] *See Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir.1992) (while investment advisor-advisee relationship is not fiduciary by law, "fiduciary duties are sometimes imposed on an ad hoc basis."). In support of her position, Peterson cites a plethora of cases, only two of which were decided in this circuit and/or based on Illinois law, where courts held that the facts before them warranted attributing fiduciary status to a tax advisor or accountant. *See, e.g., Burdett*, 957

11. Because Peterson's agency claim fails the first element, we express no opinion as to whether Peterson satisfies the second, i.e., whether Block had the power to subject her to personal liability.

12. At the present time, Illinois courts do not consider the tax advisor-client relationship fiduciary as a matter of law. *See Congregation of the Passion v. Touche Ross & Co.*, 224 Ill.App.3d 559, 590, 166 Ill.Dec. 642, 663, 586 N.E.2d 600, 621 (1991) *aff'd*, 159 Ill.2d 137, 201 Ill.Dec. 71, 636 N.E.2d 503 (1994).

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F.2d 1375; *Terrell v. Childers*, 920 F.Supp. 854 (N.D.Ill.1996).

But these cases do not assist Peterson because in each, the defendants did far more than simply provide basic tax advice on an isolated basis. The courts' decisions to impose fiduciary duties were all premised on the parties' long-term, ongoing relationships, as well as the defendants' roles in managing assets, rendering complex investment advice and/or performing audits. For example, in *Burdett* the Seventh Circuit held a financial advisor liable to his investor for breach of fiduciary duty where the advisor, in addition to preparing the investor's income tax returns, recommended a number of investments over several years and rendered advice on a series of tax shelters. *Burdett*, 957 F.2d at 1378–79. The court emphasized that the parties "cultivated a relation of trust ... over a period of years," and that the defendant induced the plaintiff "to accept his advice with no questions asked or answered." *Id.* at 1381–82. Likewise, in *Terrell*, the court concluded that a genuine issue of fact existed as to whether the defendant, a tax planning expert retained for several years to provide budget advice and preparation, tax advice and planning, insurance and estate planning, as well as to manage the plaintiff's assets, owed a fiduciary duty to his client. *Terrell*, 920 F.Supp. at 857.

[18] The facts before us are vastly different: Block has no close, long-term relationship with Peterson or influence over the management and investment of her assets. Unlike the sophisticated financial advisor in *Burdett* and the tax planning expert in *Terrell*, Block is alleged to have done nothing more than perform a basic accounting function—preparing tax returns and advising its customers on the process. "Where an accountant merely performs basic accounting functions, no fiduciary relationship is created." *Fleet Nat'l Bank v. H & D Entertainment, Inc.*, 926 F.Supp. 226, 242 (D.Mass. 1996), *aff'd*, 96 F.3d 532 (1st Cir.1996). Indeed, to render an accountant liable as a fiduciary, the plaintiff must allege that he either provided investment advice, recommended complex financial transactions, structured deals, *see id.*, or performed audits, *see, e.g., In re DeLorean Motor Co.*, 56 B.R. 936 (Bankr.E.D.Mich.1986), none of which Peterson claims Block did here. Moreover, Peterson did not have to accept Block's advice blindly. Block expressly offered her the opportunity, via the Service*Plus* pamphlet, to ask questions, a factor whose absence the Seventh Circuit found significant in *Burdett*. The sharp distinctions between these cases and the one before us prevent Peterson from resting her ad hoc fiduciary duty claim on this authority.

Aside from the defeating factual distinctions in her cited case law, Peterson fails to plead the "essence" of a fiduciary duty claim. Peterson is required to plead that Block had "a significant degree of dominance and superiority" over her, a standard her complaint does not meet. *See Logen*, 274 Ill.App.3d at 21, 210 Ill.Dec. at 780, 653 N.E.2d at 976. Peterson claims that she trusted in Block's "superior knowledge, help, and guidance" in filing her tax return and dispensing RAL advice; however, nothing in these allegations shows significant dominance. Her relationship with Block was limited to an arms-length, isolated transaction for tax preparation services and basic tax advice; Block did not retain continuing control or influence over Peterson's assets, was in no position to stake large sums of her money in risky venture, nor had unquestioning control over her financial portfolio. The fact that she trusted Block is simply not enough, *see id.*, especially when she had the opportunity to ask questions about the process. In short, Peterson and Block's relationship was merely contractual, not fiduciary. Although Block was somewhat dominant, given that Peterson lacked sophistication in tax matters and yielded control over preparing her return, a "slightly dominant business position ... [does] not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship." *Id.*; *see Pettinger*, 238 Ill. App.3d at 918, 179 Ill.Dec. at 124, 605 N.E.2d at 1138 ("[W]e do not consider the existence of a contractual relationship ..., without more, to support a finding that a fiduciary relationship in fact existed."). We find that her allegations fall short of pleading an ad hoc fiduciary relationship.

We acknowledge that Block is alleged to be a commercially successful and well-known expert on tax matters and the world's largest provider of tax services to United States taxpayers. But no case in Illinois or anywhere else holds that every expert is *ipso facto* a fiduciary. If this were so, every business that specializes in a particular type of service would be the fiduciary of its customers. And making Block a fiduciary to all of its customers would produce absurd results given that Block allegedly assists in filing one in every seven federal income tax returns. *See* Amd. Cmplt. Ex. B (H & R Block Report to Stockholders for Year Ending 4/30/95 at *14). The deterrent effect of saddling Block with fiduciary obligations could easily leave taxpayers without the firm's valuable services altogether.

After considering all of Peterson's arguments, we find that the complaint, as it stands, pleads neither an agency relationship nor any other fiduciary affiliation with Block. Because we accept Block's argument that no fiduciary relationship exists, we need not address its alternative argument that the facts alleged fall outside the scope of Block's fiduciary duty. Accordingly, we dismiss Count V without prejudice.[13]

CONCLUSION

For the reasons stated above, Block's motion to dismiss is granted in part and denied in part. It is granted as to Count V and denied as to Count I.

13. The dismissal of Count V is without prejudice in case further facts learned in discovery justify the future replending of this count in a manner consistent with this opinion.

UNITED STATES of America, Plaintiff,

v.

Musiliu BALOGUN, et al., Defendants.

No. 96 CR 518.

United States District Court,
N.D. Illinois,
Eastern Division.

July 28, 1997.

Defendants were charged with offenses arising from alleged participation in Nigerian heroin ring. On various motions, the District Court, Alesia, J., held that: (1) severance of several defendants from trial was not warranted; (2) bill of particulars was not warranted; (3) disclosure of grand jury proceedings was not warranted; (4) defendants were not entitled to list of prospective government witnesses; (5) Government was not required to produce sentencing information as part of pretrial discovery; (6) defendants' speedy trial rights were not violated; and (7) defendants were not entitled to disclosure of information regarding government informants.

So ordered.

1. Indictment and Information ⇐144

Defendants' motions to dismiss indictment charging defendants with heroin offenses, on ground that indictment was duplicitous, were moot, where Government intended to seek return of superseding indictment charging defendants with separate counts of conspiracy to import heroin and conspiracy to distribute and possess with intent to distribute heroin. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

2. Indictment and Information ⇐124(6)

Usual meaning of "same series of acts or transactions," for purposes of rule permitting joinder of defendants if they are alleged to have participated in same act or transaction or same series of acts or transactions constitu-

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ers of securities. See 6 L. Loss, Securities Regulation 3617 (1969). See, *e. g.*, *Haberman* v. *Murchison*, 468 F. 2d 1305, 1311 (CA2 1972); *Landy* v. *FDIC*, 486 F. 2d 139, 156–157 (CA3 1973), cert. denied, 416 U. S. 960 (1974); *Sargent* v. *Genesco, Inc.*, 492 F. 2d 750, 763 (CA5 1974); *Simmons* v. *Wolfson*, 428 F. 2d 455, 456 (CA6 1970), cert. denied, 400 U. S. 999 (1971); *City National Bank* v. *Vanderboom*, 422 F. 2d 221, 227–228 (CA8), cert. denied, 399 U. S. 905 (1970); *Mount Clemens Industries, Inc.* v. *Bell*, *supra*; *Jensen* v. *Voyles*, 393 F. 2d 131, 133 (CA10 1968). Compare *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960 (1974), with *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262 (CA7), cert. denied *sub nom. Bard* v. *Dasho*, 389 U. S. 977 (1967).

In 1957 and again in 1959, the Securities and Exchange Commission sought from Congress amendment of § 10 (b) to change its wording from "in connection with the purchase or sale of any security" to "in connection with the purchase or sale of, or any *attempt to purchase or sell*, any security." 103 Cong. Rec. 11636 (1957) (emphasis added); SEC Legislation, Hearings on S. 1178–1182 before a Subcommittee of the Senate Committee on Banking & Currency, 86th Cong., 1st Sess., 367–368 (1959); S. 2545, 85th Cong., 1st Sess. (1957); S. 1179, 86th Cong., 1st Sess. (1959). In the words of a memorandum submitted by the Commission to a congressional committee, the purpose of the proposed change was "to make section 10 (b) also applicable to manipulative activities in connection with any attempt to purchase or sell any security." Hearings on S. 1178–1182, *supra*, at 331. Opposition to the amendment was based on fears of the extension of civil liability under § 10 (b) that it would cause. *Id.*, at 368. Neither change was adopted by Congress.

The longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum*'s reasonable interpretation of the wording of § 10 (b), wording which is directed toward injury suffered "in connection with the purchase or sale" of securities,[5] argues significantly in favor of acceptance of the *Birnbaum* rule by this Court. *Blau* v. *Lehman*, 368 U. S. 403, 413 (1962).

Available evidence from the texts of the 1933 and 1934 Acts as to the congressional scheme in this regard, though not conclusive, supports the result reached by the *Birnbaum* court. The wording of § 10 (b) directed at fraud "in connection with the purchase or sale" of securities stands in contrast with the parallel antifraud provision of the 1933 Act, § 17 (a), as amended, 68 Stat. 686, 15 U. S. C. § 77q,[6] reaching fraud

[5] Mr. Justice Blackmun, dissenting, *post*, at 764–765, finds support in the literal language of § 10 (b) since he concludes that in his view "the word 'sale' ordinarily and naturally may be understood to mean, not only a single, individualized act transferring property from one party to another, but also the generalized event of public disposal of property through advertisement, auction, or some other market mechanism." But this ignores the fact that this carefully drawn statute itself defines the term "sale" for purposes of the Act, and, as we have noted, *infra*, at 751 n. 13, Congress expressly deleted from the Act's definition events such as offers and advertisements which may ultimately lead to a completed sale. Moreover, the extension of the word "sale" to include offers is quite incompatible with Congress' separate definition and use of these terms in the 1933 and 1934 Acts. Cf. § 2 (3) of the 1933 Act, 15 U. S. C. § 77b (3). Beyond this, the wording of § 10 (b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large.

[6] Section 17 (a) of the 1933 Act provides in wording virtually identical to that of Rule 10b–5 with the exception of the italicized portion that:

"It shall be unlawful for any person *in the offer* or sale of any securities by the use of any means or instruments of transportation

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"in the offer or sale" of securities. Cf. § 5 of the 1933 Act, 15 U. S. C. § 77e. When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly. Cf. § 16 (b) of the 1934 Act, 15 U. S. C. § 78p (b).

Section 28 (a) of the 1934 Act, 15 U. S. C. § 78bb (a), which limits recovery in any private damages action brought under the 1934 Act to "actual damages," likewise provides some support for the purchaser-seller rule. See, *e. g.*, Bromberg § 8.8, p. 221. While the damages suffered by purchasers and sellers pursuing a § 10 (b) cause of action may on occasion be difficult to ascertain, *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 155, in the main such purchasers and sellers at least seek to base recovery on a demonstrable number of shares traded. In contrast, a putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a

or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." (Emphasis added.)

We express, of course, no opinion on whether § 17 (a) in light of the express civil remedies of the 1933 Act gives rise to an implied cause of action. Compare *Greater Iowa Corp.* v. *McLendon*, 378 F. 2d 783, 788–791 (CA8 1967), with *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (CA2 1951). See, *e. g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (CA2 1968) (Friendly, J., concurring), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969); 3 L. Loss, Securities Regulation 1785 (2d ed. 1961).

largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis. Cf. *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F. 2d 527, 533 (CA10 1962); *Levine* v. *Seilon, Inc.*, 439 F. 2d 328, 335 (CA2 1971); *Wolf* v. *Frank*, 477 F. 2d 467, 478 (CA5 1973).

One of the justifications advanced for implication of a cause of action under § 10 (b) lies in § 29 (b) of the 1934 Act, 15 U. S. C. § 78cc (b), providing that a contract made in violation of any provision of the 1934 Act is voidable at the option of the deceived party.[1] See, *e. g.*, *Kardon* v. *National Gypsum Co.*, 69 F. Supp., at 514; *Slavin* v. *Germantown Fire Insurance Co.*, 174 F. 2d 799, 815 (CA3 1949); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 n. 4 (CA2 1951); Bromberg § 2.4 (1)(b). But that justification is absent when there is no actual purchase or sale of securities, or a contract to purchase or sell, affected or tainted by a violation of § 10 (b). Cf. *Mount Clemens Industries, Inc.* v. *Bell*, *supra*.

The principal express nonderivative private civil reme-

[1] Section 29 (b) of the 1934 Act provides in part:

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation . . . ."

Cf. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940).

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dies, created by Congress contemporaneously with the passage of § 10 (b), for violations of various provisions of the 1933 and 1934 Acts are by their terms expressly limited to purchasers or sellers of securities. Thus § 11 (a) of the 1933 Act confines the cause of action it grants to "any person acquiring such security" while the remedy granted by § 12 of that Act is limited to the "person purchasing such security." Section 9 of the 1934 Act, prohibiting a variety of fraudulent and manipulative devices, limits the express civil remedy provided for its violation to "any person who shall purchase or sell any security" in a transaction affected by a violation of the provision. Section 18 of the 1934 Act, prohibiting false or misleading statements in reports or other documents required to be filed by the 1934 Act, limits the express remedy provided for its violation to "any person .... who ... shall have purchased or sold a security at a price which was affected by such statement ...." It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.[8]

[8] MR. JUSTICE BLACKMUN, dissenting, *post*, at 762, finds the *Birnbaum* rule incompatible with the purpose and history of § 10 (b) and Rule 10b–5. But it is worthy of more than passing note that the history of Rule 10b–5 itself, recounted at some length in the dissent, *post*, at 766–767, strongly supports the purchaser-seller limitation. As the dissent notes, Rule 10b–5 was adopted in order to close "a loophole in the protections against fraud . . . by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." See SEC Release No. 3230 (May 21, 1942); remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967). The modest aims and origins of the Rule as recounted by the dissent stand in stark contrast with its far-ranging conclusion that a remedy exists under Rule 10b–5 whenever there is "a logical nexus between the alleged fraud and the sale or purchase of a security." *Post*, at 770. On these facts, as we have indicated, *infra*, at 752–754, extension of a Rule 10b–5 cause of action, far from closing an unforeseen loophole, would extend a private right of action for misrepresentations in a 1933 Act prospectus to those whom Congress excluded from the express civil remedies provided in the 1933 Act to cover such a violation.

Having said all this, we would by no means be understood as suggesting that we are able to divine from the language of § 10 (b) the express "intent of Congress" as to the contours of a private cause of action under Rule 10b–5. When we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, see *J. I. Case Co.* v. *Borak*, *supra*, but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b–5. It is therefore proper that we consider, in addition to the factors already discussed, what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance.

Three principal classes of potential plaintiffs are presently barred by the *Birnbaum* rule. First are potential purchasers of shares, either in a new offering or on the Nation's post-distribution trading markets, who allege that they decided not to purchase because of an unduly gloomy representation or the omission of favorable material which made the issuer appear to be a less favorable investment vehicle than it actually was. Second are actual shareholders in the issuer who allege that they decided not to sell their shares because of an

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unduly rosy representation or a failure to disclose unfavorable material. Third are shareholders, creditors, and perhaps others related to an issuer who suffered loss in the value of their investment due to corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b–5. It has been held that shareholder members of the second and third of these classes may frequently be able to circumvent the *Birnbaum* limitation through bringing a derivative action on behalf of the corporate issuer if the latter is itself a purchaser or seller of securities. See, *e. g.*, *Schoenbaum* v. *Firstbrook*, 405 F. 2d 215, 219 (CA2 1968), cert. denied *sub nom. Manley* v. *Schoenbaum*, 395 U. S. 906 (1969). But the first of these classes, of which respondent is a member, cannot claim the benefit of such a rule.

A great majority of the many commentators on the issue before us have taken the view that the *Birnbaum* limitation on the plaintiff class in a Rule 10b–5 action for damages is an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages which have in fact been caused by violations of Rule 10b–5. See, *e. g.*, Loewenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968). The Securities and Exchange Commission has filed an *amicus* brief in this case espousing that same view. We have no doubt that this is indeed a disadvantage of the *Birnbaum* rule,[8] and if it

[8] Obviously this disadvantage is attenuated to the extent that remedies are available to nonpurchasers and nonsellers under state law. Cf. § 28 of the 1934 Act, 15 U. S. C. § 78bb. See *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963, 969 (CA2 1969), cert. denied, 399 U. S. 909 (1970). Thus, for example, in *Birnbaum* itself, while the plaintiffs found themselves without federal remedies, the conduct alleged as the gravamen of the federal complaint later provided the basis for recovery in a cause of action based on state law. See 3 L. Loss, Securities Regulation 1469 (2d

had no countervailing advantages it would be undesirable as a matter of policy, however much it might be supported by precedent and legislative history. But we are of the opinion that there are countervailing advantages to the *Birnbaum* rule, purely as a matter of policy, although those advantages are more difficult to articulate than is the disadvantage.

There has been widespread recognition that litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. This fact was recognized by Judge Browning in his opinion for the majority of the Court of Appeals in this case, 492 F. 2d, at 141, and by Judge Hufstedler in her dissenting opinion when she said:

> "'The purchaser-seller rule has maintained the balances built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market.'" *Id.*, at 147.

Judge Friendly in commenting on another aspect of Rule 10b–5 litigation has referred to the possibility that unduly expansive imposition of civil liability "will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers . . . ." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (CA2 1968) (concurring opinion). See also

ed. 1961). And in the immediate case, respondent has filed a state-court class action held in abeyance pending the outcome of this suit. *Manor Drug Stores* v. *Blue Chip Stamps*, No. C–5052 (Superior Court, County of Los Angeles, Cal.)

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Boone & McGowan, Standing to Sue under SEC Rule 10b–5, 49 Tex. L. Rev. 617, 648–649 (1971).

We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b–5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. These concerns have two largely separate grounds.

The first of these concerns is that in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit. See, *e. g.*, Sargent, The SEC and the Individual Investor: Restoring His Confidence in the Market, 60 Va. L. Rev. 553, 562–572 (1974); Dooley, The Effects of Civil Liability on Investment Banking and the New Issues Market, 58 Va. L. Rev. 776, 822–843 (1972).

Congress itself recognized the potential for nuisance or "strike" suits in this type of litigation, and in Title II of the 1934 Act amended § 11 of the 1933 Act to provide that:

> "In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees . . . ." § 206 (d), 48 Stat. 881, 908.

Senator Fletcher, Chairman of the Senate Banking and Finance Committee, in introducing Title II of the 1934

Act on the floor of the Senate, stated in explaining the amendment to § 11 (e): "This amendment is the most important of all." 78 Cong. Rec. 8669. Among its purposes was to provide "a defense against blackmail suits." *Ibid.*

Where Congress in those sections of the 1933 Act which expressly conferred a private cause of action for damages, adopted a provision uniformly regarded as designed to deter "strike" or nuisance actions, *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 548–549 (1949), that fact alone justifies our consideration of such potential in determining the limits of the class of plaintiffs who may sue in an action wholly implied from the language of the 1934 Act.

The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Yet to broadly expand the class of plaintiffs who may sue under Rule 10b–5 would appear to encourage the least appealing aspect of the use of the discovery rules.

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Without the *Birnbaum* rule, an action under Rule 10b–5 will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement. In the words of Judge Hufstedler's dissenting opinion in the Court of Appeals:

> "The great ease with which plaintiffs can allege the requirements for the majority's standing rule and the greater difficulty that plaintiffs are going to have proving the allegations suggests that the majority's rule will allow a relatively high proportion of 'bad' cases into court. The risk of strike suits is particularly high in such cases; although they are difficult to prove at trial, they are even more difficult to dispose of before trial." 492 F. 2d, at 147 n. 9.

The *Birnbaum* rule, on the other hand, permits exclusion prior to trial of those plaintiffs who were not themselves purchasers or sellers of the stock in question. The fact of purchase of stock and the fact of sale of stock are generally matters which are verifiable by documentation, and do not depend upon oral recollection, so that failure to qualify under the *Birnbaum* rule is a matter that can normally be established by the defendant either on a motion to dismiss or on a motion for summary judgment.

Obviously there is no general legal principle that courts in fashioning substantive law should do so in a manner which makes it easier, rather than more difficult, for a defendant to obtain a summary judgment. But in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive dis-

covery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed. The *Birnbaum* rule undoubtedly excludes plaintiffs who have in fact been damaged by violations of Rule 10b–5, and to that extent it is undesirable. But it also separates in a readily demonstrable manner the group of plaintiffs who actually purchased or actually sold, and whose version of the facts is therefore more likely to be believed by the trier of fact, from the vastly larger world of potential plaintiffs who might successfully allege a claim but could seldom succeed in proving it. And this fact is one of its advantages.

The second ground for fear of vexatious litigation is based on the concern that, given the generalized contours of liability, the abolition of the *Birnbaum* rule would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony. We in no way disparage the worth and frequent high value of oral testimony when we say that dangers of its abuse appear to exist in this type of action to a peculiarly high degree. The Securities and Exchange Commission, while opposing the adoption of the *Birnbaum* rule by this Court, states that it agrees with petitioners "that the effect, if any, of a deceptive practice on someone who has neither purchased nor sold securities may be more difficult to demonstrate than is the effect on a purchaser or seller." Brief for the Securities and Exchange Commission as *Amicus Curiae* 24–25. The brief also points out that frivolous suits can be brought whatever the rules of standing, and reminds us of this Court's recognition "in a different context" that "the expense and annoyance of litigation is 'part of the social burden of living under

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government.'" *Id.*, at 24 n. 30. See *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U. S. 209, 222 (1938). The Commission suggests that in particular cases additional requirements of corroboration of testimony and more limited measure of damages would correct the dangers of an expanded class of plaintiffs.

But the very necessity, or at least the desirability, of fashioning unique rules of corroboration and damages as a correlative to the abolition of the *Birnbaum* rule suggests that the rule itself may have something to be said for it.

In considering the policy underlying the *Birnbaum* rule, it is not inappropriate to advert briefly to the tort of misrepresentation and deceit, to which a claim under Rule 10b–5 certainly has some relationship. Originally under the common law of England such an action was not available to one other than a party to a business transaction. That limitation was eliminated in *Pasley* v. *Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (1789). Under the earlier law the misrepresentation was generally required to be one of fact, rather than opinion, but that requirement, too, was gradually relaxed. Lord Bowen's famous comment in *Edgington* v. *Fitzmaurice*, [1882] L. R. 29 Ch. Div. 459, 483, that "the state of a man's mind is as much a fact as the state of his digestion," suggests that this distinction, too, may have been somewhat arbitrary. And it has long been established in the ordinary case of deceit that a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or sale. *Butler* v. *Watkins*, 13 Wall. 456 (1872). These aspects of the evolution of the tort of deceit and misrepresentation suggest a direction away from rules such as *Birnbaum*.

But the typical fact situation in which the classic tort

of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b–5 is applicable. The plaintiff in *Butler*, *supra*, for example, claimed that he had held off the market a patented machine for tying cotton bales which he had developed by reason of the fraudulent representations of the defendant. But the report of the case leaves no doubt that the plaintiff and defendant met with one another in New Orleans, that one presented a draft agreement to the other, and that letters were exchanged relating to that agreement. Although the claim to damages was based on an allegedly fraudulently induced decision not to put the machines on the market, the plaintiff and the defendant had concededly been engaged in the course of business dealings with one another, and would presumably have recognized one another on the street had they met.

In today's universe of transactions governed by the 1934 Act, privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule. The stock of issuers is listed on financial exchanges utilized by tens of millions of investors, and corporate representations reach a potential audience, encompassing not only the diligent few who peruse filed corporate reports or the sizable number of subscribers to financial journals, but the readership of the Nation's daily newspapers. Obviously neither the fact that issuers or other potential defendants under Rule 10b–5 reach a large number of potential investors, or the fact that they are required by law to make their disclosures conform to certain standards, should in any way absolve them from liability for misconduct which is proscribed by Rule 10b–5.

But in the absence of the *Birnbaum* rule, it would be sufficient for a plaintiff to prove that he had failed to

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purchase or sell stock by reason of a defendant's violation of Rule 10b–5. The manner in which the defendant's violation caused the plaintiff to fail to act could be as a result of the reading of a prospectus, as respondent claims here, but it could just as easily come as a result of a claimed reading of information contained in the financial pages of a local newspaper. Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b–5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him.[10]

[10] The SEC, recognizing the necessity for limitations on nonpurchaser, nonseller plaintiffs in the absence of the *Birnbaum* rule, suggests two such limitations to mitigate the practical adverse effects flowing from abolition of the rule. First, it suggests requiring some corroborative evidence in addition to oral testimony tending to show that the investment decision of a plaintiff was affected by an omission or misrepresentation. Brief for the Securities and Exchange Commission as *Amicus Curiae* 25–26. Apparently ownership of stock or receipt of a prospectus or press release would be sufficient corroborative evidence in the view of the SEC to reach the jury. We do not believe that such a requirement would adequately respond to the concerns in part underlying the *Birnbaum* rule. Ownership of stock or receipt of a prospectus says little about whether a plaintiff's investment decision was affected by a violation of Rule 10b–5 or whether a decision was even made. Second, the SEC would limit the vicarious liability of corporate issuers to nonpurchasers and nonsellers to situations where the corporate issuer has been unjustly enriched by a violation. We have no occasion to pass upon the compatibility of this limitation with § 20 (a) of the 1934 Act, 15 U. S. C. § 78t (a). We do not believe that this proposed limitation is relevant to the concerns underlying in part the *Birnbaum* rule as we have expressed them. We are not alone in feeling that the limitations proposed by the SEC are not adequate to deal with the adverse effects which would flow from abolition of the *Birnbaum* rule. See, *e. g., Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627, 630 (CA2), cert. denied, 389 U. S. 970 (1967); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d, at 967; *Rekant* v. *Desser*, 425 F. 2d 872, 879 (CA5 1970); *GAF Corp.* v. *Milstein*, 453 F. 2d 709, 721 (CA2 1971), cert. denied, 406 U. S. 910 (1972); *Drachman* v. *Harvey*, 453 F. 2d 722, 736, 738 (CA2 1972) (en banc); *Mount Clemens Industries, Inc.* v. *Bell*, 464 F. 2d 339, 341 (CA9 1972).

The virtue of the *Birnbaum* rule, simply stated, in this situation, is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates. And their dealing in the security, whether by way of purchase or sale, will generally be an objectively demonstrable fact in an area of the law otherwise very much dependent upon oral testimony. In the absence of the *Birnbaum* doctrine, bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass.

While much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plain-

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tiff who may sue in this area of the law will ultimately result in more harm than good. In *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931), Chief Judge Cardozo observed with respect to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class":

> "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." *Id.*, at 179–180, 174 N. E., at 444.

In *Herpich* v. *Wallace*, 430 F. 2d 792, 804–805 (CA5 1970), a case adopting the *Birnbaum* limitation on the class of plaintiffs who might bring an action for damages based on a violation of Rule 10b–5, Judge Ainsworth expressed concern similar to that expressed by Chief Judge Cardozo. Judge Stevens, writing in *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d, at 660, stated that court's view that these concerns were unduly emphasized, and went on to say that "we may not for that reason reject what we believe to be a correct interpretation of the statute or the rule." He relied in part on the view that Rule 10b–5 should be interpreted, in keeping with this Court's repeated admonition, "'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 151.

We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability. But as we have pointed out, we are not dealing here with

any private right created by the express language of § 10 (b) or of Rule 10b–5. No language in either of those provisions speaks at all to the contours of a private cause of action for their violation. However flexibly we may construe the language of both provisions, nothing in such construction militates against the *Birnbaum* rule. We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b–5, we believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.

Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale. Taken together with the precedential support for the *Birnbaum* rule over a period of more than 20 years, and the consistency of that rule with what we can glean from the intent of Congress, they lead us to conclude that it is a sound rule and should be followed.

IV

The majority of the Court of Appeals in this case expressed no disagreement with the general proposition that one asserting a claim for damages based on the violation of Rule 10b–5 must be either a purchaser or seller of securities. However, it noted that prior cases have held that persons owning contractual rights to buy or sell securities are not excluded by the *Birnbaum* rule. Relying on these cases, it concluded that respondent's status as an offeree pursuant to the terms of the consent decree served the same function, for purposes

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of delimiting the class of plaintiffs, as is normally performed by the requirement of a contractual relationship. 492 F. 2d, at 142.

The Court of Appeals recognized, and respondent concedes here,[11] that a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it. *United States* v. *Armour & Co.*, 402 U. S. 673 (1971); *Buckeye Co.* v. *Hocking Valley Co.*, 269 U. S. 42 (1925).[12]

A contract to purchase or sell securities is expressly defined by § 3 (a) of the 1934 Act, 15 U. S. C. § 78c (a),[13]

[11] See Brief for Respondent 60.

[12] See n. 1, *supra*; 492 F. 2d, at 144 n. 3 (Hufstedler, J., dissenting).

[13] Section 3 (a)(13) of the 1934 Act, 15 U. S. C. § 78c (a)(13), provides:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

Section 3 (a)(14) of the 1934 Act, 15 U. S. C. § 78c (a)(14), provides:

"The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

These provisions as enacted starkly contrast with the wording of the bill which became the 1934 Act when it emerged from committee and was presented on the Senate floor by Senator Fletcher, the chairman of the Senate Committee on Banking and Finance. See S. 2693, 73d Cong., 2d Sess. (1934). Section 3 (11) of the bill as presented to the Senate provided:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire, contract of purchase, *attempt or offer to acquire or solicitation of an offer to sell a security or any interest in a security.*" (Emphasis added.)

And § 3 (12) of the bill provided:

"The terms 'sale' and 'sell' each include any contract of sale or disposition of, contract to sell or dispose of, *attempt or offer to dispose of, or solicitation of an offer to buy a security or any interest therein.*" (Emphasis added.)

During consideration of the bill on the Senate floor, the ambit of these provisions was narrowed through amendment into the present wording of §§ 3 (a)(13) and (14). 48 Stat. 884. In arguing that it, as an offeree of stock, ought to be treated as a purchaser or seller for purposes of the Act, respondent is in effect seeking a judicial reinsertion of language into the Act that Congress had before it but deleted prior to passage.

as a purchase or sale of securities for the purposes of that Act. Unlike respondent, which had no contractual right or duty to purchase Blue Chip's securities, the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities have been recognized as "purchasers" or "sellers" of securities for purposes of Rule 10b–5, not because of a judicial conclusion that they were similarly situated to "purchasers" or "sellers," but because the definitional provisions of the 1934 Act themselves grant them such a status.

Even if we were to accept the notion that the *Birnbaum* rule could be circumvented on a case-by-case basis through particularized judicial inquiry into the facts surrounding a complaint, this respondent and the members of its alleged class would be unlikely candidates for such a judicially created exception. While the *Birnbaum* rule has been flexibly interpreted by lower federal courts,[14] we have been unable to locate a single decided case from any court in the 20-odd years of litigation since the *Birnbaum* decision which would support the right of persons who were in the position of respondent here to bring a private suit under Rule 10b–5. Respondent was not only not a buyer or seller of any security

[14] Our decision in *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969), established that the purchaser-seller rule imposes no limitation on the standing of the SEC to bring actions for injunctive relief under § 10 (b) and Rule 10b–5.

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but it was not even a shareholder of the corporate petitioners.

As indicated, the 1934 Act, under which respondent seeks to assert a cause of action, is general in scope but chiefly concerned with the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets. The 1933 Act is a far narrower statute chiefly concerned with disclosure and fraud in connection with offerings of securities—primarily, as here, initial distributions of newly issued stock from corporate issuers. 1 L. Loss, Securities Regulation 130–131 (2d ed. 1961). Respondent, who derives no entitlement from the antitrust consent decree and does not otherwise possess any contractual rights relating to the offered stock, stands in the same position as any other disappointed offeree of a stock offering registered under the 1933 Act who claims that an overly pessimistic prospectus, prepared and distributed as required by §§ 5 and 10 of the 1933 Act, has caused it to allow its opportunity to purchase to pass.

There is strong evidence that application of the *Birnbaum* rule to preclude suit by the disappointed offeree of a registered 1933 Act offering under Rule 10b–5 furthers the intention of Congress as expressed in the 1933 Act.[15] Congress left little doubt that its purpose in imposing the prospectus and registration requirements of the 1933 Act was to prevent the "[h]igh pressure salesmanship rather than careful counsel," causing inflated

[15] Blue Chip did not here present the question of whether an implied action under § 10 (b) of the 1934 Act and Rule 10b–5 will lie for actions made a violation of the 1933 Act and the subject of express civil remedies under the 1933 Act. We therefore have no occasion to pass on this issue. Compare *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (ED Pa. 1948), with *Thiele* v. *Shields*, 131 F. Supp. 416 (SDNY 1955). Cf. 3 L. Loss, Securities Regulation 1787–1791 (2d ed. 1961); 6 L. Loss, Securities Regulation 3915–3917 (1969); Bromberg § 2.4 (2).

new issues, through direct limitation by the SEC of "the selling arguments hitherto employed." H. R. Rep. No. 85, 73d Cong., 1st Sess., 2, 8 (1933).

> "Any objection that the compulsory incorporation in selling literature and sales argument of substantially all information concerning the issue, will frighten the buyer with the intricacy of the transaction, states one of the best arguments for the provision." *Id.*, at 8.

The SEC, in accord with the congressional purposes, specifically requires prominent emphasis be given in filed registration statements and prospectuses to material adverse contingencies. See, *e. g.*, SEC Securities Act Release No. 4936, Guides for the Preparation and Filing of Registration Statements 6, ¶ 6 (1968); *In re Universal Camera Corp.*, 19 S. E. C. 648, 654–656 (1945); Wheat & Blackstone, Guideposts for a First Public Offering, 15 Bus. Law. 539, 560–562 (1960).

Sections 11 and 12 of the 1933 Act provide express civil remedies for misrepresentations and omissions in registration statements and prospectuses filed under the Act, as here charged, but restrict recovery to the offering price of shares actually purchased:

> "To impose a greater responsibility, apart from constitutional doubts, would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public." H. R. Rep. No. 85, *supra*, at 9.

And in Title II of the 1934 Act, 48 Stat. 905–908, the same Act adopting § 10 (b), Congress amended § 11 of the 1933 Act to limit still further the express civil remedy it conferred. See generally James, Amendments to the Securities Act of 1933, 32 Mich. L. Rev. 1130, 1134 (1934). The additional congressional restrictions,

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contained in Title II of the 1934 Act, on the already limited express civil remedies provided by the 1933 Act for misrepresentations or omissions in a registration statement or prospectus reflected congressional concern over the impact of even these limited remedies on the new issues market. 78 Cong. Rec. 8668–8669 (1934). There is thus ample evidence that Congress did not intend to extend a private cause of action for money damages to the nonpurchasing offeree of a stock offering registered under the 1933 Act for loss of the opportunity to purchase due to an overly pessimistic prospectus.

Beyond the difficulties evident in an extension of standing to this respondent, we do not believe that the *Birnbaum* rule is merely a shorthand judgment on the nature of a particular plaintiff's proof. As a purely practical matter, it is doubtless true that respondent and the members of its class, as offerees and recipients of the prospectus of New Blue Chip, are a smaller class of potential plaintiffs than would be all those who might conceivably assert that they obtained information violative of Rule 10b–5 and attributable to the issuer in the financial pages of their local newspaper. And since respondent likewise had a prior connection with some of petitioners as a result of using the trading stamps marketed by Old Blue Chip, and was intended to benefit from the provisions of the consent decree, there is doubtless more likelihood that its managers read and were damaged by the allegedly misleading statements in the prospectus than there would be in a case filed by a complete stranger to the corporation.

But respondent and the members of its class are neither "purchasers" nor "sellers," as those terms are defined in the 1934 Act, and therefore to the extent that their claim of standing to sue were recognized, it would mean that the lesser practical difficulties of corroborating

at least some elements of their proof would be regarded as sufficient to avoid the *Birnbaum* rule. While we have noted that these practical difficulties, particularly in the case of a complete stranger to the corporation, support the retention of that rule, they are by no means the only factor which does so. The general adoption of the rule by other federal courts in the 25 years since it was announced, and the consistency of the rule with the statutes involved and their legislative history, are likewise bases for retaining the rule. Were we to agree with the Court of Appeals in this case, we would leave the *Birnbaum* rule open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b–5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions. Nor is it as consistent as a straightforward application of the *Birnbaum* rule with the other factors which support the retention of that rule. We therefore hold that respondent was not entitled to sue for violation of Rule 10b–5, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring.

Although I join the opinion of the Court, I write to emphasize the significance of the texts of the Acts of 1933 and 1934 and especially the language of § 10 (b) and Rule 10b–5.

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I

The starting point in every case involving construction of a statute is the language itself. The critical phrase in both the statute and the Rule is "in connection with the *purchase* or *sale* of any security." 15 U. S. C. § 78j (b); 17 CFR § 240.10b–5 (1975) (emphasis added). Section 3 (a) (14) of the 1934 Act, 15 U. S. C. § 78c (a) (14), provides that the term "sale" shall "include any contract to sell or otherwise dispose of" securities. There is no hint in any provision of the Act that the term "sale," as used in § 10 (b), was intended—in addition to its long-established legal meaning—to include an "offer to sell." Respondent, nevertheless, would have us amend the controlling language in § 10 (b) to read:

> "in connection with the purchase or sale of, or an offer to sell, any security."

Before a court properly could consider taking such liberty with statutory language there should be, at least, unmistakable support in the history and structure of the legislation. None exists in this case.

Nothing in the history of the 1933 and 1934 Acts supports any congressional intent to include mere offers in § 10 (b). Moreover, as the Court's opinion indicates, impressive evidence in the texts of the two Acts demonstrates clearly that Congress selectively and carefully distinguished between offers, purchases, and sales. For example, § 17 (a), the antifraud provision of the 1933 Act, 15 U. S. C. § 77q (a), expressly includes "offer[s]" of securities within its terms while § 10 (b) of the 1934 Act and Rule 10b–5 do not. The 1933 Act also defines "offer to sell" as something distinct from a sale. § 2 (3), 15 U. S. C. § 77b (3).

If further evidence of congressional intent were needed, it may be found in the subsequent history of these Acts.

As noted in the Court's opinion, the Securities and Exchange Commission unsuccessfully sought, in 1957 and again in 1959, to persuade Congress to broaden § 10 (b) by adding to the critical language: "or any attempt to purchase or sell" any security. See *ante*, at 732.

This case involves no "purchase or sale" of securities.[1] Respondent was a mere offeree, which instituted this suit some two years after the shares were issued and after the market price had soared. Having "missed the market" on a stock, it is hardly in a unique position. The capital that fuels our enterprise system comes from investors who have frequent opportunities to purchase, or not to purchase, securities being offered publicly. The market prices of new issues rarely remain static: almost invariably they go up or down, and they often fluctuate widely over a period far less than the two years during which respondent reflected on its lost opportunity. Most investors have unhappy memories of decisions not to buy stocks which later performed well.

The opinion of the Court, and the dissenting opinion of Judge Hufstedler in the Court of Appeals, correctly emphasize the subjective nature of the inevitable inquiry if the term "offer" were read into the Act and some arguable error could be found in an offering prospectus: "Would I have purchased this particular security at the time it was offered if I had known the correct facts?" Apart from the human temptation for the plaintiff to answer this question in a self-serving fashion, the offeror

[1] It is argued that the language "in connection with" justifies extending § 10 (b) to include offers which necessarily precede a purchase or sale. The short answer is that the statute requires a purchase or a sale of a security, and no offer was made to respondent in connection with either. Its complaint rests upon the *absence* of a sale to or purchase by it.

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of the securities—defendant in the suit—is severely handicapped in challenging the predictable testimony.[2] The subjective issues would be even more speculative in the class actions that inevitably would follow if we held that offers to sell securities are covered by § 10 (b) and Rule 10b–5.

In this case respondent was clearly identifiable as an offeree, as here the shares were offered to designated persons.[3] In the more customary public sale of securities, identification of those who in fact were bona fide offerees would present severe problems of proof. The 1933 Act requires that offers to sell registered securities be made by means of an effective prospectus. § 5 (b), 15 U. S. C. § 77e (b). Issues are usually marketed through underwriters and dealers, often including scores of investment banking and brokerage firms across the country. Copies of the prospectus may be widely distributed through the dealer group, and then passed hand to hand among countless persons whose identities cannot be known. If § 10 (b) were extended to embrace offers to sell, the number of persons claiming to have been

[2] Proving, after the fact, what "one would have done" encompasses a number of conjectural as well as subjective issues: would the offeree have bought at all; how many shares would he have bought; how long would he have held the shares; were there other "buys" on the market at the time that may have been more attractive even had the offeree known the facts; did he in fact use his available funds (if any) more advantageously by purchasing something else?

[3] It is argued that the special facts of this case justify extending the benefit of § 10 (b) to this respondent, even if the statute ordinarily requires a purchase or a sale. But this resolution also would require judicial extension of the terms of the statute. The mere fact that securities are offered to a limited class of offerees may eliminate some of the problems of proof but it does not avoid the fatal objection that no offer of securities, absent a purchase or sale, is covered by the statute.

offerees could be legion with respect to any security that subsequently proved to be a rewarding investment.

We are entitled to assume that the Congress, in enacting § 10 (b) and in subsequently declining to extend it, took into account these and similar considerations. The courts already have inferred a private cause of action that was not authorized by the legislation. In doing this, however, it was unnecessary to rewrite the precise language of § 10 (b) and Rule 10b–5. This is exactly what respondent—joined, surprisingly, by the SEC—sought in this case.[4] If such a far-reaching change is to

[4] It is more than curious that the SEC should seek this change in the 1934 Act by judicial action. The stated purpose of the 1933 Act was "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . . ." See preamble to Act, 48 Stat. 74. The evil addressed was the tendency of the seller to exaggerate, to "puff," and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation. The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters. The 1933 Act was intended to compel moderation and caution in prospectuses, and this is precisely the way that Act has been administered by the SEC for more than 40 years. Precise factual accuracy with respect to a corporate enterprise is frequently impossible, except with respect to hard facts. The outcome of pending litigation, the effect of relatively new legislation, the possible enactment of adverse legislation, the cost of projected construction or of entering new markets, the expenditures needed to meet changing environmental regulations, the likelihood and effect of new competition or of new technology, and many similar matters of potential relevancy must be addressed in registration statements and prospectuses. In administering the 1933 Act, the SEC traditionally and consistently has encouraged and often required offerors to take conservative postures in prospectuses, especially with respect to judgmental and possibly unfavorable matters. If a different philosophy now were to be read into the 1934 Act, inviting litigation for arguably misleading understatement as well as for overstatement of the issuer's prospects, the hazard of

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be made, with unpredictable consequences for the process of raising capital so necessary to our economic well-being, it is a matter for the Congress; not the courts.

II

MR. JUSTICE BLACKMUN's dissent charges the Court with "a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public." Our task in this case is to construe a statute. In my view, the answer is plainly compelled by the language as well as the legislative history of the 1933 and 1934 Acts. But even if the language is not "plain" to all, I would have thought none could doubt that the statute can be read fairly to support the result the Court reaches. Indeed, if one takes a different view—and imputes callousness to all who disagree—he must attribute a lack of legal and social perception to the scores of federal judges who have followed *Birnbaum* for two decades.

The dissenting opinion also charges the Court with having "no heed to the unremedied wrong" arising from the type of "fraud" that may result from reaffirmance of the *Birnbaum* rule. If an issue of statutory construction is to be decided on the basis of assuring a *federal* remedy—in addition to state remedies—for every perceived fraud, at least we should strike a balance between the opportunities for fraud presented by the contending views. It may well be conceded that *Birnbaum* does allow some fraud to go unremedied under the federal securities Acts. But the construction advocated by the dissent could result in wider opportunities for fraud. As the Court's opinion makes plain, abandoning the *Birnbaum* construction in favor of the rule urged by the dissent would invite any person who failed to purchase a

"going to market"—already not inconsequential—would be immeasurably increased.

newly offered security that subsequently enjoyed substantial market appreciation to file a claim alleging that the offering prospectus understated the company's potential. The number of possible plaintiffs with respect to a public offering would be virtually unlimited. As noted above (at 758 n. 2), an honest offeror could be confronted with subjective claims by plaintiffs who had neither purchased its securities nor seriously considered the investment. It frequently would be impossible to refute a plaintiff's assertion that he relied on the prospectus, or even that he made a decision not to buy the offered securities. A rule allowing this type of open-ended litigation would itself be an invitation to fraud.[5]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Today the Court graves into stone *Birnbaum*'s[1] arbitrary principle of standing. For this task the Court, unfortunately, chooses to utilize three blunt chisels: (1) reliance on the legislative history of the 1933 and

[5] The dissent also charges that we are callous toward the "investing public"—a term it does not define. It would have been more accurate, perhaps, to have spoken of the noninvesting public, because the Court's decision does not abandon the investing public. The great majority of registered issues of securities are offered by established corporations that have shares outstanding and held by members of the investing public. The types of suits that the dissent would encourage could result in large damage claims, costly litigation, generous settlements to avoid such cost, and often—where the litigation runs its course—in large verdicts. The shareholders of the defendant corporations—the "investing public"—would ultimately bear the burden of this litigation, including the fraudulent suits that would not be screened out by the dissent's bare requirement of a "logical nexus between the alleged fraud and the sale or purchase of a security."

[1] *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952).

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1934 Securities Acts, conceded as inconclusive in this particular context; (2) acceptance as precedent of two decades of lower court decisions following a doctrine, never before examined here, that was pronounced by a justifiably esteemed panel of that Court of Appeals regarded as the "Mother Court" in this area of the law,[2] but under entirely different circumstances; and (3) resort to utter pragmaticality and a conjectural assertion of "policy considerations" deemed to arise in distinguishing the meritorious Rule 10b–5 suit from the meretricious one. In so doing, the Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping, it seems to me, with our own traditions and the intent of the securities laws. See *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 463 (1969); *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967); *SEC* v. *Capital Gains Bureau*, 375 U. S. 180, 195 (1963).

The plaintiff's complaint—and that is all that is before us now—raises disturbing claims of fraud. It alleges that the directors of "New Blue Chip" and the majority shareholders of "Old Blue Chip" engaged in a deceptive and manipulative scheme designed to subvert the intent of the 1967 antitrust consent decree and to enhance the value of their own shares in a subsequent offering. Although the complaint is too long to reproduce here, see App. 4–22, the plaintiff, in short, contends that the much-negotiated plan of reorganization of Old Blue

[2] Just this Term, however, we did not view with such tender regard another decision by the very same panel. See *United States* v. *Feola*, 420 U. S. 671 (1975), and its treatment of an analogy advanced in *United States* v. *Crimmins*, 123 F. 2d 271 (CA2 1941).

Chip, pursuant to the decree and approved by the District Court, was intended to compensate former retailer-users of Blue Chip stamps for damages suffered as a result of the antitrust violations. Accordingly, the majority shareholders were to be divested of 55% of their interest; Old Blue Chip was to be merged into a new company; and 55% of the common shares of the new company were to be offered to the former users on a pro rata basis, determined by the quantity of stamps issued to each of these nonshareholding users during a designated period. Some 621,000 shares were thus to be offered in units, each consisting of three shares of common and a $100 debenture, in return for $101 cash.

It is the plaintiff's pleaded position that this offer to the former users was intended by the antitrust court and the Government to be a "bargain," since the then reasonable market value of each unit was actually $315. The plaintiff alleged, however, that the offering shareholders had no intention of complying in good faith with the terms of the consent decree and of permitting the former users of Blue Chip stamps to obtain the bargain offering. Rather, they conspired to dissuade the offerees from purchasing the units by including substantially misleading and negative information in the prospectus under the heading "Items of Special Interest." The prospectus contained the following statements, allegedly false and allegedly made to deter the plaintiff and its class from purchasing the units: (1) that "[n]et income for the current fiscal year will be adversely affected by payments aggregating $8,486,000 made since March 2, 1968 in settlement of claims" against New Blue Chip; (2) that net income "would be adversely affected by a substantial decrease in the use of the Company's trading stamp service"; (3) that net income "would be adversely affected by a sale of one-third of the Company's trading stamp

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business in California"; (4) that "Claims or Causes of Action (as defined) against the Company, including prayers for treble damages, now aggregate approximately $29,000,000"; and (5) that, based upon "statistical evaluations," "the Company presently estimates that 97.5% of all stamps issued will ultimately be redeemed." App. 56, 66.

Plaintiff alleged that these negative statements were known, or should have been known, by the defendants to be false since, for example, the $29,000,000 in purported legal claims were settled for less than $1,000,000 only three months later, and, as a historical fact, less than 90% of all trading stamps are redeemed. Importantly, when the defendants offered their own shares for sale to the public a year later, the prospectus issued at that time made no reference to these factors even though, to the extent that they were relevant on the date of the first prospectus, one year earlier, they would have been equally relevant on the date of the second. As a result of the defendants' negative statements, plaintiff claims that it and its class were dissuaded from exercising their option to purchase Blue Chip shares and that they were damaged accordingly.

From a reading of the complaint in relation to the language of § 10 (b) of the 1934 Act and of Rule 10b–5, it is manifest that plaintiff has alleged the use of a deceptive scheme "in connection with the purchase or sale of any security." To my mind, the word "sale" ordinarily and naturally may be understood to mean, not only a single, individualized act transferring property from one party to another, but also the generalized event of public disposal of property through advertisement, auction, or some other market mechanism. Here, there is an obvious, indeed a court-ordered, "sale" of securities in the special offering of New Blue Chip shares and debentures to former users. Yet the Court denies this

plaintiff the right to maintain a suit under Rule 10b–5 because it does not fit into the mechanistic categories of either "purchaser" or "seller." This, surely, is an anomaly, for the very purpose of the alleged scheme was to inhibit this plaintiff from ever acquiring the status of "purchaser." Faced with this abnormal divergence from the usual pattern of securities frauds, the Court pays no heed to the unremedied wrong or to the portmanteau nature of § 10 (b).

The broad purpose and scope of the Securities Exchange Act of 1934 are manifest. Senator Fletcher, Chairman of the Senate Committee on Banking and Currency, in introducing S. 2693, the bill that became the 1934 Act, reviewed the general purposes of the legislation:

> "Manipulators who have in the past had a comparatively free hand to befuddle and fool the public and to extract from the public millions of dollars through stock-exchange operations are to be curbed and deprived of the opportunity to grow fat on the savings of the average man and woman of America. Under this bill the securities exchanges will not only have the appearance of an open market place for investors but will be truly open to them, free from the hectic operations and dangerous practices which in the past have enabled a handful of men to operate with stacked cards against the general body of the outside investors. For example, besides forbidding fraudulent practices and unwholesome manipulations by professional market operators, the bill seeks to deprive corporate directors, corporate officers, and other corporate insiders of the opportunity to play the stocks of their companies against the interests of the stockholders of their companies." 78 Cong. Rec. 2271 (1934).

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The Senator went on to describe the function of each of the many provisions of the bill, including § 9 (c) which, without significant alteration, became § 10 (b) of the Act. He said, as to this section, in terms that surely are broad:

> "The Commission is also given power to forbid any other devices in connection with security transactions which it finds detrimental to the public interest or to the proper protection of investors." *Ibid.*

Similarly, the broad scope of the identical provision in the House version of the bill was emphasized by one of the principal draftsmen, in testimony before the House Committee on Interstate and Foreign Commerce. Summing up § 9 (c), he stated:

> "Subsection (c) says, 'Thou shalt not devise any other cunning devices.'
>
> . . . . . .
>
> ". . . Of course subsection (c) is a catch-all clause to prevent manipulative devices[.] I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices." Testimony of Thomas G. Corcoran, Hearing on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 115 (1934).

In adopting Rule 10b–5 in 1942, the Securities and Exchange Commission issued a press release stating: "The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230 (May 21, 1942). To say specifically that certain types of fraud are within Rule 10b–5, of course, is not to say that others are necessarily excluded. That this

is so is confirmed by the apparently casual origins of the Rule, as recalled by a former SEC staff attorney in remarks made at a conference on federal securities laws several years ago:

> "It was one day in the year 1943, I believe. I was sitting in my office in the S. E. C. building in Philadelphia and I received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, 'I have just been on the telephone with Paul Rowen,' who was then the S. E. C. Regional Administrator in Boston, 'and he has told me about the president of some company in Boston who is going around buying up the stock of his company from his own shareholders at $4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be $2.00 a share for this coming year. Is there anything we can do about it?' So he came upstairs and I called in my secretary and I looked at Section 10 (b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be, and we decided it should be at the end.
>
> "We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, 'Well,' he said, 'we are against fraud, aren't we?' That is how it happened." Remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967).

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The question under both Rule 10b–5 and its parent statute, § 10 (b), is whether fraud was employed—and the language is critical—by "any person . . . in connection with the purchase or sale of any security." On the allegations here, the nexus between the asserted fraud and the conducting of a "sale" is obvious and inescapable, and no more should be required to sustain the plaintiff's complaint against a motion to dismiss.

The fact situation in *Birnbaum* itself, of course, is far removed from that now before the Court, for there the fundament of the complaint was that the controlling shareholder had misrepresented the circumstances of an attractive merger offer and then, after rejecting the merger, had sold his controlling shares at a price double their then market value to a corporation formed by 10 manufacturers who wished control of a captive source's supply when there was a market shortage. The Second Circuit turned aside an effort by small shareholders to bring this claim of breach of fiduciary duty under Rule 10b–5 by concluding that the Rule and § 10 (b) protected only those who had bought or had sold securities.

Many cases applying the *Birnbaum* doctrine and continuing critical comments from the academic world [3] fol-

[3] See, *e. g.*, Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968); Boone & McGowan, Standing to Sue Under SEC Rule 10b–5, 49 Tex. L. Rev. 617 (1971); Whitaker, The *Birnbaum* Doctrine: An Assessment, 23 Ala. L. Rev. 543 (1971); Ruder, Current Developments in the Federal Law of Corporate Fiduciary Relations—Standing to Sue Under Rule 10b–5, 26 Bus. Law. 1289 (1971); Fuller, Another Demise of the Birnbaum Doctrine: "Tolls the Knell of Parting Day?", 25 Miami L. Rev. 131 (1970); Comment, Dumping *Birnbaum* to Force Analysis of the Standing Requirement under Rule 10b–5, 6 Loyola L. J. 230 (1975); Note, Standing to Sue in 10b–5 Actions, 49 Notre Dame Law. 1131 (1974); Comment, 10b–5 Standing Under Birnbaum: The Case of the Missing Remedy, 24 Hastings L. J. 1007 (1973); Comment, The Purchaser-Seller Requirement of Rule 10b–5 Reevaluated, 44 U. Colo. L. Rev. 151 (1972); Comment, Inroads on the Necessity for a Consummated Purchase or Sale Under Rule 10b–5, 1969 Duke L. J. 349; Comment, The Decline of the Purchaser-Seller Requirement of Rule 10b–5, 14 Villanova L. Rev. 499 (1969); Comment, The Purchaser-Seller Limitation to SEC Rule 10b–5, 53 Cornell L. Rev. 684 (1968); Comment, The Purchaser-Seller Rule: An Archaic Tool for Determining Standing Under Rule 10b–5, 56 Geo. L. J. 1177 (1968). See Note, Limiting the Plaintiff Class: Rule 10b–5 and the Federal Securities Code, 72 Mich. L. Rev. 1398, 1412 (1974).

lowed in its wake, but until today the Court remained serenely above the fray.

To support its decision to adopt the *Birnbaum* doctrine, the Court points to the "longstanding acceptance by the courts" and to "Congress' failure to reject *Birnbaum*'s reasonable interpretation of the wording of § 10 (b)." *Ante*, at 733. In addition, the Court purports to find support in "evidence from the texts of the 1933 and 1934 Acts," although it concedes this to be "not conclusive." *Ibid.* But the greater portion of the Court's opinion is devoted to its discussion of the "danger of vexatiousness," *ante*, at 739, that accompanies litigation under Rule 10b–5 and that is said to be "different in degree and in kind from that which accompanies litigation in general." *Ibid.* It speaks of harm from the "very pendency of the lawsuit," *ante*, at 740, something like the recognized dilemma of the physician sued for malpractice; of the "disruption of normal business activities which may accompany a lawsuit," *ante*, at 743; and of "proof . . . which depend[s] almost entirely on oral testimony," *ibid.*, as if all these were unknown to lawsuits taking place in America's courthouses every day. In turning to, and being influenced by, these "policy considerations," *ante*, at 737, or these "considerations of policy," *ante*, at 740, the Court, in my view, unfortunately mires itself in speculation and conjecture

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not usually seen in its opinions. In order to support an interpretation that obviously narrows a provision of the securities laws designed to be a "catch-all," the Court takes alarm at the "practical difficulties," *ante*, at 754, 755, that would follow the removal of *Birnbaum*'s barrier.

Certainly, this Court must be aware of the realities of life, but it is unwarranted for the Court to take a form of attenuated judicial notice of the motivations that defense counsel may have in settling a case, or of the difficulties that a plaintiff may have in proving his claim.

Perhaps it is true that more cases that come within the *Birnbaum* doctrine can be properly proved than those that fall outside it. But this is no reason for denying standing to sue to plaintiffs, such as the one in this case, who allegedly are injured by novel forms of manipulation. We should be wary about heeding the seductive call of expediency and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one.

Instead of the artificiality of *Birnbaum*, the essential test of a valid Rule 10b–5 claim, it seems to me, must be the showing of a logical nexus between the alleged fraud and the sale or purchase of a security. It is inconceivable that Congress could have intended a broad-ranging antifraud provision, such as § 10 (b), and, at the same time, have intended to impose, or be deemed to welcome, a mechanical overtone and requirement such as the *Birnbaum* doctrine. The facts of this case, if proved and accepted by the factfinder, surely are within the conduct that Congress intended to ban. Whether this particular plaintiff, or any plaintiff, will be able eventually to carry the burdens of proving fraud and of proving reliance and damage—that is, causality and injury—is a matter that should not be left to specula-

tions of "policy" of the kind now advanced in this forum so far removed from witnesses and evidence.

Finally, I am uneasy about the type of precedent the present decision establishes. Policy considerations can be applied and utilized in like fashion in other situations. The acceptance of this decisional route in this case may well come back to haunt us elsewhere before long. I would decide the case to fulfill the broad purpose that the language of the statutes and the legislative history dictate, and I would avoid the Court's pragmatic solution resting upon a 20-odd-year-old, severely criticized doctrine enunciated for a factually distinct situation.

In short, I would abandon the *Birnbaum* doctrine as a rule of decision in favor of a more general test of nexus, just as the Seventh Circuit did in *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654, 661 (1973), cert. denied, 416 U. S. 960 (1974). I would not worry about any imagined inability of our federal trial and appellate courts to control the flowering of the types of cases that the Court fears might result. Nor would I yet be disturbed about dire consequences that a basically pessimistic attitude foresees if the *Birnbaum* doctrine were allowed quietly to expire. Sensible standards of proof and of demonstrable damages would evolve and serve to protect the worthy and shut out the frivolous.

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time of payment—even if the claim is unliquidated, unfixed or contingent. *Energy Co-op, Inc. v. SOCAP Int'l, Ltd. (In re Energy Co-op, Inc.)*, 832 F.2d 997, 1001 (7th Cir. 1987).

22. When determining whether a claim for unpaid taxes existed before payment, a special rule applies: "[a] debt for a tax is incurred [for preference purposes] on the day when such tax is last payable without penalty, including any extension." 11 U.S.C. § 547(a) (1995).

23. As previously concluded, Pullman can only seek to recover $149,197.44 of the $610,143.64 it originally sought to recover from the IRS because it could not establish an identifiable property interest in the remaining $460,946.19. To recover under § 547(b), Pullman must further demonstrate that the taxes satisfied by transfer of the $149,197.44 were "last payable without penalty" before the payments were made.

24. Pullman has not demonstrated by a preponderance that its non-trust fund taxes were last payable without penalty before it made the four payments to the IRS which included the $149,197.44 previously identified. Unlike income and social security taxes withheld, Pullman was not compelled under penalty by IRS regulation to deposit non-trust fund taxes with a qualified federal tax depository institution. Rather, Pullman's social security taxes were not due until the respective date on which Pullman was required to file its quarterly tax return (Form 941). *See* 26 U.S.C. § 6151 (1995). Pullman was not required to file its quarterly return for non-trust fund taxes until April 30, 1987. 26 U.S.C. §§ 6011, 6071, 6151 (1995); 26 C.F.R. §§ 31.6011(a)–4 (returns of income taxes withheld), 31.6071(a)–1 (time for filing returns), 31.6151–1 (time for paying tax). As previously found, all four payments in question were sent and received on or before that date. Thus, Pullman has failed to demonstrate by a preponderance of the evidence that its payments of non-trust fund taxes were for or on account of antecedent debts as required by § 547(b)(3). It may be ironic, but because Pullman paid too early, it loses here.

CONCLUSION

Pullman has failed to satisfy its burden of demonstrating the elements of § 547(b) by a preponderance of the evidence. Accordingly, judgment is by separate order entered entirely in favor of the United States and against Pullman.

In re S.N.A. NUT COMPANY, an Illinois corporation, Debtor.

Bankruptcy No. 94 B 05993.

United States Bankruptcy Court, N.D. Illinois, Eastern Division.

Aug. 31, 1995.

Unsuccessful bidder in sale of Chapter 11 debtor's assets applied for reimbursement of costs and expenses incurred in unsuccessful bidding. The Bankruptcy Court, Erwin I. Katz, J., held that: (1) bankruptcy court would not award break-up fees absent compelling circumstances clearly indicating that payment of fees would be in best interest of estate, and (2) bidder could not recover costs and expenses either as break-up fee or as administrative expense.

Application denied.

1. Corporations ⇐582

Agreements to provide break-up fees or reimbursement of fees and expenses are meant to compensate potential acquirer who serves as catalyst or "stalking horse" which attracts more favorable offers.

2. Corporations ⇐582

Generally, break-up fees for failure to consummate transactions in context of merger and acquisition are allowed as long as they "enhance" bidding and are reasonable in relation to bidder's efforts and size of transaction; as long as procedural safeguards accompanied approval of bidding incentive by corporate board of directors, those bidding incentives will not be disturbed by courts.

3. Corporations ⇐582

Agreements made by parties to corporate combination are deferentially reviewed by nonbankruptcy courts under business judgment rule.

4. Corporations ⇐320(11)

Under "business judgment rule," there is presumption that, in making business decision, directors of corporation acted on informed basis, in good faith and in honest belief that action taken was in best interests of company.

See publication Words and Phrases for other judicial constructions and definitions.

5. Bankruptcy ⇐3072(1)

In bankruptcy context, proper standard for evaluating break-up fee, or fee payable as incentive payment to prospective purchaser with which debtor fails to consummate transaction, should be whether interests of all concerned parties are best served by break-up fee and whether payment of fee is in best interests of estate, including whether revenues will be maximized for estate; business judgment rule is applied by courts when decision being reviewed is within ordinary course of decision-maker's business, but, when break-up fee comes before bankruptcy court as part of motion to sell estate assets, it is necessarily outside ordinary course of debtor's or trustee's business. Bankr.Code, 11 U.S.C.A. § 363(b)(1).

6. Bankruptcy ⇐3067.1

When debtor or trustee conducts sale of estate assets, it has obligation to maximize revenues for estate. Bankr.Code, 11 U.S.C.A. § 363(b).

7. Bankruptcy ⇐3072(1)

Absent compelling circumstances which clearly indicate that payment of fee would be in best interests of estate, break-up fees should not be awarded to unsuccessful bidder in bankruptcy auction sales. Bankr.Code, 11 U.S.C.A. § 363(b)(1).

8. Bankruptcy ⇐3072(1)

Because Chapter 11 debtor was seeking liquidation rather than reorganization, no particular deference was to be given debtor's business decision to allow bidder to apply for break-up fees after unsuccessful bid for debtor's assets, and bankruptcy court would not award break-up fees absent compelling circumstances clearly indicating that payment of fees would be in best interest of estate; unsecured creditors committee, which was entitled to more deference in context of liquidation, opposed payment of break-up fees, and, regardless of whether sale of assets was usually within ordinary course of business, debtor was not in business of liquidating. Bankr.Code, 11 U.S.C.A. § 363(b)(1).

9. Bankruptcy ⇐2872, 3072(1)

Unsuccessful bidder in sale of Chapter 11 debtor's assets could not recover costs and expenses incurred in unsuccessful bidding, either as break-up fee or as administrative expense, since recovery was not in best interests of the estate, and reimbursement was not appropriate to reward substantial contribution to estate; unsuccessful bidder may have lured in other bidders, but no offer received was reasonable, no sale was consummated, and estate received no benefit from unsuccessful bid. Bankr.Code, 11 U.S.C.A. §§ 363(b)(1), 503(b)(3)(D).

10. Bankruptcy ⇐2871

Administrative expenses are priority claims, and thus are subject to strict scrutiny by court. Bankr.Code, 11 U.S.C.A. § 503(b).

11. Bankruptcy ⇐2872

For entity to recover on administrative expense claim for having made substantial contribution in Chapter 11 case, it must show that services were rendered to benefit all parties in case and not just applicant, services provided direct, significant and demonstrable benefit to estate and unsecured creditors, and services were not duplicative. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(D).

12. Bankruptcy ⇐2872, 2926

To recover on administrative expense claim for having made substantial contribution in Chapter 11 case, burden is on appli-

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cant to prove its substantial contribution. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(D).

13. Bankruptcy ⇐2871

Compensation on administrative expense claim must be preserved for those rare occasions when creditor's involvement truly fosters and enhances administration of estate. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(D).

14. Bankruptcy ⇐3072(1)

Goal of bankruptcy auction is to maximize return to estate, and costs of bidding should be borne by those who are best able to bear them, the bidders who have voluntarily entered bidding process, and who are bidding for company with title free and clear of liens and with all advantages provided by Bankruptcy Code. Bankr.Code, 11 U.S.C.A. § 363(b)(1).

15. Bankruptcy ⇐2872

Unsuccessful bidder in sale of Chapter 11 debtor's assets was not among entities described by statute as having standing to bring administrative expense claim incurred by making substantial contribution to case. Bankr.Code, 11 U.S.C.A. § 503(b)(3)(D).

Ronald R. Peterson, Jenner & Block, Chicago, IL, for debtor.

Virginia W. Powell, Hunton & Williams, Atlanta, GA, for movant.

MEMORANDUM OPINION

ERWIN I. KATZ, Bankruptcy Judge.

This matter comes before the Court on the Application of Alimenta (U.S.A.), Inc. ("Alimenta") For Reimbursement of Costs and Expenses Incurred in Unsuccessful Bidding ("Application"). Alimenta seeks to recover $206,544.21 in costs and expenses arising out of its unsuccessful bid for the assets of S.N.A. Nut Company ("SNA" or "Debtor"). In support of its Application, Alimenta relies on the July 6, 1994 order ("Order") in which this Court stated that in the event Alimenta "is not the successful bidder, the Court may allow reimbursement of Alimenta's out-of-pocket costs and expenses not to exceed $350,000 ("Costs and Expenses")." As an alternative basis, Alimenta seeks recovery as an administrative expense claim under 11 U.S.C. § 503(b). In response, the Debtor argues that Alimenta has no contractual right to reimbursement and, in the alternative, cannot meet its burden of proof for allowance of an administrative expense claim under § 503(b). Having considered the arguments, pleadings and exhibits, the Court finds that Alimenta is not entitled to reimbursement of its costs and expenses.

BACKGROUND

SNA filed a voluntary petition for relief under Chapter 11 on March 25, 1994. Subsequently, SNA and Alimenta entered into negotiations for the sale of all of Debtor's assets. SNA received a written offer from Alimenta to purchase substantially all of its assets, free and clear of all liens, claims and encumbrances, for $28.8 million. On June 27, 1994, the Debtor filed a Motion for Leave to Sell Assets and To Set Sale Procedures ("Sale Motion"). That Motion referred to the Alimenta offer which included the provision requiring that it be paid a "breakup fee." The Creditors' Committee took the position that it did not object to a sale for an adequate price but was not endorsing the sale at the price, or under the terms, offered. The Court ordered that an auction sale be held without prejudging the question of whether Alimenta would be entitled to a breakup fee.

On July 6, 1994, an order was entered setting forth the procedures for the sale, which provided that in the event Alimenta was not the successful bidder it may apply for reimbursement which the Court may allow, in its discretion. Attached to the Order was a "Notice of Hearing on Debtor's Motion to Sell Assets" ("Notice").[1]

Paragraph 5 of the Notice set forth two alternative possibilities for recovery by Alimenta. The first was reimbursement to Alimenta of its out-of-pocket costs and expenses not to exceed $350,000 if it was outbid at the sale. The second alternative applied if this Court did not authorize Debtor to sell its assets. In that instance, the Notice provided that the Court may consider whether reimbursement would be appropriate as an administrative expense.

Although at least two other bids were filed with the Court, none of the bids received, including Alimenta's, were adequate. Neither the Debtor nor the Creditors' Committee recommended Alimenta's bid. No sale occurred, and Debtor withdrew its Sale Motion. The Debtor eventually liquidated various of its assets via a liquidating plan. Alimenta now applies for reimbursement of its costs and expenses.

JURISDICTION

This Court's jurisdiction derives from 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(e)(2)(A).

DISCUSSION

Alimenta argues that the "breakup fee" was intended to apply even if no sale was consummated. It is clear from the Notice, however, that the parties contemplated both scenarios. The Court finds that the intent and agreement were that if Alimenta was outbid it was entitled to apply for a breakup fee, but if no sale was approved Alimenta could attempt to qualify itself under 11 U.S.C. § 503(b) as an administrative expense claimant.

Breakup Fee:

[1] "A break-up fee, or more appropriately a termination fee, is an incentive payment to a prospective purchaser with which a company fails to consummate a transaction." *In re Integrated Resources, Inc.*, 147 B.R. 650, 653 (S.D.N.Y.1992), *app. dismissed on jurisdictional grounds*, 3 F.3d 49 (2nd Cir.1993). "Agreements to provide breakup fees or reimbursement of fees and expenses are meant to compensate the potential acquirer who serves as a catalyst or 'stalking horse' which attracts more favorable offers." *In re Marrose Corp.*, 1992 WL 33848, *5 (Bankr. S.D.N.Y.1992). *See* Bruce A. Markell, *The Case Against Breakup Fees in Bankruptcy*, 66 Am.Bankr.L.J. 349, 352 (1992) ("Breakup fees are post-sale payments made to bidders who fail to acquire the target sought.")

Non-Bankruptcy Treatment of Breakup Fees:

Outside of bankruptcy, the courts have dealt with the concept of breakup fees and other bidding incentives in merger and acquisition cases.[2] Because the acquirer is taking the risk that "another party will come in and outbid you and all that time and money will have been spent for naught," *Beebe v. Pacific Realty Trust*, 578 F.Supp. 1128, 1150 n. 7 (D.Or.1984) (quoting *A Leveraged Buyout. What It Takes*, Business Week, July 18, 1983, at 104, 108), breakup fees are often part of the deal. "[A] potential acquirer's task is not finished when it signs its deal with manage-

1. The Court noted at the hearing on July 6 that the drafters of the Notice had erred in its use of the term "will allow" in lieu of "may allow" regarding the breakup fee. Alimenta agreed that the word should be "may."

2. These cases generally come to court when a shareholder of one party to a deal is dissatisfied. They are really not similar to the bankruptcy cases since most involve allegations of breach of fiduciary duty by the directors. The Board Of Directors favors one bidder due to the Board's self interest. The Board grants a favorable penalty clause to the favored bidder as a bar to competing bids. In *Conte v. Storer Communication, Inc.*, 849 F.2d 570 (11th Cir.1988), for example, after a dissident stockholders' group announced it wanted to implement a liquidation and distribution of the assets of Storer Communication, Inc., ("Storer") the Storer board of directors solicited potential purchasers. Kohlberg, Kravis, Roberts & Company ("KKR") eventually acquired Storer after a bidding contest with Comcast Corporation, the Storer board of directors had granted KKR a lock-up option. The plaintiff shareholder in *Conte* alleged that the Storer directors had abused their discretion when the lock-up option was granted. *Samjens Partners I v. Burlington Industries, Inc.*, 663 F.Supp. 684 (S.D.N.Y.1987) involved another dissatisfied shareholder, who was also making a hostile tender offer. Samjens Partners I ("Samjens") commenced a tender offer for Burlington Industries, Inc. ("Burlington"). Burlington subsequently entered a merger agreement with Morgan Stanley Group, Inc. ("Morgan"), which included a $25 million break up fee and up to $25 million as reimbursement for expenses. This agreement was approved by Burlington's board of directors. Samjens filed a cause of action which alleged, inter alia, that Burlington's board breached its fiduciary duty to Samjens a Burlington shareholder, by agreeing to pay the break up fee to Morgan.

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ment: it could lose to a better bid if shareholders fail to approve its bid. The breakup fee is designed in part to compensate for the risk of losing a signed deal." Markell, *Case Against Breakup Fees*, at 353.

[2] Generally, breakup fees are allowed as long as they "enhance" the bidding, *CRTF*, 683 F.Supp. at 440; *Samjens*, 663 F.Supp. at 624–625; Joseph Samet & Donald J. Kravet, "*Use of Break-up and Topping Fees in Asset Sales*," Basics of Bankruptcy and Reorganization, 1993, and are reasonable in relation to the bidder's efforts and the size of the transaction, *Cottle*, 849 F.2d at 578. As long as procedural safeguards accompanied the approval of the bidding incentive by the board of directors, those bidding incentives will not be disturbed by the courts.

[3, 4] Agreements made by parties to a corporate combination are deferentially reviewed by non-bankruptcy courts under the business judgment rule. *Cottle*, 849 F.2d at 578; *CRTF Corp. v. Federated Dept. Stores, Inc.*, 683 F.Supp. 422 (S.D.N.Y.1988). Under the business judgment rule, there "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del.1985). Nonbankruptcy courts inquire into the procedures followed by the board of directors. If the process was fair, then the courts do not inquire into the substance of the transaction. The courts have, essentially, limited their review to a due process type of inquiry. The board of directors is in the business of running the corporation. If the procedures utilized by the directors are applied fairly, and if the directors do not violate any of their fiduciary duties, then, under the business judgement rule their decision will not be second-guessed.[3]

By contrast, when a bankruptcy court is reviewing proposed actions under § 363(b), those actions are necessarily outside of the ordinary course of business.[4]

Bankruptcy Treatment of Breakup Fees:

Some bankruptcy cases have followed the lead of nonbankruptcy courts and applied the business judgment rule to the use of bidding incentives in bankruptcy asset sales. In *Integrated Resources*, 147 B.R. 650, at 657 the Court looked for key factors, including the time and resources invested by the acquirer, the complexity of the transaction, and whether other bidders were attracted, but excluding the presence of an agreement which was binding on the parties pending court approval. In that case there were multiple bidders for the assets. In *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 888 (Bankr. S.D.N.Y.1990), a break-up fee was approved without discussion. The Court in *In re 995 Fifth Avenue Associates, L.P.*, 96 B.R. 24, 28 (Bankr.S.D.N.Y.1989), held that principles used outside bankruptcy to evaluate bidding incentives "have vitality by analogy in the chapter 11 context." (footnote omitted). *See* Paul B. Lackey, *An Empirical Survey and Proposed Bankruptcy Code Section Concerning the Propriety of Bidding Incentives in a Bankruptcy Sale of Assets*, 93 Colum.L.Rev. 720, 730 (1993) ("*Empirical Survey*").

Two bankruptcy courts have explicitly rejected the use of the business judgment rule for evaluating breakup fees in bankruptcy. *In re Hupp Industries, Inc.*, 140 B.R. 191 (Bankr.N.D.Ohio 1992); *In re America West Airlines, Inc.*, 166 B.R. 908, 911 (Bankr. D.Ariz.1994). In *Hupp*, the court cautioned that these fees must be "carefully scrutinized in § 363(b) asset sales to insure that the debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected." *Id.* at 196 (footnote omitted). The *Hupp* court listed seven factors to be considered in a determination of whether a breakup fee would be appropriate,[5] and suggested that breakup fees should "be highly scrutinized in view of the uncertainty of dividends, if any, to be received by claimants of the debtor's estate." *Id.* at 195.[6]

The *America West* court warned that bankruptcy courts should not blindly follow non-bankruptcy courts' application of the business judgment rule to break-up fees. *America West* rejected the business judgment rule because bankruptcy courts must determine what is in the best interests of the estate, and deference to the debtor's business judgment will not always produce the result which is best for the estate.[7] In rejecting the earlier line of bankruptcy cases which followed the business judgment rule, *America West* adopted and approved of the reasoning articulated by Markell in *The Case Against Breakup Fees* (supra). *America West*, 166 B.R. at 912.

Markell refutes the argument that breakup fees are a necessary inducement to draw bidders into the asset sale process. From an economic standpoint, he suggests that the debtor can eliminate the need for a breakup fee by increasing the available information about itself and standardizing bidding procedures. By doing so, the debtor would eliminate much of the cost associated with the bidding process and increase the marginal gain available to bidders. Further, providing more information to bidders enables them to more accurately determine the value of the debtor, so that they will be more likely to submit higher bids. Thus, the debtor can take certain actions which reduce or eliminate the need for a breakup fee and increase its chances of maximizing revenue for the estate.

Markell distinguishes the use of breakup fees outside of bankruptcy, noting that "non-bankruptcy courts focus on procedure in their review of breakup fees, while § 363(b) instructs bankruptcy courts to look at substance.... Bankruptcy courts look at process as well, but also have the ability and the responsibility to ask if the proposed transaction makes economic sense for all concerned." *Id.* at 374. Further distinctions between non-bankruptcy corporate combinations and § 363 asset sales include the inability of the trustee or debtor-in-possession to bind the estate without court approval, the obligation of debtor's management to sell the assets or reorganize, and the rights of the ultimate beneficiaries—not shareholders, but creditors.[8]

Finally, Markell argues that breakup fees are unnecessary to ensure that bidders get fair treatment in a bankruptcy asset sale. He refutes the theory that a breakup fee is liquidated damages for breach of an acquisition agreement. Liquidated damages are inappropriate because an enforceable contract for a sale of assets does not exist until court approval has been obtained. It is not a reverse option price since similar treatment is not given to the other bidders. Breakup fees should not be paid as compensation for

3. Query: Can a sale of all the assets of a business corporation ever really be "ordinary course" as to the directors' business judgement? Most Business Corporation Acts would seem to require shareholder approval before disposing of all of the assets of a corporation.

4. "The trustee after notice and a hearing, may use, sell, or lease, *other than in the ordinary course of business*, property of the estate." 11 U.S.C. § 363(b)(1) (emphasis added).

5. 1) Whether the fee requested correlates with a maximization of value to the debtor's estate;
2) Whether the underlying negotiated agreement is an arms-length transaction between the debtor's estate and the negotiating acquirer;
3) Whether the principal secured creditors and the official creditors committee are supportive of the concession;
4) Whether the subject break-up fee constitutes a fair and reasonable percentage of the proposed purchase price;
5) Whether the dollar amount of the break up fee is so substantial that it provides a "chilling effect" on other potential bidders;
6) The existence of available safeguards beneficial to the debtor's estate;
7) Whether there exists a substantial adverse impact upon unsecured creditors, where such creditors are in opposition to the break up fee.
Hupp, 140 B.R. at 194.

6. *Integrated Resources* suggested a "careful scrutiny" test, but failed to follow through on its own suggestion.

7. As one court noted, the best interests of the estate and the best interests of the debtor "do not always coincide." *In re Clark*, 1995 WL 495951, *5 (N.D.Ill 1995)

8. It must be noted, however, that non bankruptcy settings may have similar restrictions. A corporate sale of substantially all the assets of the corporation requires shareholder approval. Further, it has been held that the directors owe an increased fiduciary duty to creditors as insolvency approaches

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use by other bidders of the benefit of the initial bidder's due diligence, because bidders can adjust their bids to compensate for the cost of due diligence.

The estate has a better chance to maximize revenues when a significant amount of information is available to bidders. These "[i]ncreased revenues, in turn, translate into increased creditor dividends, a specific bankruptcy goal. If bidders suffer some loss that is made up by gains to creditors, we might very well accept that result on a policy basis." *Id.* at 379. In a free market, no-one is forcing these bidders to play the game; they choose to enter the bidding arena presumably because a profit is to be made. Why should the estate, and ultimately the creditors, pay the entry fee? *Id.* at 377–380.

In fact, as a later article notes, bidders in a § 363 asset sale enjoy several benefits not available to bidders operating outside of the Code.

> An initial advantage to acquiring a bankrupt company is that the investor knows that the company is in 'play.' In other words, a bankruptcy sale is not like a hostile takeover in which a company attempts to fend off potential acquirers.
>
> . . . .
>
> Additionally, a company in bankruptcy has certain powers that make it more attractive than nonbankrupt companies. Under the Bankruptcy Code, a debtor can reject executory contracts and leases and limit the damage claims that arise from the breach caused by this rejection. . . Buyers are thus particularly interested in purchasing companies that are in bankruptcy: there is little risk of being saddled with onerous obligations of the old company.

Lackey, *Empirical Survey*, at 736 (footnotes omitted).[9]

Additionally, as here, the bulk of the costs incident to the initial bid are incurred far in advance of the motion seeking approval of a breakup fee. Those due diligence costs are incurred for the benefit of the bidder, enabling that bidder to make an informed bid, irrespective and independent of the consideration of whether that bid should be an initial bid.

[5, 6] The *America West* court adopted Markell's reasoning on all these points, and proposed a new test to replace the business judgment rule in evaluating the use of bidding incentives in bankruptcy. The *America West* test "is not whether a break-up fee is within the business judgment of the debtor, but whether the transaction will 'further the diverse interests of the debtor, creditors and equity holders, alike.' " *America West*, 166 B.R. at 912 (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir.1983)). This Court agrees with *America West* that the proper standard for evaluating a breakup fee should be whether the interests of all concerned parties are best served by such a fee. The test is whether the payment of a breakup fee is in the best interests of the estate. As previously discussed, the business judgment rule is applied by courts when the decision being reviewed is within the ordinary course of the decision-maker's business. By virtue of the fact that the breakup fee comes before this Court as part of a motion to sell assets pursuant to § 363(b), it is necessarily outside the ordinary course of the debtor's (or trustee's) business.[10] When a debtor or trustee conducts a sale under § 363(b), it has an obligation to maximize revenues for the estate. *See, e.g., In re Atlanta Packaging Products, Inc.*, 99 B.R. 124, 131 (Bankr. N.D.Ga.1988); Thomas J. Salerno, et al., *Advanced Chapter 11 Bankruptcy Practice* Vol. I at § 7.139 (April 1994). Therefore, bankruptcy courts should carefully scrutinize breakup fees to be sure that, following the underlying policy guiding § 363, revenues will be maximized. As stated by another court, in another context, defining best interests of the estate, "The prime criterion for assessing the interests of the estate is the maximization of its value . . . ," *In re Clark*, 1995 WL 495951 (N.D.Ill.1995).

9. It should be noted that the Seventh Circuit has held that a sale under a liquidating plan is not always free of successor liability. *Chicago Truck Drivers v. Tasemkin*, 59 F.3d 48 (7th Cir.1995).

10. See note 5, supra.

[7, 8] Further, this debtor is no longer being reorganized; instead, this is a liquidating Chapter 11. This is of note for two reasons. First, regardless of whether a sale of assets is usually within the ordinary course of business, in this instance the debtor is not in the business of liquidating. Therefore, no particular deference should be given to the debtor's business decision. Second, the unsecured creditors' committee opposes payment of this breakup fee. In a liquidating Chapter 11, more deference is shown to the unsecureds' viewpoint than in a reorganization case "because the principle [sic] underlying rationale for the 'business judgment rule', i.e., that a DIP is entitled to some free reign in fulfilling its perceived mission of aiding the economy . . . is lacking in such circumstances." *In re After Six, Inc.*, 154 B.R. 876, 882 (Bankr.E.D.Pa.1993) (citations omitted). Therefore, absent compelling circumstances which clearly indicate that payment of the fee would be in the best interests of the estate, breakup fees should not be awarded in bankruptcy auction sales.[11]

Administrative Expense:

[9–13] Alimenta requests that it be granted an administrative expense claim pursuant to 11 U.S.C. § 503(b). In order to recover costs and expenses as a § 503(b)(3)(D) administrative expense claim, Alimenta must show a substantial contribution to the estate. Administrative expenses are priority claims, and thus are subject to strict scrutiny by the court. *Matter of Jack Winter Apparel, Inc.*, 119 B.R. 629, 632 (E.D.Wis.1990). Although "substantial contribution" is not defined in the Code, case law has established that for an entity to recover under § 503(b) it must show that (1) the services were rendered to benefit all parties in the case and not just the applicant; (2) the services provided a direct, significant and demonstrable benefit to the estate and the unsecured creditors; and (3) the services were not duplicative. *In re Envirodyne Industries, Inc.*, 176 B.R. 815, 819 (Bankr. N.D.Ill.1995). *See Jack Winter*, 119 B.R. at 633. The burden is on the applicant to prove its substantial contribution. *In re Lister*, 861 F.2d 55, 57 (10th Cir.1988); *Envirodyne*, 176 B.R. at 819. "Compensation under § 503(b) must be preserved for those rare occasions when the creditor's involvement truly fosters and enhances the administration of the estate." *Envirodyne*, 176 B.R. at 819.

Best Interests Of The Estate:

Under either the breakup fee or administrative expense analysis, this Court must determine whether reimbursing Alimenta's costs and expenses is in the best interests of the estate. Alimenta has argued that as the initial bidder, it rendered a benefit to the estate. Although no sale was completed, it created an opportunity for bidding at higher prices, and an increased value was placed on the Debtor's assets. In addition, Alimenta notes that it would not have made the initial bid if a breakup fee were not contemplated.

The Court rejects Alimenta's statement that a benefit was rendered to the estate by its bid. Since "any money that a bidder receives through a bidding incentive comes out of the pockets of the creditors of the estate . . there should be a direct relationship between the reimbursement an unsuccessful buyer receives and the benefit to the estate from the unsuccessful buyer's bid." [12]

11. There may be a setting in which due diligence and audit type costs resulting from an auction sale of assets may be reimbursable as an administrative expenses. This opinion is not meant to anticipate all the unique settings in which such recovery might be appropriate, nor to rule in advance on proposed scenarios. A court may conclude, prior to the sale, that full disclosure by way of an audit report to be filed and made available to interested parties could constitute a meaningful incentive to the maximization of the sale process. Should a creditors committee request that such a report be prepared, that expense could conceivably be an administrative expense. So too, if there are insufficient funds for the audit an interested potential bidder may be willing to advance the cost on condition of reimbursement as an administrative expense. Such a timely disclosure may be demonstrated to benefit the estate even if the assets are not eventually sold.

12. The Court notes, without deciding the issue, that if an initial bidder is to be rewarded with a breakup fee the minimum increment which the next bidder may acceptably bid over the initial bidder must be the amount of the fee if such to equalize the benefit to the estate.

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Lackey, *Empirical Survey*, at 738 (footnotes omitted). An opportunity for other bidders to bid higher than Alimenta without a subsequent sale is of no benefit to the estate.

[14] The ultimate question becomes, who pays the costs of investigating the potential subject of an auction? If Debtor agrees to reimburse a bidder or to pay the opportunity cost of bidding, then the creditors are paying those costs. The goal of a bankruptcy auction, however, is to maximize the return to the estate. The costs of bidding should be borne by those who are best able to bear them—the bidders who have voluntarily entered the bidding process, and who are bidding for a company with title free and clear of liens and with all the advantages provided by the Bankruptcy Code. Markell, *Case Against Breakup Fees*, at 374 (footnote omitted); Lackey, *Empirical Survey*, at 736 (footnotes omitted). This court rejects the line of cases which hold that break-up fees and bidding incentives in general are analyzed under the business judgment rule, and finds the reasoning of *Hupp* and *America West* persuasive. When the break-up fee before this Court is carefully scrutinized to determine whether it is in the best interests of the estate, and whether such reimbursement is appropriate to reward a substantial contribution to the estate, the answer is clearly no. Alimenta's bid may have lured in other bidders, but none of the offers received were reasonable. No sale was consummated and the estate received no benefit from Alimenta's bid.

Standing

[15] Finally, as Debtor noted for the Court, Alimenta is not one of the entities described in 11 U.S.C. § 503(b)(3)(D) which has standing to bring an administrative expense claim incurred by making a substantial contribution to the case. (July 12, 1995 Tr. at 12).[13]

CONCLUSION

For the reasons stated above, Alimenta's Application for Reimbursement of Costs and Expenses Incurred in Unsuccessful Bidding will be denied.

13. Only creditors, indenture trustees, equity security holders, and committees representing creditors or equity security holders other than as appointed under 11 U.S.C. § 1102 may proceed under § 503(b)(3)(D). 11 U.S.C. § 503(b)(3)(D)

In re Richard Glenn CARRELL, Kathy Ann Carrell, Debtors.

Bankruptcy No. 95-41253-ABF.

United States Bankruptcy Court, W.D. Missouri.

Sept. 6, 1995.

Chapter 7 trustee who objected to "tool of the trade" exemption claimed by Chapter 7 debtor-wife in transmission cords and rebuild kits used in her and her husband's automotive repair business. The Bankruptcy Court, Arthur B. Federman, J., held that debtor-wife did not have to personally use transmission cords and rebuild kits in conduct of automotive repair business to be entitled to exemption in articles as necessary tools of the trade actually used, by someone, in conduct of business.

Objection overruled.

1. Exemptions ⇐45

Debtor-wife was entitled to Missouri "tools of the trade" exemption in transmission cords and rebuild kits used in her and husband's automotive repair business, though debtor-wife did not personally use such equipment, but performed work for business only in her capacity as bookkeeper and manager; debtor-wife was dependent upon automotive repair business for her livelihood, and equipment in question was undisputedly used in that business, albeit not by debtor-wife personally. V.A.M.S. § 513.430(4).

See publication Words and Phrases for other judicial constructions and definitions.

2. Exemptions ⇐45

"Tools of the trade," within meaning of Missouri exemption, are tools or other mechanical instruments or appliances necessary to practice of debtor's trade, business or profession and used in practice thereof. V.A.M.S. § 513.430(4).

3. Exemptions ⇐45

Under Missouri law, debtor may remove property from reach of creditors as exempt "tools of the trade" only if property is needed for reasonable conduct of debtor's trade and is so used. V.A.M.S. § 513.430(4).

4. Exemptions ⇐45

Although article must actually be used in conduct of trade or business, in order to qualify as exempt "tool of the trade" under Missouri law, there is no requirement that debtor personally use tool, only that tool is actually used in debtor's trade. V.A.M.S. § 513.430(4).

5. Exemptions ⇐4

Exemption statutes are enacted for relief of debtor and are to be liberally construed.

Raymond Calkins, Kansas City, MO, for debtors.

Robert A. Pummill, Pummill & Rubin, P.C., Kansas City, MO, for trustee.

MEMORANDUM OPINION AND ORDER

ARTHUR B. FEDERMAN, Bankruptcy Judge.

The Chapter 7 Trustee, Robert A. Pummill (the "trustee") objects to the tools of the trade exemption claimed by debtor Kathy Ann Carrell with respect to certain transmission cords and rebuild kits used in the operation of a business owned by herself and her husband, debtor Richard Glen Carrell. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) over which the Court has jurisdiction pursuant to 28 U.S.C. § 1334(b), 157(a), and 157(b)(1). For the reasons set forth below, the trustee's objection is OVERRULED.

The facts here are straightforward. The debtors own an automotive repair shop. Debtor Richard Glenn Carrell is himself a mechanic. Debtor Kathy Ann Carrell performs other work at the shop on a part-time basis. Neither of the debtors is paid a salary by such shop, but they instead take a draw for payment of their living expenses as such funds are available.

Debtors own, as tenants by the entirety, certain tools used in the auto shop. Both debtors claim a tools of the trade exemption as to such tools. The issue here is whether debtor Kathy Ann Carrell is entitled to claim such an exemption. Mo.Stat.Ann. § 513.430(4) (Supp.1995). For these purposes, I assume that she does not actually use such tools to repair vehicles, but that her livelihood is derived from the ownership of such tools.

[1-5] The Bankruptcy Code (the "Code") permits a debtor to exempt certain property, unless the state of residence has "opted out" of the Code exemption provisions. 11 U.S.C. § 522(b)(2)(A). The State of Missouri has "opted out" of the Code provisions by providing that any person seeking relief under Title 11 shall be allowed to exempt property that is exempt from attachment and execution under the laws of Missouri or under Federal law other than Title 11. Mo.Stat.Ann. § 513.427 (Supp.1995). In Missouri, a person may exempt from attachment and execution, to the extent of that person's interest, "[a]ny implements, professional books or tools of the trade of such person or the trade of a dependent of such person not to exceed two thousand dollars in value." Mo.Stat. Ann. § 513.430(4) (Supp.1995). Tools of the trade are defined as "the tools or other mechanical instruments or appliances *necessary* to the practice of any trade, business or profession and *used in the practice thereof*." *Steward v. Commerce Bank of Blue Hills (In re Steward)*, 7 B.R. 121, 123 (Bankr.W.D.Mo. 1980). In *Steward* the Court held that in order to exempt certain property as a tool of

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Mario RAMOS–MENIEUR, Petitioner,

v.

UNITED STATES of America, Respondent.

No. Civ.A. 01–40109–NMG.

United States District Court, D. Massachusetts.

June 27, 2001.

Upon alien's pro se motion to vacate judgement and sentence, the District Court, Gorton, J., held that alien's claim, that he was not advised of the adverse immigration consequences of entering a guilty plea, could not provide basis for section 2255 relief.

Motion denied.

1. Criminal Law ⇐274(9)

Court could not permit withdrawal of guilty plea because petitioner failed to file such motion before sentencing. Fed.Rules Cr.Proc.Rule 32(e), 18 U.S.C.A.

2. Criminal Law ⇐1462

Petitioner's claim, that he was not advised of the adverse immigration consequences of entering a guilty plea, could not provide basis for section 2255 relief. 28 U.S.C.A. § 2255.

Mario Ramos-Menieur, Greenfield, MA, pro se.

MEMORANDUM AND ORDER

GORTON, District Judge.

On June 19, 2001, petitioner, now incarcerated at the Franklin County Jail, submitted for filing his self-prepared pleading entitled "Motion to Vacate Judgement & Sentence" accompanied by an Application to Proceed Without Prepayment of Filing Fees. Although it appears petitioner intended to file this motion in his criminal action, C.R. 97–40032–NMG, the clerk assigned this motion a separate civil action number. Petitioner does not provide a jurisdictional basis for this motion and the court will not construe this motion under 28 U.S.C. § 2255.

On March 13, 2001, petitioner entered a guilty plea pursuant to a plea agreement and was sentenced on May 21, 2001. *See United States v. Dias*, C.R. No. 97–40032–NMG. Petitioner now complains that at the time of his guilty plea, the court and his attorney did not provide him with a warning that his guilty plea could result in his deportation.[1] Petitioner contends (Motion, ¶ 2) "removal proceedings were instituted against [petitioner] when the Immigration and Naturalization Service ['INS' or 'Service'] issued a 'Notice to Appear' in order to show cause of non-deportability." It is clear petitioner seeks to have his conviction set-aside in order to avoid being considered deportable.

[1] To the extent petitioner seeks to file this motion pursuant to Rule 32(e) of the Federal Rules of Criminal Procedure, the court cannot permit withdrawal of the plea because petitioner failed to file such motion before sentencing. Rule 32(e) provides that after sentencing "a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255."

[2] Petitioner's claim, that he was not advised of the adverse immigration consequences of entering a guilty plea, cannot provide the basis for Section 2255 relief. The application of the collateral-consequences doctrine "bar[s] any ineffective assistance claims based on an attorney's failure to advise a client of his plea's immigration consequences." *United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir.2000). Because deportation is a collateral consequence of a guilty plea, district courts are not obliged to grant plea withdrawal motions filed by defendants who realize, post-plea, the immigration implications of their conviction. *Id.* at 28. (citations omitted).

Based upon the foregoing, it is hereby

ORDERED, petitioner's Application to Proceed Without Prepayment of Fees is ALLOWED; and it is further

ORDERED, the *pro se* Motion to Vacate Judgement and Sentence is DENIED.

SO ORDERED.

1. The warning, which is required in state court proceedings in the Commonwealth of Massachusetts pursuant to G.L. ch. 278, § 29D, provides in pertinent part. "The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court advises such defendant of the following. 'If you are not a citizen of the United States, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation ...'

The TERRA FOUNDATION FOR THE ARTS, an Illinois Not–for–Profit Corporation, Paul Hayes Tucker, Director, Chairman, and President, the Terra Foundation for the Arts, Alan K. Simpson, Director, the Terra Foundation for the Arts, and Judith Terra, Director, the Terra Foundation for the Arts, Plaintiffs,

v.

Floyd D. PERKINS, in his official capacity as Assistant Attorney General, State of Illinois, Defendant.

No. 01 C 4976.

United States District Court, N.D. Illinois, Eastern Division.

June 29, 2001.

Arts foundation and three of its directors brought Section 1983 action against assistant state attorney general charged with enforcing state's charitable institution laws, alleging that attorney violated their federal due process and free speech rights by intimidating two other directors into voting to change foundation's by-laws. Plaintiffs moved for temporary restraining order (TRO), seeking to prevent either the vote from taking place or the two other directors from participating in the vote. The District Court, Bucklo, J., held that: (1) two pending state court cases warranted abstention under the *Younger* doctrine; (2) plaintiffs did not have standing to seek TRO against assistant state attorney general; and (3) neither joint action theory nor state compulsion test applied to allow liability under Section 1983.

Motion denied.

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1. Federal Courts ⇐49

Pursuant to *Younger* abstention doctrine, federal courts cannot enjoin ongoing state criminal proceedings unless extraordinary circumstances are present.

2. Federal Courts ⇐41, 46

Federal court abstention is appropriate, due to pending state proceedings, under the *Younger* doctrine if the impacted state proceedings satisfy the following requirements: (1) the judicial or judicial-in-nature state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges.

3. Federal Courts ⇐47.1

Federal court's abstention from deciding whether arts foundation was entitled to temporary restraining order (TRO) against state attorney general, who allegedly intimidated two directors into voting to change foundation's by-laws in violation of due process, was warranted under the *Younger* doctrine due to two pending cases in state court involving same parties and subject matter; state had important interest in its ability to regulate charitable institutions, and there was ample opportunity to raise any constitutional challenges in the state court proceedings.

4. Federal Civil Procedure ⇐103.2, 103.3

In order for a party to establish standing to bring suit in federal court, three requirements under Article III of the Federal Constitution must be met: (1) the party must have personally suffered an actual or threatened injury caused by the defendant's illegal conduct; (2) the injury must be fairly traceable to the challenged conduct; and (3) the injury must be one that is likely to be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Civil Rights ⇐201

Arts foundation did not have standing to seek temporary restraining order (TRO) preventing directors from voting on proposed change in foundation by-laws, in Section 1983 action against assistant state attorney general charged with enforcing state's charitable institution laws alleging that attorney violated federal due process by intimidating two directors into voting to change by-laws; attorney was out of the country at the time vote was being taken and did not even know that he had been sued. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

6. Civil Rights ⇐198(4)

The "joint action" theory, which allows private action to be linked with state action for purposes of subjecting private actors to liability under Section 1983, says that a private defendant acts under color of state law when he is a willful participant in joint action with the State or its agents. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⇐198(4)

A charge of joint action, which allows private action to be linked with state action for purposes of subjecting private actors to liability under Section 1983, amounts to alleging some agreement between private and public actors to violate plaintiff's constitutional rights. 42 U.S.C.A. § 1983.

8. Civil Rights ⇐198(4)

A requirement of the joint action theory, which allows private action to be linked with state action for purposes of subjecting private actors to liability under Section 1983, is that both public and private actors share a common, unconstitutional goal. 42 U.S.C.A. § 1983.

9. Civil Rights ⇐198(3.1)

Arts foundation could not establish "joint action" between two foundation directors and assistant state attorney general charged with enforcing state's charitable institution laws, based on allegations that the directors were coerced into changing their votes on a settlement by attorney general, and therefore, directors could not be held liable for due process violation under Section 1983; directors did not invoke any state authority. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

10. Civil Rights ⇐198(3.1)

To state a §1983 claim against a private actor, plaintiffs must show that the defendant invoked state authority in such a way that the defendant should be considered a state actor. 42 U.S.C.A. § 1983.

11. Civil Rights ⇐198(3.1)

The "state compulsion test" allows a §1983 claim to be stated against a private defendant when the state has so implicated itself in the defendant's action that the state has in effect compelled the action. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

12. Civil Rights ⇐198(3.1)

"State compulsion theory" did not apply to allow arts foundation to state a Section 1983 claim against two of its directors, alleging due process violations resulting from directors changing their votes due to alleged intimidation by assistant state attorney general, despite attorney general's conduct of naming one director as a defendant in a lawsuit and investigating the school of which the other director was head; such actions did not require directors to change their votes. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Laurel G. Bellows, Marcia Topper Wolf Bellows & Bellows, Chicago, IL, Lawrence E. Levinson, Leonard Garment, Verner, Liipfert, Bernhard, McPherson and Hand, Washington, DC, K. Chris Todd, John H Longwell, Neil M. Gorsuch, Kellogg, Huber, Hansen, Todd & Evans Washington, DC, for plaintiffs.

AUSA, United States Attorney's Office, Chicago, IL, for defendant.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

Plaintiffs, The Terra Foundation for the Arts, Paul Hayes Tucker, Alan K. Simpson, and Judith Terra, the latter three all directors of the Terra Foundation, have sued Floyd D. Perkins, an Assistant Attorney General for the State of Illinois who is charged with enforcing the State's charitable institution laws, alleging that Mr. Perkins violated their federal constitutional rights to due process and freedom of speech by intimidating two other Terra Foundation directors who, as a result of the intimidation,[1] are about to vote to substantially change the by-laws of the Terra Foundation and take other acts that will force the Terra Foundation to keep its valuable art collection in Illinois for many years. Plaintiffs seek a temporary restraining order that would prevent either the vote that is expected to take place tomorrow, June 29, 2001, from taking

1. Dr. Stephanie Marshall is head of the Illinois Mathematics and Science Academy, an elite but public high school in Illinois. The other director in question, Dr. Theodore Siebens, is curator of the Fogg Museum at Harvard University and has no ties to public institutions in Illinois but was allegedly intimidated by proposed changes of conflict of interest in an amended complaint drafted but never filed by the State of Illinois in related state litigation

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place, or would prevent the two allegedly intimidated directors from taking part in that vote. Plaintiffs have not sued the two directors.[2] Plaintiffs nevertheless say that an injunction against the Attorney General will prevent either any vote from taking place or the two directors' participation in that vote on the ground that because of the intimidation the two directors have become de facto agents of the Attorney General. They argue therefore that an injunction against the defendant will be binding on the directors.

There are at least two problems with plaintiffs' attempted resolution of their conflict in this court. First, there is an ongoing lawsuit (two actually) presently pending in the Circuit Court of Cook County in which the present plaintiffs are defendants and involving the same subject matter raised in their federal court complaint. It is actually a proposed resolution of those lawsuits through a settlement which is expected to be voted on tomorrow that plaintiffs seek to stop. Plaintiffs say that neither the Rooker–Feldman doctrine, *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), nor the Anti-Injunction Act, 28 U.S.C. § 2283, prohibit this court from acting so long as it acts before the anticipated consent decree is entered in state court, but assuming that is so, principles of comity and federalism call for abstention where the issues raised can be litigated in the ongoing state action and where action by the federal court would interfere in the state proceeding.

[1] The State of Illinois, representing Mr. Perkins, invokes *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), in support of abstention. *Younger* holds that federal courts cannot enjoin ongoing state criminal proceedings unless extraordinary circumstances are present. In a companion case, *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Court applied a similar result to actions for declaratory judgment because they would also interfere with state prosecutions. *Younger* has been extended widely, including to civil contexts. For example, the State of Illinois likens this case to *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (*Younger* abstention appropriate when the relief sought by the federal plaintiff was an injunction against the party that had prevailed in state court to prevent it from executing its judgment prior to an appeal to a state appellate court). That case is not precisely on point because there, judgment had been entered, whereas in the case before me the goal is to prevent judgment from being entered. However, judgment need not have been entered for *Younger* abstention to be appropriate.

[2, 3] The Seventh Circuit states that abstention is appropriate "if the impacted state proceedings satisfy the following requirements: (1) the judicial or judicial-in-nature state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) there is an adequate opportunity in the state proceedings to raise constitutional challenges." *AFSCME v. Tristani*, 898 F.2d 1302, 1305 (7th Cir.1990). These requirements are satisfied here. The state court proceedings are obviously judicial. The State of Illinois has set forth what it believes to be, and what I agree are, important state interests in its ability to regulate charitable institutions. It is not necessary that I endorse the policy adopted by the state to recognize that the interests it invokes are important. Finally, there was—and as far as I know still is—ample opportunity to raise any constitutional challenges in the state court proceedings.

The plaintiffs respond that section 1983 provides an exception to the usual application of *Younger* because federal protection is needed in such cases to vindicate plaintiffs' rights against state abuses. This is not in general true. For example, in *Simpson v. Rowan*, 73 F.3d 134, 138 (7th Cir.1995), the court affirmed the use of *Younger* abstention in a § 1983 case seeking civil relief for constitutional violations of a man convicted of a crime; *accord State of Indiana v. Hicks*, 131 F.3d 1205, 1210 (7th Cir.1997)(quoting from *Barichello v. McDonald*, 98 F.3d 948, 954 (7th Cir.1996): "*Younger* has come to mean that absent unusual circumstances, a federal court must refrain from entertaining injunctive relief which might interfere with the ... judicial process of state courts ....'"). Section 1983 is not a magic key into federal court, especially when, as here, there is ample opportunity to litigate the constitutional issues in state court. Moreover, there is no reason to think that the plaintiffs require the special protections of federal court even though the state is a party to the state court action. The only basis that the plaintiffs give for thinking there may be a problem with the state court is that the very able state court judge is elected. That is not a reason to think that she cannot fairly resolve charges of misconduct made against the state and its officers, such as Mr. Perkins.

[4] Even if I were not to abstain, however, I could not grant the temporary restraining order sought by the plaintiffs. In the first place, plaintiffs do not appear to have standing. In order for a party to bring suit in federal court, three constitutional requirements under Article III must be met: "(1) the party must have personally suffered an actual or threatened injury caused by the defendant's illegal conduct; (2) the injury must be fairly traceable to the challenged conduct; and (3) the injury must be one that is likely to be redressed by a favorable decision." *United Transp. v. Surface Transp. Board*, 183 F.3d 606, 611 n. 2 (7th Cir.1999). In this case, the last requirement is missing.

[5] The only defendant named is Mr. Perkins. It would do no good to enjoin him from interfering in Board business or intimidating the directors with respect to the meeting at question. The State of Illinois says that he is in Canada, and does not even know that he has been sued. As the State says, with respect to his involvement, tomorrow is the best time to hold the meeting.

The plaintiffs really want me to enjoin Drs. Marshall and Stebbins from voting or coming to the meeting, but they are not defendants. If they were named, however, they could not be sued under section 1983, the basis for my jurisdiction. The plaintiffs suggest that they can be enjoined as persons acting "in consort" with the defendant, or as his agents. But they offer no authority that persons who have been intimidated or influenced by a state actor are acting in consort with them or as agents of those who intimidate them, or indeed that they could be named as section 1983 defendants at all. That section requires state action. And that is hard to show.

The Supreme Court has articulated several tests for when private action is state action: the "public function" test, the "state compulsion" test, the "nexus" test,

2. Plaintiffs did offer to add them as defendants but the addition of Dr. Marshall would almost certainly prevent diversity jurisdiction, alleged presently, and unless they are state actors, could not form a basis for subject matter jurisdiction under 28 U.S.C. § 1343(a)(3), the second basis on which plaintiffs allege subject matter jurisdiction. *See* 42 U.S.C. § 1983. Whether they can plausibly be considered to be acting under color of state law is discussed further in this opinion.

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and the "joint action" test. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). Of these, only the "joint action" and "state compulsion" tests are worth considering. The tests are fact-specific. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Dunham v. Frank's Nursery & Crafts, Inc.*, 919 F.2d 1281, 1284 (7th Cir.1990).

[6–8] The "joint action" theory, articulated in cases like *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), says that a private defendant acts under color of state law when he is "a willful participant in joint action with the State or its agents." A charge of joint action amounts to alleging "some agreement between private and public actors to violate plaintiff's constitutional rights," *Cunningham v. Southlake Center for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir.1991) (citing *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir.1983) ("To prove a conspiracy between private parties and the government under § 1983, an agreement or 'meeting of the minds' to violate constitutional rights must be shown.")). "A requirement of the joint action charge therefore is that both public and private actors share a common, unconstitutional goal." *Id.* If the directors in question are unwillingly intimidated, however, they are not willful joint actors who share Mr. Perkin's hypothetically unconstitutional goals. *See Moore v. Marketplace Restaurant, Inc.*, 764 F.2d 1336, 1352 (7th Cir.1985).

[9] I suppose one could be an unwilling co-conspirator, but what is alleged here is not that Drs. Marshall and Stebbins share any unconstitutional goals or have conspired, however unwillingly, to deprive the plaintiffs of their rights, but that they were somehow coerced into changing their votes on the settlement, basically to see Mr. Perkins off their backs, which change will have the effect of furthering Mr. Perkin's unconstitutional goals. That is not what is required.

[10] But the situation for the plaintiffs is worse than this analysis suggests. "To state a § 1983 claim against a private actor, plaintiffs must show that the defendant invoked state authority in such a way that the defendant should be considered a state actor." *Davis v. Union National Bank*, 46 F.3d 24, 25 (7th Cir.1994). For example in *Del's Big Saver Foods, Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344 (7th Cir.1986), the court held that a private person became a state actor for purposes of the state action requirement when he repossessed collateral on the strength of an ex parte order issued by a court. The ex parte order instructed the sheriff to assist the private person if need be to carry out the order. In that case it was not necessary to call the sheriff. The court held that "[t]he fact that the sheriff remained in the background and hence could not be joined as a defendant does not deprive Carpenter Cook's action in enforcing a judicial order of its character as state action." *Id.* at 1346. Here, it would not be possible to say that Drs. Marshall and Stebbins invoked the power of the Illinois Attorney General's office, which remains in the background: they are not argued to invoke any power; they have no court or administrative order to carry out, and they could not call in Mr. Perkins to back them up if they wanted to, which, the plaintiffs argue, they do not.

[11] The plaintiffs' best shot is the "state compulsion" test, under which a § 1983 claim may be stated "when the state has so implicated itself in the defendant's action that the state has in effect compelled the action." *Stearns v. Clarity Media, Inc.*, 39 F.3d 1394, 1398 (7th Cir.1994). This test originated in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There the Court held that a "state is responsible for the [unconstitutional] act of a private party when the state, by its law, has compelled the act." "When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby 'to a significant extent' has 'become involved' in it." *Id.* (citation omitted). However the command has to involve action under color of some "statute, ordinance, regulation, custom, or usage, of a State," in the language of § 1983 itself. *Id.*

[12] The actions challenged here are not analogous to the facts in *Adickes*, where a white woman was denied restaurant service (and subsequently arrested for vagrancy) because she was in the company of African-Americans. The Supreme Court held that it would satisfy state action if she showed that she was refused service by the defendant restaurant as the result of a state enforced custom compelling segregation of the races in Mississippi restaurants. *Adickes*, 398 U.S. at 171, 90 S.Ct. 1598. In this case, there are two actions alleged to force the directors to change their votes. One is proposing to name Dr. Stebbins as a defendant in a lawsuit. The other is investigating Dr. Marshall's school. These are both official practices, but in the first place, neither of these involve a "command." They do not require the conduct they are supposed to induce—that these directors change their votes. The difference between inducement and requirement is a matter of degree, but not every incentive and disincentive is coercive. For example, in *Mendoza v. United Farm Workers Organizing Committee*, 487 F.2d 311, 312 (9th Cir.1973) (per curiam), the court rejected the idea that a union shop agreement that grows out of the "normal give and take of collective bargaining and labor-management relations," is coercive, although anyone must recognize that it involves various threats and unwelcome inducements. It might be different if Mr. Perkins had held a gun to the heads of Drs. Marshall and Stebbins, but all he did was to name one in a proposed amendment to a lawsuit and allegedly investigate the school of another.

Moreover, the conduct being induced (a changed vote) is not itself unlawful, unlike the racial discrimination involved in *Adickes*. Essentially the plaintiffs argue that Mr. Perkins used his undoubtedly legitimate authority to name Dr. Stebbins in a complaint and to investigate Dr. Marshall's school in order to get them to do something lawful, which the plaintiffs argue will have unfortunate effects. If the directors had just changed their minds, the plaintiffs would just have to live with it. What difference, as far as their status as potential § 1983 defendants goes, does it make if they changed their votes because of the inducements by Mr. Perkins? Even if Mr. Perkin's intentions were to violate the plaintiffs' constitutional rights by getting these directors to vote to approve the settlement, the plaintiffs do not explain, either with authority or with logic, how the directors can be charged with violating the plaintiffs' rights even under compulsion if they do what they had a lawful right to do in any event.

Since enjoining Mr. Perkins would be pointless, and Drs. Marshall and Stebbins are not state actors and cannot be sued under Section 1983, there is no relief that I can give that would redress plaintiffs' complaint. They lack standing. I abstain in any event. The plaintiffs' motion for a temporary restraining order must therefore be denied. The action is dismissed.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on Friday, January 4, 2002, we filed a Memorandum of Law in Support of Dr. Stebbins' and Dr. Marshall's Motion to Dismiss, or in the Alternative For a Stay, a copy of which is hereby served upon you.

DR. THEODORE E. STEBBINS, JR. AND
DR. STEPHANIE PACE MARSHALL

By: _____
One of Their Attorneys

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McDermott, Will & Emery
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CHI99 3805452-1.060885.0013

CERTIFICATE OF SERVICE

I, Lizabeth Boyer, attorney for Dr. Theodore E. Stebbins, Jr. and Dr. Stephanie Pace Marshall, state that I caused to be served a copy of the **Memorandum of Law in Support of Dr. Stebbins' and Dr. Marshall's Motion to Dismiss, or in the Alternative For a Stay** by causing a copy to be sent by facsimile to the named parties on the attached service list as set forth on the attached transmission sheet. The following named parties were also served by messenger:

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IN THE CIRCUIT COURT OF COOK COUNTY, CHICAGO, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership	No. 01 L 009112 Judge Julia M. Nowicki

WINSTON & STRAWN'S MOTION TO DISMISS

Winston & Strawn moves to dismiss Count III of Plaintiffs Paul Hayes Tucker ("Tucker"), Judith Terra ("Terra"), and Alan Simpson ("Simpson") as follows:

1. On November 20, 2001, this Court granted Plaintiffs Tucker, Terra, and Simpson leave to add Winston & Strawn as a named defendant in the First Amended Complaint.

2. Under 735 ILSC 5/2-615, Winston & Strawn's Motion to dismiss should be granted for the following reasons:

(1) The dissenting directors fail to state a colorable claim against Winston & Strawn;

(2) Courts frown upon disqualifying counsel as a litigation ploy;

(3) The dissenting directors have no standing to sue Winston & Strawn;

(4) The dissenting directors also fail to state a claim against Winston & Strawn with the requisite specificity; and

(5) The dissenting directors' claim for declaratory relief is non-justiciable.

3. Winston & Strawn submits herewith a Memorandum in Support of its Motion to Dismiss outlining these points further.

4. In addition, to the extent that Tucker, Terra, or Simpson assert that other issues remain against Winston & Strawn, it adopts by reference the memoranda of the other defendants on those other purported remaining issues and where they further support Winston & Strawn's position discussed herein.

WHEREFORE, for the reasons stated herein and in the supporting memoranda, Winston & Strawn prays that its motion to dismiss be granted, and that it be awarded such other relief as just and appropriate.

Respectfully submitted,

Winston & Strawn

By: Scott J. Szala
One of Its Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, CHICAGO, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JAN 14 2002

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership

No. 01 L 009112

Judge Julia M. Nowicki

To: See Attached Service List

NOTICE OF FILING AND CERTIFICATE OF SERVICE

Please take notice that on January 7, 2002, we filed with the Clerk of the Circuit Court of Cook County, Law Division, Winston & Strawn's Motion to Dismiss and Memorandum in Support of its Motion to Dismiss, a copy of which is attached and hereby served upon you.

Respectfully submitted,

Winston & Strawn

By: _____
One of Its Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, CHICAGO, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership	)	No. 01 L 009112 Judge Julia M. Nowicki

WINSTON & STRAWN'S MEMORANDUM IN SUPPORT
OF ITS MOTION TO DISMISS

Defendant Winston & Strawn moves to dismiss the purported claim of Plaintiffs Paul Hayes Tucker ("Tucker"), Judith Terra ("Terra"), and Alan Simpson ("Simpson") in the First Amended Complaint ("Complaint" or "Cmpt") filed against it. In short, Plaintiff's Complaint fails to allege any colorable claim against Winston & Strawn. As such, under 735 ILCS 5/2-615, Winston & Strawn's motion to dismiss should be granted.

Background Facts

Defendant Terra Foundation for the Arts ("Terra Foundation") is a not-for-profit corporation which oversees an American art collection and other assets. Cmpt, ¶1. Plaintiffs Tucker, Terra, and Simpson, and are non-resident directors of the Terra Foundation. Id., ¶¶7-9. Defendant Winston & Strawn is an Illinois partnership and counsel to the Terra Foundation. Id., ¶24. Winston & Strawn has not filed an appearance for any defendant in this lawsuit other than itself.

The Buntrock Lawsuit, Mediation, And The Consent Judgment And Order

In September 2000, Terra Foundation Directors Dean Buntrock and Ron Gidwitz filed a lawsuit against the Terra Foundation and certain of its directors, Tucker, Simpson, and Terra in Buntrock v. Terra Foundation, Circuit Court of Cook County, Chicago, Illinois alleging certain breaches of fiduciary duty regarding a possible move of the Terra Foundation and its assets out of Chicago. Id., ¶41. Thereafter, the Attorney General of the State of Illinois (the "State") intervened. Id., ¶43. After a mediation, established by the presiding judge, the Honorable Dorothy Kirie Kinnaird, among the directors, the State, and the mediator, a proposed settlement was reached.

On June 29, 2001, the Terra Foundation Board met to consider the proposed settlement. Id., ¶67. A quorum being present, by a vote of 6-2, the directors approved the Consent Order and Judgment providing, in part, that the Terra Foundation must remain headquartered in Illinois for 50 years, must exhibit its American Art collection in the Chicago area during that time, and must have elections for five new Board members. Id., ¶¶67, 73. While Terra and Tucker voted against the proposal, Simpson did not bother to attend this Board meeting. Id. (Tucker, Terra, and Simpson hereafter will sometimes be referred as the "dissenting directors.") On July 26, 2001, Judge Kinnaird entered the Consent Judgment and Order memorializing this settlement. On August 22, 2001,

Tucker, Simpson, and Terra filed a notice of appeal from Judge Kinnaird's July 26 Order.

The Tucker, Terra, and Simpson Lawsuit

On July 31, 2001, Tucker, Terra, and Simpson sued the Terra Foundation, certain of its directors, the State's Attorney General and his assistant, Floyd Perkins. On November 20, 2001, this Court granted the dissenting directors' leave to file its First Amended Complaint and sue the five new members of the Terra Foundation's Board, Sidley & Austin, now Sidley, Austin, Brown & Wood ("Sidley"), and Winston & Strawn.

According to the Complaint, contrary to the Illinois Rules of Professional Conduct, Winston & Strawn "continues to engage in the concurrent, adverse representation of the Foundation and at least one of the defendant directors." Id., ¶¶87-88. That director is unidentified. Allegedly, Winston & Strawn has a "hopelessly conflicted representation" because it acts as "corporate" counsel for the Terra Foundation and this unidentified director client. Id., ¶88. Allegedly, Winston & Strawn provides substantive legal counsel regarding litigation tactics and outcomes, resulting in a breach of fiduciary obligations to the Terra Foundation and its directors. Id. Tucker, Terra, and Simpson further allege that Winston & Strawn compounds these purported breaches and violations of ethical rules -- Illinois Rules of Professional Conduct, Rules 1.1, 1.3, 1.4, and 1.7 -- by failing to challenge Sidley's representation in the Buntrock case. Id., ¶90. The dissenting directors claim that Winston & Strawn knew that: serious breaches of alleged fiduciary duties were asserted against one or more of the Board members; the mediator was allegedly conflicted; and the State's intervention was improvident. Id., ¶91. The dissenting directors fail to state or allege that: breaches of fiduciary duty were first alleged against themselves in the Buntrock case; Winston & Strawn was not part of the mediation sessions and did not recommend or appoint the mediator (Judge Kinnaird did); and

Winston & Strawn had no authority to stop the State from intervening in the Buntrock case. The dissenting directors further allege that Winston & Strawn's inaction and conduct (and that of Sidley) has purportedly compromised the interests of the Terra Foundation because certain legal fees would have been avoided through the retention of independent counsel. ¶92. The Complaint does not allege how or what actions "independent counsel" would have taken which would have persuaded Judge Kinnaird not to enter the July 26, 2001 Consent Judgment and Order, especially since Winston & Strawn did not represent a party in the Buntrock lawsuit. The Complaint further does not allege that the dissenting directors ever made a proposal before the Terra Foundation Board (much less voted on one) not to have Winston & Strawn continue as "corporate" or outside counsel. Moreover, the Complaint does not allege that the dissenting directors permitted Winston & Strawn to continue as general counsel. Finally, Tucker, Terra, and Simpson allege that Winston & Strawn continue to cause damage to them personally because it purportedly is "aiding and abetting" further actions of the defendant directors. Id., ¶ 93. The Complaint alleges no specific actions which Winston & Strawn has allegedly "aided and abetted."

Tucker, Terra, and Simpson only allege one prayer for relief against Winston & Strawn -- Count III dealing with declaratory relief. See Cmpt, ¶¶ 104-107. Specifically, the dissenting directors seek a "declaration that the representation of the Foundation by Winston & Strawn . . . is, and has been, tainted by conflicts of interest in violation of Winston & Strawn's fiduciary duties and is inconsistent with applicable provisions of the Illinois Rules of Professional Conduct; and that, as a result of such obvious and foreseeable conflicts of interest, Winston & Strawn . . . [is] disqualified from any further representation of the Foundation or its directors in this litigation." Cmpt, Prayer for Relief. Again, Tucker, Terra, and Simpson fail to list one defendant for whom Winston & Strawn

has filed any appearance in this case, except itself.

Argument

I. THE DISSENTING DIRECTORS FAIL TO STATE A COLORABLE CLAIM AGAINST WINSTON & STRAWN.

Winston & Strawn is in an anomalous position. Winston & Strawn did not represent any of the parties in the litigation before Judge Kinnaird during the alleged critical events: at the time of the mediation in the Buntrock case; at the time that the Terra Foundation Board voted 6-2 to adopt the mediator's proposed settlement; and at the time Judge Kinnaird entered the Consent Judgment and Order. Equally noteworthy, on June 29, 2001, Winston & Strawn even counseled the directors not to vote on the mediator's proposal if they had a concern about their own potential conflict of interests. Yet somehow, Tucker, Terra, and Simpson trumped up a claim against it in this lawsuit. This purported claim is frivolous. The dissenting directors' lawsuit against Winston & Strawn should be summarily dismissed under 735 ILCS 5/2-615.

A. Courts Frown Upon Disqualifying Counsel As A Litigation Ploy.

Since Winston & Strawn was not counsel of record for any litigant in the Buntrock case at the time of the alleged critical events, the dissenting directors have tried a novel approach. Tucker, Terra, and Simpson have sued the general counsel of the Terra Foundation without so much as submitting a resolution before the Terra Foundation to remove Winston & Strawn as its general counsel, much less to have the Board vote on such a proposal. In essence, the dissenting directors seek to disqualify the firm by naming Winston & Strawn as a party defendant. The courts in Illinois frown upon such a litigation ploy.

In Schwartz v. Cortelloni, 177 Ill. 2d 166, 178, 685 N.E.2d 871, 877 (1997), the Illinois

Supreme Court emphasized that "caution must be exercised to guard against motions to disqualify being used as tools for harassment." Similarly, in Weil, Freiburg & Thomas v. Sara Lee Corp., 218 Ill. App. 3d 383, 396, 577 N.E.2d 1344, 1354 (1st Dist. 1991), the First District Appellate Court stressed: "our courts disapprove of the use of disqualification motions as a tactical weapon in litigation insofar as such motions can be misused for purposes of harassment." Accord, Guillen v. City of Chicago, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997) (stating that cases and the Rules of Professional Conduct recognize that motions for disqualification should be viewed with extreme caution for they can be misused as techniques of harassment.) Attorney disqualification is a "drastic measure" which "destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing." Schwartz, 177 Ill. 2d at 178, 685 N.E.2d at 877. Clearly, the dissenting directors seek to destroy the attorney-client relationship of Winston & Strawn and the Terra Foundation.

Such a litigation ploy has already been rejected by an Illinois court. In Hannan v. Watt, 147 Ill. App. 3d 456, 461, 497 N.E.2d 1307, 1310 (1st Dist. 1986), the Appellate Court affirmed the denial of a preliminary injunction motion and dismissal of a complaint against a defendant law firm which had previously represented the plaintiff airline pilots. The court underscored that the Illinois Code of Professional Responsibility (the predecessor to the existing Rules of Professional Conduct) does not by its own terms "create independent rights of action." Id. The court saw the ploy for what it was: "[T]his case is nothing more than an action to disqualify . . . [the law firm] from partaking in the current proceedings." Id. As a result, the court rejected the attempt by one company's airline pilots to disqualify the law firm representing another airlines' pilots. The court also decried attempts to disqualify counsel which are used as tactical weapons for harassment. Id.

B. The Dissenting Directors Have No Standing To Sue Winston & Strawn.

The dissenting directors also do not have standing to raise the purported claim against Winston & Strawn. As such, Winston & Strawn's motion to dismiss should be granted.

Specifically, Tucker, Terra, and Simpson have failed to make a proper "demand" on the Terra Foundation Board to remove Winston & Strawn as general counsel.[1/] As stated, they themselves have failed to make any proposal to remove Winston & Strawn as the Board's general counsel, and they have failed to call for a vote on this issue. Accordingly, the dissenting directors' attempt to interfere in the attorney-client relationship should be rejected. Renard v. Columbia Broadcasting System, Inc., 126 Ill. App. 3d 563 568, 467 N.E.2d 1090, 1094 (1st Dist. 1984) ("Absent a complaint by the affected party, a party has no status to object to the representation of an adverse party by an attorney of his choice."); see Schwartz, 177 Ill. 2d at 173-74, 685 N.E.2d at 875 (stating that only a client can bring a Rule 1.9 conflict claim). Accordingly, this Court should reject the dissenting directors' attempt to bring this claim against Winston & Strawn.

II. THE DISSENTING DIRECTORS ALSO FAIL TO STATE A CLAIM AGAINST WINSTON & STRAWN WITH THE REQUISITE SPECIFICITY.

A plaintiff is required by Illinois law to plead a complaint with sufficient facts to bring a claim within the cause of action asserted, Vernon v. Schuster, 179 Ill. 2d 338, 344, 688 N.E.2d 1172, 1175 (1997). A well-pleaded complaint must allege more than "mere conclusions." Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 608, 440 N.E.2d 998, 1007 (1st Dist. 1982). Under Illinois' fact-pleading requirements, Vernon, Id., the dissenting directors' Complaint against Winston & Strawn fails.

1/ Cf: 805 ILCS 5/7.80 (Under the Illinois Business Corporation Act, a shareholder must generally make a demand upon the corporation before filing a lawsuit.)

While citing certain purported applicable rules of the Rules of Professional Conduct,[2/] the dissenting directors' conclusory allegations simply belie their unhappiness with the mediation process itself, the mediator's settlement proposal, the Terra Foundation Board's 6-2 vote on the settlement proposal, and Judge Kinnaird's Judgment Consent and Order, all of which Winston & Strawn was not involved with and for which it can have no legal liability. Tucker, Terra, and Simpson have not alleged, and cannot allege (much less with the requisite specificity), that Winston & Strawn controlled these processes. Accordingly, under Illinois law, the Complaint against Winston & Strawn should be dismissed.

III. THE DISSENTING DIRECTORS' CLAIM FOR DECLARATORY RELIEF IS NON-JUSTICIABLE.

Under Count III of the Complaint, the dissenting directors seek a declaratory judgment that Winston & Strawn's representation has been so "tainted by conflicts of interest" in violation of the firm's fiduciary duties and ethical responsibilities to the Terra Foundation that the firm should be disqualified from "any further representation of the Foundation or its directors in this litigation." Cmpt, Count III, Prayer for Relief. The dissenting directors' claim is non-justiciable, and as such, the Complaint against Winston & Strawn should be dismissed.

To prevail on a claim for declaratory judgment, (1) a plaintiff must have a tangible legal

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[2/] Even a cursory review of the Rules of Professional Conduct reveals their inapplicability here. Rule 1.1 deals generally with the competency of counsel, Rule 1.3 deals generally with a lawyer's diligence in representing a client, and Rule 1.4 deals generally with communicating with a client. The dissenting directors fail to allege any colorable claim against Winston & Strawn under these rules and for which they have standing. See text, Section IB, supra. Moreover, the dissenting directors fail to allege anything at all, much less with sufficient specificity, what a purported "independent counsel" would have done or advised the Terra Foundation different than Winston & Strawn did. They fail to specify what substantive "litigation tactics and outcomes" Winston & Strawn allegedly advised the Terra Foundation. See Complaint, ¶88. They conspicuously fail to allege that Judge Kinnaird repeatedly rejected the dissenting directors' attempts to disqualify Sidley, which, Winston & Strawn submits, means that it cannot, as a matter of law, be deemed to have violated any purported duty regarding the continued representation of Sidley as litigation counsel in the Buntrock case. See Complaint, ¶91. The dissenting directors' last claim involving Rule 1.7 (representing clients with adverse interests) also has no specificity nor merit. Again, if Tucker, Terra, and Simpson truly believed this was a legitimate issue, and not a "fishing expedition" and litigation ploy (see Complaint, ¶90), this undoubtedly would have been raised in

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interest; (2) a defendant must have an adverse interest; and (3) an actual controversy regarding that interest must exist. AG Farms, Inc. v. American Premier Underwriters, Inc., 296 Ill. App. 3d 684, 689, 695 N.E.2d 882, 887 (4th Dist. 1998). An actual controversy exists if there is a legitimate dispute requiring an immediate and definite determination of the parties' rights, the resolution of which would help terminate all or part of the dispute. Village of Maywood Bd. of Fire & Police Comm'rs v. Dep't of Human Rts., 296 Ill. App. 3d 570, 575, 695 N.E.2d 570, 575 N.E.2d 873, 877 (1st Dist. 1998). The ripeness doctrine precludes entry of a declaratory judgment unless an actual controversy exists. Id. Under the Complaint, Tucker, Terra, and Simpson cannot prevail on their claim because no actual controversy worthy of declaratory relief exists.

First, the dissenting directors, as previously discussed, do not have a tangible legal interest (or standing to bring a claim) against Winston & Stawn. Second, until the filing of the First Amended Complaint, Winston & Strawn has not had an adverse interest to the dissenting directors. Most assuredly, the dissenting directors cannot seriously believe that they can sue Winston & Strawn and thereby create a disqualifying conflict. Hannan v. Watt, 147 Ill. App. 3d 456, 461, 497 N.E.2d 1307, 1310 (1st Dist. 1986). Third, Winston & Strawn has not represented the Terra Foundation "in this litigation." As the Court knows, the law firm of Mulroy, Scandaglia, Marrinson, Ryan has taken over from Sidley as litigation counsel for the Terra Foundation here. Clearly, there is no actual controversy that is justiciable. Thus, the dissenting directors' attempt to obtain such a declaratory judgment would be a prohibited advisory opinion. CGE Ford Heights, L.L.C., v. Miller, 306 Ill. App. 431, 441, 714 N.E.2d 35, 42 (1st Dist. 1999).

In short, Tucker, Terra, and Simpson's claim for declaratory relief has no basis in fact or law.

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a Board resolution and put to a Board vote.

IV. CONCLUSION

Wherefore, for the reasons stated herein, Winston & Strawn prays this Court grant its motion to dismiss under 735 ILCS 5/2-615 and such other relief as deemed appropriate by the Court.[3/]

Respectfully submitted,

Winston & Strawn

By: Scott J. Szala
One of Its Attorneys

Scott J. Szala
Winston & Strawn
35 West Wacker Drive
Chicago, Illinois
312-558-5600
#90875

[3/] If Winston & Strawn's motion to dismiss is granted, it believes that an Illinois Supreme Court Rule 137 motion for sanctions would be appropriate.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	Transferred from Law Division

Notice of Filing

To: See attached Service List

PLEASE TAKE NOTICE that on January 8, 2002, we filed with the Clerk of the Circuit Court of Cook County, Law Division, **A Compendium of Cases Cited in the Terra Foundation's Memorandum in Support of its Motion to Dismiss, or *in the Alternative* to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint.**

One of the Attorneys for: THE TERRA FOUNDATION FOR THE ARTS

Eric J. Muñoz

Mulroy, Scandaglia, Marrinson, Ryan (#38050)

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Eric J. Muñoz, certify that I caused to be served this Notice of Filing by delivering a copy via first class U.S. mail to each of the counsel of record in the above captioned matter (see attached service list) by 5:00 p.m. on January 8, 2002.

Eric J. Muñoz

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
Case No. 01 L 009112

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January 8, 2002

VIA: U.S. MAIL

TO: All Attorneys of Record
See attached Service List

Re: *Tucker et al. v. Buntrock et al.*, Case No. 01 L 009112

Enclosed please find the Terra Foundation's **Notice of Filing** for its Compendium of Cases Cited in the Terra Foundation's Memorandum in Support of its Motion to Dismiss, or *in the Alternative* to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint, which we filed with the Clerk of the Circuit Court of Cook County, Law Division, on January 8, 2002.

Very truly yours,

Eric J. Muñoz

/ejm

Enclosure

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Case No. 01 L 009112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

MOTION FOR LEAVE TO FILE TERRA AFFIDAVIT UNDER SEAL

Plaintiffs move this Honorable Court for the entry of an Order allowing the Terra Affidavit attached as Exhibit "A" to Plaintiff's Consolidated Response In Opposition To Defendants' Motions To Dismiss to be filed under seal.

In support of this motion, Plaintiffs note that at least one of the exhibits attached to the Terra Affidavit was prepared in connection with the earlier mediation. In an abundance of caution given Judge Kinnaird's earlier ruling, we believe that the interests of the parties are served by maintaining the Terra Affidavit under seal.

Dated: January 18, 2002

Respectfully submitted:

PAUL HAYES TUCKER, *et al.*,

One of the Attorneys for the Plaintiffs

Robert P. Cummins
Thomas C. Cronin
CUMMINS & CRONIN, LLC
Firm ID No. 37288
77 West Wacker Drive, Suite 4800
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(312)578-0500

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of Motion and Motion For Leave To File Terra Affidavit Under Seal to be served on the parties listed below via facsimile and United States Mail on this 18th day of January 2002.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

NOTICE OF MOTION

TO: See Attached Service List

PLEASE TAKE NOTICE that on Thursay, January 24, 2002 at 9:15 a.m., we shall appear before the Honorable Julia M. Nowicki of the Circuit Court of Cook County, Illinois in Courtroom 2510, or before any other Judge sitting in her stead, and then and there present Plaintiff's Motion For Leave To File Terra Affidavit Under Seal, a copy of which is served upon you.

Dated: January 18, 2002

Respectfully submitted:

PAUL HAYES TUCKER, *et al*,

One of the Attorneys for the Plaintiffs

Robert P. Cummins
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, *et al.*,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	
	)	Judge Nowicki
DEAN BUNTROCK, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson, by their attorneys, hereby respond in opposition to Defendants' motions to dismiss as follows:[1]

Preliminary Statement

Defendants' contention that Judge Kinnaird's July 26, 2001 Consent Judgment and Order fully resolves Plaintiffs' claims is without merit. Neither Tucker, Terra nor Simpson were parties to that settlement agreement. Moreover, Judge Kinnaird made no findings of fact or law that bar this action. Indeed, when the Court refused to permit Tucker, Terra and Simpson to file counterclaims in *Buntrock v. Terra*, Judge Kinnaird directed Plaintiffs to pursue a separate action. This is precisely what Plaintiffs have done.

Counter-Statement of Facts

Defendants' statements of fact are incomplete and inaccurate. Rather than repeat the litany of allegations Plaintiffs have asserted, Plaintiffs simply refer the Court to the First Amended Complaint for a complete description of the factual background. The heart of Plaintiffs' claims is

[1]For the convenience of the Court and the parties, we will refer to Buntrock, Gidwitz, Daley, Hartman, Marshall and Stebbins as the "director defendants." We will refer to Donnelley, Field, Foster, Hamada and Krehbiel as the "new directors."

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that Defendants have improperly frustrated and abandoned the mission of the Foundation and the intent of its founder, Daniel J. Terra. In further support of those allegations, Plaintiffs submit the Verified Declaration of Judith F. Terra, widow of Daniel J. Terra.[2] This declaration includes two attachments: the handwritten notes of the late Mr. Terra further demonstrating the mission of the Foundation and Sidley's February 14, 2001 memorandum recognizing that mission.

In the *Buntrock v. Terra* litigation, Judge Kinnaird explicitly held that Tucker, Terra and Simpson were not parties to that settlement[3] and that no factual findings of any kind were made.[4] These elemental facts are critical to understanding why Defendants' motions to dismiss lack merit. Namely, Plaintiffs' claims have neither been released nor adjudicated. They derive from the illegal conduct of the Foundation, the directors, the Attorney General and certain law firms during and after the *Buntrock* settlement. Plaintiffs have properly alleged claims and those claims deserve to be heard.

Argument

A. Defendants' Motions To Dismiss Must Be Denied.

A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts could be proven which would entitle the pleader to relief. *See Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 639 N.E.2d 1282 (1994). Thus, a motion to dismiss concedes that all well-pleaded facts in the pleading under attack are true. *See Miner v. Gillette*, 87 Ill.2d 7, 428 N.E.2d 478

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[2]Mrs. Terra's Verified Declaration is attached as Exhibit A and is filed under seal.

[3]The transcript from the July 24, 2001 hearing could not be clearer. Simply stated – and as Judge Kinnaird repeatedly did – the "situation here [*i.e.* in the Buntrock settlement] is somewhat different. These folks [*i.e.* Tucker, Terra and Simpson] aren't settling. They are not part of the settlement." *See* Tr., July 24, 2001, vol. I at 120.

[4]Again, Judge Kinnaird's statements cannot be disputed. For example, she states at the end of five hours of argument, "I am not putting any Findings of Fact in the order that I am signing." *See* Tr., July 24, 2001, vol. II at 132.

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(1981). Moreover, the court must draw all reasonable inferences in favor of the pleader. *See Your v. Mid-Town*, 150 Ill. App. 3d 421, 501 N.E.2d 805 (1st Dist. 1985). The court must consider all possible conclusions supported by the allegations.

Moreover, pleadings must be liberally construed with a view toward doing substantial justice between the parties. *See, e.g., Bowie v. Evanston*, 168 Ill. App. 3d 101, 522 N.E.2d 669 (1st Dist. 1988). Thus, no pleading is bad in substance if its sets forth sufficient information reasonably to inform the opposite party of the nature of the claim or defense which he is called upon to meet. *See* 735 ILCS 5/2-612(b). If the trial court is adequately informed of the issues presented by the pleadings, the parties are likewise so informed. *See Kita v. YMCA*, 47 Ill. App. 409, 198 N.E.2d 174 (1st Dist. 1964). For these reasons, an action should not be dismissed unless the court is prepared to conclude that there is no possible set of facts in support of the allegations in the complaint that would entitled the plaintiff to relief. There need be only a possibility of recovery. *See Johnson v. North American*, 100 Ill. App. 2d 212, 241 N.E.2d 332 (5th Dist. 1968).

B. Plaintiffs' First Amended Complaint Properly States Claims Against The Foundation And The Other Directors.

Simply stated, the arguments of the Foundation, the director defendants and the new directors are without merit. These defendants raise three core objections: that Plaintiffs lack standing to bring this lawsuit; that no cognizable claims have been asserted; and that the doctrines of *res judicata* and collateral estoppel defeat Plaintiffs' allegations. None of these arguments is correct. The plain language of the Illinois General Not For Profit Corporation Act, 805 ILCS 105/101.1 *et seq.* (the "Act"), upholds the right to sue both the Foundation and its directors. In addition, given the proceedings in the *Buntrock* litigation, none of Plaintiffs' claims are barred.

1. Plaintiffs Have Standing.

Defendants' assertion that Tucker, Terra and Simpson lack standing is belied both by Illinois statutory law and by Defendants' own conduct. First, Defendants' arguments about standing are difficult to take seriously in light of the fact that the *Buntrock* litigation involved claims brought by directors against the Foundation and other directors. Indeed, similar to the complaint in *Buntrock*, Plaintiffs' First Amended Complaint in this action seeks, *inter alia*, declaratory and statutory relief under the Act. To argue that Terra, Tucker and Simpson lack standing to assert claims against the Foundation and its directors represents a "perversion of the judicial process" where at least some of Defendants play "fast and loose with the courts." *See In re Cassidy*, 892 F.2d 637, 641-42 (7th Cir. 1990).

Second and more fundamentally, the plain direction of the Act provides that charitable corporations and their directors may be sued. Defendants' statements that "nothing in the [Act] . . . provides standing to these plaintiffs to sue" are simply wrong.[5] The Act explicitly contemplates actions against charitable foundations and their directors. Like the plaintiffs in the *Buntrock* litigation, Tucker, Terra and Simpson bring suit under section 103.15 of the Act which entitles a director or member to seek to enjoin a foundation from committing *ultra vires* acts. The Act also sets forth "the liability of directors in certain cases" and surely contemplates suits against directors.[6]

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[5]*See, e.g.*, Memorandum of Law in Support of Dr. Stebbins' and Dr. Marshall's Motion to Dismiss, Or In the Alternative For A Stay at 6.

[6]For instance, the Act explicitly states that directors who support unauthorized distributions "shall be jointly and severally liable to the corporation for the amount of such distribution." *See* 805 ILCS 105/108.65. The Act describes the circumstances of a director's conflict of interest and apportions the burdens of proof in proceedings testing the validity of a corporate transaction. *See* 805 ILCS 105/108.60. The Act even provides for limited liability of directors and officers when they serve without compensation, *see* 805 ILCS 105/108.70, and permits not for profit corporations to indemnify directors and officers. *See* 805 ILCS 105/103.10(p) and 108.75.

2. The Claims Against The Foundation and Directors Are Legally Sufficient.

Counts I (Declaratory Relief), II (Declaratory and Injunctive Relief), IV (*Ultra Vires* Acts under 805 ILCS 105/103.15) and V (Breach of Fiduciary Duty) are directed against the Foundation and the directors. Count I seeks a declaration that the *Buntrock* settlement violates Illinois law because it was the product of, *inter alia*, conflicts of interest and breaches of duty. Count II seeks a declaration that the new directors have not been properly elected and therefore may not act on the Foundation's behalf. Count II also seeks an injunction to prevent these new directors from so acting. Count IV – which constitutes perhaps the heart of Plaintiffs' claims – asserts an *ultra vires* claim against the Foundation and its directors under section 103.15 of the Act. Lastly, Count V asserts breaches of fiduciary duty. Each of these counts properly sets forth claims against the Foundation, the director defendants and the new directors for a number of reasons:

– The counts are sufficiently specific.

The First Amended Complaint is sufficiently specific and reasonably informs both the Court and Defendants about the claims asserted against them. Do Defendants genuinely contend that they are not so informed? In their thirty-seven pages of allegations, Plaintiffs describe the history and mission of the Foundation and how certain directors, government officials and others have acted to pervert that mission. The First Amended Complaint even spells out the debilitating conflicts of interest that have burdened certain directors as well as the law firm defendants during the *Buntrock* litigation. The allegations against the new directors are similarly straightforward: Plaintiffs contend that these new directors have not been properly elected and, as a result, cannot exercise authority on the Foundation's behalf.

– **The counts properly state claims under Illinois law.**

Plaintiffs' claims are guileless and properly state claims under the Act and under Illinois common law governing the fiduciary duties of corporate directors. *See* 805 ILCS 105/103.15(a) (permitting a director to sue and seek injunctive relief). *See also Sawko v. Dominion Plaza One Condominium Assoc.*, 218 Ill. App. 3d 521, 578 N.E.2d 621 (2nd Dist. 1991) (*Ultra vires* provision of the Act is not the exclusive means for member to enjoin association from alleged *ultra vires* acts.).

In no uncertain terms, the First Amended Complaint alleges that each board member who voted in favor of the Buntrock settlement violated their duties and engaged in *ultra vires* acts. *See, e.g.*, First Amended Complaint at ¶¶ 78-80. Plaintiffs also explicitly describe how the so-called election of the new directors was both procedurally and substantively defective such that any exercise of authority reserved solely for properly elected directors also constitutes *ultra vires* conduct. *See, e.g.*, First Amended Complaint at ¶ 85. Moreover, Plaintiffs specifically allege the conflicts and disqualifying interests confronting certain directors during the *Buntrock* litigation that poisoned the vote in favor of settlement. Given these allegations, plaintiffs' claims for declaratory and other relief are wholly appropriate. Defendants' contentions to the contrary are without merit.

C. The Claims Are Not Barred by *Res Judicata* or Collateral Estoppel.

Having secured entry of the Consent Judgment by assuring Judge Kinnaird that her decision would not affect Plaintiffs' rights, Defendants now claim that the Consent Judgment forecloses this litigation in its entirety. Defendants are wrong.

First, *res judicata* and collateral estoppel do not apply because Plaintiffs are not parties to the Consent Judgment. Second, collateral estoppel only precludes litigation of issues that were actually decided, and Judge Kinnaird made no findings in connection with entry of the Consent Judgment. Third, Judge Kinnaird's refusal to permit Plaintiffs' discovery denied them an opportunity to litigate.

Fourth, the issues presented in this case are different. Fifth, *res judicata* only precludes litigation of issues that could have been litigated in a prior action; none of the issues in this case could have been litigated in the action before Judge Kinnaird. Finally, applying collateral estoppel or *res judicata* to the facts of this case would be inequitable.

1. Plaintiffs Are Not Parties to the Consent Judgment

Res judicata and collateral estoppel only preclude litigation by a party to a prior judgment. *See, e.g., Nowak v. St. Rita High School*, 197 Ill. 2d 381, 757 N.E.2d 471, 477 (2001). Throughout the hearing before Judge Kinnaird, Defendants confirmed that Plaintiffs were not parties to the Consent Judgment, calling them "strangers to the agreement." Tr., 7/24/01 Vol. II at 16. As counsel for the Foundation emphasized, "the [Plaintiffs] have chosen not to join the settlement agreement, that's their legal right. They cannot be forced to relinquish whatever legal rights they may have." Tr. 7/24/01, Vol. I at 46.[7] But that's precisely what Defendants now argue — that Plaintiffs "relinquish[ed] whatever legal rights they [had]" when the Court entered the Consent Judgment.

2. Judge Kinnaird Made No Findings

Defendants' suggestion that Judge Kinnaird decided the issues raised by Plaintiffs' Complaint ignores her clear statement to the contrary. Judge Kinnaird could not have been more clear — she made no findings. Tr., 7/24/01, Vol. II at 132 (Court: "I am not putting any Findings of Fact in the order that I am signing"); *id.* at 133 (Court: same).

Nor did Judge Kinnaird need to make any findings. Defendants argued that (1) Plaintiffs had no standing to challenge the Consent Judgment, and (2) even if they had standing, they only could overcome their "very high burden of proof" with "clear and convincing evidence" of impropriety.

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[7] *See id.*, Vol. II at 81 (Ms. Stone: "[Plaintiffs] are not releasing any legal rights they may have.").

See, e.g., id., Vol. I at 81. Judge Kinnaird appeared to accept these assertions. *See id.* Vol. II at 56 (asking Plaintiffs' counsel "Is there any case where a party in a . . . nonderivative case or a non-class-action case or a nonparty to a settlement that has had an opportunity to get . . . discovery before the Court approves the settlement?").

It is impossible to know whether Judge Kinnaird did, in fact, accept Defendants' assertions. Where, as here, it is not clear whether a factual determination was necessary to a judgment, no preclusive effect is given to any findings. *See, e.g., Hexacomb Corp. v. Corrugated Systems, Inc.*, 287 Ill. App. 3d 623, 678 N.E.2d 765 (1st Dist. 1997).[8]

3. Plaintiffs Did Not Have an Opportunity to Litigate

Plaintiffs' opportunity to argue — without the benefit of any discovery — against entry of the Consent Judgment did not constitute an opportunity to litigate any issue decided by Judge Kinnaird.

Collateral estoppel only applies when the targeted party has "had a full and fair opportunity to litigate the issue in the prior proceeding." *Fred Olson Motor Service v. Container Corp. of America*, 81 Ill. App. 3d 825, 830, 401 N.E.2d 1098, 1101 (1st Dist. 1980). Whether a "full and fair opportunity to litigate" existed "is dependent upon whether [the party being estopped was] denied a procedural, substantive or evidentiary opportunity to be heard on the issue." *Id.*[9] There can be no more fundamental denial of an "evidentiary opportunity to be heard" than the refusal to permit *any* discovery – no depositions were permitted, no documents produced, and no interrogatories

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[8] *Accord* Restatement (Second) of Judgments, § 27, comment h ("If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded.").

[9] *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 n.15 (1979) (If the party being estopped "was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted").

answered.[10] Tr., 7/24/01 Vol. II at 131.[11] Because Plaintiffs were refused discovery before Judge Kinnaird, her decision does not preclude litigating any issue in this case.[12]

Under such circumstances, a prior decision is not afforded preclusive effect. In *Sprecher v. Graber*, 716 F.2d 968 (2nd Cir. 1983), the court held that a claim of misconduct in a Securities and Exchange Commission investigation was not precluded by resolution of a challenge to the propriety of an investigatory subpoena. For both the plaintiff in that case and Plaintiffs here, the opportunity to litigate in the prior proceeding "was considerably narrower than the opportunity available in a plenary civil action." *Id.* at 972. This was so because, among other things, the opponent of a SEC subpoena "has a 'heavy burden'[13] of proving that the subpoena is sought for an invalid purpose . . . and a substantial factual showing must be made even to receive an evidentiary hearing. This evidentiary showing must be made, moreover, without the aid of discovery." *Id.*[14] Under such circumstances, the court concluded that the prior litigation did not enjoy preclusive effect.

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[10]While Assistant Attorney General Perkins did sit for an interview, he was not under oath and was free not to answer questions (a right he exercised). This does not constitute discovery.

[11]The additional evidence that Plaintiffs' sought was crucial to resolution of the issues presented. It is hard to imagine what could have been more central to the question of coercion by the Attorney General than the right to depose the involved parties.

[12]The suggestion that Judge Kinnaird denied Plaintiffs "additional discovery," Foundation Motion at 8, incorrectly suggests that Plaintiffs had *some* discovery concerning their objections.

[13]*Compare* Tr., 7/24/01 Vol. I at 81 (the Consent Judgment was "presumptively valid," and Plaintiffs only could overcome that "very high burden of proof" with "clear and convincing evidence" of impropriety) (Ms. Stone).

[14]Judge Kinnaird recognized the difficulty created by denying discovery. Tr., 7/24/01, Vol. I at 104-05 (to Ms. Stone; "You keep saying they haven't shown. Well part of what they want to be able to do is be able to show. And part of what they want to be able to do is get discovery. . . . Well, how can they show, if they don't get discovery?"). That she held a hearing and said that she would "seriously consider" Plaintiffs' objections, *Foundation's Memorandum* at 1, 6, do not remedy the denial of discovery, which crippled Plaintiffs' ability to present evidence.

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4. The Issues Here Are Different Than Those Before Judge Kinnaird

Collateral estoppel only precludes relitigation of issues "*identical*" to those decided in an earlier lawsuit. *See, e.g., Nowak*, 197 Ill. 2d 381, 757 N.E.2d at 480. It is not enough that the two issues arise out of the same facts. *See, e.g., Benton v. Smith*, 157 Ill. App. 3d 847, 855, 510 N.E.2d 952, 957 (1st Dist. 1987) ("Two causes of action are not necessarily the same merely because they arise out of the same set of facts").[15]

The issues presented here are not identical to any considered by Judge Kinnaird. For example, in the instant case, Plaintiffs seek a declaration that the Foundation's approval of the Consent Judgment is a breach of fiduciary duty. That issue never was before Judge Kinnaird.[16]

5. The Issues Could Not Have Been Litigated Before Judge Kinnaird

Certain issues that Defendants claim are precluded by the Consent Judgment did not even arise until *after* entry of that judgment. For example, Defendants argue that Plaintiffs are barred from making any claim concerning the failure to elect the new directors. First Am. Compl. ¶ 85. *See, e.g.*, Foundation Memorandum at 16-17. But that failure did not occur until *after* entry of the Consent Judgment. It would have been impossible for Plaintiffs to raise this issue during the hearing on the motion to approve the Consent Judgment. Plaintiffs sought leave to file counterclaims but Judge Kinnaird denied that motion.

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[15]*See, e.g., Hexacomb*, 287 Ill. App. 3d at 631, 678 N.E.2d at 771 ("The party asserting the preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. This is a heavy burden.") (citations omitted).

[16]Even the burdens of proof in the two cases differ significantly. In this action, Plaintiffs must prove their claims by a preponderance of the evidence. In *Buntrock*, the Consent Judgment was "presumptively valid," Tr. 7/24/01 at 81, and Plaintiffs only could overcome their "very high burden of proof" with "clear and convincing evidence" of impropriety. *Id. See, e.g., U.S. Aluminum Corp. v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), *cert. denied*, 488 U.S. 822 (1988) (collateral estoppel does not apply where burden in first action was clear and convincing and burden in second action is preponderance of the evidence).

Since the issues here could not have been litigated previously, *res judicata* does not preclude their assertion here. *See, e.g., Robinson v. Toyota Motor Credit Corp.*, 315 Ill. App. 3d. 1086, 735 N.E.2d 724 (1st Dist. 2000) (*res judicata* does not bar claim that could not have been raised in prior proceeding).

6. Application of *Res Judicata* and Collateral Estoppel Would be Inequitable

Even when the necessary elements are satisfied, neither collateral estoppel or *res judicata* will apply when to do so would be unfair. *See, e.g., Nowak*, 197 Ill. 2d 381, 757 N.E.2d at 478 ("Even where the threshold elements of the doctrine are satisfied, collateral estoppel must not be applied to preclude parties from presenting their claims or defenses unless it is clear that no unfairness results to the party being estopped.").

Where a defendant tells a plaintiff to proceed in another forum, it cannot later claim that the party is precluded from asserting its claims there. *Benton*, 157 Ill. App. 3d at 856-57, 510 N.E.2d at 958 ("Defendants advised [plaintiff that] . . . she could pursue legal action through the courts," and "[w]hen [plaintiff] followed that advice, defendants . . . . argued that she was barred from pursuing legal action"). But that is what Defendants seek to do here. Having secured entry of the Consent Judgment by assuring Judge Kinnaird that Plaintiffs "are strangers to the agreement," Tr., 7/24/01 Vol. II at 16 (Mr. Quinlan), who "cannot be forced to relinquish whatever legal rights they may have," *id.*, Vol. I at 46 (Ms. Stone), who "are not releasing any legal rights they may have," *id.*, Vol. II at 81 (Ms. Stone), and who "could very well seek out another venue and try to institute some sort of lawsuit against someone there," it is fundamentally unfair for Defendants now to claim that by entering the Consent Judgment, the Court extinguished any of Plaintiffs' rights.

D. Plaintiffs Properly State A Claim Against Defendants Sidley & Austin and Winston & Strawn.

Count III of Plaintiffs' First Amended Complaint seeks declaratory relief against Defendant law firms, Winston and Sidley. The allegations supporting this count are straightforward.[17] Throughout the fight over the Foundation's future, the Foundation has been represented by Winston and Sidley. This representation has continued despite their obvious conflicts of interest. Specifically, Winston continues to engage in concurrent, adverse representation of the Foundation and at least one of the defendant directors. Sidley has engaged in similar misconduct. Indeed, Sidley has already been accused by two defendant directors of breaching its responsibilities to the Foundation throughout the Buntrock litigation. These defendant directors even submitted an expert affidavit that concludes that Sidley is unable to provide independent professional advice as a result of its conflicts. That neither Winston nor Sidley has entered an appearance (other than for themselves) in this litigation does not end this dispute. As long as their hopelessly conflicted representation of the Foundation continues, the claims for declaratory judgment are appropriate. Thus, Winston's and Sidley's motions to dismiss should be denied.[18]

E. The Attorney General and Defendant Perkins Are Not Immune.

Neither Perkins nor the Attorney General is protected from any liability on immunity grounds. Public official immunity does not apply when an official acts with "malicious motives." *See Janes v. Albergo*, 154 Ill. App. 3d 951, 957 (1st Dist. 1993) (to be protected under the public official immunity doctrine, the actions must not result from "malicious motives"). Plaintiffs allege that the

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[17]The allegations specifically addressing Winston's and Sidley's conduct are found at ¶¶ 87-93, 104-107.

[18]When Sidley withdrew before this Court rather than give testimony regarding its conflict, Sidley tacitly admitted its conflicted status.

Attorney General launched sham investigations to coerce certain board members into approving the settlement that they wanted. Compl. ¶¶ 53-66. This is a textbook example of malicious conduct that strips a public official of his immunity. *See Tcherepnin v. Franz*, 570 F.2d 187, 191-92 (7th Cir. 1978) ("[I]t is our conclusion that Joseph Knight, as Director of the Department of Financial Institutions for the State of Illinois, owed a statutory duty to the depositors of City Savings; that the intentional breach of that duty would constitute a malicious act; and that such malicious conduct would override his qualified immunity as a public official.").

Nor are defendants entitled to sovereign immunity. Where an officer acts "beyond his delegated proper authority or abuses his discretion, then such actions will be against the officer and not the State and therefore will not offend the sovereign immunity statute." *See Nichols v. Bd. of Educ. of Chicago*, 236 Ill. App. 3d 522, 527 (1st Dist. 1992). Such are the allegations here.

Defendants' claim that they enjoy immunity from Plaintiffs' Section 1983 claims also is baseless. Absolute immunity is only available "to members of quasi-judicial adjudicatory bodies when they perform functions comparable to those of a judicial officer." *Tobin v. Illinois State Bd. of Elections*, 268 F.3d 517, 521 (7th Cir. 2001). The Attorney General performed no such functions. Qualified immunity is unavailable because Defendants could not have reasonably thought that their actions were "consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 438 U.S. 635, 639 (1987).

F. Plaintiffs Have Standing To Assert the Section 1983 Action

The Attorney General's claim that Plaintiffs lack standing to bring Count VII, a claim under 42 U.S.C. § 1983, on behalf of the Foundation ignores the settled law concerning the right of directors of not-for-profit corporations to assert claims on behalf of their respective corporations.

Given the unique nature of not-for-profit corporations, courts around the country have repeatedly held that directors of not-for-profit corporations have standing to assert claims on behalf of their respective corporations. For example, in *Kirby v. Kirby*, Civil Action No. 8604, 1989 Del. Ch. LEXIS 117 (Del. Ch. Sept. 12, 1989), several directors filed complaints alleging that the defendant directors had breached their duties to the foundation. *Id.* at *2. The defendant directors moved to dismiss, claiming that the plaintiff director lacked standing to assert claims on behalf of the foundation. *Id.* Framing the issue presented as whether "directors of charitable corporations have standing to maintain in action on behalf of the corporation," *id.* at *3, the court answered with an unequivocal "yes." The court reasoned that standing requires that a litigant must have a sufficient interest in the outcome to vigorously litigate the dispute, and "[a]s a fiduciary . . . the director of a charitable corporation has a sufficiently concrete interest in the outcome of litigation . . . that he has standing." *Id.* at **5-6 ("[t]his principle . . . has been recognized in other jurisdictions and by legal scholars").[19] *See also* In *Morgan v. Robertson*, 609 S.W.2d 662, 665 (Ark. Ct. App. 1980) (the standing of a director of a non-profit corporation to assert claims on behalf of the corporation "does not seem open to question," even where the corporation is not named as a plaintiff) (collecting cases).

Plaintiffs brought their action in their capacity as directors of the Foundation, and seek to vindicate the Foundation's rights. It is clear under settled law that they have standing to do so, and the Attorney General's motion to dismiss on this ground must therefore be dismissed.

Conclusion

For all the foregoing reasons, Plaintiffs Paul Hayes Tucker, Judith Terra and Alan K. Simpson respectfully submit that Defendants' motions to dismiss should be denied.

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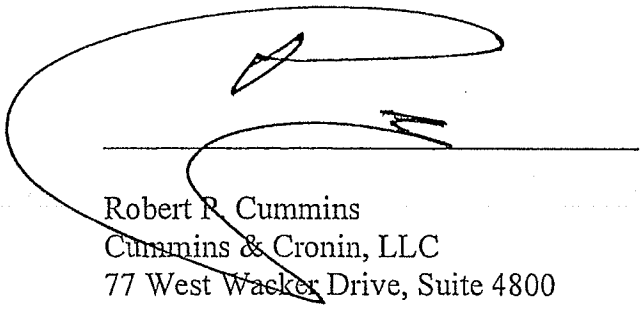
[19]As here, the plaintiff in *Kirby* did not name the foundation as a plaintiff in his complaint.

Dated: January 18, 2002

Respectfully submitted,

PAUL HAYES TUCKER, JUDITH TERRA and ALAN K. SIMPSON



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16di-004887

CERTIFICATE OF SERVICE

The undersigned certifies that he caused a true and accurate copy of the foregoing Notice of Filing and Plaintiffs' Consolidated Response In Opposition To Defendants' Motions To Dismiss to be served on the parties listed below via facsimile and United States Mail on this 18th day of January 2002.

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Willliam F. Conlon
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SIDLEY AUSTIN BROWN & WOOD
10 South Dearborn Street
Chicago, IL 60603

Thomas C. Cronin

The cost -- the cash deficit is about $2,000,000 per year. The building being used has a value in excess of $25 million -- is just much more than can ever be overcome and supported by the public.

Stuart thinks he can run the museum for fiscal 1996 (starting July 1, 1995) on $1,500,000 perhaps more effectively for more people than any time since the 2nd year after its opening.

The committee has concluded that the Museum on North Michigan Avenue just will never achieve much of its support by the public of Chicago. Even though

The Education department is doing well -- it gets better each year. Hence, the Committee recommends that we close the museum on N. Michigan Ave. effective December 31, 1995.

The committee recommends that we announce the closing by September 1, 1995.

Concurrently with the closing period, the Committee is to study the feasibility of maintaining a presence in Chicago, an Educational building of American Art in Chicago. It is believed the Foundation can develop a viable Educational program of American Art in Chicago at a cost of less than $600,000^{00}$ per year. It should be, if at all at some Central city location (other than north Michigan Avenue)

The Committee will try to do whatever the Board decides, concerning the new educational program. There are several inexpensive buildings which could be used for this purpose.

Chairman to call for a vote and discussion.

1. To close Terra Museum of American Art effective December 31, 1995.
2. Study options for a new location to create a viable learning institution for American Art.

16di-004890

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

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February 14, 2001

CONFIDENTIAL FOR MEDIATOR'S EYES ONLY

By Facsimile and Mail

David C. Hilliard
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson
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Re: Buntrock et al. v. Terra et al., Circuit Court No. 00 CH 13859

Dear Mr. Hilliard:

Factual Background

The Terra Foundation for the Arts (the "Foundation") is a private Illinois not-for-profit corporation established under the Illinois General Not For Profit Corporation Act, 805 ILCS 105/103 *et seq.*, by Ambassador Daniel J. Terra in 1978. Ambassador Terra was born and raised in Philadelphia, Pennsylvania. He later moved to Chicago and maintained a residence for many years in both Washington D.C. and the Chicagoland area. The Foundation has been almost entirely sustained by the contributions made by Ambassador Terra during his life and from his estate. The Foundation has never received any public funding of any kind.

As stated in the Foundation's original Articles of Incorporation, the Foundation was established for the stated purpose of, among other things, to "expand the artistic horizons of a growing art public . . . operate a museum . . . and any and all other purposes permitted by law to such a not-for-profit corporation." (See original Articles of Incorporation (Ex. A to Buntrock Complaint). Nothing in the original Articles of Incorporation imposed any geographic limitation on the Foundation's activities. In 1994, the Foundation's Articles of Incorporation were amended to expressly provide for the operation of "museums and schools, both in the United States and abroad" (See Memorandum from Bell, Boyd & Lloyd to the Foundation's Board attaching amended version of Articles of Incorporation, attached hereto as Ex. A). Those changes were unanimously approved by the Board of Directors which included the

Enclosure # 2

Ambassador's son, James Terra, at the July 18, 1994 Board meeting. (See Minutes of July 18, 1994 Board of Directors Meeting, attached hereto as Ex. B).

In 1980, the Foundation opened the original Terra Museum in Evanston, Illinois. In an effort to increase attendance and the Museum's exposure, in 1987, the Terra Museum was relocated to 664 North Michigan Avenue in Chicago, Illinois. In the early 1990s, in furtherance of the Foundation's purpose of propagating American art, expanding artistic horizons and operating museums in the United States and abroad, the Foundation opened the Museé d'Art Americain Giverny in Giverny, France. Today, the Foundation owns roughly one-third of the Village of Giverny and its Giverny operations are a substantial part of its overall operations.

As early as 1989 Ambassador Terra realized that the Terra Museum in Chicago was not the success that he had hoped it would be and began considering alternatives. In a memorandum dated October 6, 1989, then counsel for the Foundation, Richard Sevcik, explored the "various options available" to the Foundation. (See Memorandum from Richard L. Sevcik to James W. Collins, attached hereto as Ex. C). Those options included "merg[ing] the Museum into the Whitney Museum", or "mov[ing] the Museum's collection to either Philadelphia or Houston" or "sell[ing] the real estate and the collection." (Id.) Counsel for the Foundation specifically stated that "[s]uch a move would be permitted under the Museum's charter and bylaws." (Id.) Following up on these options, James Collins, then general counsel to the Foundation wrote to Ambassador Terra in a letter dated December 6, 1989 stating that "Chicago does not seem to support museums such as Terra to the extent it should" and suggesting that the Ambassador consider "better markets to showcase American Art, namely New York, Washington D.C., Los Angeles, San Francisco, Minneapolis/St. Paul, Boston, Philadelphia, and perhaps even Atlanta." (See Dec. 6, 1989 letter from James Collins to Ambassador Terra, attached hereto as Ex. D). Additionally, in a statement presented to the Foundation's Board of Directors at its April 25, 1990 meeting, the Ambassador himself proposed "clos[ing] the North Michigan Avenue Museum, [and] sell[ing] the real estate . . . ." (See April 25, 1990 Statement by Daniel J. Terra to the Board of Directors, attached hereto as Ex. E). In that statement, the Ambassador estimated that the Foundation would spend approximately $5,000 per visitor to the Terra Museum in fiscal year 1991 and detailed many other problems with the Michigan Avenue museum. (Id.) Ambassador Terra encouraged the Board members to also consider and recommend strategic planning solutions to the current problems with the Terra Museum in Chicago. (Id.)

Based upon his frustration over the lack of enthusiasm for the Terra Museum in Chicago as well as other difficulties with the Michigan Avenue location, between 1991 and 1993, Ambassador Terra pursued the formation of a strategic alliance between the Foundation, the Corcoran Gallery in Washington, D.C., and the Whitney Museum in New York City. (See letter from David Levy to Mr. and Mrs. Terra dated Feb. 26, 1992, attached hereto as Ex. F). The strategic alliance between the three major institutions of American Art would have resulted in a pooling of the Foundation's collection with those of the other two museums and moving the emphasis of the Foundation's work from Chicago to Washington, D.C. Unfortunately the

partnership between the three museums was abandoned when issues relating to the Whitney Museum's involvement became insurmountable.

After the failure of the proposed Terra-Corcoran-Whitney alliance, Ambassador Terra began pursuing a strategic alliance with yet another institution. Between 1993 and 1995, Ambassador Terra pursued an alliance with the Pennsylvania Academy of Fine Arts and the University of the Arts, both located in Philadelphia. These negotiations led to an agreement by the Foundation to contribute up to $22 million to the University of the Arts in Philadelphia. (See Affiliation Agreement, attached hereto as Ex. G). The University named one of its key buildings after Ambassador Terra in recognition of his generosity. Peter Solmssen, President of the University of the Arts knows of Ambassador Terra's intent to conduct the affairs of the Foundation over a broad geographic range not limited at all to Chicago. (See March 27, 1997 letter from Peter Solmssen to Mme. Ahrweiler, attached hereto as Ex. H, stating "the museum in Chicago should not continue in its present form or location. This is also in accord with many conversations I had with Ambassador Terra on the subject.").

Finally, in 1996 the year of his death, Ambassador Terra began making preparations to move the Foundation's headquarters out of Chicago all together. Ambassador Terra worked with a Washington, D.C. real estate agent toward the purchase of three pieces of property located in Washington, D.C.: (1) a transitional office for the Foundation at 1072 Thomas Jefferson Street in Georgetown; (2) a "small museum" and future home for the Foundation's offices at the corner of Connecticut and Calvert streets in Cleveland Park; and (3) a future one million square foot structure, to be called "The Terra Foundation for the Arts," in Foggy Bottom. (See Plans for the Terra Foundation's offices and a gallery by Archetype dated May 30, 1996, attached hereto as Ex. I). The Georgetown and Cleveland Park properties were actually purchased. Belinda C. Reeder of Archetype was hired, drew up plans for the Cleveland Park property, obtained a zoning permit, and phone lines, nameplates, furniture as well as other purchases were made for the property. The Foggy Bottom property was not purchased prior to the Ambassador's death in June of 1996.

During the time following the Ambassador's death, the Foundation was consumed with issues relating to his estate. After settlement of the estate, the Foundation's Board of Directors returned to its normal functions and revisited the consideration of a strategic plan for the Foundation that the Ambassador began in April 1990 and continued to pursue actively until his death in 1996. At the Foundation's November 6, 1998 Board of Directors meeting Dean Buntrock, one of the plaintiffs in this action, recommended that the Board form a Strategic Planning Committee to consider the options for the future of the Foundation and the Terra Museum on Michigan Avenue. (See Minutes for Nov. 6, 1998 Board of Directors Meeting, attached hereto as Ex. J). Ronald Gidwitz, the other plaintiff in this lawsuit, was elected as the chairman of the Strategic Planning Committee.

The Strategic Planning Committee met several times between March, 1999 and September, 2000. At the March 13, 2000 meeting plaintiff Gidwitz himself raised several

options for the future of the Foundation such as "[b]uild a new museum facility, either on the present site or a new site; affiliate with another museum; [or] focus on education and building the collection and not run our own museums." (See Strategic Planning Committee minutes for March 13, 2000 meeting, attached hereto as Ex. K (emphasis added)). During the August 7, 2000 Strategic Planning Committee meeting various options for alliances with other institutions were discussed and a poll was taken as to whether the Foundation should remain as a stand-alone museum. (See Strategic Planning Committee minutes for August 7, 2000 meeting, attached hereto as Ex. L). Six of the seven Directors present at the meeting (including plaintiff Gidwitz) voted that the Foundation should not maintain a stand-alone museum in Chicago – only plaintiff Buntrock voted "no." (Id.) However, plaintiff Buntrock later also considered closing the Terra Museum in Chicago and aligning the Foundation with another institution. In his September 2000 "Proposal" plaintiff Buntrock stated, "[i]f we close the Chicago Museum and partner with a museum that will embrace our programs, we could bring a traveling exhibition to many people who would otherwise never to exposed to the Arts ... ." (See Buntrock Proposal, attached hereto as Ex. M (emphasis added)).

On September 22, 2000, plaintiffs Buntrock and Gidwitz filed this action against the Foundation, three of the Foundation's Directors, Judith Terra, Dr. Paul Hayes Tucker and Senator Alan K. Simpson, as well as another third party, Naftali Michaeli. On September 25, 2000 the Attorney General intervened in the action by filing an unverified complaint which incorporated by reference all of the allegations contained in the Buntrock and Gidwitz complaint.

Plaintiffs' and the Attorney General's *Ultra Vires* Claims

There is no question that any decision by the Foundation to close the Terra Museum or move the Foundation out of Illinois is squarely within the rights and powers granted to the Foundation by the Illinois General Not for Profit Corporation Act, the Foundation's Articles of Incorporation and its By-Laws. An *ultra vires* act is one that is expressly prohibited and beyond the powers of the corporation. Sherrard State Bank v. Vernon, 243 Ill. App. 122 (2nd Dist. 1926). The powers and limitations of a corporation are found in its articles of incorporation, its by-laws and in applicable constitutional and statutory provisions. Stroh v. Blackhawk Holding. Corp., 48 Ill. 2d 471, 475 (1971). A not-for-profit corporation is no different in this regard – its charter, articles of incorporation and by-laws control whether a corporate action is *ultra vires*. See Scott v. Harding Museum, 58 Ill. App. 3d 408, 410 (1st Dist. 1978) ("The purposes of the [museum] are set forth in its articles of incorporation."); Southern Illinois Univ. Foundation v. Booker, 98 Ill. App. 3d 1062, 1064 (5th Dist. 1981) (court determined the purpose of a not-for-profit corporation by looking to its by-laws); Bertram v. Berger, 1 Ill. App. 3d 743, 746 (1st Dist. 1971) (court looked only to the charter of a not-for-profit corporation to determine whether action was *ultra vires*); Harrison v. Barker Annuity Fund, 90 F.2d 286, 289 (7th Cir. 1937) (holding the character and purpose of charitable corporation must be ascertained by reference to the terms of its charter).

The Illinois Supreme Court has held that articles of incorporation are a contract and must be construed the same as any contract – in accordance with the document's clear language. Stroh v. Blackhawk Holding Corp., 48 Ill. 2d 471, 474-75 (1971). Both the meaning of the contract and the intent of the parties is to be gathered from the face of the document without assistance from any extrinsic evidence. Air Safety, Inc. v. Teachers Realty Corp., 185 Ill. 2d 457, 462 (1999) citing Rakowski v. Lucente, 104 Ill. 2d 317, 323 (1984). Courts must look solely to the plain and ordinary meaning of the language of the contract to determine the intent of the parties, unless the contract is ambiguous. In re Estate of Powless, 248 Ill. Dec. 403; 734 N.E.2d 111, 115 (Ill. App. Ct. 5th Dist. 2000). However, where no ambiguity exists, construction of the instrument is a matter of law. Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 89 (1st Dist. 1999); Powless, 734 N.E.2d at 116 (holding a court will not find an ambiguity in contractual language where none exists).

There is nothing ambiguous about the purpose of the Foundation. It is specifically and clearly laid out in both the Foundation's Articles of Incorporation and By-Laws. If Ambassador Terra had intended the Foundation to forever operate a museum in Chicago and only in Chicago, he certainly and simply could have included such limiting language in the Foundation's incorporating documents. To the contrary, however, Ambassador Terra expressly stated in the Foundation's Articles of Incorporation that the purpose of the Foundation was far broader than the narrow and parochial interpretation plaintiffs and the Attorney General are seeking to impose. As the Articles of Incorporation make clear, the purpose of the Foundation is to reach a broadly-based public without regard to city or state borders:

> [T]he purposes of the corporation are to form, preserve, and exhibit collections of paintings, sculpture, graphic arts, architecture, and design representing American art; expand the artistic horizons of a growing art public through such activities which will include lectures, symposia, talks, demonstrations, films, concerts and related educational programs designed to further these purposes; establish, conduct, operate, and maintain or provide funds for schools of instruction and . . . build, erect, maintain, equip, manage, lease, and operate museums and schools, both in the United States and abroad and . . . engage in any and all other activities . . . permitted by law.

(See Foundation's current Articles of Incorporation, Ex. N)(emphasis added)). The Foundation's By-Laws echo this language. Ambassador Terra amended the Articles of Incorporation and By-Laws to include this extremely broad purpose clause in 1994 "to avoid any confusion regarding the purposes of the Foundation." (See Ex. A).

Neither the City of Chicago nor the State of Illinois are mentioned anywhere in any of the Foundation's creating documents. Rather, both its Articles of Incorporation and By-Laws

unequivocally give the Foundation the power to establish a museum anywhere inside or outside the United States.

It would be absurd to construe the Foundation's governing documents to mean that the Foundation must operate exclusively in Chicago, when the Foundation itself and its first museum were originally based outside of Chicago. It would be similarly absurd to construe the documents in such a way as to deem operating a museum outside of Chicago *ultra vires*, when plaintiffs admit themselves in their complaints and do not object to the fact that the Foundation has for years owned and operated another museum in Giverny, France – outside not only Chicago and the State of Illinois but the United States. (Buntrock Complaint at ¶ 16). This interpretation cannot possibly be reconciled with either a plain reading of the documents or the Illinois General Not For Profit Corporation Act. That Act specifically authorizes the Foundation to conduct activities and operations, maintain offices and exercise any of its powers outside of not only the State of Illinois but the United States, and does not require that there be any museum here at all. See 805 ILCS 105/103.10(j) (permitting any not-for-profit corporation to "conduct its affairs, carry on its operations, and have offices within and without this State . . . and to exercise in any other state . . . or in any foreign country, the powers granted by this Act.").

Plaintiffs and the Attorney General have attempted to characterize the Foundation as a "public trust" established for the benefit of the People of Illinois and claim therefore it may never leave the state of Illinois. The Terra Foundation is not a legal trust – it is a private Illinois not-for-profit corporation with all the rights and powers of such a corporation which have been conferred upon the Foundation by the General Assembly of the State of Illinois through the General Not For Profit Corporation Act, along with all the powers that have been granted to the Foundation by its Articles of Incorporation and By-Laws. The fact that the Foundation is a not-for-profit rather than a for-profit corporation makes no difference. The statutory provision governing *ultra vires* acts of an Illinois not-for-profit corporation is essentially identical to the provision governing *ultra vires* acts of any other Illinois corporation. See 805 ILCS 5/3.15; 805 ILCS 105/103.15; 19 C.J.S. § 576 (Corporations) n. 19 (The defense of *ultra vires* for a nonprofit corporation is the same as that of a corporation for profit).

While the Foundation may be defined as a "trustee" for purposes of the reporting requirements of the Charitable Trust Act, this does not transform the Foundation into a trust. See 760 ILCS 55/3. The purpose of the Charitable Trust Act is to assist the Attorney General in carrying out his powers to enforce "charitable trusts" as broadly defined in that Act and to see to the application of their funds to their intended uses, primarily through certain reporting and disclosure requirements. See Scott, 58 Ill App. 3d at 413. However, this Act neither turns all "charitable" not-for-profit corporations into trusts, nor allows the Court to disregard the Foundation's Articles of Incorporation issued by the State of Illinois and "pretend" the Foundation is actually a trust. Nor does the Charitable Trust Act allow the Court to disregard the Foundation's own By-Laws or the rights and powers conferred upon it by the General Assembly through the Illinois General Not for Profit Corporation Act.

Plaintiffs have not and cannot allege the necessary elements to prove that Ambassador Terra intended to create a trust when he explicitly created the Foundation as a private Illinois not-for-profit corporation. The elements of an express trust are: (1) intent of the parties to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specification of trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee. In re Estate of Zuckerman, 218 Ill. App. 3d 325, 329, 578 N.E.2d 248 (1st Dist. 1991). Ambassador Terra prepared Articles of Incorporations and By-Laws, not a trust document. Plaintiffs themselves chose to file their complaint supposedly based upon those Articles of Incorporation and By-Laws, which they attached as exhibits to their complaint. Plaintiffs did not file suit upon and did not attach to their complaint any declaration of trust or other trust document.

The Illinois Appellate Court has previously addressed this very issue in Scott v. Harding Museum, 58 Ill. App. 3d 408 (1978). In that case, the court found that because the purpose of the George F. Harding Museum, an Illinois not-for-profit corporation, as stated in the museum's articles of incorporation, constituted a "charitable" purpose, the museum was subject to the Charitable Trust Act. Id. at 415-16. However, in determining the purpose of the museum, the court looked solely to the museum's articles of incorporation. Id. The court quoted the language of the articles of incorporation in holding that in "the establishment of this museum, the express intent of the donor was the 'collection, preservation and exhibition of . . . art'." Id. Moreover, the court specifically rejected the "sophistical reading of the purpose clause of the articles of incorporation suggested by the defendants" and instead based its holding on a plain and ordinary reading of the articles of incorporation. Id. at 416.

The intent of Daniel Terra must be determine by looking solely to the Foundation's founding documents, just as the court did in Scott. Id. Even if the Court chooses to ignore the operative documents governing the Terra Foundation – a not-for-profit corporation – and decides to treat the Foundation as a "trust," plaintiffs still cannot demonstrate that it was the intent of Ambassador Terra to limit the scope of the Foundation to operating exclusively within the geographical limits of Chicago, and exclusively for the benefit of the residents of Chicago. Even the case law cited by plaintiffs for the proposition that the Court may look to "surrounding circumstances" hold that in determining the intent of a trust settlor, "the court must consider the plain and ordinary meaning of the words used." First Nat'l Bank of Chicago v. Canton Council of Campfire Girls, Inc., 85 Ill. 2d 507, 514 (1981); see also Northern Ill. Med. Ctr. v. Home State Bank of Crystal Lake, 136 Ill. App. 3d 129, 144 (2nd Dist. 1985); Stuart v. Continental Ill. Nat'l Bank and Trust Co. of Chicago, 68 Ill. 2d 502, 528 (1977). If the intent may be gathered from the language of the "trust" documents themselves, there is no need for extrinsic evidence. In the absence of ambiguity, which does not exist here, extrinsic evidence is impermissible. Nat'l Bank of Chicago, 85 Ill. 2d at 514; see also In re Estate of Mendelson, 298 Ill. App. 3d 1, 3-4 (1st Dist. 1998) (holding that courts should attempt to determine the settlor's intent solely by reference to the plain language of the trust agreement); Mitchell v. Snyder, 402 Ill. 279, 284 (1949) (finding

that the intent of the testator is to be drawn from the language of the document itself, and surrounding circumstances will not be permitted to import a different meaning from that expressed, unless there exists such an ambiguity as to require a construction by the court).

As a matter of law this issue must be decided on the face of the documents and not result in an evidentiary hearing. However, even if the Court chooses to hold an evidentiary hearing on this issue, neither the plaintiffs nor the Attorney General can prove that Ambassador Terra intended that the Terra Museum and the Foundation forever remain in Chicago, Illinois. Presumably, plaintiffs attached their best evidence to support their claims to their complaint. Such "evidence" consisted solely of a few magazine articles in which the Ambassador touts the uniqueness of his museum at around the time of its opening. In contrast, the Foundation has overwhelming evidence suggesting that Ambassador Terra was a man with a broad international vision who became disenchanted with Chicago when his museum was not the success he had hoped. As a result, Ambassador Terra actively sought out other options for his museum, including the alliances with the Corcoran Gallery, the Whitney Museum and the University of the Arts as previously described above. Those efforts are documented in the exhibits attached to this letter and would be testified to by all of the witnesses who participated with Ambassador Terra in those activities. Moreover, other individuals close to the Ambassador also agreed that it would be in the Foundation's best interest to close the Terra Museum in Chicago. (See Ex. D, 1989 letter from long-time Foundation counsel, James Collins, to Ambassador Terra (stating that Chicago has not sufficiently supported the Terra Museum and suggesting that the Ambassador consider other cities to showcase his art); see also April 2, 1997 letter from Dorrance H. Hamilton, a former Foundation Director, to Mme Arhweiler, attached hereto as Ex. O (stating "[e]ven without a firm plan I agree that the Museum in Chicago should be closed, and the Michigan Avenue real estate sold")).

As a matter of law, the Foundation is in no way restricted to the boundaries of the State of Illinois, and is entitled to choose to conduct its operations anywhere. Tellingly, on the very first day that the parties were before the Court, Floyd Perkins, Assistant Attorney General, was specifically asked by the Court whether there existed any case law where a "charitable organization[] in Illinois wish[ed] to move outside the state and [was] stopped by force from doing so." (See Tr. of Proceedings 9/22/00 at p. 17). Mr. Perkins could not at that time or any time thereafter provide any such authority to the Court – because no such authority exists. (Id. at 17-19). Moreover, even if the intent of Ambassador Terra's vision reached far beyond the City of Chicago and State of Illinois, there is no evidence suggesting that Ambassador Terra intended for the Terra Museum or the Foundation to forever remain in Illinois, in fact, the evidence shows that just the opposite is true.

Plaintiffs' and Attorney General's Allegations Regarding "Waste and Mismanagement"

As the Court has read the complaints, the second category of allegations in the complaints are directed toward the individual defendants. Plaintiffs and the Attorney General allege that the three individual defendant directors have breach some sort of claimed fiduciary

duties to the people of Illinois by engaging in alleged waste and mismanagement. While the Foundation has not conducted a formal investigation into any such allegations, due in large part to the fact that the plaintiffs have filed numerous motions attempting to enjoin the Foundation's Independent Litigation Committee and Sidley & Austin from conducting any such investigation, the Foundation currently has no reason to believe that there is any merit in any such allegations.

First, neither the plaintiffs nor the Attorney General have alleged any specific acts of waste or mismanagement on the part of any of the defendant directors.[1] Rather, the complaints contain purely general allegations that the individual defendants have engaged in "mismanagement of the Terra Museum" and "plans" to remove plaintiff Buntrock as a director as part of some sort of "scheme" to move the Foundation to Washington, D.C. Obviously, the three individual defendant directors as a minority of the eleven-member Board could never succeed in moving the Foundation out of Illinois if a majority of the Board did not also agree that this was in the best interest of the Foundation.

These "allegations" appear to be nothing more than a commentary on staffing and other administrative minutia of the Foundation, much of which reflects matters which took place prior to October, 1999 when Dr. Tucker became president of the Foundation after Mr. Gidwitz, Ambassador Hartman and Mrs. Daley had blocked the hiring of a full-time professional president. In fact, any waste or mismanagement surely should have been detected by the Foundation's treasurer and chairman of the Finance and Investment Committee, plaintiff Buntrock, who was charged with maintaining and managing the Foundation's finances. Plaintiff Buntrock held these positions during the time period covered by the complaint and until September 2000. However, Buntrock never mentioned that he thought the defendants might be wasting or mismanaging the Foundation's assets until just prior to the annual September, 2000 Board meeting when it looked like he might not be reelected to the Foundation's Board. Moreover, every year the Foundation received audited financial statements.

Plaintiffs appear to have brought their complaint (upon which the Attorney General relies and admits that he has no independent knowledge of any of the allegations contained therein) for the sole purpose of keeping the Foundation in the City of Chicago – where their loyalties lie – and removing any director who disagrees with them despite what is in the Foundation's best interest.

Settlement Proposals

[1] The only arguably specific allegation contained in either complaint, is a reference that Judith Terra supposedly appropriated art from the Foundation for her own personal use. As the plaintiffs very well know, after appropriate approval, security and insurance was secured, a few works from the Foundation's Giverny museum were brought to Mrs. Terra's nearby residence at the request of a British television production company in order to film a program promoting the Giverny museum. Officials from the Giverny museum transported the paintings to Mrs. Terra's home, waited during the three hour taping of the program, and immediately and safely returned the paintings back to the museum thereafter.

Any settlement of this matter must first recognize that the Foundation has the right to govern itself. Anything less would have a chilling effect on all not-for-profit corporations and private foundations or trusts established in Illinois, suggesting that once such an entity is formed in Illinois it belongs to the people of the State of Illinois and may never leave.

There are many issues which need to be addressed before the Foundation can agree to any plan for its future. The Foundation proposes that the plaintiffs and the Attorney General voluntarily dismiss their complaints and permit the Board of Directors to continue considering, formulating and seeking out options for a future plan for the Foundation and its museums. We believe that the Attorney General, in his February 1, 2001 letter to Judge Kinnaird, accurately addresses the multitude of issues that the Foundation was considering and would like to continue to consider without the barrier of the current lawsuit in determining the best strategic plan for the Foundation. The Attorney General noted that many of the strategic planning issues include:

> What are the missions and goals of the Foundation? What consideration must be given to Dan Terra's visions in formulating the missions and goals? What was being done right? What could be improved? Is the current location a barrier to the missions and goals? Are stand alone small museums efficient, effective, and economically justified? Will partnering with another museum create a synergy to further the missions and goals? Specifically in this regard, will a world class collection, which will create a destination for people who wish to enjoy American Art, result from the partnering? Will the current highly successful school children's education programs be enhanced by the partnering? What role will Giverny museum play within the partnering? Will a partner be in a position to make relevant art works available for display in Giverny or otherwise assemble exhibitions for display there?

All of these questions are very important ones that must be considered by the Foundation's Board of Directors. The Foundation may wish to hire consultants or analysts to assess its options. Prior to the filing of this lawsuit, the Board was at the initial stages of considering the various options available and has not been given the opportunity to fully consider each of the factors expressed by the Attorney General. The Foundation is also willing to use this time to solicit proposals from institutions, other than those already under consideration, located in Illinois.

Additionally, the Foundation would also consider agreeing that it will not close the Terra Museum or move the Foundation out of Illinois without first consulting with the Attorney General on its findings and basis for its decisions.

Finally, the Foundation would like to resolve this matter without the expense of further litigation or a trial; however, the Foundation is confident that it has an absolute right to choose to close the Terra Museum and/or move the Foundation outside of Illinois if a majority of the Board so decides. Accordingly, the Foundation is not interested in any kind of settlement that would result in a finding to the contrary.

Sincerely,

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January 18, 2002

JAN 22 2002

VIA HAND DELIVERY

The Honorable Julia M. Nowicki
Circuit Court of Cook County
2510 Richard J. Daley Center
Chicago, Illinois 60602

Re: Tucker v. Buntrock, 01 L 9112

Dear Judge Nowicki:

Enclosed is a copy of our consolidated response to the various motions to dismiss. We've made every effort to keep it short.

Also enclosed is a courtesy copy of our motion for leave to file the Terra affidavit under seal. Although we do not believe the attachments to that affidavit are necessarily "confidential," at least one of them relates to the earlier mediation.

Respectfully,

Robert P. Cummins

RPC/pw
Enclosure

cc: Service List

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 01 L 009112
	)	
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on Friday, January 18, 2002, we filed in the Clerk's Office of the Circuit Court of Cook County, Illinois, Plaintiff's Consolidated Response In Opposition To Defendants' Motions To Dismiss, a copy of which is hereby served upon you.

Dated: January 18, 2002

Respectfully submitted:

PAUL HAYES TUCKER, *et al.*,

One of the Attorneys for the Plaintiffs

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MULROY
SCANDAGLIA
MARRINSON
RYAN

January 24, 2002

VIA MESSENGER
The Honorable Judge Julia M. Nowicki
Circuit Court of Cook County
Chancery Division
Richard J. Daley Center
Courtroom 2510
Chicago, IL 60602

Re: ***Tucker v. Buntrock*** **(01 L 009112)**
Courtesy papers filed with defendants' motions to dismiss

Dear Judge Nowicki:

To better facilitate the Court's handling of this case, the Terra Foundation encloses herewith a courtesy set of the papers filed in support of the defendants' various motions to dismiss plaintiffs' First Amended Complaint at Law. As set out more completely in the Table of Contents (attached to this letter), the Terra Foundation is sending you: (1) a copy of the First Amended Complaint; (2) the defendants' motions to dismiss along with the memoranda, exhibits, and case law filed in support thereof; and (3) a copy of plaintiffs' response brief.

As you know, the defendants' reply briefs are due February 1, 2002. The Terra Foundation will forward you courtesy copies of these reply briefs (along with any supporting documents) as soon as it receives them. Accordingly, you should have a complete set of all the papers filed in connection with these pending motions to dismiss well in advance of the February 13, 2002 hearing in this matter.

Very truly yours,

Eric J. Muñoz

Enslosure

cc: All Attorneys of Record
See attached Service List

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Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
Case No. 01 L 009112

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BUNTROCK v. TERRA
COURT NO. 01 L 9112

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	Hon. Julia M. Nowicki
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

REPLY IN SUPPORT OF SECTION 2-619.1 MOTION TO STRIKE AND DISMISS COUNTS I, IV AND V OF AMENDED COMPLAINT

Defendants, Dean L. Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, by and through their attorneys, Quinlan & Carroll, Ltd., hereby state as follows as their reply in

support of their section 2-619.1 motion to strike and dismiss counts I, IV and V of amended complaint:

INTRODUCTION

By their motion and memorandum, defendants move this Court to dismiss counts I, IV and V of plaintiffs' amended complaint. Plaintiffs' amended complaint is simply an improper effort to relitigate and further challenge the entry of the consent judgment and order ("consent judgment") approved by the court in *Terra I*. In their response to defendants' motion, plaintiffs fail to address the majority of the arguments raised by defendants in support of their motion. Indeed, plaintiffs do not mention that the claims and issues of *Terra II* are subject to plaintiffs' pending appeal in *Terra I* in the First District, Appellate Court. Not only do plaintiffs fail to address the pending appeal in *Terra I*, plaintiffs fail to even mention the appeal. Notwithstanding this "omission," the fact that the same claims are pending on appeal warrants dismissal of plaintiffs' claims pursuant to section 2-619(a)(3).

Moreover, plaintiffs' attempt to avoid the clear applicability of collateral estoppel and res judicata falls short. Plaintiffs cannot reasonably dispute that *Terra II* is a clear relitigation of the objections to the consent judgment that plaintiffs litigated and the court resolved in *Terra I*.

Finally, plaintiffs are unable to support their claims that the approval of the consent judgment was an *ultra vires* act or a breach of fiduciary duty by defendants. Plaintiffs cannot allege that the consent judgment is prohibited or in violation of the Foundation's governing documents. Moreover, plaintiffs cannot state a claim that defendants breached fiduciary duties by simply approving the consent judgment. Plaintiffs' claims are premised entirely on their unhappiness with the consent judgment — claims that are not only at issue before the Appellate

Court, but also without support in Illinois law. Thus, this Court should dismiss counts I, IV and V of the first amended complaint.

ARGUMENT

I. PLAINTIFFS DO NOT DISPUTE THAT DISMISSAL IS APPROPRIATE IN LIGHT OF THE PENDING APPEAL.

Plaintiffs fail to address in their response — and, in fact, completely omit to mention — that they are currently appealing *Terra I* and that their appeal is "another action pending between the same parties for the same cause" that requires dismissal of counts I, IV and V pursuant to section 2-619(a)(3). 735 ILCS 5/2-619(a)(3). Plaintiffs' "omission" is telling. Defendants have moved this Court for dismissal pursuant to section 2-619(a)(3) because *Terra II* is an improper attempt to appeal *Terra I* to this Court while concurrently pursuing the same relief before the Appellate Court. As set forth in defendants' motion, section 2-619(a)(3) is equally applicable when the "same claim" is pending on appeal. *Wheatley v. International Harvester Co.*, 166 Ill. App. 3d 775, 520 N.E.2d 975 (5th Dist. 1998); *In re Ordinance Requesting the Annexation of Certain Territory to the Village of Willowbrook*, 62 Ill. App. 2d 45, 210 N.E.2d 25 (2nd Dist. 1965).

Plaintiffs do not dispute — because they cannot — that the requirements of section 2-619(a)(3) are satisfied here. Specifically, the pending appeal in counts I, IV and V involves the "same parties" because, as required by section 2-619, the litigants' interests are sufficiently similar. *Id.* at 318, 653 N.E.2d at 828. There is no requirement that the parties be identical in name or number and thus, the addition of individual defendant directors Daley, Hartman, Stebbins and Marshall to this action does not limit the applicability of section 2-619(a)(3).

Moreover, the "same cause" requirement is also satisfied because the relief sought is requested on substantially the same set of facts. *Schnitzer v. O'Connor*, 274 Ill. App. 3d 314, 319, 653 N.E.2d 825, 829 (1st Dist. 1995). Specifically, the "same cause" requirement is satisfied if, as here, the two actions arise out of the same transaction or occurrence, regardless of the legal theory or relief sought. *Id.*

As noted above, plaintiffs fail to even mention their pending appeal in *Terra I*. Yet, plaintiffs spend a great deal of time arguing that they cannot be bound by the consent judgment of *Terra I* because they were not parties to that consent judgment. This argument illustrates a clear inconsistency in plaintiffs' position. On one hand, plaintiffs argue, as they must, that they have standing and rights to challenge the consent judgment before the Appellate Court, yet here, although seeking the same relief, plaintiffs' claim is based entirely on the position that they are not bound by the consent judgment. This inconsistency is fatal to plaintiffs' claims.

Defendants have demonstrated that plaintiffs' pending appeal in *Terra I* is for the "same cause" and between the "same parties" for purposes of section 2-619(a)(3). Plaintiffs do not dispute this argument and, accordingly, counts I, IV and V of the amended complaint should be dismissed due to the pendency of the appeal in *Terra I*.

II. COUNTS I, IV AND V SHOULD BE DISMISSED PURSUANT TO THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA.

As set forth in defendants' motion and memorandum, this Court should dismiss counts I, IV and V pursuant to section 2-619(a)(4) under the doctrines of res judicata and collateral estoppel. Defendants' motion illustrates that the requisite elements of res judicata and collateral estoppel are satisfied here. As set forth below, plaintiffs' effort to argue against the applicability

of res judicata and collateral estoppel is insufficient.

A. Res Judicata And Collateral Estoppel Bar Plaintiffs' Claims — Regardless Of Whether Plaintiffs Were Parties To The Consent Judgment.

Plaintiffs argue that res judicata and collateral estoppel are not applicable because plaintiffs are not parties to the consent judgment of *Terra I*.[1] Plaintiffs rely on *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 757 N.E.2d 471 (2001), to suggest that res judicata and collateral estoppel would only apply if plaintiffs were parties to the consent judgment. *Nowak* does not support plaintiffs' position. Indeed, res judicata and collateral estoppel do not impose a strict requirement of identity of parties and are, in fact, applicable if there is an identity among parties "or their privies." *See River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302, 703 N.E.2d 883 (1998); *DuPage Forklift Service, Inc. v. Material Handling Service, Inc.*, 195 Ill. 2d 71, 744 N.E.2d 845 (2001). Thus, even if this Court were to adopt plaintiffs' erroneous contention that res judicata and collateral estoppel require that plaintiffs be parties to the consent judgment, under Illinois law, the Foundation, by its Board of Directors, is already, in fact, a party to the consent judgment and plaintiffs, as board members, are in privity with the parties to the consent judgment.

More importantly, plaintiffs were parties to *Terra I* from the onset and withdrew from the consent judgment after being unhappy with the result. Illinois law does not require that plaintiffs have been a party to the consent judgment. Indeed, the consent judgment was entered only after the court in *Terra I* resolved the issues and claims now presented in *Terra II*. The resolution of

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[1] Of course, this argument is totally inconsistent with plaintiffs' efforts to appeal the consent judgment of *Terra I*.

the identical issues raised in *Terra II*, the entry of the final judgment on the merits in *Terra I*, and the fact that plaintiffs were parties in *Terra I,* satisfy the elements of collateral estoppel. *See DuPage Forklift Service,* 195 Ill. 2d 71, 741 N.E.2d 845. In addition, the fact that the court entered a final judgment on the merits in *Terra I* after ruling on plaintiffs' objections to the consent judgment, that the claims in *Terra II* result from the same group of operative facts as *Terra I*, and that plaintiffs were parties in *Terra I,* satisfy the requirements of res judicata. *River Park*, 184 Ill. 2d 290, 703 N.E.2d 883.

Indeed, had Judge Kinnaird in *Terra I* not ruled on plaintiffs' claims and resolved their specific objections to the consent judgment, the consent judgment would not have been entered. The mere entry of the consent judgment in *Terra I* satisfies the requirement of res judicata and collateral estoppel that there be an identity of parties "or their privies" because plaintiffs were parties in *Terra I. See River Park, Inc.*, 184 Ill. 2d at 302, 703 N.E.2d 883 (1998); *DuPage Forklift*, 195 Ill. 2d 71, 744 N.E.2d 845. Following plaintiffs' reasoning, there could be no preclusive effect from *Terra I* unless all the directors of the Board reached a unanimous decision to enter into the consent judgment. Of course, had there been a unanimous decision, there would be no *Terra II.* This circular reasoning is not the law in Illinois nor was a unanimous decision required by the Foundation's bylaws.

B. Res Judicata And Collateral Estoppel Apply Notwithstanding That There Were No Express Findings Of Fact In *Terra I.*

Plaintiffs also argue that the preclusive effect of res judicata and collateral estoppel is not applicable because Judge Kinnaird made no findings of fact in *Terra I.* Plaintiffs miss the point. Defendants have never contended that Judge Kinnaird made express findings of fact; however, as

noted above, the mere entry of the consent judgment over plaintiffs' objections was a ruling and resolution of plaintiffs' claims and the issues raised in *Terra II*. Moreover, the consent judgment eliminates the need for findings of fact because, by its very nature, the consent judgment is a settlement of a controversy that did not necessitate fact findings.

Plaintiffs cite no authority to support their contention that the absence of express findings of fact prevents the application of res judicata or collateral estoppel to the present circumstances. Moreover, although plaintiffs argue that there were no express findings, plaintiffs totally disregard the clear rulings of the court in *Terra I* that the consent judgment was not "antithetical to the Foundation's purposes" or that despite the allegations of a conflict of interest, Stebbins and Marshall "could properly participate in this decision . . ." *See* Exhibit F to defendants' motion, pp. 127-28, 133-34. Accordingly, the court expressly rejected plaintiffs' claims without entering specific fact findings.

C. Discovery On The Objections To The Consent Judgment Was Not Required.

Plaintiffs argue that *Terra I* should not have a preclusive effect because plaintiffs were denied the opportunity to conduct discovery on their objections to the consent judgment. Notably, plaintiffs' request for discovery was made after the consent judgment was reached in mediation and approved by the Board. Plaintiffs have failed to offer any authority to support the proposition that such discovery was required, especially when plaintiffs were participants in the long-standing mediation. Plaintiffs' suggestion that they were denied an "evidentiary opportunity" in *Terra I* is undermined by the undisputed fact that the Court in *Terra I* considered voluminous exhibits and documents presented by plaintiffs in support of their objections to the consent judgment, as well as lengthy arguments (over 5 hours) on the objections.

Plaintiffs' reliance on *Sprecher v. Graber*, 716 F.2d 968 (2nd Cir. 1983), is unavailing. In *Sprecher*, the court held that collateral estoppel would not apply to certain claims alleging individual and official misconduct by the SEC. *Sprecher*, 716 F.2d 968, 972. The SEC argued that collateral estoppel barred plaintiffs' claims of official misconduct against the SEC because another court enforced the subpoena in enforcement proceedings. *Id.* at 972. The court held that collateral estoppel did not apply because subpoena enforcement proceedings are summary proceedings without discovery and so long as the SEC complied with statutory prerequisites, a party opposing a subpoena has a "heavy burden" to prove that the subpoena is based on an invalid purpose. *Id.* Thus, in light of the substantial disparate opportunities for discovery and different burdens in the proceedings, collateral estoppel was not permitted. *Id.*

Sprecher has limited applicability here because the SEC's subpoena, investigation, and enforcement powers are part of a statutory framework. Here, there was no governing statutory procedure. In fact, despite holding that collateral estoppel did not apply to certain claims in *Sprecher*, the court held that collateral estoppel barred other claims because the plaintiff had a full opportunity to litigate the merits of those claims in the enforcement proceeding. *Id.* at 973. The court held that so long as there was a full and fair opportunity to litigate the issue, collateral estoppel applied. *Id.*

Sprecher does not limit this Court's ability to apply collateral estoppel or res judicata to plaintiffs' claims. As recognized in *Sprecher*, so long as plaintiffs had a full and fair opportunity to litigate the issues in *Terra I*, collateral estoppel bars the relitigation here. The court in *Terra I* considered voluminous documents in exhibits that allegedly supported plaintiffs' objections to the consent judgment. Accordingly, the lack of discovery in *Terra I* does not preclude the

applicability of collateral estoppel.

D. The Issues Of *Terra II* Are Identical To Those Resolved In *Terra I*.

Plaintiffs, in conclusory fashion, suggest that collateral estoppel does not apply because "the issues presented here are not identical to any consideration by Judge Kinnaird." Plaintiffs make no effort to dispute the clear identity of the issues set forth in detail in defendants' motion and memorandum in support thereof. As set forth in the motion, Judge Kinnaird expressly found that the consent judgment was not "antithetical to the Foundation's purposes," that the Foundation was "going to be able to pretty much operate the way it has," and that it would "be able to conduct its mission of providing education in and throughout the world . . ." *Id.*, pp.127-28. Thus, contrary to plaintiffs' argument, the court in *Terra I* expressly found that the consent judgment was consistent with the director's fiduciary duties and the Foundation's purpose.

Indeed, plaintiffs' argument that a different burden of proof applied in *Terra I* than is applicable in *Terra II* only serves to illustrate that the identical issues presented in *Terra II* were resolved in *Terra I*. Plaintiffs essentially admit that the causes of action and the issues are identical, but that plaintiffs should be given a "second bite of the apple" under a different burden of proof. Plaintiffs are unable to provide this Court with any authority to support such a proposition.[2]

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[2] Instead, plaintiffs mistakenly rely on *U.S. Aluminum Corp. v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), *cert. denied*, 488 U.S. 822 (1988), which involved different causes of action in different proceedings, one proceeding involved federal law and the other, state law. *U.S. Aluminum* is readily distinguishable because here, plaintiffs are simply relitigating the same claims and issues resolved in *Terra I*, by a court of concurrent jurisdiction to this Court.

E. Application Of Collateral Estoppel Or Res Judicata Is Not Inequitable.

Finally, plaintiffs argue that it would be inequitable for this Court to apply res judicata or collateral estoppel. This argument must be rejected. Plaintiffs make much of the fact that the Court in *Terra I* told plaintiffs that it was not barring them from bringing another action. Yet, the Court never directed or authorized — nor could it — plaintiffs' refiling of identical claims and relitigating the same issues. Moreover, application of res judicata and collateral estoppel would not be inequitable because plaintiffs are currently pursuing a review of the consent judgment in the Appellate Court. Plaintiffs are not entitled to review in two forums. Thus, for this additional reason, this Court should dismiss counts I, IV and V pursuant to res judicata and collateral estoppel.

III. PLAINTIFFS DO NOT DISPUTE THAT COUNT I FAILS TO STATE A CLAIM FOR DECLARATORY RELIEF.

Plaintiffs fail to address in any way that the claim for declaratory relief in count I fails to satisfy section 2-701 of the Code of Civil Procedure. As set forth in defendants' motion, section 2-701 provides that "[t]he court shall refuse to enter a declaratory judgment or order if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." 735 ILCS 5/2-701. Dismissal of claims for declaratory judgments is appropriate when the relief sought would lead to "impermissible piecemeal litigation." *Marlow v. American Suzuki Corp.*, 222 Ill. App. 3d 722, 584 N.E.2d (1st Dist. 1994); *Schlossberg v. E.L. Trendall and Associates, Inc.*, 63 Ill. App. 3d 939, 942, 380 N.E.2d 950 (1st Dist. 1978). Moreover, dismissal of a declaratory judgment will avoid piece-mail litigation in situations where, as here, the claim is essentially a collateral attack on another action. *See Tait v.*

Sangamon County, 138 Ill. App. 3d 169, 485 N.E.2d 558, 560 (4th Dist. 1985); *see also Coles-Moultrie Electric Co-op v. City of Charleston*, 8 Ill. App. 3d 441, 289 N.E.2d 481 (4th Dist. 1972).

In count I, plaintiffs seek a declaration that the consent judgment and order is invalid.[3] Invalidation of the consent judgment and order would not only be a collateral attack on *Terra I,* but it would also lead to additional litigation in *Terra I*, as well as impact the proceedings before the Appellate Court. For this reason, count I should be dismissed.

IV. COUNT IV SHOULD BE DISMISSED PURSUANT TO SECTION 2-615.

Plaintiffs' response to defendants' motion to dismiss count IV, which purports to state a claim against defendants for alleged *ultra vires* acts, consists of conclusory statements that the claims are "sufficiently specific" and "properly state claims." Such conclusory allegations, relying on solely the allegations of the amended complaint that defendants challenge as defective, are insufficient. As set forth below, plaintiffs have failed to specifically address defendants' arguments.

Plaintiffs fail to respond to the argument that plaintiffs have not alleged the necessary elements for injunctive relief. The relief sought in count IV is for this Court to issue an injunction to "enjoin the doing of such acts." Plaintiffs do not attempt to allege any clearly ascertainable right or inadequate remedy at law. Moreover, by claiming damages, plaintiffs

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[3] As discussed in defendants' motion and memorandum, by seeking to invalidate the consent judgment, plaintiffs are, in essence, seeking to rescind the consent judgment without alleging any of the required elements of rescission or without seeking relief pursuant to section 2-1401 of the Illinois Code of Civil Procedure. Plaintiffs fail to dispute defendants' argument and, for this additional reason, count I should be dismissed.

totally undermine the ability to allege that there is no adequate legal remedy. Accordingly, for this reason, count IV should be dismissed.

In addition, plaintiffs do not address that the requested injunction to "enjoin such acts" is impermissibly vague. Illinois law requires that injunctions be specific and as "definite, clear and precise as possible." *Hartlett v. Dahm*, 94 Ill. App. 3d 1, 5, 418 N.E.2d 44, 47 (2nd Dist. 1981). For this additional reason, count IV should be dismissed.

Moreover, plaintiffs completely ignore defendants' argument that they have failed to allege sufficient facts to support a claim for punitive damages. Under Illinois law, to be entitled to punitive damages, one must allege outrageous conduct, acts perpetrated by evil motive or with reckless indifference to the rights of others. *Guice v. Sentinel Tech., Inc.*, 294 Ill. App. 3d 97, 689 N.E.2d 355, 365 (1st Dist. 1997). Plaintiffs do not refute that such factual allegations are lacking and count IV should be dismissed.

Finally, plaintiffs fail to address the fact that they are unable to state a claim that the Board's approval of the consent judgment was *ultra vires* because Stebbins and Marshall had an alleged conflict of interest. Conflicts of interest are governed by section 108.60 of the Not for Profit Act that provides that a director has a conflict of interest if he is directly or indirectly a party to a disputed transaction. 805 ILCS 105/108.60. Plaintiffs' response fails to address the applicability of section 108.60. Plaintiffs' sole response is that as directors, they have a right to pursue *ultra vires* claims. Notwithstanding such rights, plaintiffs must still allege facts sufficient to show that an *ultra vires* act did occur. Here, since the *ultra vires* act is based on a conflict of interest, plaintiffs must allege facts that show a violation of section 108.60. Plaintiffs' failure to do so requires dismissal of count IV.

V. COUNT IV SHOULD BE DISMISSED PURSUANT TO SECTION 2-619(a)(9).

The consent judgment itself bars plaintiffs' claim that the Board's approval of the consent judgment was an *ultra vires* act. In fact, plaintiffs' submission of the letter from Sidley, Austin, Brown & Wood ("Sidley letter"), submitted to the mediator in *Terra I* in preparation for the mediation, and attached as an exhibit to plaintiffs' response, further supports that the consent judgment was not an *ultra vires* act. As stated in the Sidley letter, Illinois law provides that an *ultra vires* act is one that is expressly prohibited and beyond the powers of the corporation. *Sherrard State Bank v. Vernon*, 243 Ill. App.122 (2nd Dist. 1926). Moreover, as noted in the Sidley letter, the powers and limitations of a corporation are found in its articles of incorporation, its bylaws, and in applicable constitutional and statutory provisions. *Stroh v. Blackhawk Holding Corp.*, 48 Ill. 2d 471, 475 (1971). As the bylaws and the articles of incorporation illustrate (though plaintiffs fail to attach these documents to the amended complaint), the Foundation is not expressly prohibited from entering into an agreement that provides that the Terra Collection of Art shall be maintained and exhibited in Chicago or in partnership with another institution in the Chicago area for 50 years. Plaintiffs fail to direct this Court to any express prohibition provided in the bylaws or articles. Moreover, the consent judgment does not limit the Foundation's ability to exhibit its collection in Giverny and for other programs and scholarly use outside of Chicago, as noted by the court in *Terra I*. Clearly, Judge Kinnaird reached the same conclusion in approving the consent judgment. Accordingly, the terms of the consent judgment bar plaintiffs' claim that it is *ultra vires*.

VI. COUNT V SHOULD BE DISMISSED PURSUANT TO SECTION 2-615.

Despite plaintiffs' conclusory statements that they have adequately alleged a breach of fiduciary duty, plaintiffs do not address the clear requirements of Illinois law that provide that in the absence of allegations of fraud, illegality, or conflict of interest, decisions made by corporate directors are protected by the business judgment rule, and may only be attacked by factual allegations that show a lack of due care in the making of those decisions. *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 636 N.E.2d 616 (1st Dist. 1993). Plaintiffs have not alleged any fraud, illegality or conflict of interest on the part of defendants, Buntrock, Daley, Gidwitz and Hartman. There are no facts that establish that the business judgment rule should not apply or that defendants' approval of the consent judgment was the result of lack of due care. *Id.*[4] For these reasons, plaintiffs have failed to state a claim for breach of fiduciary duty, and count V should be dismissed.

VII. PLAINTIFFS DO NOT DISPUTE THAT THEIR CLAIMS FOR DAMAGES IN COUNTS IV AND V MUST BE STRICKEN.

Plaintiffs make no effort to address defendants' contention that they have not alleged facts that support their claim for individual damages. It is undisputed that defendants owe a fiduciary duty to the Foundation, not plaintiffs. Thus, plaintiffs' claim for individual damages, in the absence of any facts or authority to support such claims, must be stricken.

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[4] Plaintiffs' entire claim for breach of fiduciary duty lacks any specific factual allegations against any director, as evidenced by the fact that defendants purport to state a claim for breach of fiduciary duty against all directors.

VIII. PLAINTIFFS DO NOT DISPUTE THAT THIS COURT SHOULD DISMISS COUNTS I, IV AND V PURSUANT TO SECTION 2-606.

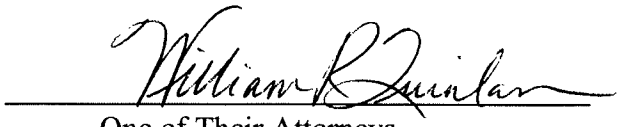
Finally, plaintiffs do not address that their failure to attach the consent judgment, the Foundation's articles, or the Foundation's bylaws to the amended complaint violates section 2-606. The amended complaint is entirely premised on these documents. Section 2-606 requires that when a claim is founded on a written instrument, such instrument must be attached to the pleading or cited therein. *See* 735 ILCS 5/2-606. Failure to comply with section 2-606 is grounds for dismissal. *Plocar v. Dunkin Donuts of America*, 103 Ill. App. 3d 740, 431 N.E.2d 1175 (1st Dist. 1981). For this additional reason, dismissal of counts I, IV and V is appropriate.

CONCLUSION

WHEREFORE, for all the foregoing reasons, defendants Dean Buntrock, Margaret Daley, Ronald Gidwitz and Arthur Hartman, respectfully request that this Court strike and dismiss counts I, IV and V of the amended complaint and enter any other relief that this Court deems fair and just.

Respectfully submitted,

DEAN BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ, and ARTHUR HARTMAN,

By: 
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HYNES JOHNSON & MCNAMARA
CHICAGO, ILLINOIS

January 25, 2001

VIA MESSENGER DELIVERY
The Honorable Julia M. Nowicki
Circuit Court of Cook County
Chancery Division
2510 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Paul Hayes Tucker, et al. v. Dean Buntrock, et al.***
No. 01 L 009112 (transferred to Chancery Division)

Dear Judge Nowicki:

Enclosed please find a courtesy copy of the Section 2-619.1 Motion to Strike and Dismiss Counts I, IV, and V of the Amended Complaint and Memorandum of Law in Support Thereof filed on January 4, 2002 on behalf of defendants Dean Buntrock, Ronald Gidwitz, Margaret Daley, and Arthur Hartman in the above-referenced matter. Pursuant to the briefing schedule set by this Court, this motion is scheduled for hearing on February 13, 2002 at 2:00 p.m.

All counsel of record have received a copy of the documents enclosed herein.

Very truly yours,

William R. Quinlan

WRQ/jmm
Enclosure

cc: Attached Service List

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16di-004927

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts; JUDITH TERRA, a Director of the Terra Foundation for the Arts; and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,	)	
Plaintiffs,	)	No. 01 L 009112
v.	)	(Transferred to Chancery Division)
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts; RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A FORSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEHL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership,	)	
Defendants.	)	

NOTICE OF FILING

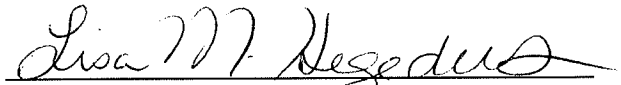
TO: See attached Service List

PLEASE TAKE NOTICE that on February 1, 2002, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **Reply in Support of Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint**, a copy of which is

attached and hereby served upon you.

Respectfully submitted,

DEAN BUNTROCK, MARGARET DALEY,
RONALD GIDWITZ and ARTHUR HARTMAN

By: 
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CERTIFICATE OF SERVICE

The undersigned, being duly sworn on oath, deposes and states that she caused true and correct copies of the attached **Notice of Filing** and **Reply in Support of Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint**, to be served on the attorneys listed on the attached service list on February 1, 2002, by messenger delivery before 5:00 p.m. or by Federal Express, as indicated.

[X] Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth herein are true and correct.

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February 1, 2002

VIA MESSENGER DELIVERY
The Honorable Julia M. Nowicki
Circuit Court of Cook County
Chancery Division
2510 Richard J. Daley Center
Chicago, Illinois 60602

Re: ***Paul Hayes Tucker, et al. v. Dean Buntrock, et al.***
No. 01 L 009112 (transferred to Chancery Division)

Dear Judge Nowicki:

Enclosed please find a courtesy copy of the Reply in Support of Section 2-619.1 Motion to Strike and Dismiss Counts I, IV and V of Amended Complaint filed on behalf of defendants Dean Buntrock, Ronald Gidwitz, Margaret Daley, and Arthur Hartman in the above-referenced matter. This matter is scheduled for hearing before this Court on February 13, 2002 at 2:00 p.m.

Very truly yours,

William R. Quinlan

WRQ/jmm
Enclosure

cc: Attached Service List

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16di-004933

16di-004934

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 009112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	Transferred from Law Division

THE TERRA FOUNDATION'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS, OR *IN THE ALTERNATIVE* TO STAY, COUNTS I, II, AND IV OF PLAINTIFFS' AMENDED COMPLAINT

In its opening brief, defendant Terra Foundation for the Arts (the "Foundation") demonstrated that Counts I, II, and IV of the Amended Complaint ("Complaint") filed by Directors Tucker, Terra and Simpson ("plaintiffs" or "dissenting directors") should be dismissed on three independent grounds: (1) that those counts involve the "same parties" and "same cause" as the pending appeal of *Buntrock I* and therefore should be dismissed under 735 ILCS 5/2-619(a)(3) (Opening Br. at 18-19); (2) that those counts are barred under the doctrines of both *res judicata* and collateral estoppel, and therefore should be dismissed under 735 ILCS 5/2-619(a)(4) (*Id.* at 10-18); and (3) that those counts fail to allege facts sufficient to state valid causes of action against the Foundation and therefore should be dismissed pursuant to 735 ILCS 5/2-615 (*Id. at* 18-25). Plaintiffs' response brief does not meet the substance of the Foundation's three arguments for dismissal. Instead, plaintiffs rest on conclusory assertions

unsupported by argument or pertinent authority, omit critical facts, and avoid several of the Foundation's arguments entirely.

I. Counts I, II and IV Should Be Dismissed or Stayed in Light of the Dissenting Directors' Pending Appeal of *Buntrock I.*

In their response brief, plaintiffs do not address the Foundation's contention that Counts I, II and IV should be dismissed pursuant to Section 2-619(a)(3) because the issues raised in those counts are the subject of their pending appeal of *Buntrock I.* (Opening Br. at 18-19[1].) In fact, plaintiffs do not mention anywhere in their response brief that they are appealing Judge Kinnaird's entry of the Consent Judgment and Order. (*See* Exh. V, Notice of Appeal.) Plaintiffs ignore this fact for good reason: they cannot plausibly deny that their appeal of *Buntrock I* constitutes "another action pending between the same parties for the same cause" and therefore should be dismissed pursuant to Section 2-619(a)(3). This is so for three reasons.

First, plaintiff simply cannot reasonably contest that they are parties to an appeal they filed. (Exh. V at 1-2.)

Second, there is no question that the *Buntrock I* appeal and Counts I, II and IV in this litigation involve the "same cause." Two "causes" are the same for purposes of Section 2-619(a)(3) if they "arise out of the same transaction or occurrence," or, put another way, "where relief is requested on substantially the same set of facts." *See Terracom Develop. Group v. Village of Westhaven*, 209 Ill. App. 3d 758, 762. Here, Tucker, Terra and Simpson state in their Notice of Appeal that they will:

---

[1] All citations to "Opening Br." are to the Foundation's Memorandum In Support of Its Motion To Dismiss, or *in the alternative*, to Stay, Counts I, II and IV of Plaintiffs' Amended Complaint, filed on January 4, 2002. All cited exhibits can be found in the two volumes of exhibits submitted with the Foundation's supporting memorandum.

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> . . . ask the Appellate Court to vacate the [Consent Judgment and Order] of July 26, 2001. In the alternative, they will ask the Court to vacate the order and remand this cause of a new hearing, or will seek such other relief as that that Court shall deem just and proper.

(Exh. V, at 2.) Necessarily, in the Appellate Court, plaintiffs will rely on the same objections they raised in front of Judge Kinnaird:

- Directors Marshall and Stebbins breached their fiduciary duties to the Foundation by participating in the vote on the settlement despite supposed conflicts of interest (Opening Br. at 7, 13-14; Exh. O at 15-18; Exh. T at 133-34);
- The settlement was the product of the Attorney General's unlawful interference (Opening Br. at 7, 14-15; Exh. O at 10-13, 22-23; Exh. T at 126-27, 130); and
- The directors who supported the settlement breached their fiduciary duties to the Foundation because, in plaintiffs' opinion, the settlement was incompatible with the Foundation's purposes or *ultra vires* (Opening Br. at 7, 15-16; Exh. O at 18-22, 24-25; Ex. T at 127-28.)

Likewise, in this action, Counts I, II and IV ask this Court to review and to vacate the July 26, 2001 Consent Judgment and Order based on those same objections. Accordingly, this case and the *Buntrock I* appeal constitute the "same cause" under Section 2-619(a)(3).

Third, dismissal of Counts I, II and IV of plaintiffs' Amended Complaint pursuant to Section 2-619(a)(3) is proper because it furthers that section's purpose of promoting judicial economy. *See, e.g., Illinois Central Gulf R.R. v. Goad,* 168 Ill. App. 3d 541, 544 (4th Dist. 1988). Specifically, plaintiffs' appeal of *Buntrock I* has only three possible outcomes: (1) an affirmance of Judge Kinnaird's decision to enter the Consent Judgment and Order over the dissenting directors' objections; (2) a complete reversal of Judge Kinnaird's decision; or (3) a remand with instructions to allow the dissenting directors discovery and an evidentiary hearing on their objections. Thus, once the Appellate Court renders its decision, whatever it is, there will no longer be any basis or

need to litigate the validity of the Consent Judgment and Order in this lawsuit and to do so now would be a waste of limited judicial resources. Moreover, it is for the Appellate Court – not a different Judge of the same Court – to determine if Judge Kinnaird erred in entering the Consent Judgment and Order over the dissenting directors' objections. Accordingly, to further Section 2-619(a)(3)'s purpose of fostering orderly procedure by avoiding a multiplicity of actions, Counts I, II and IV should be dismissed.

II. Counts I, II and IV Are Barred By the Doctrine of *Res Judicata* and Collateral Estoppel (735 ILCS 5/2-619(a)(4)).

In their response brief, plaintiffs advance six "arguments" in support of their contention that Judge Kinnaird's entry of the Consent Judgment and Order over their objections should not bar them from relitigating those objections in this proceeding. For the reasons set forth fully below, each of plaintiffs' "arguments" is meritless and should be rejected.

A. Plaintiffs Were Parties in *Buntrock I.*

Plaintiffs' assert that they were not parties in *Buntrock I* for purpose of *res judicata*/collateral estoppel analysis. However, plaintiffs were named defendants in *Buntrock* I and were granted an opportunity to present objections to the Consent Judgment and Order. Indeed, several hundred pages in briefing documents (including legal memoranda, exhibits, and case law) were submitted to Judge Kinnaird in anticipation of the July 24th hearing on the dissenting directors objections – a hearing which lasted five hours. (*See* Opening Br. at 7-8.)

Moreover, plaintiffs have appealed Judge Kinnaird's entry of the Consent Judgment and Order over their objections. (Exh. V.) This appeal is conclusive proof (1) that plaintiffs were parties in *Buntrock I* and (2) that Judge Kinnaird ruled on their

objections to the Consent Judgment and Order. Indeed, if plaintiffs were not parties to *Buntrock I* or if Judge Kinnaird did not issue a ruling on those objections as plaintiffs contend, there would be nothing for them to appeal.

B. Judge Kinnaird Rejected Each of the Dissenting Directors' Objections on the Record and Entered the Consent Judgment Over Those Objections.

Plaintiffs' next argue that Judge Kinnaird's ruling has no preclusive effect merely because she elected not to put written "findings of fact" in the Consent Judgment and Order. In fact, plaintiffs go as far as to say that it is "impossible to know" how Judge Kinnaird ruled on their objections. (Response Br. at 8.) However, as set forth in detail in the Foundation's opening brief (pages 13-16), Judge Kinnaird clearly made the following rulings with respect to the dissenting directors' objection on the record:

- Directors Stebbins and Marshall did not suffer from a conflict of interest and properly took part in the Board vote on the proposed settlement (Exh. T at 133-34).
- Assistant Attorney General Perkins did not coerce Directors Stebbins and Marshall into supporting the settlement or otherwise act unlawfully (Exh. T at 126-27, 130).
- The settlement was not "antithetical to the Foundation's purpose" or *ultra vires* (Exh. T at 127-28).

These clear rulings preclude plaintiffs from relitigating the validity of the Consent Judgment here regardless of Judge Kinnaird's decision not to include written findings of fact in the Consent Judgment and Order.

Moreover, *res judicata* and collateral estoppel apply not only findings of fact, but also questions of law. *See Du Page Forklift Serv., Inc. v. Material Handling Servs.*, 195 Ill. 2d 71, 78 (2001). Accordingly, even if Judge Kinnaird's rulings on the record do not technically constitute "findings of fact," *res judicata* and collateral estoppel

nonetheless bar Counts I, II and IV because Judge Kinnaird – *at a minimum* – made a legal determination that plaintiffs' objections were insufficient to prevent the entry of the Consent Judgment and Order. Indeed, given the plaintiffs' are appealing Judge Kinnaird's entry of the Consent Judgment and Order over their objections, they cannot plausibly contend that she made no determination of fact or law with respect to their objections. Otherwise, plaintiffs would have nothing to appeal.

C. Plaintiffs Had Ample Opportunity to Raise Their Objections to the Consent Judgment and Order in *Buntrock I.*

Plaintiffs' assert that they did not have a full opportunity to litigate their objections in *Buntrock I* because Judge Kinnaird did not allow discovery or conduct a full-blown evidentiary hearing. Contrary to plaintiffs' assertions, "the full and fair opportunity to litigate" element of the collateral estoppel doctrine does not require a full-blown evidentiary hearing. Indeed, "actually litigated" does not mean "thoroughly litigated," but only that the parties "disputed the issue and the trier of fact resolved it." *Taylor v. Peoples Gas Light & Coke Co.,* 275 Ill. App. 3d 655, 663 (1st Dist. 1995).[2]

Here, it cannot be disputed that the parties vigorously disputed the validity of the Consent Judgment and Order in *Buntrock I* and that the Court resolved that dispute by entering that Order over the dissenting directors' objections. In fact, as set forth in detail in the Foundation's opening brief (pages 4-8), the dissenting directors had ample opportunity to present their objections on several occasions during *Buntrock I,* including in their June 29 motion for a temporary restraining order (Exh. G, H), at the July 2, 2001

[2] Plaintiffs' reliance on *Fred Olson Motor Service v. Container Corp. of Am.*, 81 Ill. App. 3d 825, 830 (1st Dist. 1980) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 332, 331 n.15 (1979) is misplaced as both these cases involved the stricter standard applied to "*offensive* collateral estoppel" whereas this case involves the more liberal standards applied to *res judicata* and "defensive" collateral estoppel. Moreover, the *Fred Olson* case clearly states that a party had a full opportunity to litigate an issue so long as it had "a procedural, substantive **or** evidentiary opportunity to be heard." Here, there is no doubt that the dissenting directors had an opportunity to be heard in *Buntrock I.*

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hearing before Judge Kinnnaird (Exh. M), in their written objections which were submitted along with 35 exhibits of supporting evidence including several affidavits (Exh. O), in their reply brief in support of their objections (Exh. P), and at the five hour hearing before Judge Kinnaird on July 24, 2001 (Exhs. S and T). In light of the foregoing, there can be no dispute that plaintiffs had ample opportunity to litigate their objections in *Buntrock* I.[3]

D. The Claims and Issues Raised By Counts I, II and IV Are The Same Claims and Issues That Were Before Judge Kinnaird.

Plaintiffs next assert that Counts I, II and IV of their Amended Complaint are not barred by *res judicata* and collateral estoppel because "the issues here are different than those before Judge Kinnaird." (Response Br. at 10.) Plaintiffs' assertion is wrong for at least two reasons.

First, plaintiffs address only the narrower "identity of issues" standard applicable to collateral estoppel and completely ignore the liberal "transactional" test used by Illinois courts to determine if a subsequent lawsuit is based on the "same claim" for *res judicata* purposes. In Illinois, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park v. City of Highland*, 184 Ill. 2d 290, 302 (1998). Moreover, the "same claim" includes "not only those contentions that were offered and rejected in the first proceeding, *but includes any other contentions* ***that might have been raised in the first proceeding***." *See LaHood v.*

[3] Moreover, plaintiffs continue to litigate those objections in their appeal of *Buntrock I.* If the plaintiffs are entitled to any further process (*i.e.*, an evidentiary hearing or discovery), the Appellate Court will remand the case to Judge Kinnaird for further proceedings. If the Appellate Court affirms Judge Kinnaird's entry of the Consent Judgment and Order, then plaintiffs have received all the process to which they are entitled. Either way, there is no need to re-litigate the validity of the Consent Judgment and Order in this proceeding.

Couri, 236 Ill. App. 3d 641, 645 (3rd Dist. 1992) (emphasis added.) Here, Counts I, II and IV of their Amended Complaint are based on the same "group of operative facts" which formed the basis of the objections they presented in *Buntrock I.* Accordingly, for purposes of *res judicata*, those counts assert the same claims that were raised and rejected by Judge Kinnaird in *Buntrock I,* including the issue of director breaches of fiduciary duty.

Second, even if the narrower collateral estoppel standard is applied, it is clear that the issues raised by Counts I, II and IV are identical to those raised by Tucker, Terra and Simpson in *Buntrock I.* Indeed, nowhere in their response brief do plaintiffs dispute that those Counts are based on the conflict of interest, unlawful interference and *ultra vires* contentions they raised in *Buntrock I.*[4] Instead, plaintiffs only assert that that they did not raise their "breach of fiduciary claim" before Judge Kinnaird. (Response Br. at 10.) This assertion is false. In their written "objections" to the proposed settlement filed before Judge Kinnaird on July 19, 2001, plaintiffs asserted (1) that Directors Stebbins and Marshall breached their fiduciary duty by voting on the proposed settlement when they had a personal interest in the outcome in the vote (Exh. O at 14-18); and (2) that "the proposed settlement requires the abandonment of fiduciary obligations to beneficiaries to honor corporate purpose and prevent waste" (Exh. O at 18-22). Moreover, plaintiffs argued that "[t]he Court cannot approve this Proposed Settlement . . . without countenancing an obvious breach of fiduciary duty owed to the Foundation's beneficiaries by its Board members." (*Id.* at 2.) Accordingly, as demonstrated by

[4] The Foundation's opening brief sets forth in detail – complete with record citations -- how each of these issues were raised and resolved in *Buntrock I.* (Opening Br. at 7-8, 13-16.)

plaintiffs' own filings in *Buntrock* I, there can be no doubt that Counts I, II and IV raise the identical issues litigated in *Buntrock I.*

E. Count II Is Barred By *Res Judicata* Because Plaintiffs' Could Have Brought their Objections to The Election of the New Directors in *Buntrock I;* or in the Alternative, It Should Have Been Brought as an Action To Enforce the Consent Judgment and Order Before Judge Kinnaird.

Plaintiffs next assert that their claim that the five new directors (Donnelley, Field, Foster, Hamada and Krehbiel) were not properly elected to the Foundation's Board did not arise until after entry of the Consent Judgment and Order and thus cannot be barred by *res judicata.* Plaintiffs are wrong for at least two reasons.

First, plaintiffs' contention that the addition of the new directors is contrary to the Foundation's bylaws is barred by *res judicata* because whatever that objection is – plaintiffs have failed to explain how the election of the new directors violated the by-laws in either their Amended Complaint or their response brief – it either was or could have been raised as part of their objections to the proposed settlement in *Buntrock I.* Indeed, plaintiffs cannot dispute that the new directors were elected as part of the Board's approval of the proposed settlement on June 29, 2001 (Exh. U ¶ 9), well before plaintiffs filed their written objections to the proposed settlement on July 19.

Second, plaintiffs' assertion that the addition of the new directors was not "in compliance with the Consent Judgment and Order" (Am. Cmplt. ¶ 103(a)) is not properly brought before this Court because Judge Kinnaird expressly retained jurisdiction over the parties for purposes of enforcing the Order. (Exh. U ¶ 13.) Thus, plaintiffs' remedy is not the initiation of a new lawsuit, but rather an action asking Judge Kinnaird to enforce the terms of that order.

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F. Justice, Equity and Judicial Efficiency Will Be Served By Application of *Res Judicata* and Collateral Estoppel in This Case.

Plaintiffs' final argument against the application of *res* judicata and collateral estoppel as a bar to Counts I, II and IV is that the applications of those doctrine in this matter would be "inequitable." This is wrong for at least two reasons.

First, contrary to plaintiffs' contentions, this is not a case where plaintiffs were denied an opportunity to raise their objections in the original forum. Indeed, as discussed in detail above, plaintiffs had ample opportunity to raise their objections to the proposed settlement before Judge Kinnaird and are now appealing their loss. (*See supra* at 7-8.) If anything, it would unjust to require the Foundation and the other litigants to re-litigate the validity of the Consent Judgment and Order here, not to mention a waste of limited judicial resources.

Second, plaintiff's argument that it would be unjust to apply the doctrines of *res judicata* and collateral estoppel because the other litigants in *Buntrock* I "directed" them to proceed in another forum is baseless. Nobody "directed" the plaintiffs to file another lawsuit in lieu of pressing their objections in *Buntrock* I. The statements made by former counsel for the Foundation do not prove otherwise. Rather, those statements simply reflect the reality that the plaintiffs opposed the underlying settlement and that plaintiffs were free to press *whatever legal rights they might have in a different forum.* In no way do the statements pointed to by plaintiffs constitute an admission that plaintiffs had viable legal claims to bring or that plaintiffs were not barred from re-litigating certain contentions raised before Judge Kinnaird. Moreover, even if such a "directive" was

given, plaintiffs disregarded it and proceeded with their objections before Judge Kinnaird (*see supra* at 7-8) thereby precluding them from relitigating those matter here.[5]

III. Counts I, II and IV Fail To State Viable Causes of Action (735 ILCS 5/2-615).

In their response brief, plaintiffs make the conclusory assertion that the Counts I, II and IV fail to state viable claims upon which relief can be granted, but do not support those assertions with argument or pertinent authority that responds to the substance of the Foundation's arguments. As argued in the Foundation's opening brief, Counts I, II and IV fail to allege viable causes of action for a variety of reasons:

- Counts I and II fail to allege sufficient facts to establish that Directors Marshall and Stebbins suffered from a conflict of interest within the meaning of the Illinois General Not For Profit Act, 805 ILCS 105/108.60. Indeed, plaintiffs fail to allege any facts demonstrating that Marshall or Stebbins were directly or indirectly a party to the proposed settlement within the meaning of the Act. (Opening Br. at 20-21.)

- Count I fails to allege facts sufficient to set aside the Consent Judgment and Order based on coercion or unlawful interference by the Attorney General because its fails to allege that the Assistant Attorney General Perkins engaged in any unlawful conduct. (Opening Br. at 21-23.)

- Counts I and IV fail to allege sufficient facts to establish that the Foundation's settlement of *Buntrock I* was *ultra vires*. Indeed, in both their Amended Complaint and response brief, plaintiffs do not – and indeed cannot -- point to any particular provision of the Foundation's Articles of Incorporation or By-Laws that expressly prohibits the Foundation from agreeing to the terms of the Consent Judgment and Order. (Opening Br. at 23-25.)

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[5] Plaintiffs reliance on *Benton v. Smith*, 157 Ill. App. 3d 847 (1st Dist. 1987) is misplaced. In *Benton*, defendants deliberately led plaintiff – a *pro se* litigant living in public housing – to file her claim in a certain forum and then attempted to argue that she was precluded from proceeding in the forum they directed her to. Moreover, if the *Benton* court precluded the plaintiff from proceeding in that forum, plaintiff would be left without any forum to bring her claims. Here, unlike *Benton*, plaintiffs did not forego raising their claims before Kinnaird but argued their objections to the Consent Judgment and Order vigorously in *Buntrock I* and continue to do so on appeal. Plaintiffs had their day in Court and may have another before the Appellate Court. Moreover, unlike the *pro se* plaintiff in *Benton*, plaintiffs have been represented throughout these proceedings by a total of six law firms, including a former Judge of this Court, former counsel to President Nixon and a former Assistant United States Attorney and Iran-Contra prosecutor.

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IV. Count V Should Be Dismissed As To the Foundation.

In their response brief, plaintiffs assert that Count V of the Amended Complaint states a cause of action for breach of fiduciary not only against certain of the Foundation's directors but also against the Foundation itself. (Response Br. at 5.) However, nowhere in plaintiffs' Complaint do they allege that the Foundation owed a fiduciary duty to anyone or that it breached such a duty. In fact, Count V contains no allegations against the Foundation, but rather contains allegations aimed only at the defendant directors (Stebbins, Marshall, Buntrock, Gidwitz, Hartman and Daley). (Am. Cmplt. ¶¶ 111-115.) Indeed, the gravamen of Count V is the allegation that all defendant directors breached their fiduciary duties ***to the Foundation*** and that ***the Foundation*** "suffered injury" as a result of those alleged breaches. (*Id.*) Accordingly, because Count V does not even purport to state a breach of fiduciary duty claim against the Foundation, much less allege sufficient facts to state such a claim, that count should be dismissed as to the Foundation.

V. The Court Should Disregard the Terra Declaration and Accompanying Materials As They Have No Bearing on the Foundation's Motion To Dismiss Counts I, II and IV.

Finally, plaintiffs attempt to counter the Foundation's motion to dismiss by attaching to their response brief the "Verified Declaration of Judith F. Terra" and two attachments: (1) a document that purports to be the handwritten notes of the late Daniel J. Terra, and (2) a letter drafted by Sidley & Austin on the Foundation's behalf and submitted to the mediator during settlement negotiations in *Buntrock I.* The Court should disregard these documents as they have no relevance whatsoever to the Foundation's Motion to Dismiss Counts I, II and IV of the Amended Complaint.

First, the Terra declaration and accompanying documents are irrelevant to the Foundation's motion to dismiss Counts I, II and IV pursuant to Sections 2-619(a)(3) (pending appeal) and 2-619(a)(4) (*res judicata*/collateral estoppel). Indeed, the Terra declaration and accompanying documents do not address the question of whether the claims and issues raised in *Buntrock I* and the pending appeal are the same as those raised in this lawsuit.

Second, "it is well established that evidentiary matters outside the pleadings may not be considered in ruling on a section 2-615 motion." *Carroll v. Faust*, 311 Ill. App. 3d 679, 683-84 (2nd Dist. 2000). Thus, this Court should not consider the Terra declaration and accompanying materials in ruling on the Foundation's Section 2-615 Motion to Dismiss Counts I, II and IV and instead should look only to the allegations in the Amended Complaint. Moreover, Counts I, II and IV do not even purport to seek relief based on Daniel Terra's intent (Am. Cmplt. at pp. 31, 32, 34); accordingly, even if this Court did consider the Terra declaration and accompanying materials at this juncture (and it should not), those materials are irrelevant to the relief sought in the counts that are subject of the Foundation's motion to dismiss.

CONCLUSION

For the foregoing reasons and those stated in the Foundation's opening brief, this Court should dismiss Counts I, II and IV of plaintiffs' Amended Complaint with prejudice, thereby dismissing the Foundation as a party to this litigation and allowing it to return to the business of art, as opposed to the business of litigation.

Respectfully submitted,

THE TERRA FOUNDATION FOR THE ARTS

By: _____

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N. Gorsuch

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs	)	No. 01 L 9112
vs.	)	Judge Julia M. Nowicki
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Transferred from Law Division
Defendants	)	

NOTICE OF FILING

To: All Attorneys of Record
See attached Service List

PLEASE TAKE NOTICE that on February 1, 2002, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, **The Terra Foundation's Reply Memorandum in Support of Its Motion to Dismiss,** a copy which is hereby served upon you.

One of the Attorneys for: THE TERRA FOUNDATION FOR THE ARTS

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I, Eric J. Muñoz, certify that I caused to be served this Notice of Filing by delivering a copy via first class U.S. mail and/or Federal Express to each of the counsel of record in the above captioned matter (see attached service list) by 5:00 p.m. on February 1, 2002.

Eric J. Muñoz

Paul Hayes Tucker, et al. v. Dean Buntrock, et al.
Case No. 01 L 009112

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16di-004951

IN THE CIRCUIT COURT OF COOK COUNTY, CHICAGO, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts, Plaintiffs, v. DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts; MARGARET DALEY, a Director of the Terra Foundation for the Arts; ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts; STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts; THEODORE STEBBINS, a Director of the Terra Foundation for the Arts; JAMES R. DONNELLEY, an individual; MARSHALL FIELD V, an individual; KATHLEEN A. FOSTER, an individual; ROBERT S. HAMADA, an individual; FREDERICK A. KREHBIEL, an individual; THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation; JAMES E. RYAN, Attorney General of Illinois; FLOYD D. PERKINS, Assistant Illinois Attorney General; WINSTON & STRAWN, an Illinois Partnership; and SIDLEY & AUSTIN, an Illinois Partnership Defendants.	)	FEB 0 5 2002 No. 01 L 009112 Judge Julia M. Nowicki

WINSTON & STRAWN'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Winston & Strawn replies to the Memorandum of Plaintiffs Paul Hayes Tucker ("Tucker"), Judith Terra ("Terra"), and Alan Simpson ("Simpson") ("Pltfs Mem.") opposing its Motion To Dismiss the First Amended Complaint ("Complaint"), and Memorandum in Support thereof ("Mem.").

Overview of the Reply

Plaintiffs spend less than one-half page on its claim for declaratory relief against Winston &

Strawn, and for good reason. Plaintiffs' claim under Count III of the Complaint is devoid of legal and factual merit.

I. PLAINTIFFS FAIL TO ADDRESS NUMEROUS ARGUMENTS OF WINSTON & STRAWN, AND THEREBY CONCEDE THEM AND A LACK OF LIABILITY OF THE FIRM.

In their one-half page argument, Plaintiffs assert that: (1) Plaintiffs' allegations are "straightforward"; (2) Winston & Strawn "continues to engage in concurrent, adverse representation of the [Terra] Foundation and at least one of the directors"; (3) the absence of an appearance by Winston & Strawn on behalf of another defendant "does not end this dispute"; and (4) Winston & Strawn is "hopelessly conflicted." Plaintiffs' assertions are all conclusory and all lack factual and legal merit. (Pltfs Mem., at 12) Accordingly, Winston & Strawn's motion to dismiss under 735 ILCS 5/2-615 should be granted.

To best understand the failings of Plaintiff's Memorandum, a review of the points to which Plaintiffs failed to respond is appropriate. Specifically, Plaintiff's failed to address the arguments of Winston & Strawn that:

- Courts frown upon disqualifying counsel as a litigation ploy (Mem., at 5-6);
- The dissenting directors have no standing to sue Winston & Strawn (Mem., at 7);
- The dissenting directors fail to state a claim against Winston & Strawn with the requisite specificity (Mem., at 7- 9); and
- The dissenting directors' claim for declaratory relief is non-justiciable (Mem., at 8-10).

The total failure of Plaintiffs to refute these arguments or the cases cited by Winston & Strawn demonstrates the lack of merit of Plaintiffs' claims.

Even assuming, arguendo, Plaintiffs' allegations are "straightforward," Plaintiffs have not pleaded sufficient facts, much less demonstrated a legal basis, to make a claim against Winston & Strawn. No matter how many times Plaintiffs assert that a conflict exists, they cannot meet the pleading requirements of Illinois law to demonstrate the existence of such a purported conflict, much less establish that they have standing to bring such an action against Winston & Strawn. There simply is no claim or justiciable issue here against Winston & Strawn. Plaintiffs' failure to cite even a single case against Winston & Straw also speaks volumes about the absence of any claim against the firm.

In short, as other courts have done, this Court should frown upon Plaintiffs' litigation ploy of seeking to disqualify the Terra Foundation's general counsel by suing it, even though the firm has not appeared in court to represent any named party (except itself) on a material issue. Accordingly, this Court should dismiss this action against Winston & Strawn.

II. CONCLUSION

Wherefore, for the reasons stated herein, Winston & Strawn prays that this Court grant its motion to dismiss under 735 ILCS 5/2-615 and grant such other relief as deemed appropriate.[1/]

Respectfully submitted,

Winston & Strawn

By: Scott Szala
One of Its Attorneys

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[1/] If Winston & Strawn's motion to dismiss is granted, it believes that an Illinois Supreme Court Rule 137 motion for sanctions would be appropriate.

CERTIFICATE OF SERVICE

I, Scott J. Szala, attorney for Winston & Strawn, certify that I caused to be served, by U.S. First-Class Mail, this 1st day of February, 2002, a copy of the foregoing Winston & Strawn's Reply Memorandum in Support of Its Motion to Dismiss to the individuals on the attached service list.

Scott J. Szala

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16di-004957

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	FEB 0 5 2002
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF DR. STEBBINS' AND DR. MARSHALL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY

This reply memorandum is submitted by Director defendants Dr. Theodore E. Stebbins, Jr. ("Dr. Stebbins") and Dr. Stephanie Pace Marshall ("Dr. Marshall") in further support of their Motion to Dismiss the claims asserted against them in the First Amended Complaint (hereafter "Complaint"), or in the Alternative to Stay the Proceedings.

I. INTRODUCTION

In Dr. Stebbins' and Dr. Marshall's opening memorandum, we showed that the claims asserted by plaintiffs against Dr. Stebbins and Dr. Marshall personally must be dismissed for several reasons. First, and most importantly, as a matter of irrefutable law, plaintiffs have no standing under either the Illinois General Not for Profit Corporation Act of 1986, 805 ILCS 105/101.01, *et seq.* (hereafter "the Act"), or under the common law to bring an action on their own behalf against Dr. Stebbins and Dr. Marshall. Indeed, as we showed, an essential element of standing, *i.e.*, that a plaintiff must have suffered distinct and palpable injury to himself or herself, is entirely absent from any allegation in the Complaint. It is, therefore, not surprising

that plaintiffs failed in their opposing memorandum to cite to any language in the Act which could provide them with standing. Nor did plaintiffs attempt to distinguish, or even mention, the dispositive case law on standing cited in our opening memorandum.

Standing is a threshold, gatekeeper issue. Without standing, the doors to the Court are simply not open to these plaintiffs, at least in respect to their claims against Dr. Stebbins and Dr. Marshall. Accordingly, the Court can, and we respectfully suggest the Court must, dismiss plaintiffs' claims against Dr. Stebbins and Dr. Marshall without further analysis.

However, should the Court proceed further, and review the adequacy of plaintiffs' allegations against Dr. Stebbins and Dr. Marshall, we showed in our opening memorandum that those claims must be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure for several, independent reasons. First, as we explained, plaintiffs' failure to allege facts which show any actual injury and damage to themselves is doubly fatal to their claims against Dr. Stebbins and Dr. Marshall, because it deprives plaintiffs not only of standing, but also of an essential element of each of their claims. In addition, plaintiffs have failed to set forth any well pleaded *facts*, as distinguished from bald conclusions, which would support any claim for relief against Dr. Stebbins and Dr. Marshall personally.

Still further, we showed that pursuant to Section 2-619(a)(3), plaintiffs' claims against Dr. Stebbins and Dr. Marshall must be dismissed because a prior action, the *Buntrock* proceeding, remains pending before the Illinois Appellate Court. Plaintiffs were unable to refute this argument. We relied primarily upon, and incorporated on behalf of Dr. Stebbins and Dr. Marshall, the arguments on this issue made by the Foundation and the other defendants. To avoid duplication, we continue to do so.

We also showed in our opening memorandum that plaintiffs' claims against Dr. Stebbins and Dr. Marshall are barred by the doctrines of *res judicata* and collateral estoppel pursuant to Section 2-619(a)(4). We highlighted certain dispositive rulings by the two other courts that previously dealt with plaintiffs' claims in our opening memorandum. Plaintiffs have failed to refute them. Once again, to eliminate unnecessary duplication, we incorporated by reference and asserted on behalf of Dr. Stebbins and Dr. Marshall all of the arguments and authorities on these points set forth by the Foundation and the other defendants, and we do so again here.

Finally, we explained in our opening memorandum that if any aspect of the claims against Dr. Stebbins and Dr. Marshall should somehow survive their Motion to Dismiss, the Court should stay the proceedings in this case and await the outcome in the Illinois Appellate Court of the appeal filed by these plaintiffs in the previously filed *Buntrock* litigation. Plaintiffs failed even to address this issue in their opposing memorandum. It stands unrefuted.

II. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT PLAINTIFFS HAVE NO STANDING TO ASSERT THEIR CLAIMS PERSONALLY AGAINST DR. STEBBINS AND DR. MARSHALL.

In our opening memorandum, we showed that the Act provides no standing to plaintiffs to sue Dr. Stebbins and Dr. Marshall personally. Section 103.15, on which plaintiffs purport to rely (see Plfs. Mem., p. 4), specifically and unambiguously permits a director to bring an action only "against the *corporation*." Section 105/103.15(a)(emphasis added). We also cited dispositive Illinois case law on this subject, *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1047, 673 N.E.2d 430, 438 (1st Dist. 1996). In *Brown*, a plaintiff sued a bank's directors under the Illinois Business Corporation Act of 1993, claiming that he had standing under Section 805 ILCS 5/3.20 of that Act because that section provided for liability of "all persons who assumed

to exercise corporate powers without authority to do so." That very same language appears in Section 105/103.20 of the Not For Profit Act. The Court in *Brown* held that this language did *not* provide standing to sue a director unless the alleged absence of authority to act occurred because the defendant's action occurred either "before incorporation or after a corporation was dissolved." *Id.* at 1047, 673 N.E.2d at 438. Other jurisdictions with similar statutes are entirely in agreement that standing to assert personal liability against directors is available only in the circumstance where the director acts on behalf of a non-existent corporation. *Id.* Plaintiffs do not, and cannot, allege that the conduct of Dr. Stebbins and Dr. Marshall (or any other Foundation director) occurred at a time when the Foundation was non-existent. Significantly, plaintiffs do not even mention, much less respond to, our discussion of *Brown Leasing*.[1]

Plaintiffs' only response to Dr. Stebbins' and Dr. Marshall's showing that plaintiffs have no standing under the Act is to state the conclusion (presumably with their eyes closed) that "[t]he plain language of the [Act] upholds the right to sue both the Foundation and its directors." Plfs. Mem., p. 3 However, plaintiffs' do not quote one statutory word, plain or otherwise, which purports to provide them with standing to sue Dr. Stebbins and Dr. Marshall personally. Plaintiffs conclude that the Act "explicitly contemplates actions against charitable foundations and their directors" (Plfs. Mem., p. 4), but they do not cite to one word which supports this purported "contemplation." Plaintiffs admit that they are proceeding in this action under Section 103.15 of the Act, but that section permits actions only to enjoin "a foundation,"

[1] Plaintiffs cite two out-of-state decisions at page 14 of their memorandum in purported support of their standing to bring their Section 1983 claim in Count VII against the Illinois Attorney General. However, plaintiffs concede that Count VII is not asserted against Dr. Stebbins and Dr. Marshall. *See* Pltfs. Mem., p. 5. Furthermore, those cases deal primarily with the right to bring an action derivatively, and in any event, they do not purport to interpret the Illinois Act, which is dispositive of this case.

not the Foundation's directors.[2] As we showed in our opening memorandum, only the corporation, acting either (1) directly on its own, or (2) derivatively through a receiver or other legal representative, may sue directors personally on a claim of lack of authority. *See* 805 ILCS 105/103.15(b). The Foundation has brought no such action and plaintiffs have not brought this action derivatively. Moreover, as we have shown, no claim based on lack of authority may be brought against directors personally by anyone under the Act unless the claim is based on the non-existence of the corporation.

Plaintiffs also failed to refute Dr. Stebbins' and Dr. Marshall's showing that plaintiffs have no standing to assert their claims against them under traditional standing analysis. Under well-settled common law, a plaintiff must allege facts showing that the plaintiff suffered a distinct and palpable injury to himself or herself. However, the Complaint is devoid of any factual allegations that plaintiffs have suffered a distinct and palpable injury to themselves. See Stebbins and Marshall Mem., pp. 7-8, 15. In their opposing memorandum, plaintiffs do not contest, or even respond to, this showing. It stands unrefuted.

Instead, plaintiffs merely assert the empty rhetoric that Dr. Stebbins' and Dr. Marshall's standing arguments "are difficult to take seriously." Plfs. Mem., p. 4. Citing *In re Cassiday*, 892 F.2d 637, 641-42 (7th Cir. 1990), a case which bears no resemblance to this one, plaintiffs claim that the assertion they do not have standing is inconsistent with a previously taken position in *Buntrock* and, therefore, represents a "perversion of the judicial process." *Id.*

[2] Plaintiffs argue in their footnote 6 that the Act sets forth "the liability of directors in certain cases" (Plf. Mem., p. 4), but they cite no provision which makes the claims in this case one of those "certain cases." To the contrary, the sections to which plaintiffs refer, Section 105/108.65 (directors who cause unauthorized distributions shall be jointly and severally liable to the corporation for the amount of such distribution), Section 105/108.60 (describing, according to plaintiffs, "the circumstances of a director's conflict of interest and apportion[ing] the burdens of proof in proceedings testing the validity of a corporate transaction"), Section 105/108.70 (providing for limited liability of directors when they serve without compensation) and Sections 105/103.10(p) and 105/108.75 (permitting not-for-profit corporations to indemnify directors), have nothing to do with any claim asserted by plaintiffs in their Complaint, nor do they purport to provide standing to plaintiffs to bring any claims against their fellow directors.

However, plaintiffs failed to disclose to this Court that the motions to dismiss filed in the *Buntrock* case were never decided, because that case was instead referred to mediation, and thereafter settled, before the Court had to reach the then-pending motions. Revealingly, plaintiffs cite no decisions, from *Buntrock* or any other case, which provide them with any support on the issue of standing. Furthermore, no claims were filed against Dr. Stebbins or Dr. Marshall in the *Buntrock* case. Dr. Stebbins and Dr. Marshall have always, consistently argued that the director plaintiffs in this case have no standing to sue them personally. As we have shown, the law permits no other conclusion.

In sum, plaintiffs are utterly, irrefutably without standing to pursue their claims personally against Dr. Stebbins and Dr. Marshall. Respectfully, the Court need go no further to dismiss those claims.

III. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT PLAINTIFFS FAILED TO ALLEGE SUFFICIENT FACTS TO STATE ANY CLAIM AGAINST THEM.

In our opening memorandum, we showed that plaintiffs' claims are also fatally defective pursuant to Section 2-615 for several reasons. They remain unrefuted.

A. Plaintiffs Concede that Counts III, VI and VII Must Be Dismissed as Against Dr. Stebbins and Dr. Marshall.

As we explained, the Complaint is not sufficiently clear to permit an understanding as which Counts are being asserted against Dr. Stebbins and Dr. Marshall. In response, plaintiffs state that only Counts I, II, IV and V "are directed against the Foundation and the directors." Plfs. Mem., p. 5. Accordingly, plaintiffs concede that Counts III, VI and VII are not asserted against Dr. Stebbins and Dr. Marshall. To the extent that plaintiffs' imprecise use of the word "defendants" in these claims could permit a contrary conclusion, this ambiguity has now been removed. The Court's dismissal order should so reflect this clarification.

B. Counts I and II Seek No Relief Against Dr. Stebbins and Dr. Marshall and Must Be Dismissed As Against Them.

The above concession by plaintiffs did not remove the ambiguity in the Complaint insofar as Counts I and II are concerned. As we explained in our opening memorandum, Counts I and II seek solely declaratory and injunctive relief against the Foundation. No relief is sought or needed against Dr. Stebbins and Dr. Marshall in these claims, because any order by the Court which would enjoin the conduct of the Foundation would also bind the Foundation's directors. Dr. Stebbins and Dr. Marshall should not be required to defend themselves personally against claims in which they are not proper or necessary parties. *See* Stebbins and Marshall Mem., p. 9. Plaintiffs failed to contest, or even address, this showing. It stands unrefuted.

Moreover, Counts I and II must also fail because, as we have shown previously and further discuss below, Counts IV and V, for *ultra vires* conduct and purported breach of fiduciary duty on which Counts I and II are predicated, fail. Dismissal of Counts IV and V requires, *a fortiori*, dismissal of Counts I and II as against Dr. Stebbins and Dr. Marshall. Accordingly, Dr. Stebbins and Dr. Marshall are entitled to dismissal of Counts I and II as against them.

C. Plaintiffs Failed to Refute Dr. Stebbins' and Dr. Marshall's Showing that Count IV, For Purported *Ultra Vires* Conduct, Fails to State a Claim Against Them.

In our opening memorandum, we showed that the *ultra vires* claim asserted against Dr. Stebbins and Dr. Marshall is deficient for several reasons. First, no such action against fellow directors is authorized or permitted under the Act or the common law. In other words, and as we have shown, there is no standing for these plaintiffs to bring this claim personally against Dr. Stebbins and Dr. Marshall. Plaintiffs failed even to address this showing. It stands unrefuted.

Second, plaintiffs did not state sufficient facts to support their *ultra vires* claim against Dr. Stebbins and Dr. Marshall. The sum total of the *ultra vires* allegations asserted against Dr. Stebbins and Dr. Marshall is that they voted to approve the proposed Consent Judgment and Order that was intended to put an end to the bitter *Buntrock* litigation. There is no viable basis for asserting that their vote was *ultra vires*. Indeed, as we explained, Judge Bucklo already held that these plaintiffs have failed to "explain, either with authority or with logic, how the directors can be charged with violating the plaintiffs' rights even under compulsion if they do what they had a lawful right to do in any event," *i.e.,* vote. *Terra v. Perkins*, 151 F. Supp. 2d 931, 937 (N.D. Ill. 2001). In their opposing memorandum, plaintiffs failed even to respond to this showing.[3]

We also explained that plaintiffs failed in the Complaint to cite to any Foundation by-law or other rule which would prohibit Dr. Stebbins and Dr. Marshall from voting to approve a Consent Judgment which provides that the Foundation, which has always been located in Illinois, would remain in Illinois for the next fifty years. In response, plaintiffs do not contend that we overlooked some by-law or other rule. Instead, plaintiffs merely assert the conclusion that a vote to keep the Foundation in Chicago was contrary to the intent of the Foundation's founder, Daniel Terra, just before he died in 1996. However, this allegation, even if true, does not state a basis for an *ultra vires* claim. This is because plaintiffs do not, and cannot, cite facts that would support the contention that Daniel Terra had the unilateral right to decide where the Foundation and Museum would be located, or that he could have overruled the decision of the other ten members of the Board as to where the Foundation should be located. Plaintiffs could never show that such a fictional power existed, survived Daniel Terra's death, and required the

[3] Plaintiffs' citation to *Sawko v. Dominion Plaza One Condominium Association*, 218 Ill. App. 3d 521, 578 N.E.2d 621 (2d Dist. 1991), is entirely inapt. In *Sawko*, no directors were even named as defendants.

Foundation's directors to vote as Daniel Terra would have voted (if indeed his intent under these current circumstances could be divined), and that the failure of the Board to comply with this hypothetical is *ultra vires* conduct. The mere statement of these absurd propositions is to refute them. Yet this is what plaintiffs would have to show to sustain their *ultra vires* claim. Accordingly, the *ultra vires* claim fails as a matter of law as against Dr. Stebbins and Dr. Marshall. It must be dismissed.[4]

D. Plaintiffs Failed to Refute Dr. Stebbins' and Dr. Marshall's Showing that Count V, for Breach of Fiduciary Duty, Fails to State a Claim Against Them.

In our opening memorandum, we showed that plaintiffs' purported breach of fiduciary duty allegations fail to state a claim against Dr. Stebbins and Dr. Marshall for several additional reasons. First, an essential requirement of a claim for breach of fiduciary duty is that the plaintiff must demonstrate that the defendant owed a fiduciary duty to the plaintiff. In this case, plaintiffs have not alleged, nor can they truthfully allege, that Dr. Stebbins and Dr. Marshall owed fiduciary duties to them. To the contrary, Dr. Stebbins and Dr. Marshall owed fiduciary duties to the Foundation. Only the Foundation could bring a claim for breach of those duties, and it has not done so. Plaintiffs failed even to respond to this argument. It stands unrefuted.

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[4] We note that plaintiffs have attached to their opposing memorandum some handwritten notes purportedly prepared by Daniel Terra. As an initial matter, these materials are not competent to be considered in opposition to Dr. Stebbins' and Dr. Marshall's Section 2-615 Motion to Dismiss, for the notes are extraneous to the Complaint. Nevertheless, because motions to dismiss are pending pursuant to both Sections 2-615 and 2-619, we understand that the Court may consider these notes for some purpose. What is most instructive about these notes is that they conclusively refute plaintiffs *ultra vires* claim. This is because they show that even Daniel Terra understood he did not have the unilateral authority to move the Foundation. According to the notes, Daniel Terra headed a committee that was studying the issue and "recommends" the closing of the Museum in Chicago. Daniel Terra planned to "call for a vote and discussion" concerning the "options for a new location" for the Foundation's collection. In other words, even Daniel Terra understood that the ultimate decision was for the *Board* to make. In fact, these notes demonstrate why no set of facts could ever be proved which would permit a finding that the Board's ultimate vote to retain the collection in Illinois for fifty years was *ultra vires*.

We also showed that plaintiffs failed to allege they were personally injured or damaged in any way. This failure not only deprives them of standing, but it is also a fatal defect in their allegations of breach of fiduciary duty, for injury and damage are essential elements of that claim. *See* Stebbins and Marshall Mem., pp. 7-8, 15. Plaintiffs do not contest, or even make reference to, this showing.

In addition, we showed that plaintiffs failed in the Complaint to allege facts which demonstrate that Dr. Stebbins and Dr. Marshall breached any fiduciary duty. Plaintiffs' entire claim is that Dr. Stebbins and Dr. Marshall voted to approve the Consent Judgment and Order. However, plaintiffs pleaded no facts which demonstrate that the act of voting was, or could be, a breach of fiduciary duty. Moreover, plaintiffs have an even higher pleading burden, because Dr. Stebbins' and Dr. Marshall's conduct is protected by the Business Judgment Rule. Stebbins and Marshall Mem., pp. 15-16. Plaintiffs failed to respond to this argument as well. It stands unrefuted.

We also showed that the Act permits a transaction in which a director has a direct or indirect interest to be ratified by a vote of the disinterested directors, and that that is exactly what occurred here. *Id.*, pp. 16-17. This further underscored plaintiffs' failure to plead adequate facts to state a claim for breach of fiduciary duty against Dr. Stebbins and Dr. Marshall. Plaintiffs ignored this argument, too. It stands unrefuted.

In purported response, plaintiffs ignore the irrefutable law and the absence of factual allegations. Instead, they assert the false platitude that the Complaint reasonably informs the Court and the defendants "about the claims asserted against them." Plfs. Mem., p. 5. According to plaintiffs, the Complaint "describe[s] the history and mission of the Foundation and how certain directors, government officials and others have acted to pervert that mission" and

"spells out the debilitating conflicts of interests that have burdened certain directors. . . ." However, these are conclusions, not well-pleaded *facts,* and they do not support a claim for breach of fiduciary duty. The "history and mission" of the Foundation does not provide a basis for claiming that Dr. Stebbins and Dr. Marshall breached their fiduciary duties by voting to approve a proposed settlement of pending litigation against the Foundation. Moreover, the only purported conflict which plaintiffs have asserted against Dr. Stebbins and Dr. Marshall is that the Illinois Attorney General threatened to undertake certain proceedings against them. This does not describe a breach of fiduciary duty by Dr. Stebbins and Dr. Marshall. To the contrary, plaintiffs' "facts" show nothing more than that Dr. Stebbins and Dr. Marshall voted on a proposal that was properly put to a vote before the Foundation's entire Board. This does not state a claim for breach of fiduciary duty by Dr. Stebbins and Dr. Marshall. The claim must be dismissed as against them.

IV. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT PLAINTIFFS FAILED TO STATE A CLAIM FOR PUNITIVE DAMAGES.

We showed in our opening memorandum that plaintiffs failed to allege any facts whatsoever which would support a claim for punitive damages against Dr. Stebbins and Dr. Marshall. Indeed, plaintiffs have gone far beyond the bounds of zealous advocacy by making such a claim. Stebbins and Marshall Mem., pp. 17-18. Plaintiffs failed to address this showing in their opposing memorandum. It stands unrefuted.

V. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT THE CLAIMS AGAINST THEM MUST BE DISMISSED BECAUSE OF THE PRIOR PENDING ACTION.

In our opening memorandum, we showed that the claims against Dr. Stebbins and Dr. Marshall also must be dismissed pursuant to Section 2-619(a)(3), because of the existence of

the prior action before Judge Kinnaird, *i.e.*, the *Buntrock* case, which is now pending in the Illinois Appellate Court. Once again, plaintiffs ignore this argument. It, too, stands unrefuted.[5]

VI. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT THE CLAIMS AGAINST THEM MUST BE DISMISSED BASED ON THE DOCTRINES OF *RES JUDICATA* AND COLLATERAL ESTOPPEL.

We showed in our opening memorandum that the claims against Dr. Stebbins and Dr. Marshall must also be dismissed pursuant to Section 2-619(a)(4), because they are barred by the doctrines of *res judicata* and collateral estoppel. As we explained, all of the issues and claims asserted by plaintiffs in the Complaint were dealt with, and decided against them, by Judge Kinnaird in the *Buntrock* case. To avoid duplication, we adopted and asserted on behalf of Dr. Stebbins and Dr. Marshall the arguments set forth in the Motions to Dismiss and supporting memoranda of the Foundation and the other directors in connection with these issues. We do so again herein and similarly adopt and incorporate the arguments on these issues made by the Foundation and the other defendants in their reply memoranda being filed contemporaneously herewith. However, before proceeding on, we point out an additional, fatal, inconsistency on this subject in plaintiffs' opposing memorandum.

Plaintiffs claim in their opposing memorandum that they were not parties to the Consent Judgment and Order, and that they were not permitted to file counterclaims in the case before Judge Kinnaird. As a result, conclude plaintiffs, the issues raised in their current Complaint could not have been decided against them. However, plaintiffs own litigation conduct reveals that this analysis must be wrong. As plaintiffs concede, they appealed all aspects of

[5] In our opening memorandum, to avoid duplication, we relied on and incorporated on behalf of Dr. Stebbins and Dr. Marshall the arguments on this subject made by the Foundation and the other defendants in their Motions to Dismiss and supporting memoranda. We similarly adopt and incorporate herein the arguments and authorities set forth in the reply memoranda of the Foundation and the other director defendants that are being filed contemporaneously herewith.

Judge Kinnaird's decision in *Buntrock*, pursuant to which Judge Kinnaird approved and entered the Consent Judgment and Order. This includes Judge Kinnaird's overruling of their objections to the Consent Judgment, which were based on the same purported breach of fiduciary duty and *ultra vires* conduct that are at the center of their Complaint in this Court, and Judge Kinnaird's denial of their request for leave to file a counterclaim. In other words, plaintiffs have already conceded that these issues have been decided against them, for they have appealed them to the Illinois Appellate Court. Accordingly, they are judicially estopped from arguing to the contrary in this case.

VII. PLAINTIFFS FAILED TO REFUTE DR. STEBBINS' AND DR. MARSHALL'S SHOWING THAT THE COURT SHOULD STAY THIS CASE IF ANY CLAIMS AGAINST THEM SURVIVE THIS MOTION TO DISMISS.

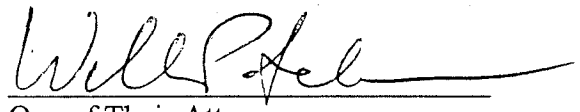
We showed in our opening memorandum that if any of the claims against Dr. Stebbins and Dr. Marshall survive their Motion to Dismiss, the Court should stay all proceedings in this case pending a resolution by the Illinois Appellate Court of the appeal filed by these very same plaintiffs in the *Buntrock* litigation. This would be the only sensible way to proceed, for plaintiffs are impermissibly asking this Court to act as a collateral, lateral Court of Appeals. They are asking this Court to reverse the rulings made by Judge Kinnaird. Such a request is not only improper, but entirely unnecessary. If the Appellate Court affirms Judge Kinnaird's rulings, this case is moot. If the Appellate Court reverses, the case before Judge Kinnaird will be reinstated and will proceed on these same issues. To permit this case to proceed while the appeal in *Buntrock* is pending would cause enormous waste of assets and unnecessary duplication of effort. It would also create a substantial risk that two courts will issue conflicting rulings.

Plaintiffs failed to respond to this showing. Once again, it stands unrefuted.

VIII. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Dr. Stebbins' and Dr. Marshall's Motion to Dismiss and opening memorandum, and for the reasons set forth in the memoranda and reply memoranda filed by the Foundation and the other defendants in support of their respective motions to dismiss, the Court should grant Dr. Stebbins' and Dr. Marshall's Motion to Dismiss all of plaintiffs' claims asserted against them, with prejudice. In the alternative, any claim asserted against Dr. Stebbins and Dr. Marshall which survives their Motion to Dismiss should be stayed pending resolution of the *Buntrock* case on appeal.

DR. THEODORE E. STEBBINS, JR. and
DR. STEPHANIE PACE MARSHALL

By: 
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FEB 0 5 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

FEB 0 5 2002

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, et al.,	)	
Plaintiffs,	)	
v.	)	No. 01 L 9112
DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, et al.,	)	Judge Julia M. Nowicki
Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on February 1, 2002, we filed the **REPLY MEMORANDUM IN SUPPORT OF DR. STEBBINS' AND DR. MARSHALL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY**, a copy of which is hereby served upon you.

THEODORE STEBBINS AND
STEPHANIE PACE MARSHALL

By: Lizabeth Boyer
One of Their Attorneys

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PROOF OF SERVICE BY FACSIMILE

I, Lizabeth A. Boyer, certify that on February 1, 2002, I caused to be served this **REPLY MEMORANDUM IN SUPPORT OF DR. STEBBINS' AND DR. MARSHALL'S MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR A STAY** by causing a copy to be mailed by U.S. mail at 227 West Monroe, Chicago, Illinois to the named parties on the attached service list.

Lizabeth A. Boyer

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FEB 05 2002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PAUL HAYES TUCKER, a Director of the Terra Foundation for the Arts, JUDITH TERRA, a Director of the Terra Foundation for the Arts, and ALAN K. SIMPSON, a Director of the Terra Foundation for the Arts,

Plaintiffs,

v.

DEAN BUNTROCK, a Director of the Terra Foundation for the Arts, RONALD GIDWITZ, a Director of the Terra Foundation for the Arts, MARGARET DALEY, a Director of the Terra Foundation for the Arts, ARTHUR HARTMAN, a Director of the Terra Foundation for the Arts, STEPHANIE PACE MARSHALL, a Director of the Terra Foundation for the Arts, THEODORE STEBBINS, a Director of the Terra Foundation for the Arts, JAMES R. DONNELLEY, an individual, MARSHALL FIELD V, an individual, KATHLEEN A. FORSTER, an individual, ROBERT S. HAMADA, an individual, FREDERICK A. KREHBIEL, an individual, THE TERRA FOUNDATION FOR THE ARTS, an Illinois Not-For-Profit Corporation, JAMES E. RYAN, Attorney General of Illinois, FLOYD D. PERKINS, Assistant Illinois Attorney General, WINSTON & STRAWN, an Illinois Partnership, and SIDLEY & AUSTIN, an Illinois Partnership,

Defendants.

No. 01 L 009112
Hon. Julia M. Nowicki

SIDLEY AUSTIN BROWN & WOOD'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT AS AGAINST IT

Plaintiffs' failure to respond in any meaningful way to Sidley Austin Brown & Wood's ("Sidley") Motion to Dismiss is a clear admission that they have not stated, and cannot state, any viable claim against Sidley. Plaintiffs have not offered this Court a single reason why their unsubstantiated, baseless complaint against Sidley should not be dismissed with prejudice.

In their 15-page response to the Motions to Dismiss filed by the various Defendants, Plaintiffs spend a mere one paragraph jointly addressing the Motions to Dismiss separately filed by Sidley and Winston & Strawn. (See Plaintiffs' Consolidated Response, p. 12). In that short paragraph, Plaintiffs do not cite a single case or any other authority to support their claim against Sidley seeking a declaration that "Sidley & Austin is, and has been, tainted by conflicts of interest . . . and that, as a result . . . Sidley & Austin [is] disqualified from any further representation of the Foundation or its directors in this litigation." (First Am. Complaint, pp. 33-34). Plaintiffs do not attempt to distinguish any of the cases cited by Sidley in support of its Motion to Dismiss. Plaintiffs do not attempt to counter or even acknowledge the arguments advanced in support of Sidley's motion. Such failure is a clear admission by Plaintiffs of the obvious defects in their complaint and reason enough for this Court to grant Sidley's Motion to Dismiss.

I. PLAINTIFFS FAIL TO STATE A COGNIZABLE CAUSE OF ACTION.

Plaintiffs totally ignore the case law which makes clear that Plaintiffs' claim against Sidley for a supposed "conflict of interest" does not state a cognizable cause of action. (See Sidley's Motion to Dismiss, pp. 4-6). In the similar case of Hannan v. Watt, the Illinois Appellate Court affirmed the dismissal of the very same type of claim that the Plaintiffs are attempting to bring here. The Hannan Court held that a violation of the ethical rules "do[es] not by [its] own terms, create independent rights of action," and dismissed the plaintiffs' complaint

as being "nothing more than an action to disqualify [opposing counsel]." 147 Ill. App. 3d 456, 461, 497 N.E.2d 1307, 1310 (1st Dist. 1986). Plaintiffs' attempt to sue Sidley for an alleged conflict of interest is exactly what the plaintiffs attempted to do in Hannan and is exactly the type of cause of action that was specifically rejected by the Appellate Court. See id. Plaintiffs' failure to distinguish the Hannan case which is both squarely on-point and binding is an obvious admission that they have no claim.

II. PLAINTIFFS FAIL TO PLEAD SUFFICIENT SPECIFIC FACTS TO STATE A CAUSE OF ACTION.

Rather than attempting to defend their patently inadequate allegations, Plaintiffs' "Response" simply restates the meaningless and conclusory assertion that:

> "Sidley has already been accused by two defendant directors of breaching its responsibilities to the Foundation throughout the Buntrock litigation. These defendant directors even submitted an expert affidavit that concludes that Sidley is unable to provide independent professional advice as a result of its conflicts."

(Plaintiffs' Consolidated Response, p. 12; see First Am. Complaint, ¶ 89 (emphasis added)). As demonstrated in Sidley's initial motion, this is not the type of specific factual allegation required to properly state a claim under Illinois law. See Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 608, 440 N.E.2d 998, 1007 (1st Dist. 1982). The legal sufficiency of a complaint requires more than "mere conclusions." Id. Whether other directors in a different lawsuit "accused" Sidley of suffering from an unfounded conflict of interest in no way sets forth any specific facts establishing that Sidley has a conflict of interest in this case. Moreover, Plaintiffs have absolutely nothing to say about the fact, as pointed out in Sidley's motion, that the "accusations" in the Buntrock litigation that Sidley suffered from a "conflict of interest" as well as the purported "expert affidavit," were repeatedly found by both Judge Kinnaird and the Appellate

Court to be without any merit whatsoever. (See J. Kinnaird's 9/25/00, 10/20/00, and 1/2/01 Orders; 1/19/01 and 2/16/01 Appellate Court Orders).[1]

III. THE UNCONTROVERTED CASE LAW ESTABLISHES THAT PLAINTIFFS' CLAIM IS MOOT.

Plaintiffs make only one statement in their "Response" that suggests that they might have actually read Sidley's Motion to Dismiss. Specifically, Plaintiffs assert, "That neither Winston nor Sidley has entered an appearance (other than for themselves) in this litigation does not end this dispute." (Plaintiffs' Consolidated Response, p. 12). This appears to be an attempt to deal with the fact that their action for declaratory judgment is moot. (See Sidley's Motion to Dismiss, pp. 11-13). Plaintiffs fail to offer a single reason why their "claim" is not moot or to cite a single case in support of their position. Their suggestion that they may properly seek a declaratory judgment that "Sidley & Austin [is] disqualified from any further representation of the Foundation or its directors in this litigation" (First Am. Complaint, pp. 33-34), despite the fact that Sidley does not represent the Foundation or any of its directors in this litigation flies directly in the face of the well established requirements to obtain a declaratory judgment. See AG Farms, Inc. v. American Premier Underwriters, Inc., 296 Ill. App. 3d 684, 689, 695 N.E.2d 882, 887 (4th Dist. 1998).

In order to state a cause of action for declaratory relief, a plaintiff must establish that an "actual controversy" exists. Id. The "ripeness" doctrine prevents courts "from entangling

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[1] Additionally, Plaintiffs have obviously failed to allege any facts to establish that they personally even have standing to bring any claim against Sidley. See Blanchard v. Edgemark Financial Corp., 1998 WL 988958, p. 21 (N.D. Ill.); Renard v. Columbia Broadcasting System, Inc., 126 Ill. App. 3d 563, 567, 467 N.E.2d 1090, 1094 (1st Dist. 1984) ("Absent a complaint by the affected client, a party has no status to object to the representation of an adverse party by an attorney of his choice."). Plaintiffs are, at best, minority shareholders of a private, not-for-profit corporation and have not established, and could not establish, any right to bring any claim arising out of any supposed breach of "responsibilities to the Foundation."

themselves in abstract disagreements." Village of Maywood Bd. of Fire and Police Comm'rs v. Dep't. of Human Rights, 296 Ill. App. 3d 570, 575, 695 N.E.2d 873, 877 (1st Dist. 1998). Plaintiffs' complaint against Sidley is nothing but an "abstract disagreement." As Plaintiffs are well aware and even admit (see Plaintiffs' Consolidated Response, p. 12), Sidley does not represent any party in this lawsuit, yet Plaintiffs insist on seeking a declaration from this Court that Sidley "is disqualified from [representing] the Foundation or its directors in this litigation." The issuance of any such judgment could be nothing but an improper advisory opinion based upon a dispute and a set of facts that simply do not exist. Accordingly, Plaintiffs' claim against Sidley must also be dismissed as moot.[2]

IV. PLAINTIFFS DO NOT DENY THAT COLLATERAL ESTOPPEL PRECLUDES THEIR PURPORTED CLAIM AGAINST SIDLEY.

Plaintiffs additionally fail to address the fact that collateral estoppel precludes them from bringing their purported claim against Sidley. (See Sidley's Motion to Dismiss, pp. 10-11). Plaintiffs spend a considerable amount of time responding to the Defendant Directors' arguments that Plaintiffs are collaterally estopped from relitigating the validity of the Consent Judgment entered in the Buntrock case. Those collateral estoppel arguments are, however, separate and apart from the collateral estoppel effect of Judge Kinnaird's earlier Orders addressing the wholly different issue of Sidley's alleged conflict of interest. As Plaintiffs

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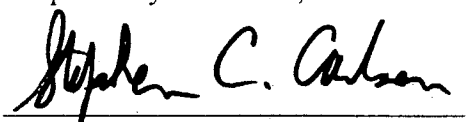
[2] In footnote 18 of their response, Plaintiffs wishfully claim that because Sidley withdrew from representing the Foundation in this case, "Sidley tacitly admitted its conflicted status." (Plaintiffs' Consolidated Response, p. 12, n. 18). Sidley did no such thing and there is no basis whatsoever for Plaintiffs' statement. Rather than be drawn into a protracted side-show of lengthy discovery, motions and hearings attendant to the kind of baseless claims of conflicts of interest that plagued the Buntrock litigation, for purely economic reasons the Terra Foundation simply chose to employ different counsel to represent it in this case in order to allow this matter to be resolved on its merits as swiftly as possible. (See Terra Foundation for the Arts' Response to Plaintiffs' Motion to Conduct Limited Expedited Discovery, pp. 2-3, filed on 10/30/01).

themselves admit, collateral estoppel "precludes litigation of issues that were actually decided." (Plaintiffs' Consolidated Response, p. 6). Plaintiffs do not dispute that they were all parties to the Buntrock case where the claims of Sidley's alleged "conflict of interest" and inability to continue to represent the Foundation were fully litigated, actually decided and rejected by Judge Kinnaird and the Appellate Court on at least six occasions. (See J. Kinnaird's 9/25/00, 10/20/00, and 1/2/01 Orders; 1/19/01 and 2/16/01 Appellate Court Orders). Plaintiffs also do not quarrel with the conclusion that they are therefore collaterally estopped from wasting this Court's time and resources in an attempt to re-litigate that issue yet again in this Court. As such, Plaintiffs' complaint cannot withstand a motion to dismiss pursuant to 735 ILCS 5/2-619(a)(4).

Conclusion

Sidley Austin Brown & Wood respectfully requests that this Court enter an Order dismissing the First Amended Complaint against it with prejudice pursuant to 735 ILCS 5/2-615 and 5/2-619(a)(4), and grant such other relief that this Court deems appropriate.

Respectfully submitted,



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16di-004982

CERTIFICATE OF SERVICE

I, Lori L. Roeser, certify that I caused a true and correct copy of the foregoing to be served on February 1, 2002 by having deposited it in the United States mail at Bank One Plaza, Chicago, Illinois with proper postage prepaid and addressed to the following counsel:

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16di-004983

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	
	)	
Plaintiffs,	)	No. 01 L 009112
	)	(transferred to Chancery)
v.	)	
	)	Judge Julia M. Nowicki
DEAN BUNTROCK, et al.,	)	
	)	
Defendants.	)	

STATE DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The Defendants, James Ryan, Attorney General of the State of Illinois and Floyd Perkins, Assistant Attorney General, submit the following reply memorandum in support of their motion to dismiss and state as follows:

I. PLAINTIFFS LACK STANDING UNDER ILLINOIS LAW

In the State Defendants motion to dismiss the State Defendants raised the issue of standing, by stating that the individual Plaintiffs do not claim that their own property rights or contract rights were damaged. (State Defendant's Mem. of law p. 15). The Plaintiffs do not appear to disagree with this contention but have responded by stating that they have brought this action as a derivative action, asserting claims on behalf of the Corporation. Plaintiffs response fails in several respects. Nowhere in the complaint does it state that it is being brought as a derivative action nor is the caption of the complaint styled as a derivative action. However assuming arguendo that the court reads into the complaint that this is indeed a derivative action

under Illinois law the case must be dismissed. The derivative form of action permits an individual shareholder to bring "suit to enforce a corporate cause of action against officers, directors, and third parties." Ross v. Bernhard, 396 U.S. 531, 534 (1970). Devised as a suit in equity[1], the purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of "faithless directors and managers." Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949). To prevent abuse of this remedy, however, equity courts established as a "precondition for the suit" that the shareholder demonstrate that "the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions." Ross v. Bernhard,396 U.S. at 534. Under Illinois law, "[a] complaint in a proceeding brought in the right of a corporation must allege with particularity the demand made, if any, to obtain action by the directors and either why the complainant could not obtain the action or why he or she did not make the demand. . . ." 805 Ill. Comp. Stat. 5/7.80(b); see also Schnitzer v. O'Connor, 274 Ill. App. 3d 314 (1st. Dist. 1995). Having failed to plead in their complaint that a demand was made on the Board of Directors or why a demand was not made, the complaint against Attorney General Ryan and Assistant Attorney General Perkins must be dismissed.

II. PLAINTIFFS HAVE FAILED TO ADDRESS AND OVERCOME ALL OF DEFENDANTS' IMMUNITY DEFENSES

In their motion to dismiss the Defendants Ryan and Perkins (State Defendants) raised the defenses of public official immunity, sovereign immunity, absolute prosecutorial immunity, and qualified immunity. Each immunity is a separate and absolute defense to the Plaintiffs'

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[1] Plaintiffs originally filed their suit in the law division, undercutting even further their argument that this was intended to be a derivative action.

complaint, any of which would terminate (with prejudice) the State Defendants from this law suit.

a. Qualified Immunity

Plaintiffs only response to the defense of qualified immunity is to state that "[q]ualified immunity is unavailable because Defendants could not have reasonably thought that their actions were consistent with the rights that they are alleged to have violated." (Pl. reply p. 13). In order to overcome a defense of qualified immunity, the plaintiff must establish that the defendants' acts violated the plaintiff's clearly established rights of which a reasonable official would have known. Harlow v Fitzgerald, 457 U.S. 800, 818 (1982); see also Lawshe v Simpson, 16 F.3d 1475, 1483 (7th Cir 1994) (plaintiff bears the burden of establishing that law was clearly established at time defendant acted). The Harlow standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." The plaintiffs may not simply assert that the right of freedom of speech (Comp. ¶ 96), restraint of interstate commerce (Comp. ¶ 97), impairment of contract (Comp. ¶ 98) is clearly established. "If the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of Harlow." Anderson v Creighton, 483 U.S. 635, 639 (1987). Rather, to satisfy the test of Harlow, the plaintiff must point to closely analogous cases demonstrating that the right allegedly violated was clearly established. Moreover, one case recognizing the right in question does not render the law "clearly established" for the purposes of Harlow (unless the case is binding). See Kikimura v Turner, 28 F.3d 592, 596 (7th Cir 1994), cert. denied, 131 L. Ed. 2d 198, 115 S. Ct 1317 (1995). Alternatively, the plaintiff may attempt to argue that the defendant's

conduct was so patently violative of the constitutional right in question that a reasonable official would be aware of the violation without guidance from the courts. Lawshe, 16 F.3d at 1483. Plaintiffs have done neither.

In Burns v. Reed, 44 F.3d 524 (7th Cir. 1994), the plaintiff sued a state prosecutor who authorized plaintiff's interrogation while she was under hypnosis and later advised police officers that they had probable cause to arrest her. The charges were later dropped. In seeking to demonstrate that hypnosis violated her constitutional rights, plaintiff offered a range of case law that proscribes in no uncertain terms the extraction of coerced confessions as a constitutional violation. The Seventh Circuit even agreed with the plaintiff that psychological as well as physical pressure can overbear a suspect's will such that a resulting statement violates due process. However in dismissing the case based on the doctrine of qualified immunity the court held "Plaintiff thus would need to cite more specific precedent than the basic line of coercion cases to persuade this Court that the United States Constitution clearly proscribed hypnosis of a suspect at the time of her interrogation." Burns 44 F. 3d at 528.

In the case at bar the plaintiffs have failed to cite any precedent or case law clearly establishing the proposition that initiating an investigation which is fully authorized by law pursuant to 760 ILCS 55/9[2], is violative of the rights of the Terra Foundation. This statute gives

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[2]§ 760 ILCS 55/9. [Investigations by Attorney General]
The Attorney General may investigate transactions and relationships of trustees subject to this Act for the purpose of determining whether the property held for charitable purposes is properly administered. He may require any agent, trustee, fiduciary, beneficiary, institution, association, or corporation, or other person to appear, at a named time and place, in the county designated by the Attorney General, where the person resides or is found, to give information under oath and to produce books, memoranda, papers, documents of title and evidence of assets, liability, receipts, or disbursements in the possession or control of the person ordered to appear.

the attorney general broad authority to determine if property that is being held for charitable purposes is being properly administered. Unlike the initiation of charges which can be the subject of a malicious prosecution action, the Plaintiffs have failed to cite one case where the initiation of an investigation that is clearly authorized and required by statute was found to be a violation of any civil right. Accordingly, the State Defendants are entitled to qualified immunity.

b. Absolute Prosecutorial Immunity

Plaintiffs are incorrect when they state in their response that absolute immunity only applies to members of quasi- judicial adjudicatory bodies. (Response P. 13). Plaintiff's response totally ignores the line of cases cited in the State Defendants' motion to dismiss[3]. The State defendants therefore stand on their initial motion to dismiss and supporting memorandum. Accordingly, Attorney General James Ryan and Assistant Attorney General Floyd Perkins are entitled to are entitled to absolute prosecutorial immunity.

c. Sovereign Immunity

The Court of Claims Act provides that the Court of Claims shall have exclusive jurisdiction to hear and determine all claims against the State for damages in cases sounding in tort. 705 ILCS 505/8.

The determination of whether an action is in fact against the State, and therefore one that must be brought in the Court of Claims, "turns upon an analysis of the issues involved and the relief sought, rather than the formal designation of the parties. Currie v. Lao, 148 Ill. 2d 151, 158

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[3] Imbler v. Pachtman, 424 U.S. 409 (1976). Butz v. Economou, 438 U.S. 478 (1978) and People v. Patrick J. Gorman Consultants, 111 Ill App. 3d 729 (1st Dist 1982).

(1992), citing Healy v. Vaupel, 133 111. 2d 295, 308 (1990). Simply naming an employee or servant of the State of Illinois as a defendant will not bypass the doctrine of sovereign immunity when the State of Illinois is the party vitally interested. Healy, 133 Ill.2d at 308.

Illinois case law has established three criteria to determine whether an action is really against the State:

> "(1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained of actions involve matters ordinarily within that employee's normal and official functions of the State."

Robb v. Sutton, 147 Ill. App. 3d 710, 716 (4th Dist. 1986) see also Healy, 133 Ill. 2d at 309. Where all the above criteria are met, the doctrine of sovereign immunity will apply as if the action had been brought against the State directly. *Id.* With respect to the first criteria, the plaintiff has not shown that the defendants acted beyond the scope of his authority. Moreover Illinois law grants the attorney general the unique responsibility to investigate transactions and relationships of trustees subject to the Charitable Trust Act for the purpose of determining whether the property held for charitable purposes is properly administered[4]. Further even if he had, an employee's violation of policy, regulation or even statute does not necessarily avert the application of sovereign immunity. See Campbell v. White, 207 111. App. 3d 541, 552 (4th Dist. 1991) (A state trooper allegedly violated a statute and a regulation while answering an emergency call, and the court found that he was within the scope of his authority because he did

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[4] Plaintiff has not alleged that any individual so investigated was not subject to the Charitable Trust Act. Accordingly, Defendants could not have acted beyond the scope of their authority.

not act for a purpose unrelated to his employment). Second, unlike cases involving physicians or operators of motor vehicles upon a public highway[5], there was no duty owed to the Plaintiffs outside of the State Defendant's employment. Madden v. Kuehn, 56 Ill App. 3d 997, 1001 (2nd Dist. 1978), Bartholomew v. Crockett, 131 Ill. App. 3d 456, 462-63 (1st. Dist. 1985) see generally Healy, 133 Ill.2d at 312-13.

In this case, the Attorney General's and his assistant's duty to investigate transactions and relationships of trustees exists by virtue of statutory authority granted to the Attorney General. Moreover, Assistant Attorney General Perkins was expressly charged with investigating transactions and relationships to trustees and involved actions taken within Mr. Perkins normal and official functions.

As the State Defendants are being sued for actions taken in their capacity as government lawyers, and for actions uniquely related to their state employment, the complaint against them must be dismissed on the grounds of sovereign immunity.

c. Public Official Immunity

Public official immunity is a common law doctrine which "rests on the theory that government officials should not be impeded from acting in ways they perceive are in the public's best interest because of fears of personal liability. Janes by First Nat'l Bank v. Albergo, 254 Ill. App. 3d 951, 957 (1st. Dist 1993). Plaintiffs claim that the Defendants are stripped of public official immunity because they acted with malicious motives. In support of this proposition the Plaintiffs' response cites to their complaint ¶¶ 53-66. These paragraphs reveal the Mr. Perkins

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[5] These types of cases arise because physicians have a duty to their patients independent of their state employment, and drivers have a duty to other users of the roadway independent of their state employment. Currie, 148 Ill. 2d at 159.

was not acting out of malicious motives but was working in ways that were in the public's best interests. According to the Plaintiffs' complaint *"the attorney general maintained that a not for profit corporation established for charitable purposes in a particular jurisdiction, simply because of its place of incorporation, becomes a public trust for the people of that jurisdiction that may not relocate without violating its fiduciary duties to that population"* (Comp. ¶ 42). Protection of a public trust and ensuring that fiduciary duties are followed is the antithesis of malicious motives. Moreover even if the Attorney General or his assistant were incorrect in his interpretation of his duty to protect public assets he would still be cloaked with public officials' immunity. *C.f.* Kinzer v. City of Chicago, 128 Ill. 2d 437 (1989). Accordingly, the State Defendants are protected by the doctrine of public official immunity.

Plaintiffs' citation to Tcherepnin v. Franz, 570 F. 2d 187 (7th Cir. 1978) completely misses the point. In Tcherepnin the Director of the Department of Financial Institutions was found to have owed a statutory duty to the depositors of City Savings. There the court found nothing in the Savings and Loan Act (Ill. Rev. Stat. Ch. 32 par. 701et. Seq., recodified and amended 205 ILCS 105/1-1 et seq-now known as the Savings and Loan Act of 1985) to suggest the statutory duties of the director were only owed to the State of Illinois. The court reasoned that repeated references to the 'protection of the Association" in defining the directors duties indicated that these duties were owed the depositors. As contrasted with the former Illinois Savings and Loan Act, the Charitable Trust Act (765 ILCS 55/1 et seq.) does not contain references to the protection of trustees. On the contrary the Charitable Trust Act is in place to protect the public from the malfeasance and misfeasance of trustees. Moreover, as contrasted with the former Illinois Savings and Loan Act the duties are owed to the State of Illinois and not

to private individuals or corporations. Therefore since no specific statutory duty was owed to the Terra Foundation no cause of action can lie against the Attorney General or his assistant on behalf of the Terra Foundation.

Respectfully Submitted,
James Ryan, Attorney General

By_____

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

PAUL HAYES TUCKER, et al.,	)	FEB 05 2002
	)	
Plaintiffs,	)	
	)	No. 01 L 9112
v.	)	(transferred to Chancery)
	)	
DEAN BUNTROCK, et al.	)	Hon. Julia M. Nowicki
	)	Judge Presiding
Defendants.	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 1st day of February, 2002, I filed with the Clerk of the Circuit Court of Cook County, County Department, Chancery Division, at the Richard J. Daley Center, Chicago, Illinois, 60602, the attached **STATE DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS,** a copy of which is herewith served upon you.

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Attorney General of Illinois

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CERTIFICATE OF SERVICE

The undersigned, being first duly sworn upon oath, deposes and states that a copy of the above mentioned document was served upon the above named, at the above addresses, by **U.S. Mail** on the 1st day of February, 2002.

SUBSCRIBED and **SWORN** to
before me this 1st day of February, 2002.
NOTARY PUBLIC

OFFICIAL SEAL
CLAUDIA I. HURTADO
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12-11-2004

16di-004994

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